2024 Hfx No. 531463

SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OR ARRANGEMENT OF SALTWIRE NETWORK INC., THE HALIFAX HERALD LIMITED, HEADLINE PROMOTIONAL PRODUCTS LIMITED, TITAN SECURITY & INVESTIGATION INC., BRACE CAPITAL LIMITED AND BRACE HOLDINGS LIMITED

BETWEEN:

Fiera Private Debt Fund III LP and Fiera Private Date Fund V LP,
each by their general partner, Fiera Private Debt GP Inc.

Applicants

-and-

Saltwire Network Inc., The Halifax Herald Limited, Headline Promotional Products Limited, Titan Security & Investigation Inc., Brace Capital Limited and Brace Holdings Limited

Respondents

BOOK OF AUTHORITIES

March 19, 2024

NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street, Suite 3000, P.O. Box 53
Toronto, ON M5K 1E7

Jennifer Stam, LSO#: 46735J
Tel: 416.202.6707
jennifer.stam@nortonrosefulbright.com

and

BOYNECLARKE LLP
99 Wyse Road, Suite 600
Dartmouth, Nova Scotia B3A 4S5

Joshua J. Santimaw
Tel: 902.460.3451
jsantimaw@boyneclarke.com

Lawyers for the Applicants, Fiera Private Debt Fund III LP and Fiera Private Debt Fund V LP

2004 Hfx No. 531463

SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OR ARRANGEMENT OF SALTWIRE NETWORK INC., THE HALIFAX HERALD LIMITED, HEADLINE PROMOTIONAL PRODUCTS LIMITED, TITAN SECURITY & INVESTIGATION INC., BRACE CAPITAL LIMITED AND BRACE HOLDINGS LIMITED

BETWEEN:

Fiera Private Debt Fund III LP and Fiera Private Date Fund V LP,
each by their general partner, Fiera Private Debt GP Inc.

Applicants

-and-

Saltwire Network Inc., The Halifax Herald Limited, Headline Promotional Products Limited, Titan Security & Investigation Inc., Brace Capital Limited and Brace Holdings Limited

Respondents

INDEX

TAB 1

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-048114-157

DATE: July 14, 2021

BY THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
Petitioners

and

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED
Mises-en-cause

And

FTI CONSULTING CANADA INC.
Monitor

And

TWIN FALLS POWER CORPORATION
CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED
Twinco Mises-en-cause

JUDGMENT ON MOTION FOR THE EXPANSION OF THE MONITOR'S POWERS
(Sections 11 and 23 of the *Companies' Creditors Arrangement Act*)

OVERVIEW

[1] With their Motion, the Petitioners and the Mises en cause are seeking an order from this Court granting additional powers to the Monitor (the "**Motion**") so that the latter may, directly or through its counsel, do the following:

> a) compel the production, from time to time, from any Person having possession, custody or control of any books, records, accountings, documents, correspondences or papers, electronically stored or otherwise, relating to the Twinco Interest, CFLCo Indemnity and CFLCo Maintenance Obligations (each as defined hereafter), including the Twinco Requested Information (as defined below) (the "**Requested Information**") in respect of the period from and after January 1, 2010, and such earlier periods as may be approved by further order of the Court (the "**Disclosure Period**");
>
> b) require any Requested Information to be delivered within thirty (30) days of the Monitor's request or such a longer period as the Monitor may agree to in its discretion; and
>
> c) conduct investigations from time to time, including examinations under oath of any Person reasonably thought to have knowledge relating to the Requested Information, in respect of the Disclosure Period.
>
> [the "**Expanded Monitor Powers**"]

[2] Previously, on June 29, 2018, Mr. Justice Stephen W. Hamilton issued an order to sanction the Joint Plan of Compromise and Arrangement dated as of May 16, 2018 (the "**Plan**") submitted jointly by the Petitioners and the Mises en cause (collectively the "**CCAA Parties**" for the purposes hereof).

[3] During the present CCAA proceedings initiated in January 2015 pursuant to the provisions of the *Companies' Creditors Arrangement Act* (the "**CCAA**"), the CCAA Parties have sold all of their assets other than the combined 17.062% equity interest (the "**Twinco Interest**") held in Twin Falls Power Corporation ("**Twinco**") by Wabush Iron Co. Limited and Wabush Resources Inc. (collectively "**Wabush**").

[4] Pursuant to the Plan, the net proceeds of sales and other recoveries are to be distributed to the creditors of the Participating CCAA Parties[1] in accordance with the terms and conditions of the Plan.

[5] Since the implementation of the Plan, the CCAA Parties, with the assistance of the Monitor, have been working to wind down the estates of the CCAA Parties so that the net

[1] As defined in the Plan.

proceeds from such recoveries and realizations can finally be distributed to the creditors of the CCAA Parties as soon as possible.

[6] The initial interim distributions to the creditors with proven claims under the Plan took place in August and September 2018.

[7] A second interim distribution to such creditors with proven claims took place in mid-of May 2021.

[8] A final distribution will not occur until the realization or collection of all material assets of the CCAA Parties including the Twinco Interest.

[9] The CCAA Parties were informed by the Monitor that a significant majority of the creditors of Wabush are former employees of Wabush Mines, many of whom are elderly, and who are reasonably assumed to be anxious to receive their final distributions as soon as possible.

[10] Subject to the resolution and collection of certain outstanding tax refunds, the CCAA Parties have realized on all of their assets other than the Twinco Interest.

[11] On November 16, 2020, in furtherance of the CCAA Parties' efforts to monetize the Twinco Interest, the CCAA Parties filed a *Motion for the Winding up and Dissolution, Distribution of Assets, Reimbursement of Monies and Additional Relief* (the "**CBCA Motion**") on a *pro forma* basis, which was subsequently scheduled by the Court to be heard on January 29, 2021.

[12] On January 29, 2021, the Court adjourned the CBCA Motion, the CFLCo Contestation[2] and the Twinco Dismissal Motion[3] *sine di*e, and on February 22, 2021, the Supreme Court of Newfoundland and Labrador (the "**Newfoundland Court**") adjourned the Twinco Liquidation Motion[4], in order to allow the parties an opportunity to explore the possibility of a consensual resolution of the matters raised in those proceedings which essentially boils down to disposing of the Twinco Interest.

[13] As those negotiations did not proceed in any meaningful way, the CCAA Parties are seeking this *Motion for the Expansion of the Monitor's Powers* to facilitate the recovery of assets for the benefit of the CCAA Parties' creditors and the winding up of the CCAA Parties' estate and the termination of the CCAA Proceedings.

[14] As can be noted above, the Expanded Monitor Powers sought herein all relate to the Twinco Interest which is, to all intents and purposes, the last asset to monetize and realize in the context of the CCAA proceedings.

---

[2] As defined below.
[3] As defined below.
[4] As defined below.

[15] Until now, Twinco and its shareholder CFLCo have been steadfastly blocking all attempts of the CCAA Parties and the Monitor to monetize the Twinco Interest in the furtherance of the Plan, which involves obtaining the relevant and necessary documentation required to determine with reasonable certainty the value of the Twinco Interest in the context of the present CCAA Proceedings.

[16] Twinco's and CFLCo's refusal to deal with the Twinco Interest has left little alternative but to seek the wind down and the dissolution of Twinco in the context of the present CCAA Proceedings to finally permit the CCAA Parties, with the assistance of the Monitor, to realize this asset of Wabush, complete the final distribution to the Plan creditors and terminate at last the CCAA Proceedings that have been ongoing since 2015.

1. THE PROCEDURAL CONTEXT INVOLVING TWINCO

1.1 The Twin Falls Power Corporation (Twinco)

[17] Based on the Motion, the Court retains the following relevant facts:

- Twinco is an incorporated joint venture formed under the *Canada Business Corporations Act* (the "**CBCA**") on February 18, 1960, among Churchill Falls (Labrador) Corporation Limited ("**CFLCo**"), Wabush Iron Co. Limited and Wabush Resources Inc. (collectively "**Wabush**") and the Iron Ore Company of Canada ("**IOC**"), among others;

- As at December 31, 2019, Twinco was owned 33.3% by CFLCo, 49.6% by IOC, and 17.062% interest held jointly by Wabush[5];

- Pursuant to Twinco's fiscal year 2019 Audited Financial Statements, Twinco has approximately $6.1M in cash and cash equivalent assets (the "**Twinco Cash**") and approximately $46,000 of liabilities[6];

- The history of the Twinco Plant[7] is long and complicated and is set out in significant detail in the CBCA Motion. However the highlights are set out hereafter;

- In 1961, CFLCo licensed to Twinco the rights to develop a 225-megawatt hydroelectric generating plant on the Unknown River in Labrador (the "**Twinco Plant**");

- In addition to the Twinco Plant, Twinco owned a number of other assets including (i) the physical building which houses the Twinco Plant (the "**Twinco Building**"); (ii) the transmission lines from the Twinco Plant to its consumers (the "**Twinco Transmission Lines**"); and (iii) the equipment which comprises the Twinco Plant

[5] 4.6% held by Wabush Iron Co. Limited and 12.5% by Wabush Resources Inc.
[6] **R-3**.
[7] As defined below.

and which was used in the production of hydroelectric power (the "**Twinco Machinery**") (collectively, with the Twinco Building and Twinco Transmission Lines, and such other assets of Twinco the "**Twinco Assets**");

- In 1974, CFLCo took over the Twinco Plant and undertook comprehensive maintenance obligations in respect of the Twinco Plant (the "**CFLCo Maintenance Obligations**"), and indemnified Twinco in respect of those obligations and environmental liabilities in connection with the Twinco Plant and Twinco Assets (the "**CFLCo Indemnity**")[8];

- The Twinco Plant was placed into an extended shutdown in 1974. Since that time until today, based on various environmental assessments commissioned by Twinco over the years as summarized in various Audited Financial Statements of Twinco, the CCAA Parties understand that potential environmental liabilities may have occurred in respect of the Twinco Plant and Twinco Assets (the "**Potential Environmental Liabilities**");

- The CCAA Parties are of the view that the responsibility for any environmental liability lies squarely with CFLCo and not Twinco, pursuant to CFLCo's Maintenance Obligations and CFLCo Indemnity[9];

- It is not clear to the CCAA Parties and the Monitor whether, and to what extent, Twinco may have funded maintenance or environmental remediation that was CFLCo's responsibility, and for which Twinco may have a claim against CFLCo for reimbursement;

- As stated in the CBCA Motion, for years, both prior to and after the commencement of the present CCAA Proceedings, the CCAA Parties, with the support of IOC, have sought to obtain a distribution of the Twinco Cash to Twinco's shareholders, but such distribution has been continuously resisted by Twinco and CFLCo;

- The CCAA Parties believe that CFLCo did not support further distributions to the shareholders because it wants to ensure a cash pool from Twinco to pay for the Potential Environmental Liabilities notwithstanding the CFLCo Indemnity and CFLCo Maintenance Obligations;

- Pursuant to Twinco's Articles of Continuance dated August 1, 1980[10], the shareholders are entitled to share rateably in the remaining property of Twinco upon dissolution;

---

[8] As more particularly detailed in the CBCA Motion.
[9] **R-6** of the CBCA Motion.
[10] **R-4**.

- Wabush's share of the Remaining Twinco Cash[11] is approximately $1,040,000, a material amount, together with their *pro rata* share of what other money may be subject to reimbursement claims against CFLCo;

- As the information to determine the amount of maintenance and other indemnifiable expenses that may be subject to reimbursement by CFLCo is within the knowledge of Twinco, an accounting was requested in the CBCA Motion;

- Without this information, it is impossible for the CCAA Parties or the Monitor to calculate what the approximate true value of the Twinco Interest may be to ensure that the CCAA Parties' creditors receive appropriate recovery from the Twinco Interest.

1.2 **The CBCA Motion and the relief sought**

[18] The history of the CCAA Parties' repeated attempts to engage in a constructive dialogue with Twinco and its majority shareholder CFLCo, is more fully set out in detail in the CBCA Motion, which has been continued *sine die* until now.

[19] While the CCAA Parties had been hopeful that a consensual resolution could be achieved, they concluded that based on the lack of desire of Twinco and CFLCo to engage in a constructive manner, a consensual resolution was not possible.

[20] Accordingly, on November 16, 2020, the CCAA Parties filed the CBCA Motion, seeking the issuance of Orders against Twinco and CFLCo:

> a) confirming CFLCo's liability for Twinco's maintenance obligations and environmental liabilities related to the Twinco Plant from and after July 1, 1974;
>
> b) compelling an accounting from Twinco of all monies expended by Twinco in respect of maintenance and environmental costs that have not been reimbursed by CFLCo pursuant to the CFLCo Indemnity and CFLCo Maintenance Obligations (collectively, the "**Reimbursable Environmental/Maintenance Costs**");
>
> c) directing CFLCo to reimburse all Reimbursable Environmental/Maintenance Costs (such amount to be reimbursed by CFLCo, being the "**CFLCo Reimbursement**") to Twinco for distribution to the shareholders as part of the winding up and dissolution of Twinco pursuant to the relief requested in paragraph (d) below;
>
> d) directing the winding up and dissolution of Twinco pursuant to section 214 and/or section 241 (3)(l) of the CBCA and a distribution of: (i)

[11] As defined below.

the Twinco Cash net of all reasonable fees and expenses incurred by Twinco to implement and complete the wind-up and dissolution being sought in this Motion (the "**Remaining Twinco Cash**"), and (ii) the CFLCo Reimbursement to Twinco's shareholders, including Wabush, on a *pro rata* basis; and

e) in the alternative to (d), directing Twinco and/or CFLCo to purchase the shares of Twinco held by Wabush pursuant to section 214 (2) and/or section 241 (3)(f) of the CBCA for a purchase price equal to the amount of Wabush's *pro rata* share of: (i) the Twinco Cash, and (ii) the CFLCo Reimbursement.

[the "**CBCA Motion Proposed Orders**"]

1.3 **Twinco's and CFLCo's response to the CBCA Motion**

[21] In response to the CBCA Motion, Twinco filed a proceeding entitled "*Motion by Twin Falls Power Corporation to Dismiss the Application for Lack of Jurisdiction and for Forum Non-Conveniens"* dated January 15, 2021[12], seeking to dismiss the CBCA Motion for lack of jurisdiction of this Court to hear the CBCA Motion and alternatively, for *forum non-conveniens* (the "**Twinco Dismissal Motion**"). The latter motion is scheduled to be heard in August 2021.

[22] Concurrently, CFLCo filed a proceeding entitled "*Contestation to the CBCA Motion*" dated January 15, 202113 (the "**CFLCo Contestation**"), substantially to the same effect while announcing that it was also filing an *Originating Application for the Issuance of a Court-Supervised Liquidation and Dissolution Order* before the Newfoundland Court pursuant to sections 214 (1)(b)(ii), 215, and 217 of the CBCA, seeking, *inter alia*, the court-supervised liquidation of Twinco.

[23] Seemingly in reaction to the CBCA Motion, CFLCo advised the CCAA Parties in its CFLCo Contestation that despite years of resisting to do so, CFLCo was going to imminently commence in the Newfoundland Court an originating application for a court-supervised liquidation and dissolution of Twinco (the "**Twinco Liquidation Motion**")[14].

[24] The Twinco Liquidation Motion was formally filed on January 21, 2021, to be heard in Newfoundland on February 23, 2021[15].

[25] At the time, subject to obtaining a court hearing date for the Twinco Dismissal Motion and CFLCo Contestation and the CBCA Motion, the parties agreed to seek an adjournment of the CBCA Motion, the Twinco Dismissal Motion, the CFLCo Contestation

---

[12] **R-5**. The Twinco Dismissal Motion was modified on May 17, 2021.
[13] **R-6**. The CFLCo Contestation was amended on May 19, 2021, in response to the present Motion.
[14] **C-1**.
[15] **R-7**.

and the Twinco Liquidation Motion, in each case without prejudice to each party's right to seek a new hearing date for any of such proceedings on 14 days' prior written notice to the other parties.

[26] On January 27, 2021, this Court adjourned *sine die* the CBCA Motion, the Twinco Dismissal Motion, and the CFLCo Contestation and on February 22, 2021, CFLCo confirmed the adjournment *sine die* of the Twinco Liquidation Motion with the Newfoundland Court (all such adjourned proceedings, the **"Adjourned Proceedings**").

[27] By letter dated February 1, 2021 (the "**February 1st Letter**"), counsel for the CCAA Parties sought to confirm its understanding of the terms of the adjournment of the Adjourned Proceedings as among the parties[16].

[28] In the February 1st Letter, CCAA Parties' counsel also set out the documents and information that was to be provided by Twinco and CFLCo in furtherance of the proposed efforts to reach a potential consensual resolution. The requested documents and information were to be provided within 30 days of the letter, or within a reasonably anticipated time that would be required to obtain any requested information that was not readily available for delivery to the CCAA Parties.

[29] The requested documents and information were intended to provide the CCAA Parties and the Monitor with a general understanding of the approximate range of Reimbursable Environmental/Maintenance Costs that could be at issue to better enable the CCAA Parties and Monitor to determine the approximate potential value of the Twinco Interest. Without this information, a potential consensual resolution would be extremely difficult, if not impossible, to reach.

[30] The requested documents and information in the February 1st Letter included, among other things, the following information:

> a) amount of cash and cash equivalents held by Twinco as at January 31, 2021, and a budget of expenses anticipated to be incurred by Twinco to the date of the wind-up and liquidation that are not currently anticipated to be subject to any reimbursement or sharing obligation;
>
> b) copies of audited financial statements for Twinco for the years ended December 31, 1974, to 2019 (excluding audited financial statements for the year-ended December 31, 2004, 2005, 2008, 2013-2019); and
>
> c) a summary of all expenses incurred by Twinco in respect to environmental and maintenance and other costs in respect to the Twinco Plant, Twinco Building and equipment located thereon for which Twinco has not received full reimbursement from CFLCo or any other party, for the

[16] **R-8**.

period from July 1974 to December 31, 2020, as described in more detail in the February 1st Letter.

[the "**Twinco Requested Information**"]

[31] The CCAA Parties pointed out that as shareholders, Wabush Iron and Wabush Resources were already entitled to copies of all annual financial statements of Twinco pursuant to section 155 of the CBCA. The balance of the information requested was in the nature of information relating to expenses incurred by Twinco in connection with the maintenance and environmental liabilities and Twinco's updated cash position as at January 31, 2021, and Twinco's go forward budget to the anticipated date of its wind-up and dissolution.

[32] However, according to the CCAA Parties' counsel, the respective counsels for Twinco and CFLCo both denied any undertaking to use in good faith efforts to provide any of the Twinco Requested Information to the CCAA Parties and Monitor and both resisted the production of any documentation to the CCAA Parties and Monitor.

[33] By letter dated February 4, 2021, counsel for Twinco stated that Twinco made no such undertakings, any request would be taken under consideration — "nothing more"— that they would not, without specific direction from the Twinco directors, offer to provide any documents, and that it would seek instructions from Twinco's directors in respect to the Twinco Requested Information and whether it was reasonable to "even consider" undertaking to provide the Twinco Requested Information.[17]

[34] Likewise, by letter dated February 5, 2021, CFLCo's counsel denied any good faith undertaking to provide any information requested by the CCAA Parties and stated that the "ultimate decision to provide the requested documentation lies with Twinco".[18]

[35] On February 16, 2021, Twinco's counsel sent a subsequent letter to the CCAA Parties' counsel confirming that Twinco's board of directors, a majority of whom are CFLCo's nominees, decided that Twinco would not provide any of the Twinco Requested Information to the CCAA Parties, as there was no "use" in such undertaking. Instead, Twinco's counsel informed the CCAA Parties that Twinco's directors have decided only to provide the CCAA Parties with Twinco's audited financial statements from 2013–2019, which financial statements, in the February 1st Letter, already expressly noted were excluded from the CCAA Parties' request (as the CCAA Parties already had copies of these financial statements).[19]

[36] While counsels for Twinco and CFLCo expressed concern that the CCAA Parties' requests went back to 1974, neither counsel proposed to narrow the scope of the

---

[17] **R-9**.
[18] **R-10**.
[19] **R-11**.

information requested to a shorter time period but instead issued blanket refusals and denied any good faith undertaking to engage in the disclosure of such information.

[37] Based on the Expanded Monitor Powers being sought in this Motion, the CCAA Parties and the Monitor are initially proposing to go back to January 1, 2010, only, with the ability to request the Court to expand the time period to include earlier periods, if needed.

[38] The counsels for the CCAA Parties and the Monitor sought to engage Twinco's and CFLCo's counsels to try to find a resolution to the disclosure impasse and have been informed by Twinco's counsel that Twinco was not prepared to provide any additional documentation beyond the financial statements it provided which the CCAA Parties already had.

[39] By letter dated May 6, 2021, counsel for the CCAA Parties expressed their disappointment and frustration over the lack of good faith demonstrated by Twinco and CFLCo towards pursuing a consensual resolution and the resulting delay that ensued since January 27, 2021, when the Adjourned Proceedings were adjourned. In that letter, Twinco and CFLCo were advised that the CCAA Parties had no alternative but to seek the present Motion and to reactivate the CBCA Motion.[20]

1.4 **The relief sought by the CCAA Parties and the Monitor**

[40] The CCAA Parties are seeking the Expanded Monitor Powers, with the support of the Monitor, pursuant to sections 11 and 23 of the CCAA, specifically sections 23(1)(c) and (k), for the expansion of the powers of the Monitor in these CCAA Proceedings, so that the Monitor may, directly or through its counsel exercise the Expanded Monitor Powers more fully described above.

[41] The Expanded Monitor Powers are necessary to enable the Monitor to: (i) assist the CCAA Parties with the recovery of value for the CCAA Parties' creditors from the last remaining asset of the CCAA Parties' estate outside of tax refunds (ii) fulfill its statutory duties to investigate and properly value, the assets and the liabilities of the CCAA Parties, and (iii) facilitate the winding up and termination of these CCAA Proceedings.

[42] The true value of the Twinco Interest is unknown as both Twinco and CFLCo have continuously refused to provide the CCAA Parties or the Monitor with any information in respect of the nature and quantum of the Reimbursable Environmental/Maintenance Costs that would assist the CCAA Parties and Monitor to properly value the Twinco Interest.

[43] In the opinion of the CCAA Parties, the valuation of the Twinco Interest is of particular importance as, among other things:

---

[20] **R-12**.

a) the Twinco Interest is the last asset of the CCAA Parties that has not yet been monetized in these CCAA Proceedings, apart the collection of outstanding tax refunds;

b) the Twinco Interest would increase the Plan creditors' recoveries;

c) the monetization of the Twinco Interest is one of the last material steps to be taken in these CCAA Proceedings, apart from the collection of the outstanding tax refunds, before the CCAA Parties can complete their wind-up of these CCAA Proceedings and provide a final distribution to the Plan creditors;

d) expanding the Monitor's powers would permit it to further the valid purpose of the CCAA engaged in the present circumstances of maximizing recovery for the CCAA Parties' creditors; and

e) the monetization of the Twinco Interest would fulfill the purpose of the Plan which is to distribute the net proceeds of the Participating CCAA Parties' assets to the Plan creditors.

[44] The continuous refusal of Twinco and CFLCo to engage with the CCAA Parties and the Monitor has only served to perpetuate the status quo, resulting in further delays to the ability of the CCAA Parties' creditors to obtain a final distribution and complete the winding up and termination of these CCAA Proceedings.

[45] The CCAA Parties contend that:

- the requested relief is necessary and appropriate in the circumstances and is in the best interests of all the CCAA Parties' stakeholders as Twinco and CFLCo have continued to demonstrate that they will not cooperate in connection with the realization of the Twinco Interest and instead, will engage in actions that seek only to preserve the status quo by frustrating and delaying all realization efforts by the CCAA Parties; and

- the valuation of the Twinco Interest is of particular importance to these CCAA Proceedings and should be conducted by the Monitor for the benefit of the creditors irrespective of the proposed liquidation and wind down of Twinco.

[46] Given the inextricable conflict of CFLCo and its new strategic attempt to control the liquidation and wind down process of Twinco in Newfoundland and Labrador, which it had previously steadfastly opposed to frustrate the CCAA Parties, the latter contend that it would be appropriate for this Court to grant their Motion, expand the powers of the Monitor and allow it to proceed with the long-delayed valuation of the Twinco Interest without further obfuscation from CFLCo.

1.5 **The position of Twinco and CFLCo**

[47] The position of Twinco and of CFLCo is essentially the same and can be summarized as follows:

- No interpretation of section 11 of the CCAA, alone or read in conjunction with sections 23(1) c) and (k), permits the granting of the Expanded Monitor Powers in the present circumstances;

- The Expanded Monitor Powers aim at Twinco which is not a debtor company pursuant to the CCAA;

- This Court does not have the power to delegate such broad powers (*i.e.*, the power to examine under oath) to the Monitor, without an explicit statutory authorization;

- This Court does not have the power to compel a person outside of Québec to respond to such orders;

- The statutory discretion under section 11 of the CCAA does not extend to the Expanded Monitor Powers sought by the CCAA Parties in the Motion.

[48] In connection with the last argument put forward by both Twinco and CFLCo that there is a limit to the statutory discretion under section 11 of the CCAA, they added that the present CCAA Proceedings which aim at restructuring corporations as opposed to their liquidation, are not the appropriate vehicle for investigation of third parties to the CCAA Proceedings.

[49] In line with the forgoing, Twinco makes the astonishing if not misleading affirmation that it is a third party (a stranger) herein, with no link to the CCAA Proceedings:

> 17. Further, neither Twinco nor CFLCo is a party to the CCAA Proceedings, nor is either corporation a party governed by the original or any subsequent order issued in the CCAA Proceedings.
>
> 18. Rather, both Twinco and CFLCo are strangers to the CCAA Proceedings in which the Wabush Motion has been brought.
>
> 117. Here, Twinco is a third party, with no link with the CCAA Proceedings. […] Twinco is neither the debtor, nor a creditor, an employee, a director, a shareholder, nor another party doing business with the insolvent company. It has no interest whatsoever in the recovery, and now, in the liquidation of the CCAA Parties.[21]

[21] Paragraphs 17, 18 and 117 of the Twinco's Argument Plan.

[Emphasis added]

[50] Contrary to the foregoing assertions, Twinco is not a "stranger to the CCAA Proceedings".

[51] Pursuant to the Claims Process[22] authorized by the Court, Twinco filed a proof of claim against Wabush for approximately $780,000[23]. Twinco's claim was allowed by the Monitor in 2016[24].

[52] The Court understands that Twinco even received a partial distribution in respect of its claim under the Plan and is likely to participate in the final distribution.

ANALYSIS

[53] With all due respect, the Court finds that it has jurisdiction to rule on the present Motion pursuant to the provisions of the CCAA.

[54] For the following reasons, the Court also finds that given the particular circumstances and the nature of the present issues confronting the CCAA Parties and the Monitor to bring the CCAA process to a conclusion within a reasonable delay, it is appropriate for this Court to exercise its judicial discretion and grant to the Monitor the Expanded Monitor Powers sought herein.

The Court has exclusive jurisdiction to determine the scope of the powers of the Monitor in furtherance of the purposes of the CCAA

[55] At the outset, the Court is of the opinion that given the nature and the somewhat narrow scope of the Expanded Monitor Powers sought, the present Motion can be entertained regardless of the CBCA Motion, the Twinco Dismissal Motion and the CFLCo Contestation and their eventual outcome as the latter rest essentially on the right of the CCAA Parties to seek to wind down and the dissolution of Twinco via the CCAA Proceedings before the Commercial Division of the Superior Court of Québec rather than allow CFLCo to proceed with its Twinco Liquidation Motion before the Court of Newfoundland.

[56] Wabush Iron Co. Limited and Wabush Resources Inc. are undoubtedly shareholders of Twinco and as such, the Twinco Interest is one of their assets to be monetized and realized with the assistance of the Monitor pursuant to the Plan sanctioned by the Court in June 2018.

---

[22] On November 5, 2015, the CCAA Court issued an Order, *inter alia*, approving a procedure for the submission, evaluation and adjudication of claims against the CCAA Parties and their current and former directors and officers (the "**Claims Process**").
[23] **R-14**.
[24] *Id*.

[57] Therefore, the valuation of the Twinco Interest is not only of particular importance to the present CCAA Proceedings, but it should be conducted by the Monitor for the benefit of the creditors irrespective of the dispute between the parties relating to the jurisdiction over the proposed liquidation and wind down of Twinco.

[58] In fact, the monetization and the realization of the Twinco Interest do not necessarily require the wind down and the dissolution of Twinco to occur given the apparent extent of the Twinco Interest in Twinco.

[59] The Court understands that the Twinco Requested Information is intended to provide the CCAA Parties and the Monitor with a general understanding of the approximate range of the Reimbursable Environmental/Maintenance Costs that could possibly be the subject of the CFLCo Reimbursement to better enable the CCAA Parties and Monitor to calculate the approximate value of the Twinco Interest.

[60] The Twinco Requested Information is purely factual in nature and excludes documents that the Wabush shareholders already have in their possession such as financial statements for December 31, 2004, 2005, 2008, 2013–2019.

[61] The Court also understands that it is the steadfast and the somewhat inexplicable refusal of Twinco and of its shareholder CFLCo to provide any of the Twinco Requested Information[25] to the CCAA Parties and to the Monitor that prevents the latter from determining with a minimum of accuracy what is the estimated value of the Twinco Interest.

[62] This determination expected to be performed by the Monitor relates directly to an asset of the CCAA Parties that is covered by the Plan sanctioned by this Court, and such a determination falls squarely on the tasks, duties and responsibilities of the Monitor within the present CCAA Proceedings regardless of the eventual dissolution or not of Twinco.

[63] Moreover, of obvious significance in the eyes of the Court, Twinco filed a proof of claim for $780,000 that was accepted by the Monitor pursuant to the Claims Process approved by the Court.

[64] It is somewhat incomprehensible that Twinco would nevertheless affirm that it is a third party, a “stranger” with no link with the CCAA Proceedings and that it is neither the debtor, nor a creditor, an employee, a director, a shareholder, nor another party doing business with the CCAA Parties that include two of its shareholders (Wabush).

[65] How can Twinco seriously pretend that it has no interest whatsoever in the recovery, and presently, in the liquidation of the CCAA Parties when it filed a proof of claim for $780,000?

---

[25] Purposely limiting the same to documents that the Wabush shareholders already have.

[66] Twinco even stands to retrieve by way of the final distribution, a portion of the Twinco Interest once realized by the Monitor, as the case may be.

[67] Moreover, didn't Twinco attorn to the jurisdiction of the Québec Superior Court (Commercial Division) by deciding to file a proof of claim against the Wabush shareholders in the present CCAA Proceedings?[26]

[68] The evidence satisfies the Court that Twinco and its shareholder CFLCo have demonstrated that they have no intention of providing any information to the CCAA Parties in a timely fashion that would assist the CCAA Parties and Monitor to determine the true value of the Twinco Interest, which would then form the basis for a potential consensual resolution, leading to a final distribution to creditors and a wind-up and termination the CCAA Proceedings.

[69] The Court shares the CCAA Parties' counsel view that it is even possible that with the information on hand, the CCAA Parties and the Monitor may come to a determination that the amount of the CFLCo Reimbursement in dispute may not be sufficiently material on a cost-benefit analysis to continue to pursue recovery of such amount, significantly narrowing the issues in dispute in the CBCA Motion.

[70] Who knows? Should the Twinco Interest be disposed of on a consensual basis, Twinco and CFLCo could very well decide to forgo the wind down and the dissolution proceedings completely, a decision that would rest with them without any further involvement of the CCAA Parties (i.e., the Wabush shareholders).

[71] Be that as it may be, the CCAA Parties are only seeking to expand the Monitor's powers in the CCAA Proceedings to enable the Monitor to obtain the Requested Twinco Information necessary to value the Twinco Interest, which is now the most significant asset of the CCAA Parties remaining to be realized in the CCAA Proceedings apart from tax refunds.

[72] With all due respect, the proposed relief sought with the present Motion does not entail any compromission of the rights and recourses of Twinco and of its shareholder CFLCo vis-à-vis the Twinco Interest other than enabling the CCAA Parties and the Monitor to be aware of its potential estimated value without prejudice to the arguments that Twinco and/or CFLCo may want to put forward in connection therewith.

---

[26] *Bouygues Building Canada inc. v. Iannitello et Associés inc*, 2018 QCCA 504 :
[23] By submitting a proof of claim to the Trustee and appealing the disallowance, the Joint Venture attorned to the jurisdiction of the Quebec Superior Court sitting in bankruptcy matters. It could hardly blame the Trustee after the fact as it did for having decided on the validity of the claim as submitted, since the Trustee was obliged to do so. The Joint Venture did not seek permission to continue the Ontario proceedings with a view to qualifying its contingent claim prior to filing a proof of claim with the Trustee. [References omitted]

[73] The Court finds that the Expanded Monitor Powers sought in the present Motion are necessary and appropriate to enable the Monitor to, among other things:

> (i) fulfill its statutory duties to investigate and properly value the assets and the liabilities of the CCAA Parties;
>
> (ii) further the valid purpose of the CCAA to maximize the recovery of Plan creditors, by assisting the CCAA Parties with the recovery of value for the CCAA Parties' creditors from the last significant asset remaining of the CCAA Parties' estate other than tax refunds; and
>
> (iii) facilitate the winding up and termination of these CCAA Proceedings.

[74] The Court bears in mind that the Monitor was appointed by this Court pursuant to the authority granted upon this Court under the CCAA[27].

[75] Therefore, subject to the provisions of the CCAA, this Court has the exclusive jurisdiction to determine, *inter alia*, the scope of the powers of the Monitor in furtherance of the purposes of the CCAA especially if such powers relate directly to an asset or the property of the CCAA Parties that is part of the Plan previously sanctioned.

Section 23(1)(c) of the CCAA

[76] In *Ernst & Young Inc. v. Essar Global Fund Limited*[28], the Court of Appeal for Ontario reminded us that section 23 of the CCAA sets out a basic framework of the minimum mandatory duties and functions of the monitor under the CCAA which may be augmented through the exercise of discretion by the Court, and that, not surprisingly, the monitor's role has evolved since then over time:

> [106] The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the CCAA supervising judge. This framework is reflected in s. 23 of the CCAA, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

[27] Section 11.7 (1) CCAA.
[28] 2017 ONCA 1014.

> [107] Not surprisingly, as with the CCAA itself, the role of the monitor has evolved over time. […]
>
> [Emphasis added]

[77] Section 23(1)(c) of the CCAA requires the Monitor to "*make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs*".

[78] In the present instance, the true value of the Twinco Interest is unknown as both Twinco and CFLCo have continuously refused to provide the CCAA Parties or the Monitor with any information in respect to the nature and quantum of the Reimbursable Environmental/Maintenance Costs that would assist the CCAA Parties and the Monitor to properly value the Twinco Interest.

[79] The information required to determine the amount of maintenance and other indemnifiable expenses that may be subject to reimbursement by CFLCo is solely within the knowledge of Twinco.

[80] Therefore, the Court is satisfied that without the Expanded Monitor Powers presently sought, it will be impossible for the Monitor to calculate what the true approximate value of the Twinco Interest may be in order for the Monitor to fulfill its statutory duties under the CCAA.

[81] In the present circumstances, it is only appropriate for this Court to grant the Expanded Monitor Powers requested.

[82] Moreover, the present circumstances are not necessarily unique, CCAA monitors have already been granted the type of additional powers sought by the CCAA Parties herein.

[83] Recently, in *Arrangement relatif à 9227-1584 Québec inc.*[29], Justice Peter Kalichman then sitting in the Commercial Division of the Québec Superior Court reminded that under section 23(1)(c) of the CCAA, a monitor was required to make an assessment or proceed to investigate what the monitor considered necessary to determine the state of the debtor's financial affairs.

[84] As the monitor was attempting to recover an asset, which was possibly of significant value to the debtors, Justice Kalichman also declared that being consistent with the purposes of the CCAA:

- The monitor was authorized and empowered to exercise powers of investigation in respect of the debtors to (i) conduct an examination under oath of any person thought to have knowledge relating to the debtors, their

[29] 2021 QCCS 1342, par. 47 and 48.

business or their property; and (ii) to order any such person to be examined to produce any books, documents, correspondence or papers in that person's possession or power relating to the debtors, their business or their property;

- Certain persons could be compelled to provide the monitor with a copy of their complete accounting with respect to the sale of certain property, which according to Justice Kalichman, was linked to the debtors and their assets.

[85] In the aforementioned case, Justice Kalichman relied in part on the extended powers that had already been granted to the Monitor by the Court in the Amended and Restated Initial Order.

[86] The Court was taken aback at the suggestion made by Twinco's counsel that such powers granted to a monitor in an Initial Order or the like should be somewhat discounted as they usually form part of a draft Initial Order prepared and submitted by the debtor's lawyer, alas, implying that the Commercial Division Justices blindly rubber stamp such draft Initial Orders, which could not be further from the reality.

[87] With all due respect, the Court believes that the Monitor's powers to investigate, question and compel the communication of information and documents required *to determine with reasonable accuracy the state of the company's business and financial affairs* which includes the assessment of the value of assets or property of the debtor, should not be limited to the only corporate documents available to a shareholder pursuant to the provisions of the CBCA.

[88] In *Osztrovics Farms Ltd*.[30], the Ontario Court of Appeal dismissed the suggestion that the trustee's power to obtain information "*relating in whole or in part to the bankrupt, his dealings or property*" only extended to corporate documentation that pertained solely to the business and affairs of the corporation, and not another company in which the bankrupt held a significant interest.

[89] The Ontario Court of Appeal also stated that applying a narrow interpretation of the trustee's investigatory powers only to the corporate documentation, that pertain solely to the business and affairs of the bankrupt, and not to information about another company in which the bankrupt has significantly invested, would frustrate the trustee's ability to discharge its duty to the bankrupt's creditors to value and realize upon the most significant asset in bankrupt's estate.

[90] In *Osztrovics*, the bankrupt was a shareholder in a corporation, owning 48% of the company. The trustee requested that the company provides certain information that the trustee required to value the bankrupt's shares in that corporation. The latter refused and the trustee sought and obtained an order pursuant to sections 163 and 164 of the BIA

---

[30] *Osztrovics Estate v. Osztrovics Farms Ltd*., 2015 ONCA 463, pars. 7,14 and 15.

requiring: (i) that company to disclose to it certain documents; and (ii) certain parties to submit to oral examinations.

[91] While *Osztrovics* was decided in the context of bankruptcy proceedings under the *Bankruptcy and Insolvency Act*[31], the Court believes that those principles apply equally to the CCAA proceedings[32].

[92] The Court may add that the fact that we find ourselves in the context of CCAA proceedings involving the liquidation of the CCAA Parties as opposed to their restructuring does not matter.

[93] Liquidating CCAA proceedings have been accepted in practice and case law with an expanded view of the role of the monitor under such circumstances[33].

[94] All in all, in liquidating CCAA proceedings, the responsibilities and the powers of the Monitor remain essentially the same subject to any additional powers that may be granted by the Court at its discretion.

Section 23(1)(k) of the CCAA

[95] Section 23(1)(k) of the CCAA expressly allows this Court to expand the list of duties and functions of the Monitor by directing the latter to "*carry out any other functions in relation to the debtor company that the court may direct*."

[96] In previous decisions, Justices sitting in the Commercial Division of the Québec Superior Court expanded the monitor's powers to include the ability to compel any person reasonably thought to have knowledge relating to any of the debtors, their business or property to be examined under oath, and to disclose and produce to the monitor any books, documents, correspondence or papers in that person's possession or power.[34]

[97] The counsel for the CCAA Parties pointed out, rightly so, to the Court that although CCAA courts have authorized relief similar to the Expanded Monitor Powers in respect to "any person" thought to have knowledge of the debtor, its business or property, the Expanded Monitor Powers here are narrower in that they are only directed at those persons reasonably thought to have knowledge relating to the Twinco Interest, the CFLCo

---

[31] Sections 163 and 164 BIA.

[32] *Confederation Treasury Services Ltd., Re*, 1995 CarswellOnt 2301, par. 18.

[33] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659 at para 68:

[68] What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA* and the expanded view of the role of the monitor, indeed the baptism of the "super monitor". […] [References omitted]

[34] Amended and Restated Initial Order dated August 24, 2018, in the matter of the Arrangement under the *Compagnies' Creditor's Arrangement Act*, of *The S.M. Group Inc.*, 500-11-055122-184 at para 50.1; See also Amended and Restated Initial Order dated December 2, 2019, in the matter of the Arrangement under the *Compagnies' Creditor's Arrangement Act*, of *9227-1584 Québec Inc. & 9336-9262 Québec Inc.*, 500-11-057549-194 at para 39 k).

Indemnity and the CFLCo Maintenance Obligations, including the Twinco Requested Information, and, subject to any further order of this Court, they are limited to a disclosure period of only 10 years, going back to 2010.

The broad judicial discretion conferred under Section 11 of the CCAA

[98] Section 11 of the CCAA stipulates:

> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> [Emphasis added]

[99] The Court is particularly mindful of the teachings of the Supreme Court of Canada in the recent case of *9354-9186 Québec inc. v. Callidus Capital Corp*.[35], in which the broad discretion under section 11 of the CCAA, being the "engine" of the CCAA, was confirmed:

> [47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18–19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.
>
> [48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "*The Evolution of Canadian Restructuring: Challenges for the Rule of Law*", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).
>
> [49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of

[35] 2020 SCC 10.

> demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).
>
> [Emphasis added]

[100] In the present instance, the Court is satisfied that the CCAA Parties have demonstrated that the Expanded Monitor Powers are appropriate in the circumstances and that they have been acting in good faith and with diligence in this matter.

[101] The Court is also satisfied that granting the Expanded Monitor Powers shall further the purposes of the CCAA.

[102] Under the present circumstances, the Court is also guided by the Plan dated May 16, 2018, that was sanctioned by the Court soon after and is satisfied that:

(i) the Expanded Monitor Powers should enable the Monitor to assist the CCAA Parties to recover additional value for the CCAA Parties' creditors;

(ii) the Twinco Interest is the last remaining asset of the CCAA Parties' estate (outside of tax refunds) that has not yet been monetized in these CCAA Proceedings;

(iii) the successful monetization of the Twinco Interest would increase the Plan creditors' recoveries. Wabush Iron and Wabush Resources' share of the Twinco Cash is approximately $1,040,000, together with their *pro rata* shares of any CFLCo Reimbursement;

(iv) a significant majority of the creditors of Wabush are former employees of Wabush Mines, many of whom are elderly, and who are reasonably assumed to be anxious to receive their final distributions as soon as possible; and

(v) the monetization of the Twinco Interest would fulfill the purpose of the Plan which is to distribute the net proceeds of the Participating CCAA Parties' assets and other recoveries for the creditors' benefit.

The "*person*" that may be subjected to the Expanded Monitor Powers does not necessarily need to be a debtor company under the CCAA Proceedings

[103] The Court shares the view of the counsel for the CCAA Parties that it is not a requirement under section 11 or section 23 of the CCAA that those who are subject to any order granted thereunder need to be debtor companies. As previously seen, there are various examples of CCAA courts granting orders under these sections that provide

for relief against third parties, including investigatory powers being granted to monitors to investigate third parties in respect of the debtor's property.

[104] Be that as it may, the Expanded Monitor Powers being sought here are in relation to the CCAA Parties' property, namely the Twinco Interest and therefore, the present Motion is clearly "*in respect of a debtor company*" without forgetting that Twinco having elected to file a proof of claim, has chosen to be a party to the CCAA Proceeding.

The Monitor's neutrality

[105] Counsel for CFLCo questioned the neutrality of the Monitor if it is granted the Expanded Monitor Powers given the ongoing litigation in Québec and in Newfoundland.

[106] The Court has already stated that the present Motion and the Expanded Monitor Powers sought therein do not impact the rights and recourses of the parties in the CBCA Motion and the Twinco Liquidation Motion instituted subsequently by CFLCo in Newfoundland.

[107] It only relates to information to be provided to the Monitor without compromising any of the parties' rights and recourses in connection with the Twinco Interest with the added potential benefit of inducing a consensual settlement and possibly avoid protracted litigation.

[108] In *Aquadis International*[36], the Québec Court of Appeal held that in expanding the monitor's powers under section 23 of the CCAA, the principle of the monitor's neutrality is "*far from absolute*" and there are exceptions. The Court stated that "[a]*s long as the monitor is objective and not biased and takes positions based on reasoned criteria to further legitimate CCAA purposes*, *it now appears inescapable that the neutrality it must maintain is attenuated*."[37]

[109] Moreover, in *Aquadis International*, Justice Schrager made the following comments regarding the involvement of a monitor in liquidating CCAA proceedings which the Court finds quite relevant in the case at hand given the arguments raised by Twinco and CFLCo in that respect:

> [68] **What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA*[38] and the expanded view of the role of the monitor, indeed the baptism of the "super monitor"**.[39] The Appellants concede, if only indirectly, that

[36] See Note 33.
[37] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659 at para 73.
[38] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, para. 42 [*Callidus*].
[39] Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s" in Jill Corraini and Blair Nixon (eds.), Annual Review of Insolvency Law, Toronto, Thomson Reuters, 2019, p. 650.

the Monitor could be authorized to exercise rights of the Debtor against third parties as could a bankruptcy trustee. However, they object to the Monitor's power to sue one group of creditors (the Respondents) on behalf of another group of creditors (the consumers or their insurers).

[69] In my opinion, the Appellants objections are not well founded.

[70] Firstly, the bankruptcy trustee analogy is only a half truth. Trustees are the assignees of a bankrupt's property, and as such, exercise the patrimonial rights of the debtor but they also wear a second hat.[40] Trustees exercise rights and recourses on behalf of creditors against other creditors and against third parties.[41] Such rights and recourses arise from the *BIA* (for example, under s. 95 for preferences) as well as under the civil law generally (for example, the paulian action under arts. 1631 and following *C.C.Q.*). **Most significantly, the *BIA* recourses to attack preferences, transfers under value and dividends paid by insolvent corporations have been available to *CCAA* monitors since the amendments adopted in 2007.**[42] **Thus, the mere fact that the judgment in appeal empowers the Monitor to sue to enforce rights of creditors is not conceptually foreign to the general framework of insolvency law**.

[71] **Moreover, and without making too fine a point, the Appellants' are not creditors of the *CCAA* estate. They might have been, but they chose not to file claims**. **As such, they are third parties**. This eliminates another conceptual, if not legal, difficulty in that, they do not potentially share in the litigation pool after contributing to it.

[72] **The Appellants also object, saying that the power given to the Monitor to sue runs contrary to the principle of a monitor's neutrality. However, the case law and literature recognize that this neutrality is far from absolute**:

> [110] Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:
>
> > Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. … [T] he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness

---

40 *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, para. 33.
41 *Lefebvre (Trustee of) ; Tremblay (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, paras. 32–40.
42 S. 36.1 *CCAA*.

> contemplated by the Court decisions, and more of an active participant or party in the proceedings.
>
> (…)
>
> [119] Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108 (C.A.), at paras. 49–53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.
>
> [120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. (…).[43]

[73] **As long as the monitor is objective and not biased and takes positions based on reasoned criteria to further legitimate *CCAA* purposes, it now appears inescapable that the neutrality it must maintain is attenuated**.

[Emphasis added]

[110] Ultimately, Justice Schrager rejected the Appellants' argument that the objectives of the *CCAA* were being thwarted by allowing the Monitor to pursue a remedy to which it was not entitled. In so deciding, Justice Schrager upheld the position of the CCAA Judge who, in the exercise of his judicial discretion, had favoured a *practical resolution of the case* by expanding the powers of the monitor:

> [32] The judge rejected the Appellants' argument that the objectives of the *CCAA* are being thwarted by allowing the Monitor to pursue a remedy to which it is not entitled. He characterized this argument as technical and unconvincing because, in the absence of consensual settlements, recourse against the Retailers (and JYIC) is the only possible avenue leading to a global treatment of Aquadis' liabilities. Thus, the powers sought by the Monitor were deemed necessary in order to materially advance the restructuring process. **The judge accepted this course of action as the only practical resolution of this case**. As such, **he indicated that the solution chosen was a sensible use of judicial resources** since it avoids the multiplication of individual actions outside the framework of the Plan of Arrangement. […]
>
> [Emphasis added]

---

[43] *Essar*, *supra*, note.

[111] In the present instance, the circumstances warrant the expansion of the Monitor's powers as it is also the only practical and most reasonable solution to obtain the Requested Information without necessarily compromising the rights and recourses of the parties.

[112] At the very least, the CCAA Parties and the Monitor will, at long last, be in a better position to determine the steps actually needed to realize the Twinco Interest and to terminate the CCAA Proceedings without necessarily proceeding with its CBCA Motion in its present format.

Is the Order granting the Expanded Monitor Powers enforceable throughout Canada?

[113] It was argued that an Order of this Court granting the Expanded Monitor Powers could not be enforceable in Newfoundland and persons in that Province could not be compelled to testify at the behest of the Monitor in the exercise of his expanded powers.

[114] With all due respect, the Court disagrees with such a proposition given the fact that such an Order is made pursuant to the CCAA.

[115] Moreover, it is only appropriate to remind Twinco and CFLCo that the Initial Order as it was subsequently amended modified and restated (collectively the "**Initial Order**") already grants to the Monitor the authorization to apply to any other court in Canada *for orders which aid and complement this Order and any subsequent orders of this Court*:

> 66. **DECLARES** that the Monitor or an authorized representative of the CCAA Parties, and in the case of the Monitor, with the prior consent of the CCAA Parties, shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and any subsequent orders of this Court and, without limitation to the foregoing, any orders under Chapter 15 of the *U.S. Bankruptcy Code,* including an order for recognition of these CCAA proceedings as "Foreign Main Proceedings" in the United States of America pursuant to Chapter 15 of the U.S. Bankruptcy Code, and for which the Monitor, or the authorized representative of the CCAA Parties, shall be the foreign representative of the CCAA Parties. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.
>
> [Emphasis added]

[116] Although the above-mentioned provision already contains a declaration that "*All courts*" are *requested to make such orders and to provide such assistance to the Monitor*

as may be deemed necessary or appropriate for that purpose, the following paragraph expands further on the Court's request for aid and assistance as follows:

> 67. **REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America and any court or administrative body elsewhere, to give effect to this Order and to assist the CCAA Parties, the Monitor and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the CCAA Parties and the Monitor as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor or the authorized representative of the CCAA Parties in any foreign proceeding, to assist the CCAA Parties and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.
>
> [Emphasis added]

[117] For greater certainty, the Court shall restate the same requests in the present Order notwithstanding that the same nevertheless already apply without having to restate all the provisions of the Initial Order herein.

The provisional execution of this Order notwithstanding any appeal

[118] It is also appropriate to grant the request of the CCAA Parties to order the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[119] All in all, based on all the circumstances mentioned above, the Court finds that without such an order, the CCAA Parties and the Plan creditors are bound to suffer greater prejudice should Twinco and/or CFLCo appeal the present Order, thus causing further delays in the implementation of the Plan given that the Twinco Interest is essentially the last tangible asset to monetize and to realize in order to permit the final distribution and the termination of the CCAA Proceedings initiated in 2015.

[120] Moreover, providing the Requested Information does not cause any prejudice to Twinco and CFLCo other than allowing the CCAA Parties and the Monitor to have at last a better idea of the value of the Twinco Interest without compromising the rights and recourses of the parties.

FOR THOSE REASONS, THE COURT:

[121] **GRANTS** the present *Motion for the Expansion of the Monitor's Powers* (the "**Motion**");

[122] **DECLARES** that the CCAA Parties have given sufficient prior notice of the presentation of this Motion to interested parties;

DEFINITIONS

[123] **ORDERS** that capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Motion;

EXPANSION OF MONITOR'S POWERS

[124] **ORDERS** that, in addition to any other powers in the Initial Orders or other Orders granted in these CCAA Proceedings, notwithstanding anything to the contrary and without limiting the generality of anything therein, the Monitor is hereby authorized and empowered to, directly or through its counsel:

a) compel any Person (as defined in the Initial Orders) with possession, custody or control to disclose to the Monitor and produce and deliver any books, records, accounting, documents, correspondences or papers, electronically stored or otherwise, relating to the Twinco Interest, the CFLCo Indemnity and the CFLCo Maintenance Obligations, including the Twinco Requested Information (the "**Requested Information**") in respect of the period from and after January 1, 2010, and such earlier periods as may be approved by the Court from time to time (the "**Disclosure Period**"); and

b) conduct investigations, including examinations under oath of any Person reasonably thought to have knowledge relating to the Twinco Interest, the CFLCo Indemnity and the CFLCo Maintenance Obligations, including the Twinco Requested Information, in respect of the Disclosure Period;

DISCLOSURE OF DOCUMENTS AND INFORMATION

[125] **ORDERS** that requests made by the Monitor for the production of Requested Information pursuant to subparagraph 124 (a) of this Order shall be made in writing and delivered by electronic transmission, registered mail or courier, specifying the Requested Information to be delivered to the Monitor by such Person;

[126] **ORDERS** that any Requested Information to be delivered by any Person to the Monitor pursuant to subparagraph 124 (a) of this Order shall be delivered within thirty (30) days of the Monitor's request or such longer periods as the Monitor may agree to in its discretion;

POWERS OF EXAMINATION

[127] **ORDERS** that the examinations held pursuant to subparagraph 124 (b) of this Order shall be conducted virtually due to the ongoing COVID-19 pandemic unless otherwise agreed between the Monitor and the Person being examined;

[128] **ORDERS** that the Monitor shall deliver by electronic transmission on the Person he wishes to examine pursuant to this Order, at least five (5) days prior to the scheduled date of the examination, a summons to appear specifying the time and the Requested Information that the Person must have in his or her possession during the examination;

[129] **ORDERS** that objections raised during examinations held pursuant to this Order shall not prevent the continuation of the examination, the witness being required to respond, unless they relate to the fact that the Person being examined cannot be compelled or to fundamental rights or to a matter of substantial legitimate interest, in which case the Person being examined may refrain from responding;

[130] For greater certainty, **RESTATES** and **DECLARES** that the Monitor or an authorized representative of the CCAA Parties, and in the case of the Monitor, with the prior consent of the CCAA Parties, shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and any subsequent orders of this Court and, without limitation to the foregoing, any orders under Chapter 15 of the *U.S. Bankruptcy Code,* including an order for recognition of these CCAA proceedings as "Foreign Main Proceedings" in the United States of America pursuant to Chapter 15 of the U.S. Bankruptcy Code, and for which the Monitor, or the authorized representative of the CCAA Parties, shall be the foreign representative of the CCAA Parties. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

[131] For greater certainty, **RESTATES** and **REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America and any court or administrative body elsewhere, to give effect to this Order and to assist the CCAA Parties, the Monitor and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the CCAA Parties and the Monitor as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor or the authorized representative of the CCAA Parties in any foreign proceeding, to assist the CCAA Parties and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.

[132] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security;

[133] **THE WHOLE** with judicial costs payable by Twin Falls Power Corporation and Churchill Falls (Labrador) Corporation Limited.

_____

MICHEL A PINSONNAULT, J.S.C.

M^tre^ Bernard Boucher
M^tre^ Milly Chow
M^tre^ Cristina Cataldo
Blake, Cassels & Graydon s.e.n.c.r.l.
Attorneys for the CCAA Parties.

M^tre^ Sylvain Rigaud
Woods s.e.n.c.r.l.
Attorneys for the Monitor FTI Consulting Canada Inc.

M^tre^ Douglas Mitchell
IMK s.e.n.c.r.l./IMK L.L.P.
Attorneys for the Mise-en-cause Twin Falls Power Corporation

M^tre^ Guy P. Martel
M^tre^ Nathalie Nouvet
Stikeman Elliott s.e.n.c.r.l.
Attorneys for the Mise-en-cause Churchill Falls (Labrador) Corporation Limited

M^tre^ Gerry Apostolatos
Langlois avocats, s.e.n.c.r.l.
Attorneys for the Mises-en-cause Quebec North Shore & Labrador Railway Company and Iron Ore Company of Canada

M^tre^ Nicolas Brochu
Fishman Flanz Meland Paquin s.e.n.c.r.l.
Attorneys for the Mise-en-cause for the Salaried/non-union employees and retirees

Hearing date: June 3, 2021

TAB 2

Ernst & Young Inc. in its Capacity as Monitor of all of the Following: Essar Steel Algoma Inc. et al. v. Essar Global Fund Limited et al.

[Indexed as: Ernst & Young Inc. v. Essar Global Fund Ltd.]

Ontario Reports

Court of Appeal for Ontario,

Blair, Pepall and van Rensburg JJ.A.

December 21, 2017

139 O.R. (3d) 1 | 2017 ONCA 1014

Case Summary

Corporations — Oppression — Algoma's monitor in Companies' Creditors Arrangement Act ("CCAA") restructuring proceedings bringing oppression action under s. 241 of Canada Business Corporations Act ("CBCA") against Algoma's parent Essar — Monitor alleging that Essar had exercised de facto control over Algoma and had consistently preferred its own interests over those of Algoma and its stakeholders — Monitor having standing as complainant under oppression provisions of CBCA — Claim properly pleaded as oppression action rather than derivative action under s. 239 of CBCA — Algoma entirely dependent on access to port in order to function economically — Trial judge entitled to find that transaction directed by Essar which conveyed port to Essar-controlled Portco and resulted in Algoma losing control over port was oppressive to Algoma's stakeholders — Business judgment rule not providing defence to Essar — Trial judge not erring in granting remedy which removed Portco's control rights — Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 239, 241 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Algoma was a steel manufacturer in Sault Ste. Marie, and its port facilities were integral to its operations. At a time when Algoma was facing a liquidity crisis, its board of directors placed responsibility for Algoma's recapitalization efforts in the hands of its parent Essar. Essar directed a transaction which conveyed the port facilities to Portco, which Essar indirectly owned. The port transaction resulted in Algoma losing control over the port facilities. Algoma was involved in restructuring proceedings under the *Companies' Creditors Arrangement Act*. As a result of the port transaction, Portco -- and therefore Essar -- effectively had a veto over any party acquiring Algoma in the *CCAA* proceedings. With the authorization of the supervising *CCAA* judge, Algoma's *CCAA* monitor brought an oppression action under s. 241 of the *Canada Business Corporations Act* against Essar and certain Essar-controlled companies. The trial judge found that the monitor had standing to bring the action. He found that the reasonable expectations of Algoma's trade creditors, employees, pensioners and retirees were that Algoma would not deal with a critical asset like the port in such a way as to lose long-term control over such a strategic asset to a related party on terms that [page2 p]ermitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the related party. He concluded that Essar's actions were oppressive. He granted a remedy

which, among other things, removed Portco's control of the port facilities. The defendants appealed.

Held, the appeal should be dismissed.

The trial judge did not err in finding that the monitor had standing as a complainant under s. 238(*d*) of the *CBCA*. While a monitor generally plays a neutral role in *CCAA* proceedings, in exceptional circumstances it may be appropriate for a monitor to serve as a complainant. This was one such case. There was a *prima facie* case that merited an oppression action. The monitor commenced the action as an adjunct to its role in facilitating a restructuring. The monitor could efficiently advance an oppression claim on behalf of a conglomeration of stakeholders -- Algoma's pensioners, retirees, employees and trade creditors -- who were not organized as a group and who were all similarly affected by the alleged oppressive conduct. The remedy granted by the trial judge removed an insurmountable barrier to a successful restructuring.

The trial judge did not err in finding that the action was properly brought as an oppression action under s. 241 of the *CBCA* rather than as a derivative action under s. 239 of the *CBCA*. The derivative action and the oppression remedy are not mutually exclusive, and there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This case fell into that overlapping category.

The trial judge correctly identified the two prongs of the oppression remedy inquiry: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling with the term "oppression"? On the evidence, he was entitled to find that the port transaction, and in particular the transfer of control and the loss of Algoma's ability to restructure absent Essar's consent, violated the reasonable expectations of Algoma's stakeholders.

In light of the fact that Algoma's board of directors was not independent and did not actually exercise business judgment, the business judgment rule did not provide a defence to Essar.

The remedy granted by the trial judge was appropriate.

BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69, 52 B.L.R. (4th) 1, EYB 2008-151755, J.E. 2009-43, 301 D.L.R. (4th) 80, 71 C.P.R. (4th) 303, 383 N.R. 119, 172 A.C.W.S. (3d) 915; *Nortel Networks Corp. (Re)* (October 3, 2012), Toronto, 09-CL-7950 (Ont. S.C.J. (Comm. List)); *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp*. (2003), 68 O.R. (3d) 544, [2003] O.J. No. 5242, 180 O.A.C. 158, 42 B.L.R. (3d) 14, 46 C.B.R. (4th) 313, 127 A.C.W.S. (3d) 830 (C.A.); *Rea v. Wildeboer* (2015), 126 O.R. (3d) 178, 2015 ONCA 373, **consd**

Other cases referred to

Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 80 D.L.R.

(4th) 161, 45 O.A.C. 320, 1 B.L.R. (2d) 225, 26 A.C.W.S. (3d) 1261 (C.A.); *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, 2011 D.T.C. 5006, 409 N.R. 201, 296 B.C.A.C. 1, 12 B.C.L.R. (5th) 1, 326 D.L.R. (4th) 577, EYB 2010-183759, 2011EXP-9, J.E. 2011-5, 2011 G.T.C. 2006, [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, [2010] G.S.T.C. 186, 196 A.C.W.S. (3d) 27; [page3 <]i>Chiang (Trustee of) v. Chiang (2009), 93 O.R. (3d) 483, [2009] O.J. No. 41, 2009 ONCA 3, 78 C.P.C. (6th) 110, 305 D.L.R. (4th) 655, 49 C.B.R. (5th) 1, 257 O.A.C. 64, 174 A.C.W.S. (3d) 105; *CW Shareholdings Inc. v. WIC Western International Communications Ltd*. (1998), 39 O.R. (3d) 755, [1998] O.J. No. 1886, 160 D.L.R. (4th) 131, 61 O.T.C. 81, 38 B.L.R. (2d) 196, 79 A.C.W.S. (3d) 518 (Gen. Div. (Comm. List)); *Essar Steel Algoma Inc. (Re)*, [2017] O.J. No. 4258, 2017 ONSC 3930, 53 C.B.R. (6th) 321 (S.C.J.); *Fedel v. Tan* (2010), 101 O.R. (3d) 481, [2010] O.J. No. 2839, 2010 ONCA 473, 264 O.A.C. 144, 83 C.C.E.L. (3d) 60, 70 B.L.R. (4th) 157, 191 A.C.W.S. (3d) 125; *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board* (2006), 79 O.R. (3d) 81, [2006] O.J. No. 27, 12 B.L.R. (4th) 189, 144 A.C.W.S. (3d) 859 (C.A.); *Hamilton v. Open Window Bakery Ltd*., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, 235 D.L.R. (4th) 193, 316 N.R. 265, J.E. 2004-470, 184 O.A.C. 209, 40 B.L.R. (3d) 1, [2004] CLLC Â210-025, 128 A.C.W.S. (3d) 1111; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43, 25 C.B.R. (5th) 176, 56 C.C.P.B. 1, 151 A.C.W.S. (3d) 1004 (C.A.); *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd*., [2008] O.J. No. 958, 2008 ONCA 183, 234 O.A.C. 59, 41 B.L.R. (4th) 51, 67 R.P.R. (4th) 1, 164 A.C.W.S. (3d) 788; *Malata Group (HK) Ltd. v. Jung* (2008), 89 O.R. (3d) 36, [2008] O.J. No. 519, 2008 ONCA 111, 233 O.A.C. 199, 290 D.L.R. (4th) 343, 44 B.L.R. (4th) 177, 164 A.C.W.S. (3d) 94; *Naneff v. Con-Crete Holdings Ltd*. (1995), 23 O.R. (3d) 481, [1995] O.J. No. 1377, 85 O.A.C. 29, 23 B.L.R. (2d) 286, 55 A.C.W.S. (3d) 86 (C.A.); *Northland Properties Ltd. (Re)*, [1988] B.C.J. No. 1210, 29 B.C.L.R. (2d) 257, 69 C.B.R. (N.S.) 266, 73 C.B.R. (N.S.) 146, 11 A.C.W.S. (3d) 76 (S.C.); *Pente Investment Management Ltd. v. Schneider Corp*. (1998), 42 O.R. (3d) 177, [1998] O.J. No. 4142, 113 O.A.C. 253, 44 B.L.R. (2d) 115, 83 A.C.W.S. (3d) 51 (C.A.); *Philip's Manufacturing Ltd. (Re)*, [1992] B.C.J. No. 1163, 67 B.C.L.R. (2d) 385, 12 C.B.R. (3d) 145, 33 A.C.W.S. (3d) 838 (C.A.); *R. v. Palmer*, [1980] 1 S.C.R. 759, [1979] S.C.J. No. 126, 106 D.L.R. (3d) 212, 30 N.R. 181, 50 C.C.C. (2d) 193, 14 C.R. (3d) 22, 17 C.R. (3d) 34, 4 W.C.B. 171; *Reference re: Constitutional Creditor Arrangement Act (Canada)*, [1934] S.C.R. 659, [1934] S.C.J. No. 46, [1934] 4 D.L.R. 75, 16 C.B.R. 1; *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208, [1994] O.J. No. 276, 111 D.L.R. (4th) 19, 69 O.A.C. 312, 25 C.P.C. (3d) 61, 2 R.F.L. (4th) 232, 45 A.C.W.S. (3d) 1101 (C.A.); *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, 301 O.A.C. 1, 96 C.B.R. (5th) 171, 8 B.L.R. (5th) 1, 354 D.L.R. (4th) 581, 2013EXP-356, 2013EXPT-246, J.E. 2013-185, D.T.E. 2013T-97, EYB 2013-217414, 439 N.R. 235, 20 P.P.S.A.C. (3d) 1, 223 A.C.W.S. (3d) 1049, 2 C.C.P.B. (2d) 1; *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc*., [2004] O.J. No. 636, 250 D.L.R. (4th) 526, 183 O.A.C. 310, 42 B.L.R. (3d) 34, 32 C.C.E.L. (3d) 68, 40 C.C.P.B. 114, 137 A.C.W.S. (3d) 742 (C.A.), affg [2002] O.J. No. 2412, 214 D.L.R. (4th) 496, 27 B.L.R. (3d) 53, 19 C.C.E.L. (3d) 203, 32 C.C.P.B. 120, 115 A.C.W.S. (3d) 981 (S.C.J.) (Comm. List); *U.S. Steel Canada Inc. (Re)*, [2016] O.J. No. 4688, 2016 ONCA 662, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450, 61 B.L.R. (5th) 1, 270 A.C.W.S. (3d) 471; *Woodward's Ltd. (Re)*, [1993] B.C.J. No. 79, 100 D.L.R. (4th) 133, 77 B.C.L.R. (2d) 332, 37 A.C.W.S. (3d) 1041 (S.C.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 13 [as am.]

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 192 [as am.], 238, (*d*), 239 [as am.], 241 [as am.], (3) [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [as am.], 11.7(1) [as am.], 23 [as am.], (1) (*c*) [as am.], (*k*) [page4]

Authorities referred to

Ben-Ishai, Stephanie, and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009)

Edwards, Stanley E., "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587

Kent, A.J.F., and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008)

Mann, David, and Neil Narfason, "The Changing Role of the Monitor" (2008), 24 Bank. & Fin. L. Rev. 131

Peterson, Dennis H., and Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed. (Toronto: LexisNexis, 2009)

Sarra, Janis P., "Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010)

Sarra, Janis P., *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013)

Wood, Roderick J., *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law Inc., 2015)

APPEAL from the judgment of Newbould J. (2017), 137 O.R. (3d) 438, [2017] O.J. No. 1377, 2017 ONSC 1366 (S.C.J.) for the plaintiff in an action for an oppression remedy; and from the costs order, [2017] O.J. No. 4248, 2017 ONSC 4017, 50 C.B.R. (6th) 148 (S.C.J.).

Patricia D.S. Jackson, *Andrew D. Gray*, *Jeremy Opolsky*, *Alexandra Shelley* and *Davida Shiff*, for appellants Essar Global Fund Limited, New Trinity Coal, Inc., Essar Ports Algoma Holding

Inc., Essar Ports Canada Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., and Essar Steel Limited.

Clifton P. Prophet, *Nicholas Kluge* and *Delna Contractor*, for respondent Ernst & Young Inc. in its capacity as monitor of Essar Steel Algoma Inc. et al.

Eliot N. Kolers and *Patrick Corney*, for respondent Essar Steel Algoma Inc.

Peter H. Griffin, *Monique Jilesen* and *Kim Nusbaum*, for appellants GIP Primus, L.P. and Brightwood Loan Services LLC.

The judgment of the court was delivered by

[1] **PEPALL J.A.**: — This appeal concerns a successful oppression action brought pursuant to s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). It involves the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") restructuring proceedings of the respondent Essar [page5 S]teel Algoma Inc. ("Algoma"),[1] one of Canada's largest integrated steel mills, and the respondent Ernst & Young Inc., the court-appointed monitor.

[2] The supervising *CCAA* judge authorized the monitor to commence an action for oppression against Algoma's parent, the appellant Essar Global Fund Limited ("Essar Global"), and the remaining appellants, other companies owned directly or indirectly by Essar Global (the "Essar Group"). The action arose in the context of a recapitalization of Algoma and a transaction between Algoma and Port of Algoma Inc. ("Portco"), two companies indirectly owned by Essar Global, in which Algoma's port facilities in Sault Ste. Marie (the "port") were conveyed to Portco.

[3] Portco is a single-purpose company established by Essar Global. As Portco's name suggests, it currently controls the Sault Ste. Marie port. Portco obtained control in November 2014 in a transaction between Algoma, Portco and Essar Global (the "port transaction"). The port transaction effectively provided Portco with the ability to veto any change in control of Algoma's business. The intervenors below and appellants on appeal, GIP Primus, L.P. and Brightwood Loan Services LLC (collectively, "GIP"), are arm's-length lenders who loaned Portco US$150 million to effect the transaction.

[4] The trial judge found the port transaction and other conduct of Essar Global to be oppressive and granted a remedy that was designed to address that oppression. Essar Global and some of the members of the Essar Group, together with GIP, appeal from that judgment. The appellants advance a number of arguments, many of them factual, in support of their appeal. The appellants' two principal legal submissions are, first, that the monitor lacked standing to bring an oppression claim; and second, that the alleged harm was to Algoma and that therefore the appropriate redress was a derivative action.

[5] For the reasons that follow, I would dismiss the appeal.

A. *Facts*

(1) *Algoma's operations*

[6] The City of Sault Ste. Marie sits on the shore of St. Mary's River, a waterway that links Lake Superior to Lake [page6 H]uron at the heart of the Great Lakes, close to the Canada/U.S. border. The steel production operations that are owned by Algoma have been the primary employer and economic engine of the city since construction of the steel mill in 1901. Not surprisingly, the city's port, which is situated next to Algoma's buildings and facilities, is integral to the steel operations. Indeed, Algoma is the port's primary customer and its employees have traditionally run the port operations. Raw materials used to produce steel are shipped to the port and the steel that is produced is shipped to market from the port. The relationship is one of mutual dependence.

[7] Unfortunately, Algoma was in and out of *CCAA* protection proceedings both in 1991 and in 2001. In late 2013, Algoma faced another liquidity crisis and restructured under the *CBCA* in 2014. The recent *CCAA* filing occurred on November 9, 2015.

(2) *The Essar Group*

[8] Essar Global is a Cayman Islands limited liability company and the ultimate parent of the respondent Algoma, which it acquired through its subsidiaries in 2007. Essar Global is also the parent of the appellants Portco, Essar Power Canada Ltd., New Trinity Coal Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc. and Essar Steel Limited. Its investments are managed by Essar Capital Limited ("Essar Capital"), which is based in London, England. These companies are part of the Essar Group, a multinational conglomerate that was founded in India by two brothers, Sashi and Ravi Ruia. Members of the Ruia family are the beneficial owners of the Essar Group.

(3) *Algoma's recapitalization*

[9] In late 2013, Algoma was facing a liquidity crisis. Algoma anticipated being unable to meet a coupon payment due to unsecured bondholders in June 2014, and its US$346 million term loan was to mature in September 2014. Although Essar Global had been injecting substantial funds into Algoma, it was hesitant to advance further cash to Algoma. Algoma decided to consider mechanisms to restructure and reduce its debt and therefore embarked on a recapitalization project.

[10] At the time of the discussions relating to the recapitalization, Algoma's board of directors consisted of five appointees affiliated with the Ruia family or the Essar Group, and three independent directors. In early January 2014, the board of directors placed responsibility for Algoma's recapitalization efforts in the hands of Essar Global and Essar Capital employees. [page7 A]lgoma personnel had no day-to-day control over the recapitalization project.

[11] Although the three independent directors had begun expressing concerns about their roles on the board as early as the fall of 2013, in the face of Algoma's serious financial challenges, their concerns became more acute. Specifically, they were concerned that their

requests for timely, full disclosure of information and full participation in the strategic decisions of the board had not been properly taken into account by the other board members. On January 19, 2014, the three sent a memo to the board proposing the establishment of an independent committee to work with outside financial advisors to evaluate options and alternatives for Algoma's recapitalization. The board held a meeting on February 11, 2014, and rejected this proposal by a vote of four to three, the three being the independent directors. In response, one of the three independent directors resigned. The other two initially remained on the board.

[12] On February 17, 2014, one of the remaining independent directors, Thomas Dodds, wrote to Prashant Ruia seeking a meeting. Prashant Ruia was then the vice-chair of Algoma's board, the son of one of the founders of Essar Group, and a director of Essar Capital. Mr. Dodds wrote:

> If your expectation of [the Algoma] Board is to simply be a formality and our role as independent directors is to essentially "rubberstamp" shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at [Algoma].
>
> . . . . .
>
> In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
> We cannot discharge our responsibilities under such an environment. [page8]

[13] The two remaining independent directors resigned on February 21 and May 5, 2014, respectively. In his resignation letter, Mr. Dodds explained his rationale, stating:

> I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company or its parent.

[14] The trial judge found, at para. 15 of his reasons, that the four directors who voted against the independent committee were "Essar-affiliated directors", that it was clear that the Ruia family did not want an independent committee, and that the Essar-affiliated directors voted accordingly.

[15] The trial judge also found that the recapitalization and the port transaction were run by Joe Seifert, chief investment officer of Essar Capital. The trial judge rejected the contention that

Mr. Seifert was merely an advisor to the board that independently made all of the critical decisions. Rather, Essar Global and Essar Capital, led by Mr. Seifert, directed and made decisions relating to the recapitalization and the port transaction. As the trial judge noted, at para. 49, the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

(4) *Restructuring support agreement*

[16] Essar Global engaged Barclays Capital, an investment bank, to pursue alternative financing structures for Algoma on behalf of Essar Global. Barclays introduced GIP to Mr. Seifert of Essar Capital. In May 2014, representatives of Essar Global, GIP, and Barclays met to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a transaction in which Algoma might sell its port assets to a new corporate entity to generate cash proceeds, but not for the purpose of recapitalizing Algoma. Rather, the proceeds would flow upstream to Essar Global. In light of Algoma's prior insolvencies, GIP thought it important that a separate corporate entity distinct from Algoma be established to hold the port assets. By the end of June 2014, Algoma had an exclusivity agreement with GIP regarding GIP's loan to finance the port transaction.

[17] Soon after entering into the exclusivity agreement with GIP, on July 24, 2014, Algoma entered into a restructuring support agreement (the "RSA") with Essar Global and an ad hoc committee of Algoma's unsecured noteholders. The RSA set out the principal terms of a restructuring. It provided for a reduction of Algoma's debt through the exchange of the unsecured notes in [page9 r]eturn for the payment of a percentage of their original principal amount and the issuance of new notes. The note restructuring would be implemented through a court-approved *CBCA* plan of arrangement. As a condition of the RSA and pursuant to an equity commitment letter dated July 23, 2014, Essar Global agreed to acquire equity in Algoma for cash in the minimum amount of US$250 million and subject to a maximum of US$300 million. The trial judge found that Essar Global never intended to honour this obligation.

[18] The equity commitment letter provided a remedy in the event of a breach. The plan of arrangement contained a release of any claim arising out of the equity commitment letter in favour of Essar Global, the noteholders and the other corporations participating in the arrangement.

[19] It was a condition of the proposed plan of arrangement that Essar Global would comply with its RSA obligation to provide the aforementioned cash equity infusion. However, as early as March 28, 2014, representatives of the Ruia family had made it clear that they did not have US$250 million for equity. Efforts were made to reduce Essar Global's contribution. In late July 2014, one of the Ruia representatives wrote that ideally the equity contribution would be kept to US$150 to US$160 million.

[20] Nonetheless, an application for approval of the plan of arrangement was made to the court. The recapitalization contemplated by the RSA was approved as an arrangement under s. 192 of the *CBCA* on September 15, 2014.

[21] Beginning in October 2014, roadshow presentations were made to market the securities being offered through the recapitalization. However, the transaction marketed did not accord

with the transaction contemplated by the RSA. First, the roadshow presentation described an Essar Global cash equity contribution in Algoma of less than US$100 million, not the US$250 to US$300 million described in the RSA. Second, the presentation provided for the cash to be generated from the sale of the port by Algoma. The RSA did not allow for such a sale absent the noteholders' consent. No such consent had been obtained. In addition, the proceeds of any sale were to be used to reduce Algoma's debt.

[22] The roadshow was unsuccessful and investors failed to subscribe for the securities marketed. The lead bookrunner attributed this failure to the perception among investors that the transaction described in the roadshow presentation contemplated an insufficient contribution of equity into Algoma by Essar Global. [page10]

[23] And so it was that Algoma was left without the cash to repay or refinance its debt.

[24] Ultimately, the RSA was amended on November 6, 2014, such that Essar Global contributed US$150 million rather than the cash contribution of between US$250 and US$300 million originally contemplated by the equity commitment letter. The amended RSA went on to provide that upon fulfillment of this revised contribution, Essar Global was deemed to have satisfied all of its obligations under the equity commitment letter. The releases contained in the original filing were repeated in the amended plan of arrangement.

[25] As subsequently discussed, in light of the amended RSA, an amended plan of arrangement was approved on November 10, 2014.

(5) *Port transaction*

[26] The port transaction closed on November 14, 2014. In summary, Algoma sold to Portco the port assets consisting of the port buildings, the plant and machinery, but not the land. Algoma leased the realty to Portco for a term of 50 years. Portco agreed to provide port cargo handling services in return for a monthly payment from Algoma to Portco. Algoma agreed to provide to Portco the services necessary to operate the port in return for a monthly payment from Portco that would be less than the monthly payment paid by Algoma to Portco for cargo handling services.

[27] Turning to the details of the port transaction, Algoma and Portco entered into a master sale and purchase agreement ("MSPA"). Under the MSPA:

(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port, and agreed to lease the realty to Portco;

(ii) Portco agreed to pay Algoma US$171.5 million to be satisfied by:

-- a cash payment by Portco of US$151.66 million; and

-- the issuance of an unsecured promissory note in the amount of US$19.84 million payable in full on November 13, 2015.

[28] To fund these obligations, Portco obtained a US$150 million term loan from GIP. GIP Primus, L.P. lent US$125 million, while Brightwood Loan Services LLC lent US$25 million. This term loan was secured by all of Portco's current and future real and personal property and supported by two guarantees in favour of GIP: one from Essar Global, and another from Algoma Port Holding Company Inc., Portco's direct parent. [page11]

[29] Pursuant to the MSPA, Algoma and Portco executed five additional documents: a promissory note, a lease, a shared services agreement, an assignment of material contracts agreement and a cargo handling agreement.

(i) *Promissory note*

[30] The promissory note was for US$19.84 million payable by Portco to Algoma. Portco immediately assigned its obligations under the promissory note to Essar Global. Essar Global therefore became the obligor under the note and Algoma released Portco from its obligation. As of the date of the trial, the promissory note remained unpaid. At para. 27 of a subsequent decision released on June 26, 2017, the trial judge granted a declaration that any amounts owing to Algoma under the promissory note given by Portco to Algoma have been set off against amounts owing by Algoma to Portco under the cargo handling agreement: *Essar Steel Algoma Inc. (Re)*, [2017] O.J. No. 4258, 2017 ONSC 3930, 53 C.B.R. (6th) 321 (S.C.J.). The decision allows for set-off against Portco, but preserves GIP's right to repayment.

(ii) *Lease*

[31] Under the lease, Portco leased from Algoma the port lands, roads and outdoor storage space for a 50-year term. Portco prepaid Algoma the rent for the entire 50-year period. The present value of this leasehold interest was stated to be US$154.8 million. Algoma maintained responsibility for all maintenance, repairs, insurance and property taxes.

(iii) *Shared services agreement*

[32] Under the shared services agreement, Algoma was to be responsible for providing all the services necessary for Portco to fulfill its obligations under the cargo handling agreement. These services were to be provided by Algoma employees, not Portco employees. Portco agreed to pay Algoma US$11 million annually subject to escalation at the rate of 3 per cent per annum beginning in 2016.

(iv) *Assignment of material contracts*

[33] Under the assignment of material contracts agreement, Algoma provided a covenant in favour of GIP, which precluded Algoma from selling or assigning any material contract relating to the port, including the cargo handling agreement except by way of security granted to its other third party lender. [page12]

(v) *Cargo handling agreement*

[34] Under the cargo handling agreement, Portco agreed to provide Algoma with cargo handling services for an initial 20-year term with automatic renewal for successive three-year periods unless either party gave written notice of termination to the other. Algoma agreed to pay Portco based on tonnage with a minimum monthly assured volume of US$3 million. In other words, Algoma was obliged to pay a minimum of US$36 million annually to Portco for 20 years subject to an escalation in price of 1 per cent per annum commencing in 2016. Therefore, while Algoma was entitled to US$11 million annually under the shared services agreement, it had to pay Portco at least US$36 million annually under the cargo handling agreement, such that Portco would receive an annual revenue stream from Algoma of US$25 million. This amount was intended to service GIP's term loan at US$25 million a year. However, GIP's loan had a term of eight years, and therefore Portco would have the full benefit of the US$25 million for at least 12 years of the initial 20-year term of the cargo handling agreement, and potentially for 42 years if the agreement was not terminated.

[35] Section 15.2 of the cargo handling agreement also contained a change of control clause that stated that the "Agreement may not be assigned by either Party without the prior written consent of the other Party." This provision became particularly contentious because it effectively gave Portco -- and therefore Portco's parent, Essar Global -- a veto over any party acquiring Algoma in the *CCAA* proceedings.

[36] Although inclusion of the change of control provision in the cargo handling agreement was driven by GIP, the trial judge found that it was effectively for the benefit of Essar Global, as it gave Portco a veto. Furthermore, the trial judge noted, at para. 117, that Essar Global had in fact relied on s. 15.2 to its benefit, by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

[37] In discussing the financial ramifications of the shared services agreement and the cargo handling agreement, the trial judge observed, at para. 26 of his reasons:

> When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan. [page13]

[38] Duff & Phelps assessed the fair value of the Portco transaction as ranging between US$150.9 million and US$174.2 million with a midpoint of US$161.7 million. However, this assessment failed to take into account the change of control provision in the cargo handling agreement. Deloitte LLP reviewed Duff & Phelps' assessment and concluded it was reasonable.[2]

(6) *Final recapitalization*

[39] Ultimately, the recapitalization of Algoma consisted of the following transactions:

(a) Algoma issued US$375 million in senior secured notes pursuant to an offering memorandum;

(b) Algoma entered into a new US$50 million senior secured asset-based revolving credit facility and a new US$375 million term loan;

(c) Algoma's unsecured noteholders were paid a portion of their principal and were issued new junior secured notes;

(d) Algoma completed the port transaction;

(e) Essar Global contributed US$150 million in cash in exchange for common equity, and also contributed US$150 million in debt forgiveness; and

(f) All other Algoma lenders were repaid in full.

[40] In addition, GIP entered into a secured term loan for US$150 million with Portco, secured by a GSA over all of Portco's assets. It also received guarantees -- one from Essar Global and one from Algoma Port Holding Company Inc. -- guaranteeing Portco's liabilities. In November 2014, the transactions in furtherance of Algoma's recapitalization, including the port transaction, were approved unanimously by Algoma's board of directors after receiving advice and on the recommendation of Algoma's management. By this time, the board consisted of four directors: Mr. Kishore Mirchandani, who became a director on June 23, 2014; Mr. Naresh Kothari, who became a director on [page14]August 24, 2014; the board's chair, Mr. Jatinder Mehra of Essar Global; and Algoma's CEO, Mr. Kalyan Ghosh. Mr. Ghosh and Mr. Rajat Marwah, Algoma's CFO, both testified that they supported the port transaction not because it was ideal, but because there was no other option given Essar Global's failure to capitalize Algoma as it had committed to do.

[41] As mentioned, the approved plan of arrangement that included the original RSA had to be amended in light of the revised equity contribution. A *CBCA* plan of arrangement incorporating the recapitalization and authorizing the amendment of the September 2014 approval order was granted by Morawetz J. on November 10, 2014.

[42] Based on the materials before this court, it would appear that the port transaction was not mentioned or brought to Morawetz J.'s attention. In this regard, the trial judge found that there was no reference to the port transaction in the affidavits filed in support of the amendment to the plan of arrangement. The port transaction is not mentioned in that order or in any endorsement.

[43] The outcome of the port transaction was that all port assets were transferred from Algoma to Portco, the port lands were leased to Portco for 50 years, and Portco obtained change of control rights. Portco paid Algoma US$151,660,501.50 in cash, provided the US$19,840,000 promissory note and was obliged to pay Algoma US$11 million per annum under the shared services agreement. In turn, Algoma was obliged to pay Portco US$36 million per annum for an initial term of 20 years under the cargo handling agreement, subject to renewal, netting Portco US$25 million per annum as against the shared services agreement payments. Meanwhile, under the revised RSA, Essar Global contributed cash of US$150 million to Algoma rather than the original cash commitment of US$250 to US$300 million.

(7) *Insolvency protection proceedings*

[44] On November 9, 2015, Newbould J. granted an order placing Algoma, Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA (the "*CCAA* applicants") under *CCAA* protection. As mentioned, he appointed Ernst & Young Inc. as the monitor. The order contained various paragraphs addressing the rights and obligations of the monitor, including a direction to perform such duties as were required by the court. On November 20, 2015, Morawetz J. granted an amended and restated initial order that, among other [page15]things, directed the monitor to review and report to the court on any related party transactions (expressly including the port transaction).

[45] During the *CCAA* proceedings, on February 10, 2016, a sales and investment solicitation process ("SISP") for Algoma's business and property was approved by the court. Essar North America, a subsidiary of Essar Global, submitted a bid but was disqualified in April 2016 under the terms of the SISP because it failed to provide sufficient evidence of financial ability to purchase. In May and July of 2016, Essar Global persisted in its efforts to be the purchaser of the *CCAA* applicants. On May 10, 2016, counsel to Portco, who was also counsel to Essar Global, wrote to counsel for Algoma to highlight matters of particular concern in connection with the *CCAA* process. The letter stated that any prospective bidder was to be told of the consent or veto right:

> Portco and [Algoma] are party to a Cargo Handling Agreement pursuant to which [Algoma] has committed to long-term use of the port. Portco, has, of course, a keen interest in any successor to [Algoma] as counterparty to that agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by [Algoma] of the agreement or a change of control of [Algoma].
>
> Again please confirm that this has been made clear to prospective bidders.

[46] On June 20, 2016, the monitor filed its thirteenth report, which described the Portco transaction and indicated that there may be grounds for further review of that transaction. The monitor noted that the renegotiated equity commitment resulted in Essar Global contributing the sum of US$150 million in equity rather than US$250 to US$300 million, and that the Portco transaction transferred control of one of Algoma's most critical assets, the Port, to Essar Global. The Monitor stated that it remained "particularly concerned about the effect on the completion of a restructuring transaction of the restrictions on assignment in the Portco Transaction documents".

[47] On September 26, 2016, Deutsche Bank AG, who led the debtor-in-possession ("DIP") lenders of Algoma and also represented the interests of potential bidders in the *CCAA* process, applied for an order empowering the monitor to commence certain proceedings and make certain investigations.[3] On September 26, 2016, Newbould J. granted an order authorizing the [page16]monitor to commence and continue proceedings under s. 241 of the *CBCA* in relation to related party transactions, including but not limited to the port transaction.

[48] The action proceeded on an accelerated timetable due to the progress of the *CCAA* restructuring.[4] On October 20, 2016, the monitor commenced proceedings claiming oppression pursuant to s. 241 of the *CBCA* against Essar Global and others in the Essar Group including

Portco. It pleaded that by reason of its role as a court officer directed to commence the oppression proceedings and to oversee the interests of all stakeholders of Algoma, it was a complainant within the meaning of ss. 238 and 241 of the *CBCA*.

[49] It alleged that since June 2007, the Essar Group had exercised *de facto* control over Algoma and had engaged in a course of conduct that consistently preferred the interests of the Essar Group and, in particular, Essar Global, to those of Algoma and its stakeholders. This included the transfer to the Essar Group of long-term control over, and a valuable equity interest in, Algoma's port facilities, an irreplaceable and core strategic asset of Algoma. The value of control over the port to Algoma and its stakeholders was immeasurable, since Algoma's business could not function without access to the port.

[50] The monitor pointed out that the Essar Group obtained its control and equity interest in the port through a cash contribution of less than US$4.7 million. It pleaded that the US$150 million raised as part of the port transaction came from third party lenders, namely, GIP, and was money raised against the security and value of the port facilities, an asset of Algoma, as well as a promissory note that remained unpaid, and a guarantee from Essar Global. The monitor also stressed that the control obtained by the Essar Group was not only over the port facilities, but extended to any sale of the Algoma business such that Essar Global had an indirect veto on transactions involving Algoma's enterprise. Essar Global also obtained a right to substantial payments under the cargo handling agreement.

[51] The oppression occasioned was exacerbated by the fact that the borrowed moneys raised through the transaction were a substitution for moneys Essar Global had promised to contribute as equity in Algoma.

[52] The monitor also argued that s. 15.2 of the cargo handling agreement itself constituted oppression, because it was for the [page17]long-term benefit of Essar Global and not in the interests of Algoma's non-shareholder stakeholders. The monitor took the position that the provision gave Portco and Essar Global a veto over any party acquiring Algoma in the *CCAA* process, thus negatively affecting the sales process. The monitor also argued that the change of control provision was not necessary for the protection of GIP because it had its own change of control rights under its credit agreement.

[53] In addition, the monitor pleaded that the oppression and prejudice to creditors was continuing as Essar Global and other related companies had insisted that bidders for Algoma's business under the SISP, which was approved by the court on February 11, 2016, be advised of Portco's consent rights under the change of control clause in the cargo handling agreement.

[54] Essar Global and the remaining defendants filed their defence rejecting the monitor's allegations, describing the action as "an improper and ill-conceived leverage tactic". They asserted that the litigation was an attempt to attack the port transaction for the benefit of other bidders under the sales process, including the DIP lenders. They pleaded that the monitor had no standing, the claim was improperly pleaded, an oppression remedy seeking to unwind or claim damages in respect of the port transaction was unavailable at law, and in any event there was no oppression, prejudice or unfairness.

[55] Portco's lenders, GIP, were granted intervenor status as parties on December 22, 2016. They noted that they were *bona fide*, arm's-length and independent commercial parties and no

cause of action or wrongful conduct was asserted by the monitor against them. Nonetheless, the monitor was seeking remedies that eviscerated the security held by them. They asserted that the monitor did not have standing and could not establish any oppressive conduct in any event. Moreover, the structure of the port transaction was transparent to all of Algoma's stakeholders. Lastly, even if the court granted a remedy to the monitor, it had no jurisdiction to prejudice the interests of GIP. The monitor subsequently amended its statement of claim to modify the language on the relief claimed relating to the indebtedness and security interests in favour of GIP.

[56] Various procedural motions were brought. Others who are not before this court intervened: Deutsche Bank AG; the ad hoc committee of Algoma's noteholders; Algoma retirees; and two locals from the union United Steelworkers, Locals 2724 and 2251. The Essar Group and GIP brought motions to strike on the basis that the monitor lacked standing and later also sought an order for particulars. On December 1, 2016, Newbould J. ordered that [page18]the standing motions be dealt with at the trial scheduled for January 30, 2017. On January 5, 2017, he urged the monitor to give as many particulars as it could regarding the relief it might seek.

[57] On January 30, 2017, Essar Capital served a motion for an order re-opening the SISP and to make information available to Essar Global to allow it to consider submitting a bid. Newbould J. dismissed the request. At para. 114 of his reasons, the trial judge found that Essar Global was still interested in purchasing the assets of Algoma.

[58] The action proceeded to a five-day trial before Newbould J. commencing on January 31, 2017.

B. *Trial Judgment*

[59] The trial judge organized his reasons for decision under six principal headings: the monitor's standing; who directed the recapitalization and the port transaction; reasonable expectations and were they violated; the business judgment rule; and the appropriate remedy. I will summarize his conclusions on each issue.

(1) *Monitor's standing*

[60] As mentioned, both Essar Global and GIP challenged the monitor's standing as a complainant under the oppression provisions of the *CBCA*. They also argued that only persons directly damaged by the oppressive conduct could bring the action and that this action was in substance a derivative claim by Algoma. The trial judge rejected these arguments.

[61] He found that the stakeholders harmed were Algoma's trade creditors, pensioners, retirees and employees. At para. 32, he noted that Algoma owed CDN$911.9 million as of the date of the port transaction to a group of creditors including trade creditors, pensioners, retirees and the City of St. Sault Marie.

[62] The trial judge acknowledged, at para. 34, that normally a monitor, who is a court officer, is to be neutral and not take sides. However, there are exceptions. Under s. 23(1) (*k*) of the *CCAA*, a monitor must carry out any function in relation to the debtor that the court may direct. At para. 35, the trial judge also pointed to the *CCAA* proceedings of Nortel Networks Corp. as a precedent: *Nortel Networks Corp. (Re)* (October 3, 2012), Toronto, 09-CL-7950 (Ont. S.C.J.

(Commercial List)). In those proceedings, a monitor was authorized to act as a litigant after all of Nortel's directors and senior executives had resigned.

[63] Moreover, the trial judge observed that determining whether someone is a complainant under s. 238 of the *CBCA* is [page19]a discretionary decision. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544, [2003] O.J. No. 5242 (C.A.), this court confirmed that a trustee in bankruptcy acting on behalf of the creditors of a bankrupt estate could be a complainant within the meaning of s. 238. In so doing, the court noted the need for flexibility to ensure that the remedial purpose of the oppression provisions is achieved. The trial judge saw no reason why the principle of collective action -- which posits that it is more efficient for creditors to pursue their claims in a bankruptcy collectively with a trustee acting as their representative rather than individually -- should not be followed in the present *CCAA* proceeding. At para. 37, he concluded that the monitor had taken the action as an adjunct to its role in facilitating a restructuring and was therefore a proper complainant.

[64] To respond to Essar Global and GIP's arguments that the claim was properly a derivative action and that no person had been personally harmed beyond Algoma, at para. 39 the trial judge relied on *Rea v. Wildeboer* (2015), 126 O.R. (3d) 178, 2015 ONCA 373, at para. 27. There, Blair J.A. commented that the derivative action and the oppression remedy are not mutually exclusive. Although on the facts of *Wildeboer*, Blair J.A. had struck out a statement of claim pleading the oppression remedy, the trial judge distinguished *Wildeboer* on the basis that the relief sought was for the benefit of the corporation and there was no allegation that individualized personal interests were affected by the alleged wrongful conduct.

(2) *Essar Global directed the recapitalization and the Portco transaction*

[65] The trial judge observed that in some respects, it did not matter who made the decisions regarding the recapitalization and the port transaction -- if the conduct was oppressive, relief could be granted. Nonetheless, he found, at para. 49, that the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

[66] At para. 52, he accepted the evidence of Mr. Ghosh and Mr. Marwah that they did not negotiate the economic terms of the refinancing or the port transaction. Nor was either involved in the renegotiation of the RSA.

[67] The trial judge relied on other evidence, including Algoma's annual business plan dated February 3, 2014, to support his factual findings. He also considered evidence of the witnesses. He found, at paras. 56-57, that some of the witnesses had been evasive, including Rewant Ruia, the Ruia family's [page20]lead in the Essar Group's North American operations; Mr. Seifert; and Rajiv Saxena, the executive director of Essar Steel India Ltd.

[68] After reviewing the evidence, the trial judge noted, at para. 58, that he was satisfied that Mr. Seifert, who represented the Essar Group's interests, had primary responsibility for pursuing the recapitalization negotiations and Algoma's refinancing via the port transaction. He concluded, at para. 60:

> I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Portco Transaction negotiations and made the critical decisions.

> Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

(3) *Reasonable expectations and their violation*

[69] The trial judge identified the two-step process to determine whether a violation of reasonable expectations has occurred under s. 241 of the *CBCA*, which is described at para. 68 of *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69: (i) does the evidence support the reasonable expectation asserted by the complainant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct that is oppressive, unfairly prejudicial or unfairly disregards a relevant interest?

[70] He described the reasonable expectations asserted by the monitor as relating to the loss by Algoma of a critical asset and the change of control clause in the cargo handling agreement. He stated, at para. 64:

> The monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

[71] At para. 67, the trial judge did not accept that the expectations of creditors such as the employees, pensioners, and retirees were governed only by their agreements with Algoma. Furthermore, the evidence, including the inferences drawn from the circumstances that existed at Algoma in 2014, supported the expectations relied upon by the monitor. He noted, at para. 73, that stakeholders have a reasonable expectation of fair treatment and this was particularly so in Sault Ste. Marie, where Algoma is of critical importance to the local economy and relied upon greatly by trade creditors and employees. [page21]

> [72] He concluded, at para. 75, that
> the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

[73] The trial judge held that the reasonable expectations of the trade creditors, employees, pensioners and retirees were violated in two principal ways: first, the port transaction itself; and second, the change of control veto provided to Portco, and thus Essar Global, in the port transaction.

[74] The port transaction was caused by Essar Global's breach of both the RSA and the equity commitment letter. Because the lease of the land from Algoma to Portco was for 50 years and Essar Global was in a position to terminate the cargo handling agreement after 20 years, Algoma would be at Essar Global's mercy for the duration of these agreements. The trial judge

found, at para. 78, that the transfer of the port assets to Portco was driven by GIP's desire for a "bankruptcy remote" special purpose vehicle. GIP was aware of Algoma's previous insolvencies and would only lend to a new entity that held the port assets and that was separate from Algoma.

[75] The port transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the RSA and the equity commitment letter under which Essar Global had pledged a cash investment of US$250 to US$300 million. The trial judge found, at para. 82, that Essar Global had no intention of living up to its promises and had acted in bad faith in this regard. The content of the roadshow presentations reflected the discordance with the RSA. The alternative transaction in the roadshow presentations contemplated cash being contributed to the recapitalization through the sale of the port. That these presentations failed was partially attributable, as the trial judge found at para. 82, to Essar Global's insufficient contribution of cash equity into Algoma.

[76] The trial judge concluded that Essar Global's decision not to fund Algoma according to the terms of the equity commitment letter made it necessary to carry out the port transaction. GIP's loan of US$150 million reduced the amount of cash equity Essar Global promised to advance to Algoma. Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the port transaction and the transfer of control. This was, as the trial judge concluded at para. 89, an exercise in bad faith. Had an independent committee of Algoma's board of directors been [page22]struck, Essar may have been held to its bargain rather than looking to third party financing from GIP under the port transaction structure. The board's failure to examine alternatives to effect Algoma's recapitalization indicated a lack of regard for the interests of Algoma's stakeholders.

[77] Additionally, the long-term value given to Essar Global by the port transaction was itself oppressive (although in stating this, the trial judge noted that the monitor did not pursue its claim that the port assets were transferred to Portco at an undervalue).

[78] As for the release in the amended RSA, the trial judge observed that it was a release of any claim arising out of the equity commitment letter. The trial judge found, at para. 100, that the monitor was not making a claim under that letter, nor was it asking that Essar Global provide the equity it had promised in that commitment. Rather, Essar Global's failure to live up to its commitment was part of the factual circumstances to be taken into account in considering whether Algoma's stakeholders were treated fairly under the port transaction.

[79] The trial judge also observed that when the court approved the amended plan of arrangement under the amended RSA, it did not have knowledge of the port transaction. There was no reference to the port transaction in the affidavits filed in support of the amendment to the plan of arrangement; there was no finding relating to the release of Essar Global; the trade creditors, the employees, pensioners and retirees were not parties to the motion approving the amended RSA; and the order was obtained without opposition.

[80] Ultimately, he concluded that the port transaction was itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners and retirees.

(4) *Change of control provision*

[81] The trial judge determined, at para. 104, that the change of control provision gave effective control to Portco (*i.e.*, Essar Global) over who may acquire the Algoma business. Any buyer of Algoma or its business would need to be assigned the cargo handling agreement so that it could operate the steel mill. Therefore, the veto under this clause was effectively a veto over any change of control of the Algoma business.

[82] Although the evidence indicated that the change of control provision was included for GIP's protection, the trial judge found that this end could have been achieved in other ways. For example, as the trial judge pointed out, at para. 110, the parties [page23]could have included a provision in the assignment of material contracts agreement that prevented a change of control of Algoma without GIP's explicit consent. Such an alternative might have been considered had there been a committee of independent directors with advisors independent of Essar Global. But, as the trial judge concluded, at para. 111, the reality was that there was no pushback on the change of control provision that was implemented, and which gave Portco/ Essar Global a veto.

[83] The trial judge concluded, at para. 113, that the change of control provision was of considerable value to Essar Global. Furthermore, as mentioned, the trial judge stated, at para. 117, that Essar Global had in fact relied on s. 15.2 to its benefit by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

[84] The May 10, 2016 letter from Portco's counsel, which sought confirmation from Algoma's counsel that prospective bidders would be advised of Portco's rights, exemplified this. In the letter, Essar Global effectively held out its consent to any change of control right to dissuade competing bidders for Algoma in the restructuring process while it continued to express its own interest as a prospective bidder. The trial judge observed, at para. 115, that "it is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful".

[85] The trial judge also observed that the evidence established that Portco's right to refuse assignment of the cargo handling agreement was a material impediment to restructuring Algoma as Algoma could not survive without access to the port. He concluded that the change of control provision in favour of Portco in the cargo handling agreement was unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners and retirees.

(5) *The business judgment rule*

[86] The trial judge also determined that the business judgment rule, which accords deference to a business decision of a board of directors so long as the decision lies within a range of reasonable alternatives, did not provide a defence to Essar Global. The board had not followed advice that it insist Essar Global comply with its commitments under the RSA and the equity commitment letter. As the trial judge stated, at para. 123, the result of this was the port transaction, which was

an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with [page24]a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

[87] Moreover, there was no evidence that the board even considered whether protection to GIP could be provided in the absence of the change of control provision in favour of Portco and hence Essar Global. This failure was unreasonable.

(6) *Remedy*

[88] The trial judge stated, at para. 136, that if there were no less obtrusive way to remedy the oppression, he would have ordered that Portco's shares be transferred to Algoma. However, mindful that a remedy for oppression should be approached with a scalpel, he instead relied on s. 241(3) of the *CBCA* to order a variation of the port transaction. He accordingly deleted s. 15.2 of the cargo handling agreement and inserted a provision in the assignment of material contracts agreement, which provided that, if GIP becomes the equity owner of Portco, its consent would be required for a change of control of Algoma. He rejected the suggestion that either GIP or Essar Global were taken by surprise by this relief.

[89] He also addressed the imbalance created by the 50-year term of the lease between Algoma and Portco as against the 20-year term of the cargo handling agreement (with automatic renewal for successive three-year periods, barring either party's termination). As the port was critical to Algoma's operation and survival, Algoma's ability under the cargo handling agreement to refuse an extension after 20 years was illusory and, in reality, the renewal provision was one-sided in favour of Essar Global.

[90] He concluded, at para. 144, that the payments under the cargo handling agreement were an unreasonable benefit in favour of Essar Global. If the agreement lasted only the initial 20-year term, Portco/Essar Global would receive US$300 million after GIP's loan was paid off. If the agreement was not terminated before the end of its 50-year life, Portco/Essar Global would receive an additional US$750 million for the last 30 years.

[91] Accordingly, the trial judge ordered that the lease, the cargo handling agreement and the shared services agreement be amended to provide Algoma with the option to terminate any of these three agreements once GIP's loan matured and was paid. If Portco elected not to renew after 20 years, or any of the three-year extensions, those three agreements would terminate, and Algoma would then owe Portco US$4.2 million plus interest.

[92] The trial judge decided, at para. 147, that the appropriate place for Portco to assert its claims for a declaration that the US$19.8 million promissory note had been paid as a result [page25]of set-off and for amounts owing under the cargo handling agreement was in the ongoing *CCAA* proceedings.

(7) *Costs*

[93] Lastly, following the release of the judgment, Essar Global agreed to pay costs of CDN$1.17 million to the monitor. The trial judge then ordered Essar Global to pay Algoma CDN$1.5 million in costs and ordered that no costs be payable by the monitor or by or to GIP.

C. *Issues*

[94] There are eight issues to be addressed:

(1) Did the monitor lack standing to be a complainant under s. 238 of the *CBCA*?

(2) Could the claim of the monitor only be brought as a derivative action under s. 239 of the *CBCA* rather than an oppression action under s. 241 of the *CBCA*?

(3) Did the trial judge err in his analysis of reasonable expectations?

(4) Did the trial judge err in his analysis of wrongful conduct and harm?

(5) Did the trial judge err in tailoring a remedy?

(6) Was there procedural unfairness?

(7) Should the fresh evidence be admitted?

(8) Should leave to appeal costs be granted to GIP and the costs award varied?

D. *Analysis*

(1) *Standing of the monitor*

[95] Essar Global submits that the monitor is not a proper complainant given the conflict between it and the stakeholders it represents. The trial judge failed to consider whether the monitor could avoid conflicts.

[96] GIP supports the position of Essar Global. It states that the trial judge erred in assuming that the court's broad jurisdiction under the *CCAA* could be combined with the equally broad jurisdiction under the *CBCA* to create a super remedy that would interfere with the contractual rights of non-offending third parties. A trustee in bankruptcy is a representative of the creditors of the bankrupt. A monitor owes duties to all [page26]stakeholders, not just creditors. Its duty to Essar Global as sole shareholder of Algoma cannot be reconciled with the monitor's oppression claim against it. Also, Algoma can be directed to make the cargo handling agreement payments to GIP directly and therefore the monitor owed a fiduciary duty to GIP.

[97] In addressing this issue, I will first discuss the evolution of the role of a monitor. I will then discuss who can be a complainant under the *CBCA* oppression provisions. Lastly, I will consider whether in the particular circumstances of this case, the trial judge was correct in concluding that the monitor could have standing to bring an oppression action.

(a) *The purpose of CCAA restructurings*

[98] As has been repeatedly described, the *CCAA* was originally enacted in 1933 to respond to the ravages of the Great Depression and to allow large corporations with outstanding bonds and debentures to restructure their debt in a court-supervised process through plans of arrangement or compromise negotiated with their creditors.

[99] As outlined by Deschamps J. in *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, the *CCAA* fell into disuse after amendments in 1953 that limited its application to companies issuing bonds. Courts breathed new life into the statute in the early 1980s in response to an economic recession, and the *CCAA* became the primary vehicle through which major restructurings were attempted. Amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), introduced in 1992, allowed insolvent debtors to make proposals to creditors under that statute, and were expected to supplant the *CCAA*. However, the *CCAA* continues to be employed as the vehicle of choice to restructure large corporations, particularly where flexibility is needed in the restructuring process: Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law Inc., 2015), at pp. 336-37; and *Century Services*, at para. 13.

[100] The corporate restructuring process at the heart of the *CCAA* "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for *CCAA*-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially distressed corporations without forcing them to first declare bankruptcy: [page27]*Reference re: Constitutional Creditor Arrangement Act (Canada)*, [1934] S.C.R. 659, [1934] S.C.J. No. 46, at p. 661 S.C.R.

[101] The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-39. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

[102] The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

[103] To summarize, by enabling the restructuring process, the *CCAA* can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the corporation operates: see Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

[104] It is against this background that the role of a monitor must be considered.

(b) *The role of the monitor*

[105] Originally, the *CCAA* was a very slim statute and made no mention of a monitor. Born of the court's inherent jurisdiction, the term "monitor" was first used in *Northland Properties Ltd. (Re)*, [1988] B.C.J. No. 1210, 29 B.C.L.R. (2d) 257 (S.C.). [page28]In that case, an interim receiver was appointed whose role was described, at p. 277 B.C.L.R., as that of a monitor or watchdog. As a watchdog, the monitor could "observe the conduct of management and the operation of the business while a plan was being formulated": A.J.F. Kent and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008), online: Mondaq https://www.mondaq.com. The monitor was thus a court-appointed officer.

[106] The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the *CCAA* supervising judge. This framework is reflected in s. 23 of the *CCAA*, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(*k*) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct". Its express duties under s. 23(1)(*c*) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

[107] Not surprisingly, as with the *CCAA* itself, the role of the monitor has evolved over time. As stated by David Mann and Neil Narfason in their article entitled "The Changing Role of the Monitor" (2008), 24 Bank. & Fin. L. Rev. 131, at p. 132:

> Born out of invention, the role has developed from one of passive observer to one of active participant. The monitor has enhanced communication, mediated disputes, provided input into plans of reorganization, and provided expert advice in complex affairs. As the business community has become more sophisticated and global, so too has the monitor -- taking on larger mandates, often times involving complex, cross-border restructurings.

[108] Examples of the use of expanded powers for a monitor are found in *Philip's Manufacturing Ltd. (Re)*, [1992] B.C.J. No. 1163, 67 B.C.L.R. (2d) 385 (C.A.), where the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors, and in *Woodward's Ltd. (Re)*, [1993] B.C.J. No. 79, 77 B.C.L.R. (2d) 332 (S.C.), where Tysoe J. (as he then was) held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy. [page29]

[109] Under s. 11.7(1) of the *CCAA*, a monitor must be a licensed trustee in bankruptcy and, as such, under s. 13 of the *BIA*, is subject to the supervision of the Office of the Superintendent of Bankruptcy. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties

reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose. In the course of a *CCAA* proceeding, a monitor frequently takes positions; indeed, it is required by statute to do so. See, for example, s. 23 of the *CCAA* that describes certain duties of a monitor.

[110] Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

> Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.

(c) *A monitor as complainant in an oppression action*

[111] Turning to the issue of a monitor and an oppression action, there is some difference in academic opinion on the suitability of the oppression remedy in insolvency proceedings. Professor Stephanie Ben-Ishai has argued that the remedy should be unavailable for use once the debtor has entered a court-supervised reorganization under the *BIA* or the *CCAA*.[5] Professor Janis Sarra has countered that the oppression remedy continues to be an important corporate law remedy that should be available in such proceedings.[6] I do not understand the appellants to be taking the former position; rather, they simply argue that the monitor has no standing.

[112] Section 238 of the *CBCA* defines a complainant as

(*a*) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates, [page30]

(*b*) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(*c*) the Director, or

(*d*) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

For the purposes of this analysis, s. 238(*d*) is the relevant subsection.

[113] Section 241of the *CBCA* describes the oppression remedy:

> 241(1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> *(a)* any act or omission of the corporation or any of its affiliates effects a result,
>
> *(b)* the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

> *(c)* the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[114] The question here is whether the trial judge erred in concluding that the monitor had standing to be a complainant. There are two elements to this analysis: can a monitor be a complainant under the *CBCA*; and should the monitor have been a complainant in this case? I would answer both questions affirmatively.

[115] As is clear from s. 238(*d*) of the *CBCA*, a court exercises its discretion in determining who may be a complainant, and this discretion is broad. There has been much jurisprudence on who qualifies as a complainant. In *Olympia & York*, a trustee in bankruptcy, acting on behalf of the creditors of the bankrupt estate, was entitled to be a complainant in an oppression action involving an oppressive agreement between the debtor and a non-arm's-length party. As this court said in that case, at para. 45:

> . . . the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

[116] Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like [page31]a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.

[117] Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The appellants did not direct us to any authority saying that a monitor could not be a complainant. Paragraph 23(1)(*k*) of the *CCAA* expressly provides that a monitor shall carry out any functions in relation to the company that the court may direct. Moreover, s. 23(1)(*c*) directs a monitor to conduct any investigation that the monitor considers necessary to determine the state of the company's business and financial affairs. It does not strain credulity that this responsibility will frequently place a monitor at odds with the shareholders or other stakeholders.

[118] Additionally, there is nothing in the *CCAA* itself to suggest that a monitor cannot be authorized to act as a complainant. Indeed, the broad language of s. 11 of the *CCAA*, which permits a supervising court to "make any order that it considers appropriate in the circumstances", is permissive of such orders. As this court and the Supreme Court have made clear, the broad language of s. 11 "should not be read as being restricted by the availability of more specific orders": *U.S. Steel Canada Inc. (Re)*, [2016] O.J. No. 4688, 2016 ONCA 662, 39 C.B.R. (6th) 173, at para. 79, citing *Century Services*, at para. 70. Courts can, and sometimes should, make "creative orders" in the context of *CCAA* proceedings: *U.S. Steel*, at paras. 80, 86-87.

[119] Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.

[120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case.

[121] Here, in para. 37(c) of the amended and restated initial *CCAA* order dated November 20, 2015, the monitor was directed to investigate whether there were potential related party transactions that should be reviewed. It then reported back to the supervising *CCAA* judge that there were, and on that basis the *CCAA* judge authorized the monitor to commence proceedings under s. 241 of the *CBCA*. The monitor proceeded with the oppression action in the interests of the restructuring consistent [page32]with the objectives of the *CCAA*. The trial judge ultimately found that aspects of the port transaction, such as the change of control clause in the cargo handling agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The monitor took the action as an "adjunct to its role in facilitating a restructuring".

[122] Moreover, it cannot be said that the monitor was a fiduciary. Indeed, the appellants did not say this in their pleadings, opening submissions, or closing submissions before the trial judge. The remedy granted by the trial judge was directed at the oppression and removed an insurmountable barrier to a successful restructuring. In addition, it was brought in the face of Essar Global demonstrating a continuous desire to acquire Algoma and, as evident from the letter sent by its counsel, a desire to discourage others from doing so.

[123] It will be a rare occasion that a monitor will be authorized to be a complainant. Factors a *CCAA* supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant include whether

(i) there is a *prima facie* case that merits an oppression action or application;

(ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(iii) any other stakeholder is better placed to be a complainant.

These factors are not exhaustive, and none of them is necessarily dispositive; they are simply factors to consider.

[124] In the circumstances that presented themselves here, the *CCAA* supervising judge was justified in providing authorization. A *prima facie* case had been established; the monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely, the pensioners, retirees, employees and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

[125] Quite apart from meeting the aforementioned criteria, I would also observe that as the presiding judge in the *CCAA* proceeding and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well positioned to [page33]supervise all parties including the monitor to ensure that no unfairness or unwarranted impartiality occurred.

[126] Lastly, I do accept the appellants' position that the *Nortel* proceedings relied upon by the trial judge in support of his conclusion were quite different from this case. In *Nortel*, the monitor's powers were expanded by an order authorizing the monitor to exercise any powers properly exercisable by a board of directors of Nortel or its subsidiaries. But this expansion was a response to the resignations of the boards of Nortel and its subsidiaries, not, as here, a response to the results of investigations the monitor had been directed to pursue. That said, the case does illustrate the need to avoid rigid definition of a monitor's role and responsibilities.

[127] In conclusion, I would not give effect to the appellants' submission that the trial judge erred in granting the monitor standing to pursue an action for oppression.

(2) *Derivative or oppression action*

[128] In addition to attacking the standing of the monitor to bring the action, the appellants also submit that the monitor was precluded from bringing the action in the form of an oppression remedy proceeding pursuant to s. 241 of the *CBCA*. In their view, the action could only have been brought as a derivative action pursuant to s. 239 of that Act. They say the claim asserted is a corporate claim belonging to Algoma, if anyone, and the stakeholders, on whose behalf the monitor asserts the claim, were not harmed directly or personally but only derivatively through harm done to Algoma. I disagree.

[129] In support of their submission, the appellants rely heavily on the decision of this court in *Wildeboer*. This case is not *Wildeboer*, however.

[130] In *Wildeboer*, "insiders" who controlled the corporation had misappropriated many millions of dollars from the corporation. The *sole claim* advanced by the complainant minority shareholder by way of oppression remedy was for the return of the misappropriated funds *to the corporation*. There was *no claim* asserted by the complainant, of any kind, *for a personal remedy qua shareholder*. As the court noted, at para. 45, "[t]he substantive remedy claimed is the disgorgement of all the ill-gotten gains back to Martinrea [the corporation in question]".

[131] The *Wildeboer* decision must be read in that context. It does not stand for the proposition that in all cases where there has been a wrong done to the corporation, the action must be brought as a derivative action. Consistent with a number of other authorities, this court expressly reaffirmed [page34]the principles that the derivative action and the oppression remedy are not mutually exclusive and that there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This is clear from para. 26:

> I accept that the derivative action and the oppression remedy are not mutually exclusive. Cases like *Malata [Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36] and *Jabalee [Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 (C.A.)] make it clear that there are

> circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression. Other examples include: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131, [1992] O.J. No. 2382 (Gen. Div. [Commercial List]); *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589, [2000] O.T.C. 865 (S.C.J.), affd [2001] O.J. No. 3918, 152 O.A.C. 39 (Div. Ct.); *Waxman v. Waxman*, [2004] O.J. No. 1765, 186 O.A.C. 201 (C.A.), at para. 526, leave to appeal refused [2004] S.C.C.A. No. 291.

[132] Or, as Armstrong J.A. put it in *Malata (Group (HK) Ltd. v. Jung* (2008), 89 O.R. (3d) 36, [2008] O.J. No. 519 (C.A.)), at para. 26:

> [T]here is not a bright-line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

[133] In short, there will be circumstances in which a stakeholder suffers harm in the stakeholder's capacity as stakeholder, from the same wrongful conduct that causes harm to the corporation. In my opinion -- unlike in *Wildeboer*, where the harm alleged was solely harm to the corporation -- this case falls into the overlapping category.

[134] For the purposes of this analysis, it is the nature of the claim put forward by the claimants, on whose behalf the monitor was pursuing the oppression remedy, that must be examined. As the trial judge noted, at para. 31, the monitor initially cast quite widely the net of stakeholders affected by the port transaction and on whose behalf it was claiming a remedy. By the time of the hearing, however, the net's reach had been narrowed to Algoma's trade creditors, employees, pensioners and retirees.

[135] In oppression remedy parlance, the nub of the exercise lies in determining whether the claimant has identified a "reasonable expectation" and shown that it has been violated by wrongful conduct that is "oppressive" (in the broad sense contemplated by the Act) *of the interests of the claimant*: see *BCE*. The monitor asserted at the hearing, and the trial judge found, at para. 75: [page35]

> [T]hat the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

[136] It was alleged, and the trial judge found, that these reasonable expectations had been violated both by aspects of the port transaction itself, and by the change of control veto provided to Portco, and thus Essar Global, in the port transaction.

[137] The appellants argue that the reasonable expectations asserted relate only to harm done to Algoma. The trial judge disagreed, as do I. As he concluded, at para. 37:

> Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process *and negatively impact creditors*.

(Emphasis added)

[138] On this basis, at para. 40, the trial judge distinguished *Wildeboer* because the monitor was asserting "that the personal interests of the creditors ha[d] been affected".

[139] The appellants place considerable emphasis on certain language contained in *Wildeboer* to the effect that, in circumstances where there may be overlapping derivative and oppression claims, the wrong must both harm the corporation and must also affect the claimant's "individualized personal interests". They interpret these comments as mandating not only that each claimant must suffer an identifiable individual harm but also that this harm must be different from other individualized personal harms suffered by others in their same class.

[140] For example, the appellants rely on certain aspects of the following comments by this court, at paras. 29, 32-33 of *Wildeboer*:

> On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants[.]
>
> . . . . .
>
> The appellants are not asserting that their personal interests as shareholders have been adversely affected in any way other than the type of harm that has been suffered by all shareholders as a collectivity. Mr. Rea -- the only director plaintiff -- does not plead that the Improper Transactions have impacted his interest *qua* director. [page36]
> Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of relief it is intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.*, the collectivity of shareholders as a whole.

[141] While pertinent to the *Wildeboer* context, some of the foregoing language, when read in isolation and out of context, may be misconceived when it comes to a more general application. However, I do not read *Wildeboer* as precluding an oppression remedy in respect of individuals forming a homogenous group of stakeholders -- for example, trade creditors, employees, retirees or pensioners -- simply because each of them, separately, may have suffered the same type of individualized harm.

[142] Instead, I read the reference, at para. 29, to the complainant being directly affected "in a manner that was different from the indirect effect of the conduct on similarly placed complainants" to be another way of capturing the notion expressed in paras. 32-33 that the

individualized harm is to be distinct from conduct harming only "the body corporate, *i.e.*, the collectivity of shareholders as a whole".

[143] Were the appellants correct in their submissions, as counsel for the monitor points out, this court would not have upheld an oppression remedy on behalf of *all* shareholders of a company that had suffered harm as a result of a non-market executive compensation contract: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412, 214 D.L.R. (4th) 496 (S.C.J.) (Commercial List), at para. 153, affd [2004] O.J. No. 636, 42 B.L.R. (3d) 34 (C.A.). Nor would it have upheld an oppression remedy claim on behalf of *a class* of shareholders who were harmed as a result of the existence of a transfer pricing regime that was disadvantageous to the company, as it did in *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board* (2006), 79 O.R. (3d) 81, [2006] O.J. No. 27 (C.A.). *Wildeboer* contains no suggestion that these authorities are no longer good law; nor would it have done.

[144] The same may be said, in my view, about a group of creditors who have suffered similar harm from a corporate wrong that affects both their interests as creditors and the interests of the corporation. While the oppression remedy is not available as redress for a simple contractual breach (such as the failure to pay a debt), it has long been held to be available, in appropriate circumstances, to creditors whose interests have been "compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself": [page37]*J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd*., [2008] O.J. No. 958, 2008 ONCA 183, 41 B.L.R. (4th) 51, at para. 66. See, also, *Fedel v. Tan* (2010), 101 O.R. (3d) 481, [2010] O.J. No. 2839, 2010 ONCA 473, at para. 56.

[145] The question is whether the impugned conduct is "oppressive" (in the broad sense contemplated by the *CBCA*) and, if so, whether the stakeholder has suffered harm in its capacity as a stakeholder as a result of that conduct.

[146] Moreover, the circumstances that presented themselves emphasize the need for flexibility in the availability of the oppression remedy. The court and the monitor were faced with *prima facie* evidence of oppression including bad faith and self-dealing. There was *prima facie* evidence of personal harm to the pensioners, employees, retirees and trade creditors. While leave of the court is required for a derivative action, in substance, in the context of a *CCAA* proceeding, court supervision is present, thereby neutralizing the need for the derivative action procedural safeguard of leave.

[147] I would also note that GIP argues that the decision not to bring this action by way of derivative action may have been a strategic decision made because Algoma was contractually prohibited from seeking to set aside or vary the contracts arising from the port transaction, including the cargo handling agreement and the lease. If anything, this argument supports the conclusion that it was appropriate for this action to be brought as an oppression claim.

[148] In conclusion, at law, the monitor was at liberty to bring an action for oppression. I will now turn to the issue of reasonable expectations.

(3) *Reasonable expectations*

[149] Essar Global and GIP submit that the trial judge erred in his analysis of reasonable expectations. They argue that there was no evidence of any subjectively held expectations, that

the trial judge did not consider whether the expectations were objectively reasonable, and that he failed to consider factors identified in *BCE*.

[150] The monitor and Algoma respond by saying that the existence of reasonable expectations is a question of fact that can be proved by direct evidence or by the drawing of reasonable inferences. In this case, the trial judge properly considered the evidence that was before him to conclude that the pensioners, employees, retirees and trade creditors held expectations that had been violated and that those expectations were objectively reasonable. [page38]

[151] In his analysis, the trial judge correctly identified the two prongs of the oppression inquiry identified by the Supreme Court, at para. 68 of *BCE*: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice", or "unfair disregard" of a relevant interest?

[152] In identifying these two prongs, at paras. 58-59, the Supreme Court made two preliminary observations:

> First, oppression is an equitable remedy. It seeks to ensure fairness -- what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. . . . It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.
> Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

(Citations omitted)

> [153] As also stated in *BCE*, at para. 71:
> Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful." The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all the interests at play.

[Citations omitted]

[154] Evidence of an expectation "may take many forms depending on the facts of the case": *BCE*, at para. 70. The "actual expectation of a particular stakeholder is not conclusive": *BCE*, at para. 62. Furthermore, a stakeholder's reasonable expectation of fair treatment "may be readily inferred", because fundamentally all stakeholders are entitled to expect fair treatment: *BCE*, at paras. 64, 70. Once the expectation at issue is identified, the focus of the inquiry is on whether it has been established that the particular expectation was reasonably held: *BCE*, at para. 70.

[155] The monitor particularized the reasonable expectations in issue. It stated that the stakeholders had reasonable expectations that the Essar Group would not cause Algoma to engage in transactions for their benefit to the detriment of Algoma and its stakeholders, cause Algoma to transfer long-term control over an irreplaceable and core strategic asset of Algoma (*i.e.,* the port) to the Essar Group, and, among other things, provide the Essar Group with a veto. The source and content of the expectations [page39]were stated by the monitor to include commercial practice, the nature of Algoma and past practice. These particulars would all feed an expectation of fair treatment.

[156] Based on the reasonable expectations particularized by the monitor, as already noted, the trial judge found, at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

[157] There was evidence of subjective expectations before the trial judge. For example, at para. 65 of his reasons, the trial judge considered the evidence of subjective expectations of two trade creditors explaining that they were unaware of the port transaction and would not have expected an outcome in which Algoma no longer had full control over the port facility.

[158] The trial judge also drew reasonable inferences from the evidence and circumstances that existed at Algoma in 2014 in support of the expectations relied upon by the monitor, as he was entitled to do: see *Ford Motor*, at para. 65. In that regard, he noted that Algoma had gone through a number of insolvencies and restructurings since the early 1990s. Given the cyclical nature of the steel business, it was reasonable for the stakeholders to expect a restructuring in the future. The reasonableness of this restructuring-related expectation was confirmed by GIP's insistence on a "bankruptcy remote" structure for its loan "given the fluctuating prices of steel and Algoma's history of insolvencies", as GIP said in its factum.

[159] Based on the evidence of subjective expectations and the reasonable inferences the trial judge drew from the record, it cannot be said that there was no evidence supporting the trial judge's conclusion that a future restructuring was not reasonably foreseeable.

[160] The trial judge also concluded that it was objectively reasonable for the stakeholders to expect, as he noted, at para. 73, that Algoma would not lose its ability to restructure absent the consent of Essar Global -- particularly in Sault Ste. Marie, where Algoma is the major industry on which trade creditors and employees rely. Put differently, it would not be reasonable to expect that the shareholder would have the right to veto any restructuring in a *CCAA* proceeding in which it was not an applicant and have the right to prefer its own interests over those of others such as the retirees, pensioners, trade creditors [page40]and employees. Contrary to the assertions of the appellants, the trial judge expressly considered those issues.

[161] Similarly, Essar Global submits that the foreseeability of another insolvency was contradicted by Mr. Marwah's affidavit evidence on the application for approval of the plan of arrangement, where he deposed that he believed that Algoma would be solvent. I would not give

effect to this argument, as the trial judge's conclusion on the foreseeability of the insolvency is a factual finding, based on his review of the record as a whole. Essar Global has not demonstrated that this finding is subject to any palpable and overriding error.

[162] The appellants' complaint that the trial judge failed to consider any of the factors identified in *BCE* is also misplaced. In that decision, the Supreme Court stated, at para. 62:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. . . . In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

[163] Essar Global's argument that the trial judge did not turn his mind to the *BCE* factors ignores the trial judge's explicit reasons on this point. At para. 68 of his decision, the trial judge referred to the factors identified by the Supreme Court as "useful" in determining whether an expectation was reasonable. These factors include (i) general commercial practice; (ii) the nature of the corporation; (iii) the relationship between the parties; (iv) past practice; (v) steps the claimant could have taken to protect itself; (vi) representations and agreements; and (vii) the fair resolution of conflicting interests between corporate stakeholders.

[164] The trial judge correctly noted that, due to the fact-specific nature of the inquiry into reasonable expectations, not all listed factors must be satisfied in any particular case. I agree with his conclusion. The *BCE* factors are "not hard and fast rules", but are merely intended to "guide the court in its contextual analysis": Dennis H. Peterson and Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed. (Toronto: LexisNexis, 2009), at 17.47.

[165] Nonetheless, the trial judge did consider a number of the *BCE* factors based on the facts before him. For instance, at para. 68, he concluded that Algoma's prior sale of a non-critical asset, relating to factor (iv), past practice, was not helpful in determining reasonable expectations. This was because the sale of a non-critical asset differs from the sale of a critical [page41]asset, as in the port transaction. Also under the rubric of past practices, he considered Algoma's prior insolvencies and restructuring proceedings. He concluded that while it was reasonable for stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, it was not reasonable for them to expect that Algoma would lose its ability to restructure without the prior agreement of its parent, Essar Global.

[166] As the trial judge's reasons reveal, he specifically considered the *BCE* factors and made findings on the objective reasonableness of the expectations at issue. I endorse the comments of the monitor found at para. 80 of its factum:

> In this case, Justice Newbould found that the employees, retirees, and trade creditors all had a reasonable expectation that Essar Group would not engineer a transaction that deprived Algoma of a key strategic asset, rendering it incapable of restructuring or engaging in significant transactions without the approval of Essar Global, for minimal cash consideration in circumstances where there had been no consideration of alternative transactions. This was entirely supported by the entirety of the record adduced at trial.

[167] This was essentially a factual exercise. There was conflicting evidence before the triall judge. However, it was for the trial judge to weigh the evidence and make factual findings. That is what he did. Based on the record before him, those factual findings were available to him. He considered both subjective expectations and whether the expectations were objectively reasonable. I see no reason to interfere.

[168] I therefore reject the appellants' submissions on reasonable expectations.

(4) *Wrongful conduct and harm*

[169] Essar Global also takes issue with the trial judge's conclusion that Essar Global's conduct was wrongful and harmful.

[170] First, Essar Global submits that the trial judge inappropriately relied on the equity commitment letter. It argues that the court approved the amended plan of arrangement that released Essar Global from any claim relating to the equity commitment letter, and that reliance on a released obligation in connection with the wrongful conduct requirement of oppression was an impermissible collateral attack on the approval order.

[171] I disagree. I can state no more clearly than the trial judge did, at para. 100 of his reasons:

> The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The [page42]Monitor contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

[172] An amended plan of arrangement became necessary when Essar Global did not provide the promised equity contribution, the roadshow presentations were unsuccessful and the port transaction was the only available means to generate sufficient cash for Algoma.

[173] I also note that the trial judge recognized that the trade creditors, the employees, pensioners and retirees were not parties to nor did they play any role in the amended plan of arrangement proceedings. Although the release was in both the original RSA and the amended RSA, it would appear that there was no express reference to the port transaction being part of the plan of arrangement, nor was there any mention of it in any endorsement or the order approving the amended plan of arrangement.

[174] In addition, the trial judge did not make his finding of wrongful conduct based on Essar Global's breach of the equity commitment letter. Rather, he found that the totality of Essar Global's conduct regarding the recapitalization and port transaction satisfied the wrongful conduct requirement.

[175] Taken in context, the trial judge made no error in his treatment of the release in favour of Essar Global.

[176] Second, Essar Global submits that the trial judge made factual errors relating to Essar Global's cash contributions. In particular, it submits that he erred in concluding that the cash Essar Global did advance in the recapitalization, namely, US$150 million rather than the US$250 to US$300 million that was originally promised, was generated by the port transaction when it was not. They also complain that he erred in granting an oppression remedy when the equity commitment letter provided for a limited remedy in the event of a breach.

[177] The reasons of the trial judge on Essar Global's cash contribution are admittedly somewhat confusing. In para. 20 of his reasons, he states that Essar Global's revised cash contribution under the amended RSA was "to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million". Reading that paragraph in isolation might lend credence to the appellants' submission. That said, having regard to the record before him and reading the reasons as a whole, I am not persuaded that the trial judge misunderstood Essar Global's contribution to the recapitalization. [page43]

[178] The relevant contributions made to Algoma in November 2014 consisted of

- US$150 million in cash from Essar Global under the amended RSA;
-

- US$150 million in debt reduction in the form of loan forgiveness for certain loans owed by Algoma to
- members of the Essar Group under the amended RSA; and

-- US$150 million in cash generated from the port transaction.

[179] Essar Global only provided Algoma with US$150 million in cash equity, not the US$250 to 300 million in cash equity it had originally promised. The debt forgiveness would not assist Algoma in addressing its impending liquidity issues in the same way a cash injection would. Additionally, as the trial judge noted, at para. 88, the US$150 million in debt reduction related to loans at the bottom of Algoma's capital structure, and therefore this reduction was of "questionable value" to Algoma at the time.

[180] Algoma, the monitor and Essar Global all provided the trial judge with written submissions describing the cash equity contribution as consisting of US$150 million in cash from Essar Global and US$150 million in cash from the port transaction. The contributions were also repeatedly referenced in the record. For example, the affidavit of Mr. Seifert -- which the trial judge considered in great detail -- clearly sets out Essar Global's cash contribution to Algoma and the US$150 million in cash paid by Portco to Algoma under the port transaction as separate transactions. Similarly, these contributions are described as separate transactions in the affidavits of Messrs. Marwah and Ghosh.

[181] The trial judge's reasons establish that he understood that there were two separate cash payments made to Algoma -- one made by Essar Global in satisfaction of its commitments under the amended RSA and one made by Portco under the port transaction. He also

understood that these cash payments were made in addition to Essar Global's forgiveness of US$150 million debt owed to it by Algoma.

[182] Specifically, at para. 85, the trial judge noted that in October 2014, after the original RSA had been executed, Essar Global contemplated reducing the amount of its cash contribution promised under the RSA and the equity commitment letter. The roadshow presentation prepared regarding Algoma's capitalization showed that Essar Global proposed to contribute less than US$100 million of *cash* rather than the US$250 --$300 million required. He obviously understood that there was to be [page44]a cash component to Essar Global's contribution separate and apart from the proceeds of the port transaction.

[183] In addition, at para. 88, the trial judge noted that the port transaction "*reduced* the amount of cash equity previously promised by Essar Global to be advanced to Algoma" (emphasis added). This shows that the trial judge understood that the proceeds from the port transaction were not *replacing* Essar Global's promised cash contribution. The trial judge recognized that the cash equity contribution of US$150 million and the debt reduction of US$150 million were insufficient to successfully refinance Algoma, and using the port transaction proceeds was the only way to generate the additional US$150 million in cash necessary. The trial judge highlighted at para. 96 that Algoma's CEO, Mr. Ghosh, had indicated that "he had to agree to the Port Transaction" as it was the "only way" to refinance Algoma, since Essar Global's contribution was only "bringing in $150 million".

[184] Even if the appellants were correct in this regard, which I do not accept, on their analysis, they themselves admit that Essar Global's contribution was short by US$50 million.

[185] No matter the correct figure, Essar Global's conduct created a situation where Algoma had no choice but to accept the port transaction. There was no palpable and overriding error in the trial judge's understanding of the recapitalization requirements.

[186] In any event, the reduction in Essar Global's cash contribution was only one aspect of Essar Global's overall conduct considered by the trial judge. He did not conclude that the cash equity reduction was itself the oppressive act. Accordingly, again, any factual error regarding Essar Global's actual cash contribution was not a palpable and overriding error.

[187] As mentioned, Essar Global also asserts that the remedy for breach contained in the equity commitment letter precluded any oppression remedy. No one was suing for breach of the equity commitment letter. Rather, it formed part of the context that included a failure to explore alternatives, the port transaction itself, control rights that were proffered as a disincentive to other bidders and that erased any possibility of a successful restructuring, all in disregard of the expectations of the pensioners, employees, retirees and trade creditors.

[188] Third, although not identified as a ground of appeal nor advanced as such in their factum, in oral argument, the appellants submitted that the alleged breach of the equity commitment letter did not cause Algoma to enter the port transaction.

[189] Essar Global contends that the trial judge made factual errors in finding a causal connection between Essar Global's [page45]equity commitment and the port transaction. It argues that the port transaction was a key component of the recapitalization before the execution of the equity commitment letter.

[190] At trial, the trial judge rejected Essar Global's argument, finding, at para. 87, that the port transaction was contemplated as a possible transaction when first introduced in May 2014, but that the transaction was not a certainty. He accurately noted that the first plan of arrangement that was approved by the court required Essar Global to comply with its cash funding commitment of US$250 to US$300 million pursuant to the equity commitment letter and that the port transaction was not a part of that plan. He found that the port transaction had to be carried out because of Essar Global's decision not to fund Algoma according to the terms of the equity commitment letter.

[191] The causal connection between Essar Global's equity commitment and the port transaction is a factual matter and the trial judge's factual finding was supported by the evidence.

[192] Furthermore, the port transaction that was floated in May 2014 was an entirely different transaction, in which the proceeds of sale would flow upstream to Essar Global and would not be used to recapitalize Algoma. Moreover, the RSA prohibited a related party transaction without noteholder consent, and the proceeds of any sale in excess of US$2 million had to be used to reduce Algoma's debt.

[193] I am not persuaded that the trial judge made any palpable and overriding error in his finding.

[194] Fourth, Essar Global submits that the trial judge erred in disregarding the business judgment rule, which should have applied to prevent judicial second-guessing of the board's decisions.

[195] The trial judge correctly described [at para. 119] the business judgment rule, relying on para. 40 of *BCE*:

> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives . . . It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions. [page46]

[196] Two additional points should be made with respect to the business judgment rule. First, the rule shields business decisions from court intervention only where they are made prudently and in good faith: *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755, [1998] O.J. No. 1886, 160 D.L.R. (4th) 131 (Gen. Div. (Commercial List)), at pp. 150-51 D.L.R.

[197] Second, the rule's protection is available only to the extent that the board of directors' actions actually evidence their business judgment: *UPM-Kymmene*, at para. 153.

[198] In deciding that the rule afforded no defence to Essar Global, the trial judge, at para. 123, relied on the fact that the board did not follow "advice to go after Essar Global on its cash equity commitment". The trial judge went on to note that had Algoma's board formed an independent committee in February 2014, events may have evolved differently, and the board may have accepted the advice to hold Essar Global to its commitment.

[199] Essar Global takes issue with this conclusion by asserting that the trial judge should not have characterized Algoma's board as lacking independence because of its decision not to strike an independent committee. Essar Global points out that there was no evidence that Mr. Ghosh -- who cast the deciding vote in that decision -- was not free to vote as he chose.

[200] Essar Global's argument ignores the trial judge's key finding that the four directors who voted against the independent committee in February 2014, including Mr. Ghosh, were not independent. The trial judge noted, at para. 15, that he could "not overlook" that Mr. Ghosh had been with Essar Steel India, adding that Algoma's CFO, Mr. Marwah, had described these four directors as "Essar-affiliated directors". On this basis, it was open for the trial judge to find that the Essar-affiliated directors were not free from the influence of Essar Global and the Ruia family, particularly when considered alongside his extensive comments, at paras. 43-60, finding that the critical decisions regarding Algoma's recapitalization and the port transaction were made not by Algoma's board, but by Essar Global and Essar Capital as led by Mr. Seifert.

[201] Specifically, the trial judge made findings of fact, at paras. 51-53, regarding the limited role played by Algoma's board and management. He accepted the evidence of Messrs. Ghosh and Marwah that they did not negotiate the economic terms of the debt refinancing or the port transaction. He also accepted the evidence of Mr. Ghosh that the transaction was [page47]approved because there was no realistic alternative to generate sufficient cash to complete the recapitalization. He rejected the contradictory evidence of Mr. Seifert because the evidence of Messrs. Ghosh and Marwah was consistent with the documentary evidence. In my view, the trial judge was entitled to weigh the evidence as he did and make these findings of fact that were not infected by any palpable and overriding error.

[202] Essar Global maintained before the trial judge, as they do before this court, that the Algoma board's decisions were nonetheless shielded from court intervention because the board had the benefit of sophisticated advisors throughout the recapitalization process. And yet, the only evidence tendered of any such advice was advice that the board elected not to follow.

[203] At para. 122, the trial judge described this advice, which was provided at least in part by Ray Schrock, described by the appellants as Algoma's lawyer. Mr. Schrock told the board that unsecured noteholders would not react well to the port transaction and were likely to seek a higher infusion of cash from Essar Global, as promised in the equity commitment letter. Mr. Schrock said that the board should insist that Algoma press Essar Global to fulfill its equity commitments. There was no evidence that steps were taken in this regard and the trial judge found that this advice was not followed.

[204] Additionally, the circumstances surrounding the resignation of the independent directors from Algoma's board lend support to the trial judge's conclusion that reliance on the business judgment rule was unavailable. Mr. Dodds' letter stated that his decision to resign was driven by his conclusion that as an independent director, he lacked confidence that he was "receiving

information and engaged in decision-making in the same manner as those board members who are directly affiliated with the company and/or its parent". It was open to the trial judge to reach the conclusions he did. In these circumstances, the business judgment rule was of little assistance.

[205] Essar Global also submits that the trial judge should not have gone on to censure the activities of the board in November 2014 (when the board approved the transactions) by relying on the board's February 2014 decision regarding the independent committee.

[206] The trial judge did not censure the decisions of the Algoma board solely based on the February 2014 meeting. The February meeting, and the events surrounding it, are part of a larger context that included the November 2014 meeting, all of which the trial judge considered, and all of which demonstrated [page48]that the board's decisions regarding the recapitalization were not made prudently or in good faith, as found by the trial judge, and thereby failed to attract the application of the business judgment rule.

[207] Specifically, the trial judge found, at para. 123, that, if the board had acquiesced to forming an independent committee, or listened to the truly independent directors before they resigned in frustration, subsequent steps taken in pursuit of the recapitalization transaction "may have been taken differently". He then went on to say that

> What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

[208] Additionally, the trial judge found that the board had accepted the inclusion of the contentious change of control provision in the cargo handling agreement without considering alternatives. If the provision was truly for the benefit of GIP, it could have been accomplished in another way, without providing Essar Global with an effective veto over a change of control of Algoma.

[209] All this evidence speaks to the board's lack of business judgment and good faith, the failure to consider reasonable alternatives, and the Algoma board's limited role in directing the recapitalization. There is no palpable and overriding error in the trial judge's conclusion that the board was precluded from relying on the business judgment rule. His decision was amply supported by the record.

[210] Essar Global makes an additional point relating to the business judgment rule: that, in any event, no independent committee was required under corporate law.

[211] It is a contrivance for Essar Global to impugn the trial judge's conclusion regarding the business judgment rule on the basis that an independent committee was not required. Although it is true that an independent committee was not legally or technically required, the board's decision not to strike one, in the circumstances surrounding the November 2014 restructuring transactions, speaks volumes. The decision not to strike an independent committee must be considered alongside the evidence I have already reviewed: the board's lack of independence, the board's failure to follow its advisors' advice, the board's failure to consider alternatives, and the board's acquiescence to recapitalization transactions that primarily benefited the interests of

Essar Global over those of Algoma. Again, the [page49]totality of the evidence supports the board's lack of good faith, and renders the business judgment rule inapplicable.

[212] There is one final argument Essar Global raises in invoking the business judgment rule. It claims that it was procedurally offensive for the trial judge to criticize the directors for not following Mr. Schrock's advice because evidence of the advice was not before him. It adds that, had the directors relied on legal advice from Mr. Schrock in the legal proceedings, privilege had not been waived.

[213] Here, the minutes of the board meeting held in November 2014 describe Mr. Schrock as "informing the Board [that] the [unsecured noteholders] would not react well to the proposed changes and that they were likely to push [Essar Global] for a higher infusion of cash/equity into [Algoma] as set forth in the Commitment [L]etter". Mr. Schrock also commented that the proposed Port Transaction "was likely to cause concern by the [unsecured noteholders]". Accordingly, Mr. Schrock advised the board to "insist that [Algoma] should press all parties to fully satisfy their . . . obligations regarding the equity contributions".

[214] To the extent that Mr. Schrock's comments amounted to legal advice, I would first note that his advice was only one piece of the evidentiary puzzle in the broader factual context. Even if Mr. Schrock's advice, and the board's failure to implement it, are disregarded, the record still amply supports the trial judge's conclusions on this issue.

[215] I would also add that Essar Global's claim that the evidence of Mr. Schrock's advice was not before the trial judge is incorrect. The board minutes were included in the record as an exhibit to an affidavit tendered by Essar Global. Finally, as for Essar Global's argument that privilege had not been waived, any privilege that may have attached to Mr. Schrock's advice belonged to Algoma and not Essar Global.

[216] Fifth, Essar Global submits that the involvement of Algoma's management and board in the port transaction sanitizes that transaction, because the trial judge concluded that Messrs. Ghosh and Marwah acted in good faith thinking they were doing the best for Algoma in the circumstances. Essar Global also claims that the trial judge erred by holding otherwise because the monitor failed to attack the board's process in its pleading. I do not accept these arguments.

[217] Despite Essar Global's argument, this court has established that good faith corporate conduct does not preclude a finding of oppression: *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683 (C.A.). [page50]

[218] Moreover, Essar Global's argument on this point ignores the trial judge's findings that Algoma's board and management played a limited role in the port transaction. It also ignores evidence that indicates that Messrs. Ghosh and Marwah's support was only given because there was no alternative to address Algoma's financial straits. This factual background demonstrates why it was open for the trial judge to conclude that the port transaction was oppressive, despite the good faith of Messrs. Ghosh and Marwah.

[219] On the pleadings issue, I note that the monitor pleaded that the port transaction was the result of Essar Global's "*de facto* control" of Algoma. In response, Essar Global pleaded that the port transaction was in the best interests of Algoma, based on the approval of the transaction by Algoma's board and senior management, who were acting on an informed basis and with the benefit of financial advice. Given the way in which Essar Global framed its defence in its

pleadings, it cannot now say that issues related to the board's process were not properly before the trial judge.

[220] Turning to the appellants' last argument relating to wrongful conduct and harm, they submitted that the trial judge identified two potential harms caused by Essar Global, neither of which is actionable in the oppression action: the undervalue of the port transaction to Algoma and the impairment of Algoma's ongoing restructuring.

[221] In my view, it is inaccurate to characterize the trial judge's findings and analysis as concluding that harm flowed to stakeholders because the port transaction did not provide sufficient value to Algoma.

[222] Specifically, he did not find that the US$171.5 million in consideration paid by Portco to Algoma constituted undervalue. Indeed, his remedy that GIP be repaid in full suggests the contrary. Rather, he found that Essar Global received an unreasonable benefit from the port transaction.

[223] Moreover, it was an exercise in self-dealing. As the trial judge stated, at para. 144:

> For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend [page51]to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

[224] The trial judge also concluded that the mismatched terms of the cargo handling agreement (20 years renewable) and the 50-year lease offered Essar Global an additional benefit. In that regard, he was not bound to accept the evidence of the appellants' expert. He reasoned, at para. 142, that the port was critical to Algoma's functioning, and therefore that Algoma would not be in a position to terminate the cargo handling agreement for the duration of the lease:

> The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If

> Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

[225] The change of control provision or veto was also an exercise in "self-dealing". The consent provision unnecessarily tied Algoma's strategic options to Essar Global. The trial judge properly found that the insertion of control rights in the cargo handling agreement served no practical purpose to GIP and the same rights could have been provided for in the assignment of material contracts.

> [226] As the trial judge concluded, at para. 138:
> In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP. [page52]

[227] There was evidence from Messrs. Ghosh and Marwah that supported the trial judge's conclusion that harm had flowed from the presence of the change of control provision and the ensuing letter from counsel. They were not cross-examined and no competing evidence was tendered by the appellants. It was also open to the trial judge to interpret the letter sent by Portco's counsel to Algoma's counsel as a veto threat to potential bidders while Essar Global continued to be interested in being a bidder. I would not give effect to this argument.

[228] On the issue of the impairment of Algoma's ongoing restructuring, the appellants argue that no harm could have flowed from this, as the restructuring was not, in fact, impaired. Specifically, they argue that the only evidence of impairment consisted of statements in the affidavits of Messrs. Ghosh and Marwah that potential bidders for Algoma were concerned about the change of control clause. I would reject this argument as well. Again, I note that the appellants chose not to cross-examine on these affidavits, nor did they object to their admission into evidence. They cannot now, after the fact, impugn the trial judge's reliance on these statements.

[229] Additionally, the appellants argue that it was premature for the trial judge to conclude that the control clause impaired the restructuring, because Portco/Essar Global was never asked to consent to a new transaction or to new owners. However, at para. 117, the trial judge noted that the change of control rights had to be considered alongside Essar Global's holding itself out as a prospective buyer in any bidding process for Algoma. That Essar Global has never been asked to consent to a new transaction was immaterial, as it remained in Essar Global's "interest to dissuade other buyers in order for it to achieve the lowest possible purchase price". In coming to this conclusion, the trial judge pointed to the letter from counsel for Portco/Essar Global on May 12, 2016, which "sp[oke] volumes" by "clearly invit[ing] any bidder to understand

that Essar Global has control rights".

[230] I see no error in the trial judge's conclusion.

(5) *The remedy*

[231] Turning then to the issue of the remedy. Essar Global submits that the trial judge erred in striking out the control clause in the cargo handling agreement and in granting Algoma the option of terminating the port agreements upon repayment of the GIP loan. They argue that he was only permitted to rectify the harm that was suffered. Deleting the provision was an overly broad remedy that was unconnected to the [page53]reasonable expectations of the stakeholders, and instead, he should have considered a nominal damages award.

[232] GIP supports the submissions of Essar Global. It argues that the remedy awarded was not sought by any party, no evidence had been called in respect of that remedy and no submissions were made. The practical effect of granting Algoma a termination right is that GIP does not have the security for which it bargained and it was prejudiced, despite its lack of involvement in the oppression found against Essar Global. GIP also argues that the monitor and Algoma are seeking to set-off amounts owed by Essar Capital to Algoma against amounts owed to GIP, which results in additional prejudice.

[233] I would not give effect to these submissions. First, trial judges have a broad latitude to fashion oppression remedies based on the facts before them. Once a claim in oppression has been made out, a court may "grant any remedy it thinks fit": *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177, [1998] O.J. No. 4142 (C.A.), at para. 4. The focus is on equitable relief, and deference is owed to the remedy granted: *Fedel*, at para. 100.

[234] Second, the trial judge properly identified the need to avoid an overly broad remedy, stating, at para. 136, that there were "less obtrusive ways" of remedying the oppression than ordering shares of Portco be transferred to Algoma (the remedy the monitor had originally requested). Varying the transaction as he did was one such way. The trial judge's remedy removes Portco's control rights (the main obstacle to a successful restructuring) and, after GIP is paid, restores the port to the ownership of Algoma. If GIP becomes the equity owner of Portco, its consent will be required to any change of control. Unlike a damages award, the remedy was responsive to the oppressive conduct. It served to vindicate the expectations of the stakeholders that Algoma would retain long-term control of the port and that Essar Global would not have a veto over its restructuring efforts.

[235] Third, the remedy granted preserves the security GIP had bargained for and therefore GIP has not suffered any prejudice as a result of the remedy. The trial judge's remedy, as described at para. 145, ensures that GIP is to be paid in full. Until "payment in cash of all amounts owing to GIP" is made, the port remains in Portco's hands and the contractual remedies held by GIP to enforce its security remain in place. Moreover, Essar Global guaranteed Portco's liabilities to GIP under GIP's loan in the port transaction, which further demonstrates GIP's lack of prejudice. As GIP's own affiant indicated, this guarantee [page54]provides GIP with "an extra layer of protection in the event the debtor is unable to repay the loan".

[236] Finally, regarding the issue of set-off, I note that the arguments made by GIP in support of this ground were made prior to Newbould J.'s subsequent ruling dealing with this issue. In that decision, he held that Algoma had set-off amounts owed under the promissory note against Essar Global, but he preserved GIP's right to repayment. This decision is a full answer to GIP's arguments on this point, and ensures that GIP will not suffer any prejudice as a result of the remedy granted in response to Essar Global's oppressive conduct.

(6) *Was there procedural unfairness?*

[237] Essar Global submits that the trial judge erred in basing his decision and relief on bases that were not pleaded. GIP supports the position of Essar Global, with particular focus on the remedy that was ultimately imposed.

[238] As mentioned, the trial judge was the supervising *CCAA* judge and deeply acquainted with the facts of the restructuring. Of necessity, and on agreement of all parties to the oppression action, the timelines for pleadings, productions and examinations were truncated. Additionally, no party objected at trial that the process had been procedurally unfair. Given the context and the complexity of the dispute, the pleadings were not as clear as they might have been in a less abbreviated schedule. That said, on a review of the record, I am not persuaded that there was any procedural unfairness with respect to the claims or that the appellants did not know the case they had to meet.

[239] The focus of at least GIP's complaint lies in the remedy. The appellants are correct that the precise remedy awarded by the trial judge was not pleaded. A trial judge must fashion a remedy that best responds to the oppressive conduct and that is not overly broad. While it is desirable for a party seeking oppression relief to provide particulars of the remedy, a trial judge is not bound by those particulars. Because the discretionary powers under the oppression remedy must be exercised to *rectify* the oppressive conduct complained of (see *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481, [1995] O.J. No. 1377 (C.A.), at para. 27), it follows that the remedy will, by necessity, be linked to the oppressive conduct that was pleaded. Therefore, a party against whom a specifically tailored oppression remedy is ordered cannot fairly complain that the remedy caught them by surprise. This conclusion is consistent with *Fedel*, where this court upheld oppression remedies imposed by [page55]the trial judge where the relief granted had not been specifically pleaded or sought in argument.

[240] Moreover, absent error, a trial judge's decision on remedy is entitled to deference. As I have discussed, there is an absence of error. Furthermore, in this case, there is no prejudice to GIP. Its position is preserved by the remedy granted by the trial judge. At the same time, the remedy is responsive to Essar Global's oppressive conduct.

[241] That said, the trial judge did consider whether Essar Global and GIP could fairly argue that they were taken by surprise by his remedy. At para. 141, he rejected this position, holding that the issue of the change of control clause was pleaded by the monitor, and affidavit material filed by both Essar Global and GIP provided evidence on the provision's significance. At para. 146, he concluded that issues relating to the relief he ordered were "fully canvassed in the evidence and argument", and that the remedy he ordered in fact was less intrusive than the remedy originally pled by the monitor. And although he did not think an amendment was

necessary, he nonetheless ordered that the monitor would be granted leave to amend its claim to support the relief he granted.

[242] I would not give effect to this ground of appeal.

(7) *Fresh evidence*

[243] Essar Global seeks to introduce fresh evidence on appeal that addresses the independence of Algoma's board of directors. It takes the position that the trial judge's rejection of the independence of two directors, Messrs. Kothari and Mirchandani, played a significant role in his decision. It adds that the lack of independent directors was not pleaded by the monitor and so Essar Global had no reason to adduce this evidence earlier.

[244] Messrs. Mirchandani and Kothari joined Algoma's board in June and August 2014, respectively, after the three independent directors resigned. They were therefore on the board when the port transaction was approved in November 2014.

[245] Whether "a proper case" exists to allow fresh evidence is determined by applying the test outlined in *R. v. Palmer*, [1980] 1 S.C.R. 759, [1979] S.C.J. No. 126, or the slightly modified test from *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208, [1994] O.J. No. 276 (C.A.).

[246] As this court has noted, the two tests are quite similar: see *Chiang (Trustee of) v. Chiang* (2009), 93 O.R. (3d) 483, [2009] O.J. No. 41, 2009 ONCA 3, at para. 77. Under the *Palmer* test, the party seeking to admit fresh evidence must [page56]demonstrate that the evidence could not, by due diligence, have been adduced at trial; that the evidence is relevant in that it bears on a decisive issue in the trial; that the evidence is credible; and that the evidence, if believed, could be expected to affect the result.

[247] Under the *Sengmueller* test, the moving party must demonstrate that the evidence could not have been obtained by the exercise of reasonable diligence prior to trial; that the evidence is credible; and that the evidence, if admitted, would likely be conclusive of an issue on appeal.

[248] Essar Global has failed to meet either the *Palmer* or the *Sengmueller* test for two main reasons.

[249] In both its original and its amended statement of claim, the monitor alleged that representatives of Essar Global were members of Algoma's board and exercised *de facto* control over Algoma, such that they made decisions for the benefit of Essar Global while unfairly disregarding the interests of Algoma's stakeholders. Essar Global cannot claim to have been caught by surprise by the issue of the board's independence being in play. The fresh evidence could have been obtained with reasonable diligence prior to trial.

[250] In any event, the evidence would not have affected the result at trial, and is not conclusive of any issue on appeal. The fresh evidence Essar Global asks to proffer consists of the affidavit of Mr. Mirchandani, which states that he and Mr. Kothari were determined to be independent board members as a result of a conflict of interest policy and by virtue of the questionnaires they each completed.

[251] However, there was evidence before the trial judge essentially to this effect, including Algoma's October 2014 offering memorandum, which stated that the board included two independent directors. Indeed, the trial judge commented on this evidence in footnote 7 of his

reasons, and rejected it in concluding that Messrs. Mirchandani and Kothari were not truly independent of Essar Global.

[252] Additionally, and as I have already discussed elsewhere in these reasons, the remainder of the record strongly supported the board's lack of independence. Even if the trial judge had Mr. Mirchandani's affidavit before him, it would not have made a difference.

[253] I would therefore dismiss the motion for fresh evidence.

(8) *Costs*

[254] GIP claimed costs of CDN$750,156.18 against the monitor payable on a partial indemnity scale. It claimed it was [page57]entirely successful because it successfully resisted relief sought by the monitor that would have prejudiced GIP. The trial judge exercised his discretion and observed that success between the monitor and GIP was divided. He also relied on GIP's appeal as a basis to conclude success was divided. He therefore did not order any costs in favour of or against GIP.

[255] GIP seeks leave to appeal the trial judge's costs award. Before this court, GIP in essence renews the arguments made before the trial judge. The awarding of costs is highly discretionary and leave is granted sparingly. I see no error in principle in the trial judge's exercise of discretion nor was the award plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, at para. 27.

[256] At trial, GIP was unsuccessful in challenging both the monitor's claim of standing and its claim that the port transaction was oppressive. It also seems incongruous for GIP to suggest that it was entirely successful in defeating the monitor's claims, while it appeals the trial decision.

[257] I see no basis on which to interfere with the costs award of the trial judge and would refuse leave to appeal costs.

E. *Disposition*

[258] For these reasons, I would dismiss the appeal, the motion for fresh evidence and the motion for leave to appeal costs.

[259] As agreed, I would order that the monitor and Algoma are entitled to costs of the appeal fixed in the amounts of CDN$100,000 and CDN$60,000, respectively, inclusive of disbursements and applicable taxes on a partial indemnity scale. At the oral hearing, the parties had not agreed on whether the award should be payable on a joint and several basis and requested more time to consider the matter. On September 15, 2017, counsel wrote advising that they had still not agreed on this issue. GIP requested the opportunity to make additional costs submissions on this issue at the appropriate time. Under the circumstances, I would permit GIP to make brief written submissions on this issue by January 10, 2018. Essar Global shall have until January 17, 2018 to file its submissions. The monitor and Algoma shall have until January 24, 2018 to respond.

Appeal dismissed.

Notes

1 Algoma was named in the proceeding below as a defendant, but supports the position taken by the respondent Ernst & Young Inc. It is therefore a respondent on this appeal.

2 In early 2015, Essar Consulting obtained two additional valuations of the port assets, one in February from Royal Bank of Canada and one in April from ICICI Securities. The RBC valuation, which was an exhibit to the affidavit of Joseph Seifert, was between US$165 and US$200 million. The ICICI valuation, which was an exhibit to the affidavit of Anshumali Dwivedi, was US$349 million.

3 Although Deutsche Bank intervened in the proceedings below, it was not involved in this appeal.

4 Before this court, no submissions on urgency were advanced.

5 Stephanie Ben-Ishai and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009), at pp. 430-31 and 436.

6 Janis P. Sarra, "Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010), at p. 99.

TAB 3

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-028436-194, 500-09-028474-195, 500-09-028476-190
(500-11-049838-150)

DATE: May 21, 2020

CORAM: THE HONOURABLE MARK SCHRAGER, J.A.
PATRICK HEALY, J.A.
LUCIE FOURNIER, J.A.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT

No.: 500-09-028436-194

HOME DEPOT OF CANADA INC.
APPELLANT – Impleaded Party
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.)
RAYMOND CHABOT INC.
RESPONDENTS/ INCIDENTAL RESPONDENTS
and
HOME HARDWARE STORES LIMITED
IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party
and
RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
GROUPE BMR INC. (Formerly known as Gestion BMR Inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin Inc.)
MATÉRIAUX LAURENTIENS INC.
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
INTACT INSURANCE COMPANY

L'UNIQUE GENERAL INSURANCE INC.
LA CAPITALE GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRE-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
PROMUTUEL INSURANCE OUTAOUAIS
PROMUTUEL INSURANCE LA VALLÉE
PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
PROMUTUEL INSURANCE VAUDREUIL- SOULANGES
PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES
PROMUTUEL INSURANCE LANAUDIÈRE
AIG TAIWAN INSURANCE CO LTD
AVIVA INSURANCE COMPANY OF CANADA
SOVEREIGN GENERAL INSURANCE COMPANY
INTERNATIONAL ASSOCIATION OF PLUMBING AND MECHANICAL OFFICIALS
JYIC INDUSTRIAL CORPORATION
INSURANCE COMPANY OF NORTH AMERICA
IAPMO RESEARCH AND TESTING INC.
FUBON INSURANCE CO. LTD
GEAREX CORPORATION
SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters
IMPLEADED PARTIES – Impleaded Parties

No.: 500-09-028474-195

GROUPE BRM INC. (Formerly known as Gestion BMR inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin inc.)
MATÉRIAUX LAURENTIENS INC.
INTACT INSURANCE COMPANY
APPELLANTS – Impleaded Parties
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.
RAYMOND CHABOT INC.
RESPONDENTS/INCIDENTAL RESPONDENTS

and

HOME HARDWARE STORES LIMITED

IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party

and

CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
L'UNIQUE GENERAL INSURANCE INC.
LA CAPITAL GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRES-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
PROMUTUEL INSURANCE OUTAOUAIS
PROMUTUEL INSURANCE LA VALLÉE
PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
PROMUTUEL INSURANCE VAUDREUIL-SOULANGES
PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES
PROMUTUEL INSURANCE LANAUDIÈRE
RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
HOME DEPOT OF CANADA INC.
AIG TAIWAN INSURANCE CO LTD
AVIVA INSURANCE COMPANY OF CANADA
SOVEREIGN GENERAL INSURANCE COMPANY
INTERNATIONAL ASSOCIATION OF PLUMBING AND MECHANICAL OFFICIALS
JYIC INDUSTRIAL CORPORATION
INSURANCE COMPANY OF NORTH AMERICA
IAPMO RESEARCH AND TESTING INC.
FUBON INSURANCE CO. LTD
GEAREX CORPORATION
SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters

IMPLEADED PARTIES – Impleaded Parties

RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
APPELLANTS – Impleaded Parties
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International inc.)
RAYMOND CHABOT INC.
RESPONDENTS/INCIDENTAL RESPONDENTS
and
HOME HARDWARE STORES LIMITED
IMPLEADED PARTY/INCIDENTAL APPELLANT – Impleaded party
and
HOME DEPOT OF CANADA INC.
CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
GROUPE BMR INC. (Formerly known as Gestion BMR Inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin inc.)
MATÉRIAUX LAURENTIENS INC.
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
INTACT INSURANCE COMPANY
L'UNIQUE GENERAL INSURANCE INC.
LA CAPITALE GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRE-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
PROMUTUEL INSURANCE OUTAOUAIS
PROMUTUEL INSURANCE LA VALLÉE
PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
PROMUTUEL INSURANCE VAUDREUIL-SOULANGES
PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES
PROMUTUEL INSURANCE LANAUDIÈRE
AIG TAIWAN INSURANCE CO LTD
AVIVA INSURANCE COMPANY OF CANADA
SOVEREIGN GENERAL INSURANCE COMPANY
INTERNATIONAL ASSOCIATION OF LUMBING MECHANICAL OFFICIALS

JYIC INDUSTRIAL CORPORATION
INSURANCE COMPANY OF NORTH AMERICA
IAPMO RESEARCH AND TESTING INC.
FUBON INSURANCE CO. LTD
GEAREX CORPORATION
SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters
IMPLEADED PARTIES – Impleaded Parties

JUDGMENT

---

[1] On appeal from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier), that approved a plan of arrangement (the "**Plan of Arrangement**" or the "**Plan**") under the *Companies' Creditors Arrangement Act* ("***CCAA***") relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[2] For the reasons of Justice Schrager, J.A., with which Justices Healy and Fournier, JJ.A., concur, **THE COURT**:

In the file 500-09-028436-194

[3] **DISMISSES** the appeal with legal costs;

[4] **DISMISSES** the incidental appeal without legal costs

In the file 500-09-028474-195

[5] **DISMISSES** the appeal with legal costs;

[6] **DISMISSES** the incidental appeal without legal costs

In the file 500-09-28476-190

[7] **DISMISSES** the appeal with legal costs;

[8] **DISMISSES** the incidental appeal without legal costs.

MARK SCHRAGER, J.A.

PATRICK HEALY, J.A.

LUCIE FOURNIER, J.A.

Mtre Hubert Sibre
Mtre Rosemarie Sarrazin
MILLER THOMSON
For Home Depot of Canada Inc.

Mtre Pierre Goulet
For Groupe BMR Inc., Groupe Patrick Morin Inc., Matériaux Laurentiens, Intact Compagnie d'assurance inc.

Mtre Julie Himo
Mtre Dominic Dupoy
Mtre Arad Mojtahedi
NORTON ROSE FULBRIGHT CANADA
For Rona Inc., Royal & Sun Alliance Insurance Company of Canada

Mtre Jocelyn Perreault
Mtre Gabriel Faure
McCARTHY TÉTRAULT
Mtre Antoine Melançon
LAPOINTE ROSENSTEIN MARCHAND MELANÇON
For Raymond Chabot inc.

Mtre Éric Savard
LANGLOIS AVOCATS
For Desjardins General Insurance Inc., The Personal General Insurance Inc., Intact Insurance Company, L'unique General Insurance Inc., La Capital General Insurance Inc., Promutuel Insurance Bagot, Promutuel Insurance Boréale, Promutuel Insurance Bois-Francs, Promutuel Insurance Chaudières-Appalaches, Promutuel Insurance L'estuaire, Promutuel Insurance Deux-Montagnes, Promutuel Insurance Lac Au Fleuve, Promutuel Insurance Outaouais, Promutuel Insurance La Vallée, Promutuel Insurance Montmagny-L'islet, Promutuel Insurance Portneuf-Champlain, Promutuel Insurance Réassurance, Promutuel Insurance Rive-Sud, Promutuel Insurance Vallée Du Saint-Laurent, Promutuel Insurance Vaudreuil-Soulanges, Promutuel Insurance Verchères-Les-Forges, Promutuel Insurance Lanaudière, Royal Sun Alliance Insurance Company

of Canada, Aviva Insurance Company of Canada

Mtre Alexandre Bayus
GOWLING WLG (Canada)
For Home Hardware Stores Limited

Date of hearing: March 11, 2020

REASONS OF SCHRAGER, J.A.

[9] These are appeals from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier),[1] that approved a plan of arrangement (the **"Plan of Arrangement"** or the "**Plan**") under the *Companies' Creditors Arrangement Act*[2] (**"*CCAA*"**) relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[10] The Appellants (sometimes hereinafter the "**Retailers**") oppose the Plan because it authorizes the Respondent Raymond Chabot Inc. (the "**Monitor**") to take legal proceedings against them on behalf of creditors of Aquadis International Inc. ("**Aquadis**" or the "**Debtor**"). Most of the creditors are insurers by way of subrogation in the rights of policy holders whose homes were damaged due to the allegedly defective faucets sold by Aquadis.

[11] The appeals are concerned with the scope of the powers that may be conferred on the Monitor.

[12] The Monitor was authorized to exercise the rights of creditors rather than those of the Debtor. While some reported judgments may present certain analogies, the present case appears to be unique in Canadian jurisprudence.

[13] There are also procedural issues raised against the Appellants' challenge of the specific clause in the Plan of Arrangement. As will be explained below, the Respondents argue primarily that these appeals are an indirect challenge of the *CCAA* judge's November 2016 order to vary the Monitor's powers (the "**November 2016 Order**").

I. FACTS AND PROCEDURAL HISTORY

[14] The case arises from the sale of faucets that were allegedly affected by manufacturing defects and the subsequent claims arising from the resulting water damage suffered by purchasers of the product.

[15] Aquadis imported and distributed bathroom products, including faucets.

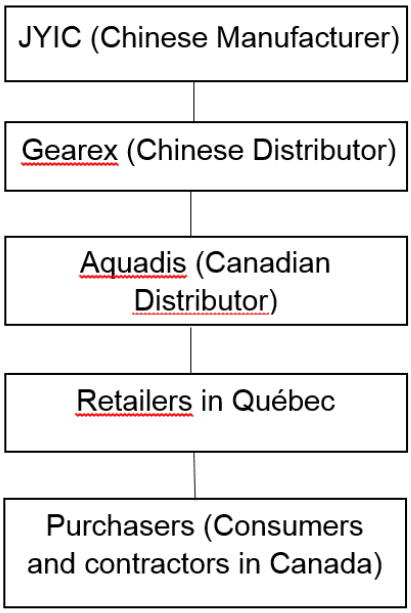
[16] Jing Yudh Industrial Co. ("**JYIC**") is a China-based manufacturer of various valve products. The faucets in question were manufactured by JYIC and sold to a Chinese

---

1 Judgment in appeal.

2 *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36.

distributor, Gearex, which, in turn, sold them to Aquadis. The latter resold the faucets to various retailers in Quebec. These include the Appellants Rona Inc. ("**Rona**"), BMR Group Inc. ("**BMR**"), The Home Depot of Canada ("**Home Depot**"), Matériaux Laurentiens and Home Hardware Stores Limited ("**Home Hardware**"). The Appellants ultimately resold the faucets to Quebec-based consumers or contractors. The flowchart in the Appellants' factum, appropriately translated, represents the chain of distribution as follows:



[17] It should be noted that the Retailers are not creditors in the insolvency proceedings in that they did not file proofs of claim. Rona sought leave to file two years after the deadline set forth in the court-approved claims protocol. Such leave was denied by the *CCAA* judge on March 13, 2019.[3]

[18] Claiming water damage caused by faulty faucets, many consumers sought compensation from their insurers, who upon payment were subrogated in the rights of their insureds.

[19] The insurers then instituted legal proceedings against Aquadis, the aggregate of which claims exceeded Aquadis' insurance coverage. Faced with this multitude of recourses, Aquadis obtained stays of proceedings through the filing of a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*[4] ("*BIA*") in June 2015, which was continued under the *CCAA* pursuant to an initial order made on

---

3 *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2019 QCCS 1396.

4 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

December 9, 2015. Raymond Chabot Inc. was appointed Monitor and granted the powers of the board of directors given the resignation of all members of the board. Legal proceedings instituted against Aquadis or anyone in the distribution chain (i.e., the Retailers) were suspended in accordance with the provisions of the *CCAA*. At the time, approximately 20 actions regrouping several hundred consumers' claims were pending before the courts of Quebec and two other provinces.[5]

[20] On January 6, 2016, the Superior Court issued an order regarding the filing and processing of creditors' claims.

[21] On November 9, 2016, the Monitor sought an order to amend its powers "to conclude transactions or, failing that, to take proceedings against persons having resold or installed defective products purchased from Aquadis, such as distributors, retailers and general contractors". Rona was the only Appellant that was notified of the motion giving rise to such order as it was the only one that had requested to be entered on the service list.

[22] On November 14, 2016, the Court granted the application to vary the Monitor's powers and thus granted the Monitor the right to commence or continue any action for and in the name of Aquadis' creditors having any connection with defective faucets. This is the November 2016 Order referred to above.[6]

[23] That judgment was not appealed nor was there an attempt to seek its revision in the lower court or in the present appeal.

[24] Following the issuance of the November 2016 Order, the Monitor began negotiations with the Retailers that stretched over a period of two years with a view to arriving at a "global settlement" in virtue of which the Retailers would contribute to a litigation pool in exchange for full releases from any liability arising as a result of the sale of any defective faucets.

[25] On December 19, 2016, the Monitor initiated legal proceedings against JYIC and Gearex to enforce the rights of Aquadis regarding the defective faucets. Settlements were reached with some of JYIC's and Gearex's insurers generating the receipt of over $7 million ($4.7 million net of fees and costs) in consideration of full releases. However,

---

5 In virtue of arts. 1728, 1729 and 1730 *C.C.Q.*, each group in the supply chain would have a recourse against relevant parties above them at each step in the chain.

6 The November 2016 Order is in these terms:

> initier ou continuer toute réclamation, poursuite, action en garantie ou autre recours des créanciers de 9323-7055 Québec inc. (anciennement connue sous le nom d'Aquadis International inc., « Aquadls ») au nom et pour le compte de ces créanciers contre des personnes opérant au Canada découlant, directement ou indirectement, ou ayant un lien ou pouvant avoir raisonnablement un lien, direct ou indirect, avec un défaut de fabrication affectant des biens vendus par Aquadis, avec l'accord préalable du comité des créanciers constitue par Ie paragraphe n° 24 de l'Ordonnance initiale (Ie « Comite des créanciers »). (Emphasis added)

the Monitor was unable to reach an agreement with one of JYIC's insurers, Cathay Century Insurance Co. Ltd. On June 20, 2018, the Superior Court approved these transactions between Aquadis, its insurers and the manufacturer of the products in a judgment executory notwithstanding appeal. The Retailers opposed this because, in their view, the proceedings under the *CCAA* were being used to settle disputes not involving Aquadis' creditors, but rather third parties. On June 28, 2018, Rona sought leave to appeal and a stay of the foregoing judgment which was dismissed by a judge of this Court since the matter had become hypothetical given the completion of the transaction immediately following the issuance of the judgment.[7]

[26] At the beginning of 2019, the Monitor filed the Plan of Arrangement providing for the establishment of a litigation pool made up of all the sums collected by the Monitor in exchange for full releases. The Plan of Arrangement also includes the power of the Monitor to sue the Retailers on behalf of the creditors, which is the subject of these appeals.

[27] The Plan, as amended, was unanimously approved at the meeting of creditors called for such purpose on April 25, 2019. All creditors voting (831 in number representing $20,686,727) were in favour. The total claims in the file (885) are $22,424,476, of which 738 creditors held $18,190,120 (or 81%) of the debt. These 738 creditors, who are represented on the creditors' committee, all voted in favour. They are all insurers of consumers who claimed damages arising from the faucets.

[28] On May 23, 2019, the Monitor instituted actions in damages against the Retailers as contemplated in the Plan. These actions were suspended pending judgment in these appeals. The Monitor seeks condemnations against the Retailers based on the total amount of claims received for damages incurred by consumers divided amongst the Retailers on the basis of the proportion of defective faucets sold. The validity of the approach is not in issue in these appeals. The eventual success or failure of these actions based on the evidence presented will be for another day in another court.

[29] The Plan of Arrangement, as amended at the meeting of creditors, was approved by the Superior Court on July 4, 2019 despite the Retailers' contestation. This is the judgment in appeal.

II. THE JUDGMENT IN APPEAL

[30] The *CCAA* judge emphasized from the outset that the Retailers' opposition was based primarily on the fact that Aquadis had no right of action against them. He undertook an analysis of the Plan of Arrangement in light of the three criteria developed by the case law as relevant to approval: (1) that all statutory provisions are complied

---

[7] Arrangement relatif à 9323-7055 Québec inc., 2018 QCCA 1345 (Schrager, J.A.).

with; (2) that nothing was done that was not authorized by the *CCAA*; and (3) that the plan is fair and reasonable.

[31] The first two criteria were not in issue. The judge concluded that the Plan of Arrangement satisfies the third criterion since the Monitor's main objective was to achieve an overall solution to all the actions brought against Aquadis. The Monitor's proceedings against the Retailers were therefore aimed at maximizing Aquadis' assets in liquidation, which is a proper purpose recognized in the case law. Thus, the Plan would, upon resolution of the law suits, allow for distribution of all the sums collected in partial satisfaction of creditors' claims.

[32] The judge rejected the Appellants' argument that the objectives of the *CCAA* are being thwarted by allowing the Monitor to pursue a remedy to which it is not entitled. He characterized this argument as technical and unconvincing because, in the absence of consensual settlements, recourse against the Retailers (and JYIC) is the only possible avenue leading to a global treatment of Aquadis' liabilities. Thus, the powers sought by the Monitor were deemed necessary in order to materially advance the restructuring process. The judge accepted this course of action as the only practical resolution of this case. As such, he indicated that the solution chosen was a sensible use of judicial resources since it avoids the multiplication of individual actions outside the framework of the Plan of Arrangement. He also pointed out that the Appellants cannot complain that they are prejudiced by having to defend themselves against a single action rather than a "cascade of litigation by individual insurers".

[33] Finally, the judge noted that the Retailers were aware, in 2016, of the November 2016 Order granting the Monitor the power to sue them but failed to challenge it. As such, their challenge of such power in the Plan of Arrangement was late.

[34] The judge thus approved the Plan of Arrangement.

III. ISSUES

[35] The Appellants submit two questions to the Court:

a) Can a monitor appointed under the provisions of the *CCAA* exercise the rights, not of the insolvent debtor, but of certain creditors of the insolvent debtor to sue third parties for damages?

b) Does the mere fact that the Retailers did not challenge the November 2016 Order mean that they could not challenge the application for approval of the corresponding provision of the Plan of Arrangement?

[36] The Respondent Monitor adds that the appeal should be dismissed as hypothetical, since the November 2016 Order granting it the power to sue is not challenged and as such will remain in effect even if this Court allows the appeals.

IV. **APPELLANTS' POSITION**

[37] The Appellants submit to the Court that the judge of first instance erred in granting the Monitor the right to bring actions on behalf of Aquadis' creditors against the Retailers, because this power is not "in respect of the company" within the meaning of section 23 of the *CCAA* which enumerates the Monitor's duties.

[38] In addition, they argue that since these claims are not assets of the Debtor, the mere fact that the law suits relate to products distributed by the Debtor is insufficient to give the Monitor the right to sue the Retailers on behalf of the creditors. The Appellants contend that the Monitor cannot pursue recourses between the various creditors of an insolvent company given the lack of a sufficient connection with the insolvency of the Debtor. Stays of proceedings granted by a *CCAA* judge should apply only to actions against the debtor and its assets. Lawsuits by the creditors against the Retailers fall outside the *CCAA* estate and should not be stayed or otherwise dealt with in the file.

[39] The Appellants further submit that the Monitor's exercise of remedies on behalf of Aquadis' creditors compromises the Monitor's duty of neutrality. They argue that by exercising the rights of the creditors the Monitor is acting for the benefit of some of the Debtor's creditors. They also point out that the Monitor failed to act transparently in the process leading up to the November 2016 Order and that the contingency fee agreed upon with the creditors' committee places the Monitor in a conflict of interest.

[40] The Appellants contend that the hearings of damage actions based on the *Civil Code of Québec* before the Commercial Division of the Superior Court results in inappropriate preferential treatment of such claims over similar ones filed before the Civil Division, which is contrary to the proper administration of justice. Specifically, the Monitor, by instituting proceedings in the Commercial Division, avoids the filing of a case protocol[8] and may improperly rely on the *Canada Evidence Act*.[9] They add that their rights of appeal under the *CCAA* are subject to leave[10] whereas under the *Code of Civil Procedure* they would have a right of appeal for any condemnation exceeding $60,000.[11]

[41] The Appellants also argue that, according to established and recognized principles of statutory interpretation, a tribunal must favour an interpretation of the law

---

8 Under arts. 148 and following *Code of Civil Procedure* [*C.C.P.*].
9 *Canada Evidence Act*, R.S.C. 1985, c. C-5 [*CEA*].
10 See s. 13 *CCAA*.
11 See art. 30 *C.C.P.*

that is respectful of the division of powers under the *Canadian Constitution*.[12] They point out that an interpretation conferring rights on the Monitor to exercise remedies on behalf of solvent creditors against solvent defendants (the Retailers) constitutes an unwarranted intrusion by Parliament into the jurisdiction of the provincial legislatures over property and civil rights, thereby contravening the division of powers. They argue that the interpretation of the scope of *CCAA* jurisdiction should be directed to a result that is constitutionally coherent.

[42] As for the second question in appeal, the Appellants argue that they are entitled to challenge the Plan of Arrangement and are not precluded from doing so despite the absence of any contestation of the November 2016 Order, now or previously.

[43] For the Appellants, the Plan of Arrangement is not merely a confirmation of the powers granted by the November 2016 Order, but rather has the effect of replacing the interlocutory orders. In that sense, the present challenge is not, in their view, a collateral attack on the November 2016 Order. Moreover, since that order is the product of an interlocutory decision, it does not benefit from the presumption of *res judicata*.

[44] The Appellants further indicate that they were not notified of the application to vary the Monitor's powers until two years after the fact and, in that sense, they could not oppose the granting of the November 2016 Order. They further state that the consumers or their insurers (i.e. the creditors) are not prejudiced by the failure to challenge the November 2016 Order as this has had no impact on any party who chose to settle.

[45] In addition, the Appellants contend that even if they are effectively precluded from challenging the November 2016 Order, the question as to whether the judge had jurisdiction to sanction a plan of arrangement granting the Monitor the right to exercise the rights of creditors against the Retailers remains open. In that sense, the November 2016 Order does not, in the Appellants' view, establish the validity of any such power under a plan of arrangement made pursuant to the *CCAA*.

V. **DISCUSSION**

[46] I am of the view that the judge's approval of the Plan of Arrangement and, specifically, the Monitor's power to institute proceedings to recover from the Retailers damages allegedly suffered by consumers is not tainted by a reviewable error. Though I think that reasoning in addition to that found in the judgment is required to justify such a position, the result is not an erroneous or unreasonable exercise of the judge's discretion. As such, I propose to dismiss the appeals.

---

[12] *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 [*Constitution Act*].

[47] Given such results, it is not strictly necessary to dispose of the Appellants' second ground regarding the right to challenge the Plan given the November 2016 Order, but I think a few words are appropriate to set the record straight from the point of view of both Appellants and Respondent Monitor, because of the emphasis put on such matter by the parties.

[48] The judge said this:

> [27] It bears mention that the Opposing Retailers were aware in November 2016 of the Court's Order authorizing the Monitor to institute legal action against Canadian distributors. They did not oppose the Order at that time, or thereafter attempt to have it set aside or varied. The Opposing Retailers claim they are not challenging the Order now, but they are clearly doing so, and their complaint is late. The Plan merely continues the power granted to the Monitor over two and a half years ago.

[49] This, essentially, is in answer to the Monitor's argument, reiterated in appeal, that the contestation of the Plan of Arrangement by the Appellants constitutes a collateral attack against the November 2016 Order long after the expiry of the time limit to appeal and after the expiry of any time limit which could be reasonable to either revoke it (under the *Code of Civil Procedure*)[13] or vary it (under the comeback clause in the initial order issued under the *CCAA*), the whole given the Appellants' lack of diligence in the matter.

[50] The time limit to seek leave to appeal under the *CCAA* is 21 days.[14] The "comeback clause" in the initial order[15] permits parties such as the Appellants, who may be affected by an order of the *CCAA* court, to seek to vary such provision even after the expiry of the time limit to appeal. Even in the absence of such a clause, a party that was not served with the proceedings could seek its revision.[16] However, a party seeking "comeback relief" must act diligently.[17]

[51] The Appellants underline that with the exception of Rona, they were not served with the proceedings giving rise to the November 2016 Order as they were not on the service list. They contend that they were only informed two years after the fact as

---

13 Arts. 347 and 348 *C.C.P*.

14 S. 14 (2) *CCAA*.

15 Paragraph 44 of the Order of December 9, 2016.

16 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed., Toronto, Carswell, 2013, pp. 58-60. *Indalex Limited (Re)*, 2011 ONCA 265, para. 55 [*Indalex*]; *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550, para. 48 [*Canada North Group*].

17 See *Indalex*, *supra*, note 16, paras. 157, 161 and 166, reversed on other grounds in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Parc Industriel Laprade Inc. v. Conporec Inc*., 2008 QCCA 2222, paras. 7 and 17; *Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2015 QCCS 3236, para. 33; *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, para. 238; *Muscletech Research and Development Inc., Re*, 2006 CanLII 1020 (Ont. Sup. Ct.), para. 5; *Canada North Group Inc*, *supra*, note 16, para. 48.

disclosed by the correspondence filed as exhibits.[18] However, and though the record does not *per se* disclose it, the fact of not being on the service list is, experience indicates, purely a result of not asking the Monitor or its counsel to be placed on the list.[19]

[52] The Respondents contend that the Appellants have not acted with sufficient diligence in the matter and point to analogous situations arising before the Ontario Court of Appeal in *Indalex* and before the Quebec Superior Court in *Aveos*.[20]

[53] In *Indalex*, the interim lender sought the benefit from the proceeds of asset sales in the repayment of loans in accordance with the priority granted by the *CCAA* court three months earlier. The debtor company's pension fund sought to enforce its alleged priority over the monies, which the monitor contested, pleading that the pension fund was in effect attacking the security previously granted the lenders in priority to the pension fund. The Ontario Court of Appeal held that the pension fund had acted in a timely manner since it was only upon the court application to distribute the funds received from the asset sales that "it became clear" that the debtor company was abandoning the pension plans in their underfunded states.

[54] In *Aveos*, the Superintendent of Financial Institutions claimed that the statutory deemed trust created in its favour afforded a priority for monthly pension plan contributions to defray the pension plan deficit. These payments were stopped with court approval at the inception of the *CCAA* process. The present Respondents quote the undersigned, then the *CCAA* judge treating the argument, as follows:

> [92] The Initial Order was renewed six (6) times. The Superintendent has been on the service list. It is not sufficient to reserve one's rights. These rights must be exercised. Where a failure to exercise those rights may cause prejudice to other parties, those rights, though not time barred by statute, may be subject to an estoppel in virtue of the doctrine of laches in common law or as a result of the doctrine of "fin de non-recevoir" in civil law.
>
> (…)
>
> [95] Accordingly, in the opinion of the undersigned, the Superintendent is barred from seeking an amendment to the Initial Order at this time to, in effect, retroactively reverse the power of Aveos to interrupt the pension payments and to order Aveos to pay to the pension fund the $2,804,450.00.[21]

---

18 The record indicates that this is not the case for all of the Appellants (*infra*, para. [55]).

19 Para. 41 of the Initial Order of December 9, 2015 provides for service of proceedings to all who have given notice to the Monitor or its counsel.

20 *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 [*Aveos*] and Indalex, *supra*, note 16, reversed on other grounds in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

21 *Aveos*, *supra*, note 20, paras. 85, 91-95.

Aveos does not support the Respondents' position on the matter of delay since, in effect, the secured creditor in *Aveos* would have retroactively been obliged to cede priority to the $2.8 million of pension deficit. The debtor company and the secured creditor acted throughout on the premise arising from the court's order that the pension payments need not be made in priority to repayments to the secured creditor. In the present matter, the inaction of the Appellants since November 2016 has not caused the Monitor to act to its detriment. The only material prejudice the Monitor points to is the time and energy invested in negotiating with the Retailers, but there is no quantification of a proof of loss and, in any event, the Monitor's fees are calculated on a contingency basis, not on a "time spent on the matter" basis.

[55] In the cases at bar, the Appellants contend that until the Plan was approved (and almost simultaneously the legal proceedings against them filed) it was not clear that their potential liability in the matter would be the object of litigation rather than negotiated settlements. However, they had previously received demand letters from the Monitor[22] and contested the approval of settlements reached by the Monitor with the insurers of the Debtor and the manufacturer. The judgment of Collier, J.S.C., approving the settlements, refers specifically to the November 2016 Order, and counsel for the Appellants Home Depot, Rona and BMR were heard on the application.[23]

[56] The Appellants appear to have had sufficient knowledge of the November 2016 Order prior to the filing of the Plan in 2019. However, even if I were to ignore this, I think that they would still be barred from seeking the revision of the November 2016 Order as part of their contestation of the Plan of Arrangement simply because they have not sought any formal conclusions regarding the November 2016 Order. They target only the powers afforded the Monitor in clause 6.2 of the Plan of Arrangement. The Respondents plead that even if the Plan is set aside, the same powers subsist under the November 2016 Order.[24] As such, the Monitor maintains that the Appellants' contestation is an indefensible collateral attack[25] on the November 2016 Order or, alternatively, that the appeal raises a moot point,[26] because, as stated above, even if

---

[22] BMR, Groupe Patrick Morin inc. and Rona appear to have received the letters in 2016 while Home Hardware and Matériaux Laurentiens inc. received one in 2018. No letter addressed to Home Dépôt is filed in the record.

[23] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2018 QCCS 2945.

[24] Moreover, the Monitor amended the Plan at the meeting of creditors to provide that the previous orders survive the Plan sanction: "6.2(d) … the Initial Order remains in effect … until the final distribution date." This is reflected in para. 19 of the sanction order.

[25] See for example: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 par. 61; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279, para. 35; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, paras. 33-34.

[26] *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. See also: *R. v. Oland*, 2017 SCC 17; [2017] 1 S.C.R. 250*; R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Forget v. Québec (Attorney General)*, [1988] 2 S.C.R. 90, paras. 67-68. Art. 10, para. 3 *C.C.P.*

section 6.2(c) of the Plan is set aside, the power to sue the Retailers subsists under the November 2016 Order.

[57] I would tend to think that, on the facts, no reviewable error is made out in the judge's conclusion that the attack is late. Moreover, the November 2016 Order would survive the Plan sanction and, in all events, the Appellants do not directly seek conclusions contrary to said order. However, as mentioned earlier, these questions do not require definite resolution given my answer to the primary point of the appeal, which is the validity of the power granted the Monitor in the Plan to sue on behalf of a group of creditors rather than in the exercise of the Debtor's rights. I now address that issue.

* * *

[58] As indicated in the review of the facts above, parties in the distribution chain would in the normal course have recourse against those above them in the flowchart. The recourses (exercised or not) of the ultimate purchasers of the faucets (and their insurers) and the Retailers were stayed upon the initial insolvency filing in 2015. The November 2016 Order led to some negotiated settlements. The consumers (or their insurers) filed proofs of claim; the Retailers did not, nor did they settle any claims asserted by the Monitor. It is against this factual background that the Monitor was granted the power to sue the Retailers under the Plan of Arrangement.

[59] The purpose of the proposed legal proceedings is consonant with a legitimate purpose under the *CCAA,* as the Monitor seeks to establish a "litigation pool" with a view to paying creditors of Aquadis on a *pro rata* basis. In itself, this more than satisfies the spirit of the *CCAA,* but is also supported by examples in the reported cases. Specifically, and of close resemblance is the arrangement in the matter of *Muscletech*,[27] where the debtor was a distributor of dietary supplements in the middle of a multi-tier distribution chain between the manufacturer at one end and ultimate consumers at the other. The plan of arrangement provided for releases from liability to be given to those in the chain who paid into the litigation pool as compensation arising from selling the defective product. The scheme was voluntary – i.e. the monitor was not given power to sue. However, the situation is similar to that in the case at bar. Other examples of voluntary litigation pools where contributors receive releases exist, but the precise factual matrix of the present plan, where the Monitor is empowered to sue, appears to be novel.[28]

---

[27] *Muscletech Research and Development Inc. (Re)*, 2007 CanLII 5146 (Ont. Sup. Ct.).

[28] *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403, paras. 6 and 33; *Metcalfe & Mansfield Alternative Investments II Corp (Re)*, 2008 ONCA 587, paras. 69-71 [*Metcalfe*]; *Montreal, Maine & Atlantic City Canada Co./(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2015 QCCS 3235.

[60] The granting of releases for third parties in consideration of their contribution to a litigation pool to satisfy creditors' claims is now well entrenched in *CCAA* jurisprudence.[29]

[61] The *CCAA* expressly provides for certain powers and duties of the monitor.[30] These powers and duties may be extended, because s. 23 *CCAA* provides that a monitor is required to "do anything in respect of the company that the court directs the monitor to do".[31] Thus, while the law does provide the basic framework within which the monitor must act, the courts may use their discretion to grant additional powers considered appropriate.[32]

[62] This discretion cannot be exercised arbitrarily; it must be exercised in a manner consistent with and directed toward the attainment of the objectives of the *CCAA*. In *Century Services Inc.,* Justice Deschamps observed for the Supreme Court that:

> [58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs". (References omitted)

She added that judicial discretion may be exercised in furtherance of the *CCAA*'s purposes,[33] which in the case at bar is the maximization of creditor recovery, since Aquadis has ceased carrying on business.

[63] The courts, however, have expressed reservations regarding the imposition of third-party settlements under the *CCAA,* indicating that the purpose of the *CCAA* is not to settle disputes between parties other than the debtor and its creditors.[34] Nonetheless, the precise point in issue – i.e. whether a judge may allow a monitor to exercise the rights and remedies of certain creditors against other persons or creditors of a debtor appears to be without precedent.

---

29 *Metcalfe*, *supra*, note 28.

30 S. 23 *CCAA*.

31 S. 23 (1) (*k*) *CCAA*.

32 *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, paras. 105-106 [*Essar*]; *MEI Computer Technology Group Inc. (Bankruptcy), Re*, 2005 CanLII 15656 (Qc. Sup. Ct.), para. 20.

33 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, para. 59.

34 The courts have also indicated that proceedings under the *CCAA* were not intended to alter priorities amongst creditors: "The *CCAA* is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholders (sic) position at the expense of others - there should be no confiscation of legal rights.": *843504 Alberta Ltd., Re*, 2003 ABQB 1015, para. 13. See also: *Royal Oak Mines Inc., Re*, 1999 CanLII 14843 (Ont. Sup. Ct.), para. 1.

[64] In *Urbancorp*,[35] the Ontario Superior Court of Justice refused to recognize the power of a monitor to claw back a payment in kind made by the debtor to a third party who was a creditor of a company related to the debtor. While Justice Myers acknowledged that "… Monitors can certainly be empowered to bring legal proceedings to act on behalf of *CCAA* debtors",[36] he disagreed that the monitor should act as a bankruptcy trustee to bring proceedings in the place of *CCAA* creditors. The latter could initiate their own proceedings outside of the insolvency or provoke a bankruptcy for a trustee to initiate those proceedings for them. It should be emphasized that a single payment was in issue in *Urbancorp*. Justice Myers distinguished *Essar*,[37] which is relied on by Respondents. In that case, the Ontario Court of Appeal confirmed the lower court's authorization of the monitor to institute oppression proceedings for the benefit of various creditors (or stakeholders) in the *CCAA* estate: "(…) the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the pensioners, retirees, employees, and trade creditors (…)".[38] The court noted as well that the debtor would also benefit from such proceedings, particularly in the sense that an impediment to restructuring would potentially be removed by the oppression remedy.

[65] The result in *Urbancorp* was echoed in *Pacific Costal Airlines*,[39] where the British Columbia Supreme Court indicated that "proceedings under the *CCAA* are not intended to resolve disputes between a creditor and third parties":

> [24] It is true that, in addition to alleging breach of contract by Canadian, the Dispute Notice made reference to allegations against Air Canada for inducing breach of contract, breach of fiduciary duty and other economic torts. However, the Plaintiff could not have pursued those claims in the *CCAA* proceedings. The purpose of a *CCAA* proceeding, as reflected in the preamble to the legislation, is to "facilitate compromises and arrangements between companies and their creditors". Its purpose is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in *CCAA* proceedings, it is not a proper use of a *CCAA* proceeding to determine disputes between parties other than the debtor company.[40]

[66] The *Stelco*[41] case, for its part, raised issues relating to a dispute between certain creditors near the end of the debtor's restructuring process over the distribution of

---

35 *Urbancorp Cumberland 2 GP Inc., (Re)*, 2017 ONSC 7649.
36 *Ibid*.
37 *Essar*, *supra*, note 32.
38 *Essar*, *supra*, note 32, para. 124.
39 *Pacific Coastal Airlines Ltd. v. Air Canada*, 2001 BCSC 1721, para. 24; see also *Stelco Inc., Re*, 2005 CanLII 42247 (Ont. C.A.), para. 32 [*Stelco*].
40 *Id*., para. 24.
41 *Stelco*, *supra*, note 39.

certain amounts payable to holders of subordinated notes and the priority entitlement to interest payments. Farley, J. commented as follows:

> [7] The *CCAA* is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company.[42] (References omitted)

[67] The *dicta* in all of these cases reflect the orthodox view of the law put forward by the Appellants. However, none of the fact patterns resemble the chain of distribution in the present case. Nor were these judgments focused on a huge number of claims, which were stayed in this case and are effectively replaced by the Monitor's proceedings authorized under the Plan. This factual distinction makes these judgments of limited instructive or precedential value.

[68] What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA*[43] and the expanded view of the role of the monitor, indeed the baptism of the "super monitor".[44] The Appellants concede, if only indirectly, that the Monitor could be authorized to exercise rights of the Debtor against third parties as could a bankruptcy trustee. However, they object to the Monitor's power to sue one group of creditors (the Respondents) on behalf of another group of creditors (the consumers or their insurers).

[69] In my opinion, the Appellants objections are not well founded.

[70] Firstly, the bankruptcy trustee analogy is only a half truth. Trustees are the assignees of a bankrupt's property, and as such, exercise the patrimonial rights of the debtor but they also wear a second hat.[45] Trustees exercise rights and recourses on behalf of creditors against other creditors and against third parties.[46] Such rights and recourses arise from the *BIA* (for example, under s. 95 for preferences) as well as under the civil law generally (for example, the paulian action under arts. 1631 and following *C.C.Q.*). Most significantly, the *BIA* recourses to attack preferences, transfers under value and dividends paid by insolvent corporations have been available to *CCAA* monitors since the amendments adopted in 2007.[47] Thus, the mere fact that the

---

42 *Stelco Inc., Re*, 2005 CanLII 41379 (Ont. Sup. Ct.).

43 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, para. 42 [*Callidus*].

44 Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s" in Jill Corraini and Blair Nixon (eds.), Annual Review of Insolvency Law, Toronto, Thomson Reuters, 2019, p. 650.

45 *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, para. 33.

46 *Lefebvre (Trustee of); Tremblay (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, paras. 32-40.

47 S. 36.1 *CCAA*.

judgment in appeal empowers the Monitor to sue to enforce rights of creditors is not conceptually foreign to the general framework of insolvency law.

[71] Moreover, and without making too fine a point, the Appellants' are not creditors of the *CCAA* estate. They might have been, but they chose not to file claims. As such, they are third parties. This eliminates another conceptual, if not legal, difficulty in that, they do not potentially share in the litigation pool after contributing to it.

[72] The Appellants also object, saying that the power given to the Monitor to sue runs contrary to the principle of a monitor's neutrality. However, the case law and literature recognize that this neutrality is far from absolute:

> [110] Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:
>
> > Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. … [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.
>
> (…)
>
> [119] Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108 (C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.
>
> [120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. (…).[48]

[73] As long as the monitor is objective and not biased and takes positions based on reasoned criteria to further legitimate *CCAA* purposes, it now appears inescapable that the neutrality it must maintain is attenuated.

[74] It must be repeated that the Retailers are not creditors in the *CCAA* estate as they did not file proofs of claim. As such, their status as "stakeholders" is tenuous, so that any resulting duty to them by the Monitor is questionable.

[75] Neither is the contingency fee arrangement of the Monitor and its counsel a valid ground to attack the Monitor's neutrality. The contingency fee may give the Monitor an interest in the outcome of the litigation, but such arrangements have a long history, particularly with lawyers' mandates, and are recognized as legitimate and, indeed, as

---

[48] *Essar*, *supra*, note 32.

enhancing access to justice. The fee arrangement dates back to the initial order. Given that Aquadis had no assets, there would be no other way to pay professionals to act in the matter. In effect, the professionals are financing the recovery efforts.

[76] The Appellants also submitted that the Monitor has lacked transparency. This position has no merit. The Plan sanction was the product of a legal process served on parties that appeared in the record by entry on the service list and followed a creditors' meeting and a court hearing before an impartial judge. The Monitor's agenda was not hidden.

* * *

[77] I agree with the judge that on practical and equitable grounds the power accorded to the Monitor to sue the Retailers in the context of the present matter makes *CCAA* sense. In my mind, however, that is not enough to justify the judge's exercise of discretion to approve the Plan.

[78] The broad judicial discretion propounded in much of the case law and literature is not boundless.[49] It, like all judicial discretion, must be exercised judiciously, meaning that it must be based on legal rules and principles. In my opinion mere commercial expediency or good sense is not enough to qualify the exercise of judicial discretion under the *CCAA* as appropriate[50] nor for a plan to qualify as fair and reasonable. Rulings (even discretionary ones) must have some measure of predictability if confidence in the legal system is to be maintained.[51] That predictability stems from adherence to the application of the law. I am not willing to cross the Rubicon from the realm of the law to the land of the lore.

[79] That being said, there is, in the present case, legal and not merely commercial or practical justification for the judgment. The Appellants attack it based on an analogous reasoning of the powers of a bankruptcy trustee to exercise the debtor's rights against third parties but not the rights of creditors. However, this is not really true as I have indicated above. The trustee in bankruptcy can exercise rights for the benefit of creditors.

[80] Significantly, the creditors voted unanimously that their rights against the Retailers be exercised by the Monitor in their place and stead and for their benefit through the proposed proceedings and the litigation pool within the *CCAA* framework.

---

49 *Callidus*, *supra*, note 43, paras. 48-49.

50 *Ibid*.

51 See Sharpe, Robert J., *Good judgment – Making Judicial Decisions*, Toronto, University of Toronto Press, 2018, p. 129; *Nechi Investments Inc. v. Autorité des marchés financiers*, 2011 QCCA 214, paras. 22-23.

[81] Absent a *CCAA* process, the creditors would have been free to consensually assign their rights or subrogate others, including, by way of example, a trustee of a litigation trust. Again, there is precedent in *CCAA* matters for such litigation trusts,[52] which trusts include rights of actions against third parties.[53] With the *CCAA* file, the Monitor, through the Plan, the vote and the sanctioning judgment in appeal, is in such position to exercise those rights against the Retailers. The Monitor is putting into effect the collective will of the creditors expressed through their unanimous vote approving the Plan of Arrangement. Giving effect to creditor democracy reflected in the *CCAA*[54] is a sound basis for a court to approve the Plan.

[82] Accordingly and in conclusion, given that the parties being sued are third parties vis-à-vis the *CCAA* estate and as such, have no claim on the litigation pool, and given that the creditors/beneficiaries of the litigation pool voted unanimously in favour of the Plan of Arrangement, there is sufficient legal rationale to grant the power in question. In addition, as indicated by the trial judge, the mechanism is a direct and practical way to maximize recovery for creditors.

* * *

[83] The Appellants have also argued that granting the Monitor the power to sue is a misuse of the resources of the Commercial Division of the Superior Court, since the proposed proceedings should be taken in the Civil Division. This, however, is purely a matter of case management for the Superior Court. There is but one Superior Court; its administrative divisions, such as the Commercial Division, are not separate and distinct tribunals.[55] Accordingly, there is no valid argument based on the jurisdiction of the Superior Court which can be brought to bear against the judgment of the lower court.

[84] The Appellants submit that they are prejudiced by the judgment in that eventual rights of appeal are restricted because leave is required under the *CCAA* but not under the *C.C.P.* for awards exceeding $60,000. The argument is not persuasive given that the judgment is not erroneous, the Monitor's recourses against the Retailers fall under the *CCAA* and consequently eventual appeals would be governed by s. 14 *CCAA*.

[85] In addition, the Appellants put forward a constitutional argument claiming that since the creditors and Retailers are not insolvent, proceedings of one against the other under the umbrella of the *CCAA* should not apply to them.

---

52 Plan of Compromise and re-organization of Sino-Forest Corporation, December 3, 2012, Ont. Sup. Ct. CV-12-9667-00CL.

53 *Lutheran Church Canada (Re)*, 2016 ABQB 419, paras. 125, 134 and 135.

54 S. 6 *CCAA*.

55 *Re Arctic Gardens Inc.*, 1990 R.J.Q. 6 (Qc. C.A.). See also *TVA Publications inc. v. Quebecor World Inc.*, 2009 QCCA 1352, para. 71 (Morissette, J.A.); *Formula E Operations Limited v. Ville de Montréal*, 2019 QCCS 884.

[86] The constitutional validity of the *CCAA* is grounded in Parliament's jurisdiction under s. 91(21) of the *Constitution Act*[56] with respect to bankruptcy and insolvency. The statute should be applied, say the Appellants, in a manner consistent with its constitutional foundation.

[87] The Ontario Court of Appeal made it clear in *Metcalfe & Mansfield* that the granting of releases to solvent third parties in proceedings under the *CCAA* is not contrary to the constitutional division of powers. To the extent that the granting of such powers to the Monitor enables the objectives of the *CCAA* to be achieved, the impact of the exercise of ancillary powers in respect of solvent third parties (such as suing the Retailers) cannot constitute an infringement of the constitutional division of powers. Rather, the powers granted to the Monitor in clause 6.2 of the Plan arise out of, and are necessary for, the valid exercise of federal jurisdiction.[57]

[88] In the case at bar, the Plan provides for releases to be granted to, *inter alia*, Retailers who contribute to the litigation pool destined to satisfy claims of creditors against the Debtor. The Monitor has the additional power to compel such contribution by instituting legal proceedings. Such actions are calculated to maximize creditor recovery, a proper *CCAA* purpose[58] falling within the ambit of s. 91(21) of the *Constitution Act*. Moreover, the parties who might have raised a contestation analogous to that of the objecting parties in *Metcalfe & Mansfield* are the consumers (or their insurers) who can no longer sue the Retailers outside of the Plan of Arrangement. However, they voted unanimously in favour of the arrangement.

[89] As for the other consequence for the Appellants, their direct recourse for any loss would be against Aquadis, but that recourse is stayed and such stay of proceedings is, self-evidently, a valid exercise by way of the *CCAA* of federal jurisdiction in insolvency matters under s. 91(21) of the *Constitution Act*.

[90] The Appellants' submissions based on the division of powers have no merit.

* * *

[91] Plans of arrangement are sanctioned by the courts where considered "fair and reasonable", which raises mixed questions of fact and law. Accordingly, the standard of review is one of deference.[59] Appellate intervention is only warranted where the

---

56 *Constitution Act*, *supra*, note 12, s. 91; See *Reference re constitutional validity of the Companies Creditors Arrangement Act (Dom.)*, [1934] S.C.R. 659.

57 *Metcalfe*, *supra*, note 28.

58 *Essar*, *supra*, note 32, para. 103.

59 *Metcalfe*, *supra*, note 28.

judgment is affected by an error of principle or results from an unreasonable exercise of judicial discretion.[60] The Appellants have failed to satisfy this standard.

[92] For all the foregoing reasons, I propose that the appeals be dismissed with legal costs.

MARK SCHRAGER, J.A.

[60] *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, para. 20; *Ivaco Inc., Re*, 2006 CanLII 34551 (Ont. C.A.), para. 71; *Re Air Canada*, 2003 CanLII 36792 (Ont. C.A.), para. 25; *Re Royal Crest Lifecare Group Inc.*, 2004 CanLII 19809 (Ont. C.A.), para. 23; *Algoma Steel Inc. v. Union Gas Ltd.*, 2003 CanLII 30833 (Ont. C.A.), para. 16.

TAB 4

SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00696017-00CL **DATE: May 12, 2023**

NO. ON LIST: 3

TITLE OF PROCEEDING: In the Matter of a Plan of Compromise or Arrangement of LoyaltyOne, Co.

BEFORE: JUSTICE CONWAY

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Jane Dietrich Timothy Pinos Natalie Levine	Counsel for LoyaltyOne, Co.	jdietrich@cassels.com tpinos@cassels.com nlevine@cassels.com
Rachel Biblo Block Meredith Lahaie	Counsel for Akin Gump Strauss Hauer & Feld LLP	rbibloblock@akingump.com mlahaie@akingump.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Brendan O'Neill Christopher Armstrong Andrew Harmes	Counsel to the Monitor KSV Restructuring Inc	boneill@goodmans.ca carmstrong@goodmans.ca aharmes@goodmans.ca
David Bish Scott A. Bomhof	Counsel to Bank of Montreal as DIP Lender and	dbish@torys.com sbomhof@torys.com

Mike Noel	the Buyer	mnoel@torys.com
Ashley Taylor Maria Konyukhova	Counsel to Bread Financial Holdings Inc	ataylor@stikeman.com mkonyukhova@stikeman.com
Jesse Mighton Rob Staley	Counsel to Ad Hoc Committee of Term Loan B Lenders	mightonj@bennettjones.com staleyr@bennettjones.com
Alex MacFarlane	Counsel to Bank of America, N.A. as Credit Facility Agent	amacfarlane@blg.com
Eli Columbus Frasher Murphy Matthew Ferris	Counsel to Bank of America, N.A. as Credit Facility Agent	eli.columbus@haynesboone.com frasher.murphy@haynesboone.com matt.ferris@haynesboone.com
Bertrand Giroux	Counsel to Metro and Le Groupe Jean Coutu (PJC) Inc.	bgiroux@millerthomson.com
David Wedlake	Counsel to Sobeys Capital Incorporated	dwedlake@stewartmckelvey.com

---

ENDORSEMENT OF JUSTICE CONWAY:

[1] All defined terms used in this Endorsement shall, unless otherwise defined, have the meanings ascribed to them in the Factum of the Applicant dated May 10, 2023.

[2] The Applicant seeks three orders today: (i) the Approval and Vesting Order; (ii) the Assignment Order; and (iii) the Ancillary Relief Order. All of those orders will implement the Transaction with BMO (through its subsidiaries) to acquire the assets and assume the liabilities of the AIR MILES® Reward Program business, as set out in the Asset Purchase Agreement.

[3] At the conclusion of the hearing, I said that I was granting the orders (with the minor amendments discussed at the hearing). These are my reasons for doing so.

[4] BMO was the stalking horse bid in connection with the SISP, both of which were approved by this court. The SISP process ran its course. Although 48 parties were contacted, BMO was the only bidder and was confirmed to be the Successful Bid.

[5] The Transaction will see the AIR MILES® Reward Program continue as a going concern, with offers of employment for approximately 700 employees, as well as continuity for the approximately 10 million active Collectors, the Partners, Reward Suppliers and vendors. The Buyers will purchase all or substantially all of the operating assets of the Applicant, including the Travel Services Shares, and assume the Assumed Contracts. The Buyers will pay US$160,259,861.40 in cash, less certain purchase price adjustments, and will assume the Assumed Liabilities and pay certain transfer taxes.

[6] There is widespread support for the Transaction. It is supported by the Monitor. Mr. Staley and Mr. MacFarlane voiced their support for their respective secured creditors. There is no opposition from any stakeholder. Mr. Taylor addressed the court for the Bread parties and confirmed that they are not opposing the relief today. The Monitor, in its Third Report, states that the Transaction "provides for the greatest

recovery available in the circumstances and will be more beneficial to creditors than a sale or disposition in a bankruptcy".

[7] With respect to the **Approval and Vesting Order**, I am satisfied that the Transaction should be approved. I have considered the factors in s. 36 of the CCAA and in *Soundair*. Specifically, the process leading to the Transaction – the SISP – was developed in consultation with the Monitor, the Financial Advisor, BMO and certain Credit Agreement Lenders. It was approved by this court and followed by the Applicant. The market has been canvassed in accordance with that process and the Transaction is the only one that emerged. As noted, it is the only viable option and continues the business as a going concern. The purchase price will be sufficient to satisfy the Charges and the Employee Payables, and provide for a distribution to the Credit Agreement Lenders in partial recovery of their secured claims at a later date.

[8] The repayment of the DIP and the payment of the Transaction Fee are satisfactory and approved.

[9] I reviewed the Releases in detail with counsel at the hearing. I approve them pursuant to s. 11 of the CCAA. I am satisfied, among other things, that the Released Parties were necessary to the Transaction; the released claims are rationally connected to the purchase of the Transaction and are necessary for it; and the Released Parties contributed to the Transaction. The Releases do not extend to the Applicant or Travel Services. They exclude any obligations that may not be released under s. 5.1(2) of the CCAA, any obligations under the Asset Purchase Agreement and related documents, and any obligations of BMO to its own customers (the latter as directed by me at the hearing). There is no release of any Bread-related parties as set out in paragraph 24.

[10] All other provisions of the Approval and Vesting Order are satisfactory and I approve it.

[11] With respect to the **Assignment Order**, Newco (a subsidiary of BMO) will be assuming the Assumed Contracts. These are required for the ongoing business operations of the Applicant. There are approximately 231 contracts. The Applicant has served all counterparties, except for four who were served under the contract provisions but cannot be found. While the Applicant has obtained approvals for the transfer from a large number of counterparties, there are some for whom consent has not been obtained as yet (most of which are non-disclosure agreements (NDAs) and have no cure costs at issue). Ms. Dietrich advised the court that there have been no oppositions to the transfer.

[12] The Assignment Order provide that any assignment is subject to payment of any cure costs, satisfying the requirement under s. 11.3(4) of the CCAA. The assignments are to Newco, which is a subsidiary of BMO, a sophisticated financial entity. Mr. Bish submitted that although the purchase has been structured this way, for all practical purposes BMO will be seeing that the obligations under these contracts are satisfied going forward. With respect to the NDAs, the assignment will enable Newco to protect any confidential data of the business through enforcement of those agreements. Considering all of these factors, I consider it appropriate to grant the Assignment Order.

[13] With respect to the **Ancillary Relief Order**, the stay extension to July 14, 2023 is approved. This will give the parties time to close the Transaction and start the transition of the business. The Applicant is acting in good faith and with due diligence and no creditor will be prejudiced by the extension. I am expanding the powers of the Monitor under s. 11 and 23(1)(k) of the CCAA. This will enable it to seek additional avenues of recovery for the remaining assets of the Applicant, to assist in the transition of the business, and to bring this CCAA proceeding to an efficient conclusion for the benefit of stakeholders.

[14] I have signed the three orders and attached them to this Endorsement. These orders are effective from today's date and are enforceable without the need for entry and filing.

TAB 5

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

[2] Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

Background

[3] Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.

[4] Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.

[5] It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.

[6] Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated $7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

[7] At the time of its initial application to the court, Harte Gold's assets were valued at $163.8 million. Its liabilities were valued at $166.1 million. On a balance sheet basis, therefore, Heart Gold was insolvent.

[8] Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.

[9] This prefiling strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.

[10] In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.

[11] In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.

[12] The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.

[13] Only one competing bid was received – a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.

[14] This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that

the $10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the prefiling cure costs; and, (c) the undertaking to pay an additional cash deposit of US$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

[15] In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

- the cancellation of all Harte Gold shares and the issue of new shares to the purchaser
- payment by the purchaser of all secured debt
- payment by the purchaser of virtually all prefiling trade amounts (estimated at $7.5 million but with a $10 million cap) and postfiling trade amounts
- certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contacts and liabilities include a number of agreements involving ongoing or future services in respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction The emplyment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority
- retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and
- releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

[16] I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and postfiling trade amounts, interim financing and the like, totals well over $160 million.

Issues

[17] There are three principal issues:

(1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;

(2) Whether the stay should be extended; and,

(3) Whether the Monitor's mandate should be extended to included additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

[18] Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".

[19] Section 36(1) of the CCAA provides:

> A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

[20] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> (d) the extent to which the creditors were consulted;
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp,* 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process:

see *Target Canada Co. (Re),* 2015 ONSC 1487*,* at paras. 14-17.

[22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[23] In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:

(a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,

(b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

[24] The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re),* (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found "the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise."

[25] A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.

[26] More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.

[27] In *Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218* at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc,* 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc,* 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently
- The efficacy and integrity of the process followed
- The interests of the parties, and
- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[28] In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that "the terms 'sell or otherwise dispose of assets outside the ordinary course of business' under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*": *Nemaska* QCCA at para 19.

[29] Similarly, in *Quest University Canada (Re),* 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court's authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on CCAA jurisdiction in *9354-9186 Québec Inc. v. Callidus Capital Corp.,* 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.

[30] In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.

[31] Fitzpatrick J. relied on *Callidus* to the effect that:

- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence". On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only

by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances"

- the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company"

- Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context

- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence

- Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. The supervising judge is best positioned to undertake this inquiry.

[32] The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[33] Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.

[34] The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not "meritorious", also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. "reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings": *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

[35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

[40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

[41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

[42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

[43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

[44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

[45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

Comparison with Sale in Bankruptcy

[46] The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.

[47] The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.

[48] In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.

[49] Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

Consultation with Creditors

[50] Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately $28 million in respect of its hedge agreements. Silver Lake has claims of approximately $95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.

[51] BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.

[52] While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

[53] The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.

[54] I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

[55] The proposed transaction affords the following benefits to the creditors and to stakeholders generally:

(a) the retention and payment in full of the claims of almost all creditors of Harte Gold;

(b) continued employment for all except four of the Harte Gold's employees;

(c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and

(d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.

[56] The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.

[57] Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional "compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.

[58] The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).

[59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

[60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

[61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

[62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

[63] Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.

[64] Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: *Stelco Inc. (Re),* 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.

[65] Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

Fairness of Consideration

[66] Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable.[1]

[67] A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational – both payments being made to bring about the acquisition of the Mine as a going concern.

[68] It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the prefiling strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

[69] The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

[70] As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

[71] The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would

---

[1] The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

[72] It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

[73] The position of the purchaser is, not unreasonably, that it will not both continue to fund ongoing operations and the CCAA process and undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

[74] The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

[75] In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

[76] For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

[77] In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's

assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

[78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

[79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

[80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

[81] Whether the claims to be released are rationally connected to the purpose of the restructuring: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

[82] Whether the releasees contributed to the restructuring: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

[83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

[84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

[85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

[86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

[87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

[88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

[89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

[90] For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

[91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

[92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

[93] I approve the grant of the requested powers to the Monitor.

Conclusion

[94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Penny J.

Date: 2022-02-04

TAB 6

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION
In Bankruptcy and Insolvency

Citation: *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, 2023 NLSC 88
Date: June 16, 2023
Docket: 202201G0709

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. 36, as amended;

AND IN THE MATTER OF an application of Grant Thornton Ltd., as Court-appointed Monitor of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc., Newspar and CFI Newspar Holdings Inc.;

AND IN THE MATTER OF a Plan of Compromise or Arrangement of the CFI Group.

Before: Justice Alexander MacDonald
Edited Transcript of Oral Reasons for Judgment

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: June 6, 2023

Date of Oral Judgment: June 6, 2023
Appearances:

Geoffrey L. Spencer, Meghan M. King	Appearing on behalf of the Monitor, Grant Thornton Limited
Darren D. O'Keefe	Appearing on behalf of the CFI Group
Joseph J. Thorne	Appearing on behalf of PricewaterhouseCoopers
Gavin D.F. MacDonald and Dylan Chochla	Appearing on behalf of the Purchaser, Fluorspar Holdings PTE. Ltd.
Robert J. Kennedy	Appearing on behalf of HSBC Bank Canada
David G. Rodgers	Appearing on behalf of His Majesty in right of Newfoundland and Labrador
Shane R. Belbin and Laura F. Murphy	Appearing on behalf of Komatsu
Sophie J. Dupré	Appearing on behalf of Canada Revenue Agency
Sean M. Pittman	Appearing on behalf of Equipment SMS Inc., M. Rock Inc., Atlantic Explosives Limited and Lorne Tide Controls Limited
Geoffrey W. Boyd	Appearing on behalf of Pennecon Grand Banks Warehousing Inc.
Deborah LJ Hutchings KC	Appearing on behalf of Inaminka Marine Services Limited
Brendan O'Neill	Appearing on behalf of CF Investments S.a.r.l.

Authorities Cited:

CASES CONSIDERED: *Harte Gold Corp. (Re)*, 2022 ONSC 653; *Plasco Energy (Re)* (2015), 2015WL13889310, CV-15-10869-00C (Ont. S.C.J.

[C.L.]); *Arrangement Nemaska Lithium Inc. (Re)*, 2020 QCCS 3218, leave to appeal refused, 2020 QCCA 1488, leave to appeal refused, 2021 CarswellQue 4589 (SCC); *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364, refusing leave to appeal, *Quest University Canada (Re)*, 2020 BCSC 1883; *9354-9186 Québec Inc. v. Callidus Capital Corp*., 2020 SCC 10; *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc*., 2022 ONSC 6354; *Royal Bank v. Soundair Corp* (1991), 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.); *Lydian International Limited (Re),* 2020 ONSC 4006; *Sports Villas Resort Inc. (Re)*, 2020 NLSC 109

STATUTES CONSIDERED: *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

REASONS FOR JUDGMENT

MACDONALD J.

INTRODUCTION

[1] On February 21, 2022, Chief Justice Whalen granted a receivership order and appointed Grant Thornton Ltd. (GTL) as receiver for the Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. (Company).

[2] The Company, by their court-appointed interim receiver GTL and on behalf of Newspar, a general partnership (Companies), applied for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[3] On March 11, 2022, I granted the Initial Order now filed in this Court. In that order, I appointed GTL as Monitor of the Companies and issued a stay of proceedings until the comeback hearing on March 18, 2022.

[4] On March 18, 2022, I granted an Amended and Restated Initial Order (ARIO) in which I provided for enhanced Monitor's powers, approved the Sales and Investment Solicitation Process (SISP), and extended the stay until June 10, 2022.

[5] On June 10, 2022, I granted ARIO Amendment #1, and I amended the SISP, and extended the stay until September 2, 2022.

[6] On August 30, 2022, I granted ARIO Amendment #2, an amended SISP and extended stay until October 17, 2022.

[7] On October 6, 2022, the Monitor proposed extending the stay until February 28, 2023, to close a proposed sale, and to terminate these proceedings. The Monitor withdrew this application because of a material adverse change as the prospective purchaser failed to pay a required cash deposit.

[8] On October 12, 2022, I granted ARIO Amendment #3 and extended the stay until February 26, 2023, to allow the Monitor to consult with DIP lenders and decide how it would proceed because of the failure of the prospective sale.

[9] In February 2023, the Monitor informed the Court that it had finalized a binding letter of intent for a new prospective purchaser. On February 21, 2023, I granted ARIO Amendment #4, and extended the stay of proceedings until May 31, 2023. I also sealed the Monitor's second confidential report.

[10] On May 18, 2023, I granted ARIO Amendment #5, and extended the stay of proceedings until June 16, 2023, to allow the Monitor time to finalize the definitive agreements with the prospective purchaser. I also added CFI Newspar Holdings Inc. as an applicant under this *CCAA* proceeding.

[11] This is a motion by the Monitor for an approval of the sale of the shares of CFI to the prospective purchaser and approval of:

(a) a Reverse Vesting Order (RVO) to allow for the sale of the CFI's mining enterprise;

(b) an order extending the stay until October 31, 2023;

(c) an order expanding the Monitor's powers to include new entities to be created for the purposes of implementing the CFI Group's proposed restructuring;

(d) an order releasing certain persons as I describe later in this decision (Releases); and

(e) an order sealing the Monitor's third confidential report that included an un-redacted copy of the share purchase agreement.

[12] The Monitor served the CFI Group and all known creditors and shareholders with its application materials. Monitor's counsel provided notice to stakeholders previously registered for prior court applications. It also published its report accompanying this application on GTL's website

[13] There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the Monitor's Motion or took no position.

[14] At the end of the hearing, I granted the sixth amendment of the ARIO, the RVO, the order enhancing the Monitors power, the Releases, and the order sealing the Monitor's third confidential report. This is an edited version of my oral reasons.

FACTS

[15] I explained the background of this *CCAA* proceeding, and the circumstances that gave rise to it, in my various oral decisions. I will not repeat all of that background today but will provide a summary.

[16] The Company operated or supported operations of a fluorspar mine (Mine) and related facilities, including a mill facility and marine terminal, all near St. Lawrence, NL. In early February 2022, it employed about 280 people, most of whom are in Newfoundland and Labrador. Golden Gate Capital wholly owned Canada Fluorspar Inc., which wholly owns Canada Fluorspar (NL) Inc., which owns 99.999% of Newspar.

[17] The economics of the facility require the Company to operate at near full capacity to produce enough fluorspar to recover the costs associated with production.

[18] Mr. Phil Clarke of GTL, the Monitor I appointed under the Initial Order, and the court-appointed interim receiver of the Company, says that a combination of shareholders' equity, secured creditors, capital lessors, and unsecured creditors financed the Company's operations.

[19] Golden Gate Capital has invested approximately US $238 million in equity financing since it acquired the Company in 2014, including covering operating losses. It refused to continue to provide additional financing in February 2022. This refusal triggered the liquidity crisis, which in turn resulted in the Interim Receivership Order.

[20] As of March 4, 2022, the Company had about $95 million in secured debt, $10 million in capital leases, and $23 million in unsecured debt. The secured creditors include Bridging Finance Inc. (Bridging), the Government of Newfoundland and Labrador (GNL), and HSBC Bank Canada (HSBC).

[21] When the Company asked for the court-appointed receiver, they had approximately $1.8 million in cash and owed $800,000 to employees. On February 21, 2022, because of these financial difficulties, the Court appointed GTL as interim receiver of the Company (Interim Receivership Order).

[22] The interim receivership order authorized Interim Receiver Borrowing. The Company's cash flow statements show that during the week of February 21, 2022, Bridging lent the Company about $1,809,000 as part of the Interim Receiver Borrowing.

[23] In March 2022 the Companies applied for creditor protection under the *CCAA*. I granted an initial order, and later granted ARIO Amendments 1 through 5 as I described earlier. In the ARIOs I approved an administration charge of $250,000, and debtor-in-place financing up to $4.7 million (DIP). I also ordered certain enhancement of the Monitor's powers and approved the SISP.

[24] The Monitor has completed the SISP. The Monitor entered into negotiations with the initial prospective purchaser under the SISP, but these negotiations failed. The Monitor seeks approval of a sale to new purchaser. He seeks to implement the transaction through a proposed RVO.

[25] A RVO generally involves a series of steps whereby:

(a) the purchaser becomes the sole shareholder of the debtor company;

(b) the debtor company retains its assets, including key contracts and permits; and

(c) the excluded liabilities and assets not assumed by the purchaser are transferred into a newly incorporated entity or entities (referred to in RVOs

> as "ResidualCo"). The Monitor then addresses these assets and liabilities through a bankruptcy or similar process. In this case, the Monitor will eventually substitute ResidualCo for the CFI Group as the applicant under this *CCAA* proceeding.

[26] The RVO differs from a traditional assets vesting order (AVO) in which the assets of a debtor company are vested in the purchaser free and clear of any encumbrances or claims, other than those assumed by the purchaser, as contemplated by s. 36(4) of the *CCAA*. The purchase price stands in place of the assets and is available to satisfy creditor claims in accordance with their pre-existing priority.

[27] Here, the purchaser will pay the purchase price in exchange for the existing common shares in CFI. The RVO provides that CFI will transfer the purchase price and excluded assets, excluded contracts, and excluded liabilities to 92834 Newfoundland and Labrador Inc., the ResidualCo in this RVO.

[28] CFI will retain its equity interest in Canada Fluorspar (NL) Inc. and CFI Newspar Holdings Inc., and its partnership interests in Newspar general partnership.

[29] The RVO cancels other equity and partnership interests in the remaining CFI Group for no consideration. Thus, immediately thereafter, the purchaser will then own 100% of the issued capital of the CFI Group free and clear of any encumbrances.

[30] CFI will then own all of the CFI Group’s assets and liabilities except those excluded. CFI retains its environmental obligations. CFI also retains the benefit of an $8,084,965 historical environmental indemnity given to it by the GNL.

[31] The share purchase agreement contemplates that the CFI Group and the purchaser will take certain implementation steps to allow the sale to proceed in a tax-efficient manner. The Monitor after discussions with its counsel, the Company,

and the purchaser understands the reasons for the steps. It believes the implementation steps are reasonable in the circumstances.

[32] The excluded liabilities and excluded assets vest in ResidualCo. These amounts exceed $140 million and ResidualCo will be insolvent.

[33] The Monitor applied to keep the purchase price confidential until the transaction closes. However, the transaction provides that ResidualCo will retain the purchase price to satisfy the DIP loan and to support a claims resolution process for these claims;

(a) CRA liability of about $76,000;

(b) Service Canada for WEPP liability of about $60,000;

(c) A claim of the Town of Port Blandford;

(d) A maritime lien claim by Inaminka Marine Service Ltd on a barge owned by CFI; and

(e) A claim on the barge by Richard Spellacy, a master Mariner.

[34] The Monitor will also acquire and then extinguish a royalty owned by Newfoundland Fluorspar Exploration Limited for $400,000.

[35] ResidualCo will pay the balance of the proceeds to Bridging, the first-ranking secured creditor. The Monitor reports that Bridging and the purchaser have agreed that Bridging may participate in CFI's future cash flows.

[36] Thus, the purchase price is insufficient to pay out secured creditors who will suffer a substantial loss. The unsecured creditors will receive nothing.

ISSUES

[37] The issues are, should I approve:

(a) the RVO?

(b) an order extending the stay until October 31, 2023?

(c) an order expanding the Monitor's powers over new entities created for the purposes of implementing CFI Group's proposed restructuring?

(d) an order providing the Releases? and

(e) an order sealing the Monitors third confidential report and the un-redacted copy of the share purchase agreement?

ANALYSIS

Should I approve the RVO?

[38] I hereby approve the RVO. A successful *CCAA* process typically results the plan of arrangement that creditors approve. However, Section 36(1) of the *CCAA* says, "a debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court."

[39] Section 36 provides that shareholder approval is not necessary. Furthermore, it does not require creditor approval. Section 11 of the *CCAA* also gives me general

authority. It provides, "the court, on the application of any person interested in the matter, may … make any order that it considers appropriate in the circumstances."

[40] Thus, creditors need not approve a sale of assets outside the ordinary course of business. A RVO is such a transaction.

[41] I will first consider whether I have the statutory authority to approve a RVO. Justice Penny in *Harte Gold Corp. (Re)*, 2022 ONSC 653, conducted an extensive review of the history of RVOs in *CCAA* applications.

[42] The Justice says that the first RVO appeared to have been approved by the Ontario court in *Plasco Energy (Re)* (2015), 2015WL13889310, CV-15-10869-00C (Ont. S.C.J. [C.L.]) in the handwritten endorsement of Justice Wilton-Siegel (*Harte* at para. 24).

[43] Justice Wilton-Siegel said, "the Court has authority under section 11 of the *CCAA* to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the *CCAA* insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise." (*Harte* at para. 24*)*

[44] Justice Penney observed in that, "A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years." (at para. 25)

[45] Two appeal courts have dealt with RVOs.

[46] The first is *Arrangement Nemaska Lithium Inc. (Re)*, 2020 QCCS 3218, leave to appeal refused, 2020 QCCA 1488, leave to appeal refused, 2021 CarswellQue

4589 (SCC), at paras. 52 and 71. The Applications Justice Gouin approved a RVO in the face of opposition by a creditor.

[47] Justice Gouin (*Harte*, at paragraph 27) found that the approval of a RVO should be considered under s. 36 *CCAA,* subject to determining, for example:

(a) Whether sufficient efforts to get the best price have been made and whether the parties acted providently;

(b) The efficacy and integrity of the process followed;

(c) The interests of the parties; and

(d) Whether any unfairness resulted from the process.

[48] Justice Gouin found the applicant met these criteria. He approved the RVO, concluding that it would serve to maximize creditor recoveries while maintaining the debtor company as a going concern and allowing for an efficient transfer of the necessary permits licences and authorizations to the purchaser (*Harte*, para. 27).

[49] The Quebec Court of Appeal denied leave to appeal. In paragraph 19 it said, "[t]he *CCAA* judge dismissed Cantore's argument regarding the Court's limited authority to grant a vesting order." It found that courts should broadly interpret, "sell or otherwise dispose of assets outside the ordinary course of business under s. 36(1) *CCAA"* to "allow a *CCAA* judge to grant innovative solutions such as RVOs," consistent with the "wide discretionary powers afforded the supervising judge pursuant to section 11 *CCAA*." (see also *Harte* at para. 28)

[50] The second is *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364, refusing leave to appeal, *Quest University Canada (Re)*, 2020 BCSC 1883. The British Columbia Court of Appeal refused leave to appeal, and said at paragraph 32 that the RVO granted by the application judge, Justice Fitzpatrick,

"reflects precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising *CCAA* proceedings."

[51] *In Harte,* Justice Penny said, “the jurisprudence … clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the *CCAA*.” (at para. 37)

[52] Justice Penny, (at para. 38) provides a list of questions I should consider. These are:

(a) Why is the RVO necessary?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO than they would have been under any other viable alternative?

(d) Does the price paid for the debtor’s business reflect the importance and value of the licenses and permits (or other intangible assets) preserved under the RVO?

[53] Justice Fitzpatrick in *Quest University Canada (Re)* found that the *CCAA* provided sufficient authority to grant the RVO that was consistent with the remedial purposes of the *CCAA*. (at para. 170)

[54] In paragraph 155 she said, “I find further support for Quest's position in the recent comments of the Court in *Callidus* (*9354-9186 Québec Inc. v. Callidus Capital Corp*., 2020 SCC 10). The Court was there addressing a different issue — whether a *CCAA* judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is ‘acting for an improper purpose’ — but the Court's comments

on the exercise of jurisdiction under the *CCAA* ring true in relation to the RVO structure."

[55] Justice Fitzpatrick quoted the Supreme Court of Canada in *Callidus* where it said, "The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA.* … Additionally, the court must keep in mind three 'baseline considerations' (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence" (*Quest* at para. 155 and *Callidus* at para. 49).

[56] The Justice continued and said, "[m]any of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable 'assets' that could be not transferred" (at para. 160).

[57] Justice Fitzpatrick in *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc*., 2022 ONSC 6354, said "Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the 'norm' and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances ... That said, reverse vesting orders have been deemed appropriate in a number of cases." (para 33)

[58] Justice Fitzpatrick continued in paragraph 34 and said:

> ... cases approved reverse vesting orders in circumstances where:
>
> - the debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser;

- the debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser; and

- where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

[59] I agree. I will consider the factors in section 36(3) of the *CCAA*, the principles articulated in these cases, the court's guidance in *Royal Bank v. Soundair Corp* (1991), 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) for the approval of the sale of assets in an insolvency, and the additional factors referred to in paragraph 38 of *Harte*.

[60] Thus when I combine these factors, I will consider:

(a) is the RVO necessary?

(b) does the RVO produce an economic result at least as favourable as any other viable alternative?

(c) is any stakeholder worse off under the RVO than they would have been under any other viable alternative?

(d) does the price for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO?

(e) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(f) whether the Monitor approved the process leading to the proposed sale or disposition;

(g) does the Monitor say that the proposed sale would be more beneficial to the creditors than disposition under a bankruptcy?

(h) the extent to which the creditors were consulted;

(i) the effects of the proposed sale on the creditors and other interested parties;

(j) whether the price is reasonable and fair, taking into account their market value;

(k) whether sufficient effort has been made to obtain the best price, and whether the debtor has acted improvidently;

(l) the interests of all parties;

(m) the efficacy and integrity of the SISP; and

(n) whether there has been unfairness in operation of the SISP.

[61] I need not consider all of these factors. Each need not support the issuing of the RVO. I use them to assist me in exercising the broad discretion I have under the *CCAA*.

Is the RVO necessary?

[62] I find that the RVO is necessary. CFI has dozens of permits and licenses that it must retain if it is to operate the Mine. The Monitor says that:

(a) under an AVO most of these may be difficult to transfer. Even if it is possible do so, the transfers will likely result in significant delays and costs;

(b) the permits, licenses and leases are critical to the ability for the purchaser to restart operations. The uncertainty around timing of acceptance would

materially affect the restart operations and therefore the economics of the transaction. (Monitor's Ninth Report at para. 47);

(c) the GNL historical environmental indemnity is critical to the purchaser's offer. GNL, who granted the indemnity and is a stakeholder, a secured creditor, and a DIP Lender, is supportive of the RVO. (Monitor's Ninth Report at para. 48);

(d) the tax attributes of a RVO are critical to the purchaser and support its valuation of CFI. It can only preserve these tax attributes through an RVO. (Monitor's Ninth Report at para. 49); and

(e) the RVO has significant benefits that are reasonable, justified and appropriate in the circumstances. Accordingly, he supports the transaction and the RVO.

Reasonableness of the Process Leading to the Proposed Sale

[63] I find that the process leading to the proposed sale is reasonable in the circumstances. I find that the Monitor approved the process leading to the proposed sale or disposition.

[64] The Monitor sought court approval of the SISP. He sought court amendment of the SISP on a number of occasions. Creditors received notice of these applications. Secured creditors were given the opportunity to provide input to the Court on these processes. The SISP is not innovative or unique. Many courts have approved similar sales processes.

Are stakeholders worse off under the RVO structure than they would have been under any other viable alternative? Comparison with Sale in Bankruptcy - does the RVO structure produce an economic result at least as favourable as any other viable alternative?

[65] I find that the RVO produces an economic result at least as favourable as any other viable alternative. The Monitor says, and I agree that:

(a) the additional cost to implement and approve the transaction would affect the purchaser's proposed timelines to restart operations;

(b) the economic result of the transactions provides a better result than any other form of transaction under bankruptcy (Monitor's Ninth Report at para. 55). It allows the CFI Group to continue as a going concern. The transaction provides for repayment of DIP financing as well as some payment to the senior secured creditor;

(c) even under the RVO, secured creditors will realize a substantial loss. There are no funds available for unsecured creditors. Thus, the RVO does not disadvantage the unsecured, as they would not receive any distribution in an AVO. (Monitor's Ninth Report at para. 51); and

(d) approval of a plan of arrangement based on an AVO is not an option. It would further reduce recovery to the secured creditors who were already suffering losses. It would unnecessarily add additional cost and risk to the sale as it would take time and money that the Monitor does not have.

[66] I also find that:

(a) a bankruptcy would jeopardize the possibility of future operations. It could jeopardize the permits and licences necessary to maintain such operations. It could jeopardize the historical environmental indemnity. These risks could destroy the sale or reduce the purchase price;

(b) a bankruptcy sale would delay, and perhaps jeopardize, the sale. Before an AVO can be approved under a bankruptcy, CFI must be bankrupt, a meeting of creditors must be held, inspectors must be appointed, and they must approve the sale;

(c) DIP lenders would need to advance additional money to finance ongoing operations during this time. There is no evidence they would be willing to do so. This process might fundamentally change the CFI Group's value to the purchaser; and

(d) every non-liquidation bid in the SISP assumed a RVO. There is no other more traditional AVO Proposal.

Consultation with Creditors

[67] I discussed the efforts the Monitor took to inform creditors of this sale earlier in this decision. Despite these efforts, no one opposes this application. The Monitor

did consult with CRA and other secured creditors. I have no evidence if he consulted with unsecured creditors.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

[68] The proposed transaction has the prospect of renewed employment for some of the CFI employees. It has the prospect of providing ongoing business opportunities for suppliers of goods and services to the Mine.

[69] The Monitor says that the RVO will provide an expedient efficient transfer of CFI's intangible assets to the purchaser. This would support a timely restart of operations that will provide an opportunity for employees, stakeholders, and the unsecured creditors to engage with the new business. He says, and I agree, that this will benefit the local community.

[70] Thus, the evidence is that no creditor is in a worse position because of the use of a RVO, than they would have been under an AVO (or, for that matter, under any plausible plan of compromise).

[71] Furthermore, the transaction contemplates transfer to the purchaser of all the shares in CFI and its interests in the other entities in the CFI Group. The RVO cancels the remaining interests in the CFI Group. Thus, the CFI Group's current shareholders will receive no recovery of their investment.

Fairness of Consideration

[72] CFI's business and assets have been extensively marketed both prior to and during the *CCAA* proceedings. At the conclusion of the SISP, this bid is the most acceptable one. As I described earlier, this transaction will provide a superior

recovery for creditors than would a liquidation of the Companies' assets in bankruptcy.

[73] Furthermore, the Monitor said that the purchase price is fair and reasonable taking into account the assets including the mineral leases and licenses. Therefore, I find the price is fair and reasonable.

Other Considerations Re. Appropriateness of RVO vs. AVO

[74] The principal objective and benefit of employing the RVO in this case is the preservation of CFI's many permits and licences necessary to conduct operations at the Mine. It preserves the historical environmental indemnity.

[75] Under an AVO, the purchaser would have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This process would necessarily involve risk, delay and cost. Furthermore, there is no way of knowing whether a new environmental indemnity is available from the GNL.

[76] Thus, the RVO would achieve the timely and efficient preservation of the licenses and permits necessary for the operations of the Mine.

[77] Finally and importantly, the Monitor supports the use of the RVO.

[78] For all these reasons, I find that the proposed RVO is necessary to achieve the clear benefits of the purchase and that it is appropriate to approve this transaction in the circumstances.

[79] The RVO will:

(a) provide for timely, efficient and impartial resolution of the Companies' insolvency;

(b) preserve and maximize the value of the Companies' assets;

(c) ensure a fair and equitable treatment of the claims against the Companies;

(d) will protect the public interest and preserve employment and third party suppliers and service providers; and

(e) balance the costs and benefits of CFI Group's restructuring or liquidation.

Should I approve an Order Extending the Stay until October 31, 2023?

[80] I extend the stay until October 31, 2023.

[81] The current stay period expires on June 16, 2023. Under s. 11.02 of the *CCAA*, I may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the CFI Group satisfies me that it has acted, and is acting, in good faith and with due diligence.

[82] The CFI Group seeks to extend the stay period to October 31, 2023, to allow it to proceed with the closing of the transaction, and resolve the issues associated with the RVO claims I referred to earlier.

[83] I find that creditors will not suffer material prejudice because of the extension of the stay. CFI's cash flow forecast shows sufficient liquidity to allow the Monitor

to deal with the remaining tasks contemplated by the RVO. The Monitor has confirmed, and I find, that the CFI Group continues to act in good faith and due diligence.

Should I approve an Order Expanding the Monitor's Powers Over New Entities created for the Purposes of Implementing the CFI Group's Proposed Restructuring?

[84] The *CCAA* provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the *CCAA* provides that the Monitor can, "carry out any other functions in relation to the [debtor] company that the court may direct." Section 11 authorizes me to make any order that is necessary and appropriate in the circumstances.

[85] I will grant the Monitor's enhanced powers provided in the draft Order. I do so because:

(a) the Monitor's expanded powers will allow it to administer the affairs of ResidualCo, to wind down these *CCAA* proceedings, and deal with ResidualCo through bankruptcy or otherwise following the close of the transaction; and

(b) The Monitor needs such powers to achieve the benefits of the transaction to stakeholders. No creditor suffers prejudice because of the Monitor's enhanced powers.

Should I approve an Order Providing the Releases?

[86] The Monitor asked that I grant a court order releasing (a) the present and former directors, officers, employees, legal counsel and advisors of Canada

Fluorspar Inc., or ResidualCo;(b) the Monitor and its legal counsel and advisors, and their respective present and former directors, officers, partners, employees and advisors; (c) the Purchaser, it's directors, officers, employees, legal counsel and advisors; (d) the DIP Lenders, its counsel, and their respective present and former directors, officers, partners, employees and advisors (the Persons listed above in (a), (b), (c), and (d) being collectively, the "Released Parties."

[87] The Releases will cover any present and future claims against the released parties based on any fact or matter of occurrence in respect of the purchase transaction. It does not release any claim for fraud or willful misconduct. It does not release any claim that I may not release pursuant to section 5.1(2) of the *CCAA*. It does not release any environmental liability to GNL.

[88] I grant these Releases with respect to CFI, but not to the remaining CFI Group. I find that the Releases are reasonable and appropriate in the circumstances. I base my decision on an assessment of Section 5.1 of the *CCAA* and the factors taken from *Lydian International Limited (Re),* 2020 ONSC 4006 (at para. 54).

[89] Section 5.1 of the *CCAA* says, "A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations."

[90] Subsection 2 says, "A provision for the compromise of claims against directors may not include claims that relate to contractual rights of one or more creditors; or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

[91] Finally, subsection 3 says, "[t]he court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances."

[92] Chief Justice Morawetz said in *Lydian* (at para. 54), I should consider the following factors:

(a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

(b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

(c) Whether the plan could succeed without the Releases;

(d) Whether the parties being released were contributing to the plan; and

(e) Whether the Releases will benefit the debtors as well as the creditors generally.

[93] Again, I need not consider all of these factors. Each need not support the issuing of the Releases. I use the factors to assist me in exercising the broad discretion I have under the *CCAA*.

[94] I find the that:

(a) the Releases are fair and reasonable in the circumstances;

(b) the released claims rationally connect to the restructuring;

(c) the released parties are necessary and essential to the restructuring of the CFI Group; and

(d) the released parties contributed to the restructuring.

[95] The released parties' efforts directly lead to the RVO and the sale of the enterprise. The share purchase agreement provides that the purchaser must be satisfied with the form of the RVO. Counsel tells me that the various internal versions of the RVO always contained the release in favour of the purchaser.

[96] Because of this sale and the efforts of the parties, there is cash available to satisfy some creditor claims. If I do not grant the Releases there is a risk that the purchaser might not proceed. If the purchaser does proceed, it might reduce the purchase price.

[97] The Mine will likely reopen. It will provide employment. It will provide benefits to suppliers, and to St. Lawrence and the larger community. The Releases help achieve the purposes of a *CCAA* proceeding, which includes maximizing creditor recovery and preserving continued employment in a restructured enterprise. Therefore, I find that the Releases connect rationally to the restructuring.

[98] CFI was also a critical player in the processes leading up the *CCAA* filing. Counsel tells me that the directors of CFI resigned shortly after the *CCAA* filing at the request of secured creditors.

[99] Thus, I find that the released parties made significant contributions to the CFI Group's restructuring, both prior to and throughout these *CCAA* proceedings.

[100] The Monitor, the purchaser, CFI, and the DIP Lenders are unaware of any claims against them or their advisors related to these *CCAA* proceedings. Therefore, the Releases should not materially prejudice any stakeholders.

[101] Furthermore, that the Releases are sufficiently narrow. Any environmental liabilities to the GNL are unaffected. The Releases do not affect claims referred to in section 5.1(2) of the *CCAA* or ones arising from fraud or willful misconduct.

[102] The scope of the Releases is sufficiently balanced. It allows the released parties to move forward with the transaction and to conclude these *CCAA* proceedings. The Monitor, CFI, and the purchaser all take the position that the Releases are an essential component to the transactions.

[103] The Monitor and its counsel served creditors with materials relating to this motion in accordance with the process set out in the AIROs.

[104] The Monitor included the form of the Releases was included in the draft RVO. This provided stakeholders with ample notice and time to raise concerns with CFI or the Monitor. No creditor (or any other stakeholder) has objected to the Releases.

[105] Thus, I find that the Releases are fair and reasonable.

Should I approve an order sealing the Monitors Third Confidential Report and the un-redacted copy of the Share Purchase Agreement?

[106] The Monitor also requests that I seal his third confidential report and share purchase agreement until the closing of the purchase as outlined in the share purchase agreement. I hereby grant that order.

[107] The Monitor says that the share purchase agreement contains commercially sensitive information about the value of the Mine, the various bids, and the terms of the proposed sale.

[108] He is concerned that publication of this information would pose serious risk to the commercial interests of the stakeholders. It would then irreparably harm the CFI Group's efforts to maximize the sale price.

[109] The Newfoundland Supreme Court gave guidance on the principles applicable to these requests in *Sports Villas Resort Inc. (Re)*, 2020 NLSC 109 (at para. 7), when it said. "I also granted an order sealing the Receiver's First Report until the transaction contemplated in the application is completed."

[110] It continued, "this Court has authority to seal part or all of the court record. The receiver submits that this is an appropriate case for me to exercise my discretion in accordance with generally accepted insolvency practice to grant a sealing order over the Receiver's First Report… until the completion of the sale contemplated by this application."

[111] The court continued (at para. 9) and said, "[b]ecause the proposed sale of the subject property has not been approved, the receiver is rightly concerned that the sensitive information contained in the receiver's First Report could adversely affect the sale of these assets to other party."

[112] I agree. I also find that the extent of the sealing order required is the minimum that will preserve the confidentiality of the purchase price until the transaction is closed. No less onerous sealing order is suitable in the circumstances.

_____
ALEXANDER MacDONALD
Justice

TAB 7

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler* and *Jeremy Dacks,* for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

Alan Mark, Melaney Wagner, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

[25] On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

   a) Should the stay be extended to the Partnerships?

   b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

   c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

   d) Should the Court approve protections for employees?

   e) Is it appropriate to allow payment of certain pre-filing amounts?

   f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

   g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

   h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco.*

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, [2010] SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 ("*Canwest Global*").

[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R (4^{th}) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

TAB 8

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	THURSDAY, THE 18TH
	)	
JUSTICE MCEWEN	)	DAY OF AUGUST, 2022

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant**", and collectively, the "**Applicants**")

SISP APPROVAL ORDER

THIS MOTION, made by the Applicants (together, the Applicants and the partnerships listed on **Schedule "A"** hereto, the "**Just Energy Entities**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, for an order, *inter alia*, approving the Sale and Investment Solicitation Process in respect of the Just Energy Entities attached hereto as **Schedule "B"** (the "**SISP**") and certain related relief, was heard on August 17, 2022 by judicial videoconference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

ON READING the affidavit of Michael Carter sworn August 4, 2022 and the Exhibits thereto (the "**Carter Affidavit**"), the Eleventh Report of FTI Consulting Canada Inc. (the "**Eleventh Report**"), in its capacity as monitor (the "**Monitor**"), dated August 13, 2022, and on hearing the submissions of counsel for the Just Energy Entities, the Monitor, the Sponsor (as hereinafter defined), and such other counsel who were present, no one else appearing although duly served as appears from the affidavits of service of Emily Paplawski sworn August 5, August 8, August 11 and August 16, 2022.

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion was properly returned on August 17, 2022 and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SISP, the Second Amended and Restated Initial Order of this Court dated May 26, 2021 (the "**Second ARIO**"), the Claims Procedure Order of this Court dated September 15, 2021 (the "**Claims Procedure Order**"), or the Support Agreement attached as Exhibit "I" to the Carter Affidavit (the "**Support Agreement**"), as applicable.

SALES AND INVESTMENT SOLICITATION PROCESS

3. **THIS COURT ORDERS** that the SISP is hereby approved and the Just Energy Entities are hereby authorized to implement the SISP pursuant to the terms thereof. The Just Energy Entities, the Monitor and the Financial Advisor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations thereunder and as directed by the Court in this Order and the related endorsement dated August 18, 2022.

4. **THIS COURT ORDERS** that the Monitor and the Financial Advisor, and their respective affiliates, partners, directors, employees, and agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the gross negligence or wilful misconduct of the Monitor or Financial Advisor, as applicable, in performing their obligations under the SISP, as determined by this Court.

SUPPORT AGREEMENT

5. **THIS COURT ORDERS** that the Support Agreement is hereby approved and the Just Energy Entities are authorized and empowered to enter into the Support Agreement, *nunc pro tunc*, subject to such minor amendments as may be consented to by the Monitor and as may be acceptable to each of the parties thereto, and are authorized, empowered and directed to take all steps and actions in respect of, and to comply with all of their obligations pursuant to, the Support Agreement.

6. **THIS COURT ORDERS** that, notwithstanding the stay of proceedings imposed by the Second ARIO, a counterparty to the Support Agreement may exercise any termination right that may become available to such counterparty pursuant to the Support Agreement, provided that such termination right must be exercised pursuant to and in accordance with the Support Agreement.

STALKING HORSE TRANSACTION AGREEMENT

7. **THIS COURT ORDERS** that Just Energy Group Inc. ("**Just Energy**") is hereby authorized and empowered to enter into the stalking horse transaction agreement (the "**Stalking Horse Transaction Agreement**") dated as of August 4, 2022, between Just Energy and LVS III

SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP, and CBHT Energy I LLC (collectively, the "**Sponsor**") and attached as Exhibit "A" to the Carter Affidavit, *nunc pro tunc,* and such minor amendments as may be acceptable to each of the parties thereto, with the approval of the Monitor and subject to the terms of the Support Agreement; provided that, nothing herein approves the sale and the vesting of any Property to the Sponsor (or any of its designees) pursuant to the Stalking Horse Transaction Agreement and that the approval of any sale and vesting of any such Property shall be considered by this Court on a subsequent motion made to this Court if the Stalking Horse Transaction is the Successful Bid pursuant to the SISP.

8. **THIS COURT ORDERS** that, as soon as reasonably practicable following Just Energy (a) entering into any amendment to the Stalking Horse Transaction Agreement permitted pursuant to the terms of this Order; or (b) agreeing upon the final Implementation Steps (as defined in the Stalking Horse Transaction Agreement), the Just Energy Entities shall, in each such case, (i) file a copy thereof with this Court, (ii) serve a copy thereof on the Service List, and (iii) provide a copy thereof to each SISP Participant (as hereinafter defined), excluding from the public record any confidential information that Just Energy and the Sponsor, with the consent of the Monitor, agree should be redacted.

BID PROTECTIONS

9. **THIS COURT ORDERS** that the Break-Up Fee is hereby approved and Just Energy is hereby authorized and directed to pay the Break-Up Fee to the Sponsor (or as it may direct) in the manner and circumstances described in the Stalking Horse Transaction Agreement.

10. **THIS COURT ORDERS** that the Sponsor shall be entitled to the benefit of and is hereby granted a charge (the "**Bid Protections Charge**") on the Property, which charge shall not exceed

US$14,660,000, as security for payment of the Break-Up Fee in the manner and circumstances described in the Stalking Horse Transaction Agreement.

11. **THIS COURT ORDERS** that Paragraphs 53, 54 and 56 of the Second ARIO shall be, and are hereby, amended in the manner detailed below:

(a) Paragraph 53 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that the priorities of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge, the Cash Management Charge and the Bid Protections Charge (as defined in the Order in these proceedings dated August 18, 2022), as among them, shall be as follows:
>
> > First – Administration Charge and FA Charge (to the maximum amount of C$3,000,000 and C$8,600,000, respectively), on a *pari passu* basis;
> >
> > Second – Directors' Charge (to the maximum amount of C$44,100,000);
> >
> > Third – KERP Charge (to the maximum amounts of C$2,012,100 and US$3,876,024);
> >
> > Fourth – DIP Lenders' Charge (to the maximum amount of the Obligations (as defined in the DIP Term Sheet) owing thereunder at the relevant time) and the Priority Commodity/ISO Charge, on a *pari passu* basis; ~~and~~
> >
> > Fifth – Cash Management Charge; and~~.~~
> >
> > Sixth – Bid Protections Charge (in the amount of US$14,660,000).

(b) Paragraph 54 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge the Cash Management Charge, or the Bid Protections Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

(c) Paragraph 56 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court on notice to parties in interest, the Just Energy Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Just Energy Entities also obtain the prior written consent of the Monitor, the DIP Agent on behalf of the DIP Lenders and the beneficiaries of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the Priority Commodity/ISO Charge, the Cash Management Charge and the Bid Protections Charge or further Order of this Court.

PIPEDA

12. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Monitor, the Just Energy Entities and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants (each, a "**SISP Participant**") and their advisors personal information of identifiable individuals but only to the extent desirable or required to negotiate or attempt to complete a transaction pursuant to the SISP (a "**Transaction**"). Each SISP Participant to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation for the purpose of effecting a Transaction, and if it does not complete a Transaction, shall return all such information to the Monitor or the Just Energy Entities, or in the alternative destroy all such information and provide confirmation of its destruction if requested by the Monitor or the Just Energy Entities. Any Successful Party shall maintain and protect the privacy of such information and, upon closing of the Transaction(s) contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Just Energy Entities, and shall return all other personal information to the Monitor or the Just Energy Entities, or ensure

that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor or the Just Energy Entities.

THIRD KEY EMPLOYEE RETENTION PLAN

13. **THIS COURT ORDERS** that the Third KERP, as described in the Carter Affidavit and attached as Confidential Exhibit "L" thereto, is hereby approved and the Just Energy Entities are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the Third KERP.

14. **THIS COURT ORDERS** that the Just Energy Entities, in consultation with the Monitor, are authorized and empowered to reallocate funds under the Third KERP originally allocated to Key Employees who have resigned, or will resign, from their employment with the Just Energy Entities, or who have declined, or will decline, to receive payments(s) under the Third KERP, to remaining Key Employees or other employees of the Just Energy Entities that the Just Energy Entities, in consultation with the Monitor, identify as critical to their ongoing business.

15. **THIS COURT ORDERS** that the KERP Charge established at paragraph 24 of the Second ARIO shall apply equally to, and secure, any remaining payments under the KERP and the Second KERP (as defined in the Order of this Court dated November 10, 2021) to the Key Employees and the payments contemplated to the Key Employees referred to in the Third KERP.

STAY EXTENSION

16. **THIS COURT ORDERS** that the Stay Period is hereby extended until and including October 31, 2022.

APPROVAL OF MONITOR'S REPORTS

17. **THIS COURT ORDERS** that the activities and conduct of the Monitor prior to the date hereof in relation to the Just Energy Entities and these CCAA proceedings are hereby ratified and approved.

18. **THIS COURT ORDERS** that each of the Tenth Report of the Monitor dated May 18, 2022, the Supplement to the Tenth Report of the Monitor dated June 1, 2022, and the Eleventh Report be and are hereby approved.

19. **THIS COURT ORDERS** that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way the approvals set forth in paragraphs 17 and 18 of this Order.

CLAIMS PROCEDURE

20. **THIS COURT ORDERS** that the ongoing claims review, claims determination and dispute resolution processes under (a) the Claims Procedure Order; (b) the Order of this Court dated March 3, 2022, among other things, appointing the Honourable Justice Dennis O'Connor as Claims Officer for the purposes set forth therein; and (c) the Endorsement of this Court dated June 10, 2022, shall be suspended pending further Order of this Court; provided that, for certainty, (x) where (i) a Claimant has not submitted a Proof of Claim or D&O Proof of Claim by the applicable Bar Date, (ii) a Negative Notice Claimant has not submitted a Notice of Dispute of Claim by the applicable Bar Date, or (iii) a Claim or D&O Claim has already been disallowed or revised in accordance with the Claims Procedure Order and the applicable period of time to dispute such revision or disallowance has expired without the Claimant submitting a Notice of Dispute of Revision or Disallowance, such Claimant will continue to be barred from pursuing such Claim or

D&O Claim pursuant to the relevant provisions of the Claims Procedure Order and (y) this Order does not impact the acceptance of any Claims or other final determination or agreement in respect of Claims made pursuant to the Claims Procedure Order prior to the date of this Order; provided further that, notwithstanding anything to the contrary herein, the Just Energy Entities shall be permitted, with the consent of the Monitor, to refer any Claim to a Claims Officer or this Court for adjudication for the purposes of determining entitlement to proceeds to be distributed in accordance with a transaction completed pursuant to the SISP.

GENERAL

21. **THIS COURT ORDERS** that Confidential Exhibits "J" and "L" to the Carter Affidavit shall be and is hereby sealed, kept confidential and shall not form part of the public record pending further Order of this Court.

22. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal and regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, including the United States Bankruptcy Court for the Southern District of Texas overseeing the Just Energy Entities' proceedings under Chapter 15 of the Bankruptcy Code in Case No. 21-30823 (MI), or in any other foreign jurisdiction, to give effect to this Order and to assist the Just Energy Entities, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Just Energy Entities and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order

or to assist the Just Energy Entities and the Monitor and their respective agents in carrying out the terms of this Order.

SCHEDULE "A"
PARTNERSHIPS

- JUST ENERGY ONTARIO L.P.
- JUST ENERGY MANITOBA L.P.
- JUST ENERGY (B.C.) LIMITED PARTNERSHIP
- JUST ENERGY QUÉBEC L.P.
- JUST ENERGY TRADING L.P.
- JUST ENERGY ALBERTA L.P.
- JUST GREEN L.P.
- JUST ENERGY PRAIRIES L.P.
- JEBPO SERVICES LLP
- JUST ENERGY TEXAS LP

SCHEDULE "B"
SALE AND INVESTMENT SOLICITATION PROCESS

1. On August 18, 2022, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted an order (the "**SISP Order**") that, among other things, (a) authorized Just Energy (as defined below) to implement a sale and investment solicitation process ("**SISP**") in accordance with the terms hereof, (b) approved the Support Agreement, (c) authorized and directed Just Energy Group Inc. to enter into the Stalking Horse Transaction Agreement, (d) approved the Break-Up Fee, and (e) granted the Bid Protections Charge. Capitalized terms that are not defined herein have the meanings ascribed thereto in the Second Amended & Restated Initial Order granted by the Court in Just Energy's proceedings under the *Companies' Creditors Arrangement Act* on May 26, 2021, as amended, restated or supplemented from time to time or the SISP Order, as applicable.

2. This SISP sets out the manner in which (i) binding bids for executable transaction alternatives that are superior to the sale transaction to be provided for in the Stalking Horse Transaction Agreement involving the shares and/or the business and assets of Just Energy Group Inc. and its direct and indirect subsidiaries (collectively, "**Just Energy**") will be solicited from interested parties, (ii) any such bids received will be addressed, (iii) any Successful Bid (as defined below) will be selected, and (iv) Court (as defined below) approval of any Successful Bid will be sought. Such transaction alternatives may include, among other things, a sale of some or all of Just Energy's shares, assets and/or business and/or an investment in Just Energy, each of which shall be subject to all terms set forth in this SISP.

3. The SISP shall be conducted by Just Energy under the oversight of FTI Consulting Canada Inc., in its capacity as court-appointed monitor (the "**Monitor**"), with the assistance of BMO Capital Markets (the "**Financial Advisor**").

4. Parties who wish to have their bids considered shall be expected to participate in the SISP as conducted by Just Energy and the Financial Advisor.

5. The SISP will be conducted such that Just Energy and the Financial Advisor will (under the oversight of the Monitor):

    a) prepare marketing materials and a process letter;
    b) prepare and provide applicable parties with access to a data room containing diligence information;
    c) solicit interest from parties to enter into non-disclosure agreements (parties shall only obtain access to the data room and be permitted to participate in the SISP if they execute a non-disclosure agreement that is in form and substance satisfactory to Just Energy); and
    d) request that such parties (other than the Sponsor or its designee) submit (i) a notice of intent to bid that identifies the potential purchaser and a general description of the assets and/or business(es) of the Just Energy Entities that would be the subject of the bid and that reflects a reasonably likely prospect of culminating in a Qualified Bid (as defined below), as determined by the Just Energy Entities in consultation with the Monitor and the Credit Facility Agent (subject to the confidentiality requirements set forth in Section 15 below) (a "**NOI**") by the NOI Deadline (as defined below) and, if applicable, (ii) a binding offer meeting at least the requirements set forth in Section 7 below, as determined by the Just Energy Entities in consultation with the Monitor (a "**Qualified Bid**") by the Qualified Bid Deadline (as defined below).

6. The SISP shall be conducted subject to the terms hereof and the following key milestones:

   a) Just Energy to commence solicitation process on the date of service of the motion for approval of the SISP – August 4, 2022;[1]
   b) Court approval of SISP and authorizing Just Energy to enter into the Stalking Horse Transaction Agreement – August 18, 2022;
   c) Deadline to submit NOI – 11:59 p.m. Eastern Daylight Time on September 8, 2022 (the "**NOI Deadline**");
   d) Deadline to submit a Qualified Bid – 11:59 p.m. Eastern Daylight Time on October 13, 2022 (the "**Qualified Bid Deadline**");
   e) Deadline to determine whether a bid is a Qualified Bid and, if applicable, to notify those parties who submitted a Qualified Bid of the Auction (as defined below) – 5:00 p.m. Eastern Daylight Time on October 20, 2022;
   f) Just Energy to hold Auction (if applicable) – 10:00 a.m. Eastern Daylight Time on October 22, 2022; and
   g) Implementation Order (as defined below) hearing:
      - (if no NOI is submitted) – by no later than September 16, 2022, subject to Court availability.
      - (if there is no Auction) – by no later than October 29, 2022, subject to Court availability.
      - (if there is an Auction) – by no later than twelve (12) days after completion of the Auction, subject to Court availability.

7. In order to constitute a Qualified Bid, a bid must comply with the following:

   a. it provides for (i) the payment in full in cash on closing of the BP Commodity/ISO Services Claim (as defined in the Support Agreement), unless otherwise agreed to by the holder of such claim in its sole discretion; (ii) the payment in full in cash on closing of the Credit Facility Claims, unless otherwise agreed to by the Credit Facility Agent in its sole discretion; (iii) the payment in full in cash on closing of any claims ranking in priority to the claims set forth in subparagraphs (i) or (ii) including any claims secured by Court-ordered charges, unless otherwise agreed to by the applicable holders thereof in their sole discretion (iv) the return of all outstanding letters of credit and release of all Credit Facility LC Claims or arrangements satisfactory to the applicable Credit Facility Lenders in their discretion to secure with cash collateral or otherwise any Credit Facility LC Claims not released, and (v) the payment in full in cash on closing of any outstanding Cash Management Obligations or arrangements satisfactory to the applicable Credit Facility Lenders or their affiliates to secure with cash collateral or otherwise any outstanding Cash Management Obligations.
   b. it provides a detailed sources and uses schedule that identifies, with specificity, the amount of cash consideration (the "**Cash Consideration Value**") and any assumptions that could reduce the net consideration payable. At a minimum, the Cash Consideration Value plus Just Energy's cash on hand must be sufficient for payment in full of the items contemplated in Sections 7(a)(i) and 7(a)(ii) herein, 3.2 of the Stalking Horse Transaction Agreement and the Break-Up Fee, plus USD$1,000,000, on closing, which Cash Consideration Value is estimated to be USD$460,000,000 as of December 31, 2022.

[1] To the extent any dates would fall on a non-business day, to be the first business day thereafter.

c. it is reasonably capable of being consummated by 90 days after completion of the Auction if selected as the Successful Bid;
d. it contains:
    i. duly executed binding transaction document(s);
    ii. the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, and the name(s) of its controlling equityholder(s);
    iii. a redline to the form of transaction document(s) provided by Just Energy, if applicable;
    iv. evidence of authorization and approval from the bidder's board of directors (or comparable governing body) and, if necessary to complete the transaction, the bidder's equityholder(s);
    v. disclosure of any connections or agreements with Just Energy or any of its affiliates, any known, potential, prospective bidder, or any officer, manager, director, or known equity security holder of Just Energy or any of its affiliates; and
    vi. such other information reasonably requested by Just Energy or the Monitor;
e. it includes a letter stating that the bid is submitted in good faith, is binding and is irrevocable until the selection of the Successful Bid; provided, however, that if such bid is selected as the Successful Bid, it shall remain irrevocable until the closing of the Successful Bid;
f. it provides written evidence of a bidder's ability to fully fund and consummate the transaction and satisfy its obligations under the transaction documents, including binding equity/debt commitment letters and/or guarantees covering the full value of all cash consideration and the additional items (in scope and amount) covered by the guarantees provided by affiliates of the Purchaser in connection with the Transaction Agreement;
g. it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;
h. it is not conditional upon:
    i. approval from the bidder's board of directors (or comparable governing body) or equityholder(s);
    ii. the outcome of any due diligence by the bidder; or
    iii. the bidder obtaining financing;
i. it includes an acknowledgment and representation that the bidder has had an opportunity to conduct any and all required due diligence prior to making its bid;
j. it specifies any regulatory or other third-party approvals the party anticipates would be required to complete the transaction (including the anticipated timing necessary to obtain such approvals) and, in connection therewith, specifies whether the bidder or any of its affiliates is involved in any part of the energy sector, including an electric utility, retail service provider, a company with a tariff on file with the Federal Energy Regulatory Commission, or any intermediate holding company;
k. it includes full details of the bidder's intended treatment of Just Energy's employees under the proposed bid;
l. it is accompanied by a cash deposit (the "**Deposit**") by wire transfer of immediately available funds equal to 10% of the Cash Consideration Value, which Deposit shall be retained by the Monitor in a non-interest bearing trust account in accordance with this SISP;
m. a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and
n. it is received by the Qualified Bid Deadline.

8. The Qualified Bid Deadline may be extended by (i) Just Energy for up to no longer than seven days with the consent of the Monitor, the Credit Facility Agent and the Sponsor, acting reasonably, or (ii) further order of the Court. In such circumstances, the milestones contained in Subsections 6(f) and (g) shall be extended by the same amount of time.

9. Just Energy, in consultation with the Monitor, may waive compliance with any one or more of the requirements specified in Section 7 above and deem a non-compliant bid to be a Qualified Bid, provided that Just Energy shall not waive compliance with the requirements specified in Subsections 7(a), (b), (d), (e), (f), (g), (i) or (l) without the prior written consent of the Sponsor and Credit Facility Agent, each acting reasonably.

10. Notwithstanding the requirements specified in Section 7 above, the transactions contemplated by the Stalking Horse Transaction Agreement (the "**Stalking Horse Transaction**"), is deemed to be a Qualified Bid, provided that, for greater certainty, no Deposit shall be required to be submitted in connection with the Stalking Horse Transaction.

11. If one or more Qualified Bids (other than the Stalking Horse Transaction) has been received by Just Energy on or before the Qualified Bid Deadline, Just Energy shall proceed with an auction process to determine the successful bid(s) (the "**Auction**"), which Auction shall be administered in accordance with Schedule "A" hereto. The successful bid(s) selected within the Auction shall constitute the "**Successful Bid**". Forthwith upon determining to proceed with an Auction, Just Energy shall provide written notice to each party that submitted a Qualified Bid (including the Stalking Horse Transaction), along with copies of all Qualified Bids and a statement by Just Energy specifying which Qualified Bid is the leading bid.

12. If, by the NOI Deadline no NOI has been received, then the SISP shall be deemed to be terminated and the Stalking Horse Transaction shall be the Successful Bid and shall be consummated in accordance with and subject to the terms of the Support Agreement and the Stalking Horse Transaction Agreement. If no Qualified Bid (other than the Stalking Horse Transaction) has been received by Just Energy on or before the Qualified Bid Deadline, then the Stalking Horse Transaction shall be the Successful Bid and shall be consummated in accordance with and subject to the terms of the Support Agreement and the Stalking Horse Transaction Agreement.

13. Following selection of a Successful Bid, Just Energy, with the assistance of its advisors, shall seek to finalize any remaining necessary definitive agreement(s) with respect to the Successful Bid in accordance with the key milestones set out in Section 6. Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, as determined by Just Energy, in consultation with the Monitor, Just Energy shall apply to the Court for an order or orders approving such Successful Bid and/or the mechanics to authorize Just Energy to complete the transactions contemplated thereby, as applicable, and authorizing Just Energy to (i) enter into any and all necessary agreements and related documentation with respect to the Successful Bid, (ii) undertake such other actions as may be necessary to give effect to such Successful Bid, and (iii) implement the transaction(s) contemplated in such Successful Bid (each, an "**Implementation Order**").

14. All Deposits shall be retained by the Monitor in a non-interest bearing trust account. If a Successful Bid is selected and an Implementation Order authorizing the consummation of the transaction contemplated thereunder is granted, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the cash consideration to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit delivered with a Qualified Bid that is not selected as a Successful Bid, will be returned to the applicable bidder as soon as reasonably practicable (but not later than ten

(10) business days) after the date upon which the Successful Bid is approved pursuant to an Implementation Order or such earlier date as may be determined by Just Energy, in consultation with the Monitor.

15. Just Energy shall provide information in respect of the SISP to the DIP Lenders, the holder of the BP Commodity/ISO Services Claim and the Supporting Secured CF Lenders on a confidential basis, including (A) copies (or if not provided to the Just Energy Entities in writing, a detailed description) of any NOI and any bid received, including any Qualified Bid, no later than one (1) calendar day following receipt thereof by the Just Energy Entities or their advisors and (B) such other information as reasonably requested by the DIP Lenders', the holder of the BP Commodity/ISO Services Claim or the Supporting Secured CF Lenders' respective legal counsel or financial advisors or as necessary to keep the DIP Lenders, the holder of the BP Commodity/ISO Services Claim or the Supporting Secured CF Lenders informed no later than one (1) calendar day after any such request or any material change to the proposed terms of any bid received, including any Qualified Bid, as to the terms of any bid, including any Qualified Bid, (including any changes to the proposed terms thereof) and the status and substance of discussions related thereto. Just Energy shall be permitted, in its discretion, to provide general updates and information in respect of the SISP to counsel to any unsecured creditor of Just Energy (a "**General Unsecured Creditor**") on a confidential basis, upon: (i) the irrevocable confirmation in writing from such counsel that the applicable General Unsecured Creditor will not submit any NOI or bid in the SISP, and (ii) counsel to such General Unsecured Creditor executing confidentiality agreements with Just Energy, in form and substance satisfactory to Just Energy and the Monitor.

16. Any amendments to this SISP may only be made by Just Energy with the written consent of the Monitor and after consultation with the Credit Facility Agent, or by further order of the Court, provided that Just Energy shall not amend Subsections 7(a), (b), (d), (e), (f), (g), (i) or (l) or Section 14 without the prior written consent of the Sponsor and the Credit Facility Agent.

SCHEDULE "A": AUCTION PROCEDURES

1. **Auction**. If Just Energy receives at least one Qualified Bid (other than the Stalking Horse Transaction), Just Energy will conduct and administer the Auction in accordance with the terms of the SISP. Instructions to participate in the Auction, which will take place via video conferencing, will be provided to Qualified Parties (as defined below) not less than 24 hours prior to the Auction.

2. **Participation**. Only parties that provided a Qualified Bid by the Qualified Bid Deadline, including the Stalking Horse Transaction (collectively, the "**Qualified Parties**"), shall be eligible to participate in the Auction. No later than 5:00 p.m. Eastern Daylight Time on the day prior to the Auction, each Qualified Party (other than the Sponsor) must inform Just Energy whether it intends to participate in the Auction. Just Energy will promptly thereafter inform in writing each Qualified Party who has expressed its intent to participate in the Auction of the identity of all other Qualified Parties that have indicated their intent to participate in the Auction. If no Qualified Party provides such expression of intent, the Stalking Horse Transaction shall be the Successful Bid.

3. **Auction Procedures**. The Auction shall be governed by the following procedures:

(a) **Attendance.** Only Just Energy, the other counterparties to the Support Agreement, the Qualified Parties, the Monitor and each of their respective advisors will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any subsequent Overbids (as defined below) at the Auction;

(b) **No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (i) it has not engaged in any collusion with respect to the Auction and the bid process; and (ii) its bid is a good-faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bid (as defined below);

(c) **Minimum Overbid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by Just Energy, in consultation with the Monitor (the "**Initial Bid**"), and any bid made at the Auction by a Qualified Party subsequent to Just Energy's announcement of the Initial Bid (each, an "**Overbid**"), must proceed in minimum additional cash increments of USD$1,000,000;

(d) **Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group video-conference, on an open basis, and all Qualified Parties will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Party will be fully disclosed to all other Qualified Parties and that all material terms of each subsequent bid will be fully disclosed to all other Qualified Parties throughout the entire Auction; provided, however, that Just Energy, in its discretion, may establish separate video conference rooms to permit interim discussions between Just Energy and individual Qualified Parties with the understanding that all formal bids will be delivered in one group video conference, on an open basis;

(e) **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit one or more additional bids with full knowledge and written confirmation of the then-existing highest bid(s); and

(f) **No Post-Auction Bids**. No bids will be considered for any purpose after the Auction has concluded.

Selection of Successful Bid

4. **Selection**. Before the conclusion of the Auction, Just Energy, in consultation with the Monitor, will: (a) review each Qualified Bid, considering the factors set out in Section 7 of the SISP and, among other things, (i) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same, (ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in prong (i) above; (iii) the likelihood of the Qualified Party's ability to close a transaction by 90 days after completion of the Auction and the timing thereof (including factors such as the transaction structure and execution risk, including conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required governmental or other approvals), (iv) the likelihood of the Court's approval of the Successful Bid, (v) the net benefit to Just Energy and (vi) any other factors Just Energy may, consistent with its fiduciary duties, reasonably deem relevant; and (b) identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**").

5. **Acknowledgement**. The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within one business day of the Successful Bid being selected as such, unless extended by Just Energy in its sole discretion, subject to the milestones set forth in Section 6 of the SISP.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

Court File No: CV-21-00658423-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., et al.

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

SISP APPROVAL ORDER

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Marc Wasserman (LSO# 44066M)
Michael De Lellis (LSO# 48038U)
Jeremy Dacks (LSO# 41851R)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers for the Just Energy Entities

TAB 9

Court File No. CV-23-00707394-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MADAM	)	MONDAY, THE 30TH
JUSTICE KIMMEL	)	DAY OF OCTOBER, 2023

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.

(Applicant)

AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by Tacora Resources Inc. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order amending and restating the initial order issued by the Court on October 10, 2023 (the "**Filing Date**"), substantially in the form included at the Applicant's Application Record was heard on October 24, 2023 at 330 University Avenue, Toronto, Ontario with reasons released this day.

ON READING the Application Record of the Applicant dated October 9, 2023 (the "**Application Record**"), the Affidavit of Joe Broking sworn October 9, 2023, the Affidavit of Chetan Bhandari sworn October 9, 2023, the Supplementary Application Record of the Applicant dated October 15, 2023 (the "**Supplementary Application Record**"), the Affidavit of Joe Broking sworn October 15, 2023 (the "**Second Broking Affidavit**"), the Affidavit of Chetan Bhandari sworn October 15, 2023, the Affidavit of Philip Yang sworn October 15, 2023, the consent of FTI Consulting Canada Inc. ("**FTI**") to act as Court-appointed monitor of the Applicant (in such capacity, the "**Monitor**"), the Pre-Filing Report of the Proposed Monitor dated October 10, 2023, the First Report of the Monitor dated October 20, 2023, the Motion Record of the Ad Hoc Group of Noteholders (the "**Ad Hoc Group**") dated October 16, 2023, the Affidavit of Thomas Gray sworn October 16, 2023, the Brief of Transcripts and Exhibits, including the transcripts from the Examinations of Leon Davies held October 18, 2023, Chetan Bhandari held October 18, 2023, Paul Carrelo held October 19, 2023 and Joe Broking held October 19, 2023, and on being advised

that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicant, counsel for the Monitor, counsel for Cargill, Incorporated and Cargill International Trading Pte Ltd., and counsel for the Ad Hoc Group, and such other counsel and parties as listed on the Counsel Slip, with no one else appearing although duly served as appears from the affidavits of service of Natasha Rambaran and the affidavit of service of Philip Yang, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application, the Application Record, and the Supplementary Application Record, is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Applicant shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Applicant is authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that, subject to the terms of the DIP Agreement (as defined below), the Applicant shall be entitled to continue to utilize the cash management system currently

in place as described in the Broking Affidavit or replace it with another substantially similar cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicant of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicant, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that, subject to the terms of the DIP Agreement, the Applicant shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses, and director fees of outside directors payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein and subject to the terms of the DIP Agreement, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers' insurance), and maintenance and security services;

(b) payment for goods or services actually supplied to the Applicant following the date of this Order; and

(c) payments on behalf of Tacora Resources LLC to pay salaries and wages for U.S. based employees and rent for the Applicant's head office located in Grand Rapids, Minnesota.

8. **THIS COURT ORDERS** that the Applicant shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of employment insurance, Canada Pension Plan, and income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicant is hereby directed, until further Order of this Court: to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date; to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. **THIS COURT ORDERS** that the Applicant shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the DIP Agreement and the Definitive Documents (as hereinafter defined), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding US$1,000,000 in any one transaction or US$5,000,000 in the aggregate;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further Order of this Court upon application by the Applicant on at least two (2) days notice to such landlord and any such secured creditors. If the Applicant disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of

the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including February 9, 2024, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (a) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (c) prevent the filing of any registration to preserve or perfect a security interest, or (d) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

NO PRE-FILING VS POST-FILING SET-OFF

17. **THIS COURT ORDERS** that, no Person shall be entitled to set off any amounts that: (a) are or may become due to the Applicant in respect of obligations arising prior to the date hereof with any amounts that are or may become due from the Applicant in respect of obligations arising on or after the date of this Order; or (b) are or may become due from the Applicant in respect of obligations arising prior to the date hereof with any amounts that are or may become due to the Applicant in respect of obligations arising on or after the date of this Order, in each case without the consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall prejudice any arguments any person may want to make in seeking leave of the Court or following the granting of such leave.

CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicant or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed

property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

20. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

21. **THIS COURT ORDERS** that the Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings, including with respect to employee vacation pay which may have accrued prior to the commencement of these proceedings, but which obligation may become due and payable after the commencement of these proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

22. **THIS COURT ORDERS** that the directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of US$5,200,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 46 and 49 herein.

23. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order.

ENGAGEMENT OF GREENHILL

24. **THIS COURT ORDERS** that the engagement of Greenhill & Co. Canada Ltd. ("**Greenhill**") by the Applicant as investment banker pursuant to the engagement letter dated as of January 23, 2023 (the "**Greenhill Engagement Letter**") and payment by the Applicant of the Monthly Advisory Fee (as defined in the Greenhill Engagement Letter) and the Transaction Fee (as defined in the Broking Affidavit) are hereby approved, subject to the priority provided for herein.

25. **THIS COURT ORDERS** that Greenhill shall be entitled to the benefit of and are hereby granted a charge (the "**Transaction Fee Charge**") on the Property as security for the Transaction Fee, which charge shall not exceed an aggregate amount of US$5,600,000. The Transaction Fee Charge shall have the priority set out in paragraphs 46 and 49 herein.

26. **THIS COURT ORDERS** that Greenhill shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of the Greenhill Engagement Letter, save and except for any gross negligence or wilful misconduct on its part.

APPOINTMENT OF MONITOR

27. **THIS COURT ORDERS** that FTI. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

28. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicant's receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicant, to the extent required by the Applicant, in its dissemination, to the DIP Lender and their counsel, pursuant to and in accordance with the DIP

Agreement (as defined herein), or as may otherwise be agreed between the Applicant and the DIP Lender;

(d) advise the Applicant in its preparation of the Applicant's cash flow statements and reporting required by the DIP Lender under the DIP Agreement, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their counsel in accordance with the DIP Agreement;

(e) advise the Applicant in its development of the Plan and any amendments to the Plan;

(f) assist the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicant, to the extent that is necessary to adequately assess the Applicant's business and financial affairs or to perform its duties arising under this Order;

(h) hold and administer funds in connection with arrangements made among the Applicant, any counterparties and the Monitor or by Order of this Court;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

29. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

30. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation,

enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, the *Ontario Occupational Health and Safety Act*, the *Newfoundland Environmental Protection Act*, the *Newfoundland Water Resources Act*, the *Newfoundland Occupational Health and Safety Act*, and the regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

31. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicant and the DIP Lender with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

32. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

ADMINISTRATION CHARGE

33. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicant shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on or subsequent to the date of this Order, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a bi-weekly basis and, in addition, the Applicant is hereby authorized to pay to the Monitor, counsel to the Monitor and counsel to the Applicant reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

34. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

35. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, the Applicant's counsel and Greenhill for its Monthly Advisory Fee (as defined by the Greenhill Engagement Letter) shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of US$1,000,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 46 and 49 hereof.

DIP FINANCING

36. **THIS COURT ORDERS** that the Applicant is hereby authorized and empowered to obtain and borrow a super-priority, debtor-in-possession, non-revolving credit facility (the "**DIP Facility**") under a DIP Loan Agreement dated October 9, 2023 (the "**DIP Agreement**") from Cargill Inc. (collectively, in such capacity, the **"DIP Lender"**) in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under the DIP Agreement shall not exceed the principal amount of US$75,000,000 and Post-Filing Credit Extensions (as defined in the DIP Agreement) shall not exceed the principal amount of US$20,000,000, unless permitted by further Order of this Court.

37. **THIS COURT ORDERS** that the DIP Facility shall be on the terms and subject to the conditions set forth in the DIP Agreement attached as Exhibit "K" to the Broking Affidavit.

38. **THIS COURT ORDERS** that the Applicant is hereby authorized and empowered to execute and deliver such security documents and other definitive documents (collectively, the **"Definitive Documents"**), as are contemplated by the DIP Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Agreement and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

39. **THIS COURT ORDERS** that the DIP Lender and Cargill International Trading Pte Ltd. ("**CITPL**") shall be entitled to the benefit of and is hereby granted a charge (the **"DIP Charge"**) on

the Property, which DIP Charge shall not secure an obligation that exists before this Order is made, and in the case of CITPL, shall only secure Post-Filing Credit Extensions. The DIP Charge shall have the priority set out in paragraphs 46 and 49 hereof.

40. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Agreement or the Definitive Documents, the DIP Lender may cease making advances to the Applicant upon four (4) business days' notice to the Applicant and the Monitor, exercise any and all of its rights and remedies against the Applicant or the Property under or pursuant to the DIP Agreement, Definitive Documents and the DIP Charge, including without limitation, set off and/or consolidate any amounts owing by the DIP Lender to the Applicant against the obligations of the Applicant to the DIP Lender under the DIP Agreement, the Definitive Documents or the DIP Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicant or the Property.

41. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act (Canada)* (the **"BIA"**), with respect to any advances made under the Definitive Documents.

42. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Agreement, the Definitive Documents or the DIP Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**"), such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as made prior to the Variation), under the DIP Agreement or the Definitive

Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Charge) for all advances so made and other obligations set out in the DIP Agreement and the Definitive Documents.

KEY EMPLOYEE RETENTION PLAN

43. **THIS COURT ORDERS** that the Key Employee Retention Plan (the "**KERP**"), as described in the Broking Affidavit and the Second Broking Affidavit, is hereby approved and the Applicant is authorized to make payments contemplated thereunder in accordance with the terms and conditions of the KERP.

44. **THIS COURT ORDERS** that payments made by the Applicant pursuant to the KERP do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

45. **THIS COURT ORDERS** that the Applicant is authorized to pay up to US$3,035,000 to the Monitor to hold in a segregated account (the "**KERP Funds**") and the key employees referred to in the KERP (the "**Key Employees**") shall be entitled to the benefit of and are hereby granted a charge on the KERP Funds (the "**KERP Charge**"), which charge shall not exceed an aggregate amount of US$3,035,000 to secure any payments to the Key Employees under the KERP. The KERP Charge shall have the priority set out in paragraphs 46 and 49 hereof. The Monitor shall not be responsible for making the payments to the Key Employees under the KERP; paying any tax withholdings or remittances payable to any tax authorities or otherwise in respect of the KERP; or reporting or making disclosure with respect to the KERP to any taxing authorities or otherwise.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

46. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Directors' Charge, the Transaction Fee Charge and the DIP Charge (collectively, with the KERP Charge, the "**Charges**"), as among them, as against the Property other than the KERP Funds, shall be as follows:

First – the Administration Charge (to the maximum amount of US$1,000,000);

Second – the Directors' Charge (to the maximum amount of US$5,200,000);

Third – the Transaction Fee Charge (to the maximum amount of US$5,600,000); and

Fourth – the DIP Charge.

47. **THIS COURT ORDERS** that the KERP Charge (to the maximum amount of US$3,035,000) shall rank first solely as against the KERP Funds and the other Charges shall rank subordinate to the KERP Charge as against the KERP Funds in the priorities set out in paragraph 46.

48. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

49. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property, and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for the portion of the Transaction Fee Charge which ranks *pari passu* basis with the Senior Priority Notes and Senior Priority Advances.

50. **THIS COURT ORDERS** that, except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with any of the Charges, unless the Applicant also obtains the prior written consent of the Monitor, the beneficiaries of the Administration Charge, the Directors' Charge, DIP Charge and the KERP Charge, or further Order of this Court.

51. **THIS COURT ORDERS** that the Administration Charge, the Directors' Charge, the KERP Charge, the Transaction Fee Charge, the DIP Charge, the DIP Agreement and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by the pendency of these proceedings and the declarations of insolvency made herein; any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; the filing of any assignments for the general benefit of creditors made pursuant to the BIA; the provisions of any federal or provincial statutes; or any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Agreement or the Definitive Documents shall create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicant entering into the DIP Agreement, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicant pursuant to this Order, the DIP Agreement or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

52. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicant's interest in such real property leases.

SERVICE AND NOTICE

53. **THIS COURT ORDERS** that the Monitor shall (a) without delay, publish in the Globe and Mail (National Edition), a notice containing the information prescribed under the CCAA, (b) within five (5) days after the date of this Order, (i) make this Order publicly available in the manner prescribed under the CCAA, (ii) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than $1,000, and (iii) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

54. **THIS COURT ORDERS** that the Commercial List E-Service Guide (the "**Guide**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at https://www.ontariocourts.ca/scj/practice/regional-practice-directions/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05 of the *Rules of Civil Procedure* (Ontario) (the "**Rules**"), this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules. Subject to Rule 3.01(d) of the Rules and paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a

Case Website shall be established in accordance with the Protocol with the following URL: http://cfcanada.fticonsulting.com/tacora.

55. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicant and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

56. **THIS COURT ORDERS** that the Applicant and the Monitor and their counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices or other correspondence, by forwarding true copies thereof by electronic message to the Applicant's creditors or other interested parties and their advisors. Any such distribution or service shall be deemed to be in satisfaction of a legal or judicial obligation and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SORS/DORS).

SEALING

57. **THIS COURT ORDERS** that Confidential Exhibit "C" to the Second Broking Affidavit is hereby sealed pending further Order of the Court and shall not form part of the public record.

GENERAL

58. **THIS COURT ORDERS** that the Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

59. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.

60. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying

out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

61. **THIS COURT ORDERS** that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

62. **THIS COURT ORDERS** that any interested party (including the Applicant, the Monitor and the DIP Lender) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

63. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the Filing Date.

64. **THIS COURT ORDERS** that this Order is effective from today's date and is enforceable without the need for entry and filing.

Digitally signed
by Jessica Kimmel
Date: 2023.10.30
14:29:55 -04'00'

Court File No./N° du dossier du greffe : CV-23-00707394-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.

(Applicant)

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

AMENDED AND RESTATED INITIAL ORDER

STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Ashley Taylor (LSO #39932E)
Tel: 416-869-5236
Email: ataylor@stikeman.com

Lee Nicholson (LSO #66412I)
Tel: 416-869-5604
Email: leenicholson@stikeman.com

Natasha Rambaran (LSO #80200N)
Tel: 416-869-5504
Email: nrambaran@stikeman.com

Philip Yang (LSO #82084O)
Tel: 416-869-5593
Email: pyang@stikeman.com

Counsel to Tacora Resources Inc.

TAB 10

Clerk's Stamp

AO

COURT FILE NUMBER	2301 - 08305
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	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.
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP 3000, 700 - 9th Avenue S.W. Calgary, AB, Canada T2P 3V4 Attention: James W. Reid / Larry Ellis Telephone: 403.298.2418 / 416-595-8639 Fax: 403.262.0007 E-mail: jwreid@millerthomson.com / lellis@millerthomson.com File No.: 0221652.0006

DATE ON WHICH ORDER WAS PRONOUNCED:	August 23, 2023
NAME OF JUSTICE WHO MADE THIS ORDER:	The Honourable Justice Hollins
LOCATION OF HEARING:	Calgary Courts Centre

UPON the application of Wallace & Carey Inc., Loudon Bros Limited, and Carey Management Inc. (collectively, the "**Applicants**"),

AND UPON having read the Application, Affidavit No. 1 of Eric Rolheiser sworn August 21, 2023, and the Third Report of KSV Restructuring Inc. in its capacity as Monitor dated August 21, 2023;

AND UPON being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and either do not oppose or alternatively consent to the within Order;

AND UPON hearing counsel for the Applicants, counsel for the Monitor, counsel for Canadian Imperial Bank of Commerce, counsel for Canadian Western Bank, counsel for 7-Eleven Canada Inc. ("**7-Eleven**"), and counsel for other interested parties;

AND UPON reviewing the Affidavit of Service of Marica Ceko sworn August 21, 2023;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and this application is properly returnable today.

DEFINITIONS

2. Capitalized terms used in this Order and not otherwise defined herein shall have the meaning ascribed to them under the Amended and Restated Initial Order of this Court pronounced June 30, 2023 (the "**ARIO**").

EXTENSION OF STAY PERIOD

3. The Stay Period is hereby extended from September 20, 2023 to and including November 30, 2023.

APPROVAL OF THE ADVISOR AGREEMENT

4. The advisor agreement dated August 13, 2023, between Alvarez & Marsal Canada Securities ULC ("**A&M**") and the Applicants (the "**Advisor Agreement**") is hereby approved, authorized and ratified, with such minor amendments as the Applicants and A&M, with the consent of the Monitor, may deem necessary. The Applicants are authorized and directed to take any and all actions as may be necessary or desirable to implement the Advisor Agreement.

5. As part of the approval of the Advisor Agreement, the Work Fees and Restructuring Fees, each as defined and described in the Advisor Agreement are hereby secured by

the Administration Charge set out in the ARIO, and A&M, along with the Applicants, counsel to the Applicants, the Monitor, and the Monitor's counsel shall be entitled to the benefit of and are hereby granted a charge on the Property, which charge shall not exceed an aggregate amount of $850,000.

6. The Administration Charge of $750,000 granted pursuant to paragraph 33 of the ARIO is hereby increased from $750,000 to $850,000.

7. The Work Fees and Restructuring Fees, each as defined and described in the Advisor Agreement are hereby secured by and form part of the Administration Charge as set out in the ARIO.

8. A&M shall be entitled to the benefit of and is hereby granted a charge on the Property (the "**Transaction Fee Charge**") for the Transaction Fee, as defined and described in the Advisor Agreement, with the priority set out in paragraph 9 below.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

9. Paragraph 43 of the ARIO is hereby amended such that the priorities of the Administration Charge, Transaction Fee Charge, Lender Priority Charge, the D&O Charge, Encumbrances charge, and the Tobacco Tax Charge as among them, shall be as follows:

   (a) First – Administration Charge (to the maximum amount of $850,000 and including the Work Fee and Restructuring Fee);

   (b) Second – Transaction Fee Charge;

   (c) Third – Lender Priority Charge (to the maximum amount of $55,000,000 plus interest, fees, and expenses);

   (d) Third – D&O Charge (to the maximum amount of $4,000,000);

   (e) Fourth – the Encumbrances existing as of the date hereof in favour of the Lender securing the pre-filing obligations owing under the CIBC Credit Agreement including, for greater certainty, obligations in connection with the BCAP Loan; and

(f) Tobacco Tax Charge (to the maximum amount of $26,000,000).

APPROVAL OF WEX DEPOSIT ARRANGEMENT

10. The deposit arrangement, including the terms of the deposit agreement dated July 7, 2023 between WEX Canada Ltd. and Wallace & Carey Inc. (the "**Deposit Arrangement**") is hereby approved, authorized and ratified, with such minor amendments as the Applicants and WEX Canada Ltd., with the consent of the Monitor, may deem necessary. The Applicants and the Monitor are authorized and directed to take any and all actions as may be necessary or desirable to implement the Deposit Arrangement.

GENERAL

11. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

12. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

13. The Applicants and the Monitor are at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

14. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or

parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

15. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of King's Bench of Alberta

TAB 11

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Freshlocal Solutions Inc. (Re),* 2022 BCSC 1616

Date: 20220913
Docket: S223941
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

- and -

In the Matter of a Plan of Compromise and Arrangement of Freshlocal Solutions Inc., Sustainable Produce Urban Delivery Inc., 569672 BC Limited, Organics Express Inc., Mainland Fresh Distribution Inc., Food-X Urban Delivery Inc., Food-X Technologies Inc., Food-X Technologies GP Inc., Food-X Technologies (EGMS) Inc., Be Fresh (AB) Inc. and Blush Lane Organic Produce Ltd.

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	D. Gruber J. Mighton
Counsel for the Monitor, Ernst & Young Inc.:	L. Hiebert
Counsel for Silicon Valley Bank:	S. Babe
Counsel for Third Eye Capital Corporation:	S. Stephens
Counsel for the Bridge Lenders:	L. Williams F. Finn
Counsel for Export Development Bank:	K. Siddall C. Formosa
Counsel for Desjardins Securities Inc.:	J. Reynaud
Place and Date of Hearing:	Vancouver, B.C. July 14-15 and 20, 2022
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. July 20, 2022

Place and Date of Written Reasons: Vancouver, B.C.
September 13, 2022

INTRODUCTION

[1] The petitioners seek various relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. The relief includes approval of a sales and investment solicitation process (SISP), appointment of a financial advisor and charges for its fees, approval of a stalking horse agreement and, finally, extension of the stay of proceedings to August 19, 2022.

[2] On July 15, 2022, I granted all of the relief sought, save for approval of the stalking horse agreement, with written reasons to follow. These are those reasons.

BACKGROUND FACTS

[3] The petitioners are a group of companies in the organic online grocery business. Earlier in 2022, they operated three major business segments: (1) an online grocery store with two physical locations in BC operating as "Spud.ca"; (2) physical grocery stores in Alberta; and (3) a software company licensing for online grocery operations, known as "Food-X" (which has since ceased to do business). I will refer to the petitioner group as "Freshlocal".

[4] The three major secured creditors of Freshlocal are owed approximately $17.8 million. In general order of priority, they are: Silicon Valley Bank ("SVB") for $2 million; a group of lenders (collectively, the "Bridge Lenders") for $7 million; and Export Development Canada ("EDC") for $8.8 million (EDC holds a first ranking position on Food-X).

[5] The Bridge Lenders are also unsecured creditors of Freshlocal, holding $10.75 million of convertible debentures.

[6] On May 16, 2022, I granted an initial order in favour of Freshlocal. The initial relief included an administration charge of $350,000 (the "Administration Charge"), an interim financing charge up to the maximum amount of $2.5 million in favour of Third Eye Capital Corporation ("TEC") (the "Interim Lender's Charge"), and a charge of up to $250,000 for directors and officers.

[7] On May 26, 2022, I granted an amended and restated initial order (the "ARIO") that extended the stay of proceedings to June 30, 2022, approved a key employee retention plan and increased the TEC interim financing and Interim Lender's Charge to $7 million.

[8] The stay of proceedings has since been extended to July 15, 2022.

[9] When the initial hearing took place, Freshlocal's counsel made it clear that they intended to apply, as soon as possible, for approval of a SISP. In fact, substantial discussions had already taken place to that end, and specifically with TEC.

[10] TEC's term sheet for the initial interim financing dated May 13, 2022 (the "Term Sheet"), approved by the Court, expressly referred to TEC advancing a stalking horse offer within the context of a SISP:

> 20. Sale and Investment
>
> The Monitor will work with the DIP Agent to allow the DIP Agent to present a stalking hose offer ("Stalking Horse Offer"), on terms acceptable to the DIP Agent, for the economically viable assets of the Borrowers under any [SISP] to be initiated within the CCAA Proceedings. The Monitor and the Borrowers shall work together with the DIP Agent to ensure that it is granted full access to the books and records of the Borrowers, satisfactory to the DIP Agent, and shall work with the DIP Agent to ensure that the SISP, including the Stalking Horse Offer, is presented to the Court for approval expeditiously, on a timeline to be agreed to among the Borrower and DIP Agent, each acting reasonably.
>
> Should the Stalking Horse Offer not be confirmed as the winning offer within the SISP, for any reason, the Borrowers shall pay a break fee to the DIP Agent equal to 2.5% of the value of the Stalking Horse Offer plus the amount equal to the DIP Agent's costs, charges and expenses (including legal fees on a solicitor and own client full indemnity basis) incurred in respect of the Stalking Horse Offer.

[11] On May 16, 2022, when I approved TEC's interim financing, Freshlocal's counsel expressly acknowledged that the Court was not being asked to approve any SISP or stalking horse offer, nor the terms of any stalking horse offer, including as referenced in the Term Sheet quoted above.

THE SISP/STALKING HORSE OFFER

[12] On July 12, 2022, Freshlocal filed its present application. There are two aspects of the relief sought that bear on the contested issues and these reasons.

[13] Firstly, Freshlocal seeks approval of certain arrangements with a financial advisor. In fact, on June 21, 2022, Freshlocal engaged Desjardins Securities Inc. ("Desjardin") as a financial advisor in respect of its sales efforts (the "FA Engagement"). On this application, Freshlocal seeks approval of the FA Engagement, which provides for the payment of certain fees to Desjardins, being a monthly working fee and a transaction fee in respect of any ultimate purchase agreement, and the appointment of Desjardin as its financial advisor in connection with the SISP. It is a condition of the FA Engagement that Desjardins be granted court-ordered charges to secure its monthly fees (*pari passu* with the Administration Charge) and to secure its transaction fee (after the Administration Charge and the Interim Lender's Charge).

[14] No objections were raised with respect to the FA Engagement or the charges.

[15] Secondly, Freshlocal sought court approval of TEC as a stalking horse bidder.

[16] On June 23, 2022, Freshlocal entered into a binding letter of intent (LOI) with TEC respect to a potential stalking horse offer. After that time, Freshlocal engaged in extensive discussions with TEC to provide responses to various due diligence enquiries and requests.

[17] On July 12, 2022, Freshlocal and TEC entered into the definitive stalking horse agreement (the "SH Agreement") contemplated in the TEC LOI. An unredacted copy of the SH Agreement and the FA Engagement were sealed by the Court to the extent that they revealed financial terms that, if publicly available, might have harmed the integrity of the SISP. That said, Freshlocal's evidence on this application describes the key terms of the SH Agreement as follows:

a) It is structured as a reverse vesting order for the "economically viable" assets of Freshlocal;

b) Should TEC not become the ultimate purchaser, TEC would be paid a break fee of 2.5% of the ultimate purchase price under the SH Agreement and an expense reimbursement fee, the maximum amount of which is specified in the SH Agreement such that the total exposure for amounts collectible by TEC for such costs would be 3.7% of the purchase price under the SH Agreement (the "Break Fee and Expense Reimbursement"); and

c) The Break Fee and Expense Reimbursement are to be a charge on Freshlocal's assets, standing only behind the Administration Charge (and the monthly charge under the FA Engagement) and ahead of the Interim Lender's Charge.

[18] Freshlocal states that, in its opinion, the SH Agreement:

> … establishes a valuable baseline price that will: (a) act as a "protective bid" by ensuring a going-concern outcome for [Freshlocal's] remaining business units … thereby preserving approximately 850 jobs, as well as the supplier relationships that support these businesses, and (b) provide value to the SISP by setting a baseline purchase price intended to create a competitive bidding environment, thereby increasing the likelihood of a value maximizing transaction in the SISP.

[19] Specifically, Freshlocal argues that, in its sound business judgment, the terms of the SH Agreement relating to the Break Fee and Expense Reimbursement were reasonable in the circumstances as representing a significant term of TEC's participation and support of these proceedings. Freshlocal's board of directors approved the SH Agreement.

[20] The proposed SISP included ambitious timelines, with a binding LOI to be received by August 11, 2022, final agreements by September 1, 2022, and an application for court approval by September 15, 2022. No objections were raised in respect of the reasonableness of the timelines.

DISCUSSION

[21] The Bridge Lenders and EDC do not object to court approval of the SISP and the FA engagement, but they strenuously object to approval of the SH Agreement. In addition, these secured creditors point to other more nuanced provisions in the SH Agreement that they say are not appropriate. I will discuss those further terms below.

CCAA Considerations

[22] There is no dispute that this Court has jurisdiction under the *CCAA* to approve the SISP and also approve a stalking horse offer. Specific sale provisions are found in s. 36 of the *CCAA* (although not expressly addressing approval of a sales process). In addition, the general jurisdiction of the Court is found in s. 11 of the *CCAA* to approve such relief as is appropriate.

[23] Stalking horse agreements have become fairly common in *CCAA* proceedings and sales processes specifically. Sales processes in *CCAA* proceedings are usually very fact specific, as are the circumstances in which stalking horse agreements have been considered by Canadian courts in the past. Consideration must be given to the specific terms of any such agreements in the context of the *CCAA* proceedings more generally, including the financial terms of any offer. It is common to see break fees and other compensation built into the offer.

[24] That said, certain themes or factors emerge from the authorities that bear scrutiny when considering approval of any stalking horse bid.

[25] In Janis P. Sarra's "*Rescue!: The Companies' Creditors Arrangement Act*" (Toronto: Carswell, 2007) [*Sarra*] at 118, the author describes the basic rationale behind such stalking horse offers and the financial protections that are usually built into such an offer:

> In the insolvency context, it is used to signify a situation where the debtor makes an agreement with a potential bidder for a sale of the debtor's assets or business, and that agreement forms part of a process whereby an auction or tendering process is conducted to see if there is a better and higher bidder that will result in greater returns to creditors. The premise is that the stalking

> horse has undertaken considerable due diligence in determining the value of the debtor corporation, and other potential bidders can rely, to an extent, on the value attached by that bidder based on that due diligence.

[26] The above comment—and case authorities—were considered by Justice Gascon (as he then was) in *Boutique Euphoria Inc. (Re)*, 2007 QCCS 7129. At para. 37, Gascon J. set out the following non-exhaustive factors as important considerations in assessing whether a stalking horse bid process should be approved:

> 1. Has there been some control exercised at the first stage of the competition (namely that to become the stalking horse bidder) and to what extent?
>
> Two main reasons explain that first consideration.
>
> On the one hand, the stalking horse bid establishes the benchmark to attract other bids and its accuracy is therefore key to the integrity of the whole process.
>
> On the other hand, as the stalking horse bid is normally subject to a break up fee, it is even more important that it be accurate, as the call for overbids will have to exceed a certain margin over and above the stalking horse bid.
>
> In other words, some assurances should exist that the horse chosen is indeed the right one.
>
> 2. Is there a need for stability within a very short time frame for the debtor to continue operations and the restructuring contemplated to be successful?
>
> This second consideration is explained by the fact that the stalking horse bid process is generally more stringent and less flexible than a traditional call for tenders process. As a result, to resort to such a process, time should normally be of the essence.
>
> 3. Are the economic incentives for the stalking horse bidder, in terms of break up fee, topping fee and overbid increments protection, fair and reasonable?
>
> This third consideration is justified by the fact that excessive economic incentives in terms of a break up fee or other fees may chill the market and deter other potential bidders. Thus, rendering the process inefficient and, in fact, inadequate in terms of meeting its goal. The concept of fairness to all bidders here comes to mind.
>
> 4. Are the time lines contemplated reasonable to insure a fair process at the second stage of the competition, namely that to become the successful over bidder?

> This fourth consideration is obviously also linked to the fairness of the bid process to ensure, inasmuch as possible, an equal opportunity to all interested bidders.
>
> [Emphasis added.]

[27] In *Brainhunter Inc. (Re*), [2009] O.J. No. 5578, Justice Morawetz (as he then was), took a more generalized approach to considering the issue:

> [13] The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp*. [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:
>
> (a) Is a sale transaction warranted at this time?
>
> (b) Will the sale benefit the whole "economic community"?
>
> (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) Is there a better viable alternative?

[28] In *CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd.*, 2012 ONSC 1750 [*CCM Master*] at para. 6, Justice Brown (as he then was) stated that consideration of any sales process must assess:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[29] In *CCM Master*, Brown J. also discussed relevant considerations in respect of a stalking horse bid, emphasizing potential urgency and the need for a fair sales process:

> [7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.
>
> [8] ... I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a

> stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:
>
> > To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.
>
> [Footnotes omitted.]

[30] More recently, in *Danier Leather Inc. (Re)*, 2016 ONSC 1044, Justice Penny cited *Brainhunter* and, at para. 20, stated that stalking horse agreements are commonly used in insolvency proceedings as they "establish a baseline price and transactional structure for any superior bids from interested parties" and "maximizes value of a business for the benefit of its stakeholders". With respect to the break fee for the stalking horse bidder, Penny J. stated:

> [41] Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

[31] Section 11.52 of the *CCAA* specifically provides the court with authority to grant any charge for financial incentives. A charge for financial incentives under a stalking horse bid can be considered under the factors set out in s. 11.2(4) of the *CCAA*, which relates to interim financing and related charges.

[32] In *Quest University Canada (Re)*, 2020 BCSC 1845 at paras. 53–58, I addressed authorities that have discussed the question as to whether the financial incentives in a stalking horse offer are appropriate. At para. 59, I set out certain factors that can be considered in determining whether a given break fee is fair and

reasonable in all of the circumstances in the sense that it provides a corresponding or greater benefit to the estate:

a) Was the agreement reached as a result of arm's length negotiations?;

b) Has the agreement been approved by the debtor company's board or specifically constituted committees who are conducting the sales process?;

c) Is the relief supported by the major creditors?;

d) What may be the effect of such a fee/charge? Will it have a chilling effect on the market, or will it facilitate the sales process?;

e) Is the amount of the fee reasonable? In relation to expenses anticipated to be covered, is the amount reasonable given the bidder's time, resources and risk in the process?;

f) Will the fee and charge enhance the realization of the debtor's assets?;

g) Will the fee and charge enhance the prospects of a viable compromise or arrangement being made in respect of the company?; and

h) Does the monitor support the relief?

[33] At the most basic level, the *benefits* of entering into a stalking horse bid that can be potentially achieved in these proceedings must be justified by the *costs* in doing so. That cost/benefit analysis requires a rigorous review of all the relevant circumstances toward answering the question—is a stalking horse offer appropriate at this time in these *CCAA* proceedings?

[34] As is often the case in *CCAA* proceedings, the court must make this assessment, not only on historical facts, but also with a view to what the future *might* hold for the debtor company and its stakeholders given the present state of affairs.

The Objections

[35] I propose to address the Bridge Lenders' and EDC's objections to the SH Agreement under the following headings:

1) How did the SH Agreement arise?

[36] In support of the SH Agreement, the Monitor filed its third report to the Court dated July 13, 2022.

[37] The Monitor confirms that the SH Agreement did not come about through a competitive process. The Monitor states that this arose from two factors: (1) Freshlocal had limited time and resources to engage in any process; and (2) TEC advised Freshlocal that it would be a breach of the Term Sheet if Freshlocal did not proceed with TEC as the stalking horse bidder and if it them engaged in an open sales process. As such, there is an inference that the SH Agreement arose less from Freshlocal's objective enthusiasm for the transaction and more from TEC's not so veiled threats of litigation.

[38] As noted in *Sarra*, the premise is that stalking horse bids result from "considerable due diligence" such that the amount of the bid is intended to reflect the true value of the assets against which other potential bids might be measured. Both *Danier Leather* (para. 33) and *Boutique Euphoria* (paras. 41-42) considered earlier marketing efforts in its assessment of the appropriateness of a stalking horse offer. See also *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840 at para. 10.

[39] In *Mecachrome Canada Inc. (Re)*, 2009 QCCS 6355, the Court considered that there had been no legitimate and open process to obtain funding proposals: para. 35.

[40] I accept here that Freshlocal was under substantial time pressures to move this proceeding forward to a sale. However, it is anything but transparent as to how the purchase price in the SH Agreement came about.

[41] In that vein, Freshlocal's reference, supported by the Monitor, that the SH Agreement establishes a minimum or "floor price" is concerning. This is more akin to a "reserve bid" at auction. I acknowledge that this phrase has been used in the past to describe stalking horse bids, but it is an unfortunate one in the sense that it gives the sense that higher bids are being sought and fully expected. A more appropriate description might be "value price", where the stalking horse is put forward as an appropriate pricing of the debtor's assets, in the event that no higher offer is received.

[42] It is not the underlying rationale of a stalking horse offer to allow a bidder to get a bargain basement price, save as might be (or likely will be) exceeded in the true marketplace, while securing substantial financial benefits for that bidder (see my discussion below).

[43] Freshlocal refers to the SH Agreement guaranteeing an outcome. I accept that the SH Agreement achieves that goal, but at what cost to the stakeholders?

[44] As was noted in *Boutique Euphoria*, an important consideration is to ensure you are riding the right "horse" in the sales process by having the right "benchmark" to hopefully attract other—and higher—bids. A failure to test the market toward picking your "horse" might very well mean that the debtor has "baked in" a result with a stalking horse offer which is not necessarily reflective of the value of the assets. I accept that it will not always be possible to expose the assets for sale toward choosing a stalking horse bid; however, failure to do so may be indicative of a less than robust process at this critical first stage to choose a stalking horse offer to "lead" the SISP.

[45] In addition, the amount of the break fee was already settled in the Term Sheet. It is clear that no further negotiations regarding the amount of the break fee took place leading to the SH Agreement.

2) Stability Benefits of the SH Agreement

[46] Freshlocal, as supported by the Monitor, places considerable emphasis on the stability afforded by the SH Agreement to many stakeholders, including customers, suppliers and employees. It refers to the "positive message" that approval of the SH Agreement will allow. The Monitor states that some messaging has already been sent to suppliers about the SH Agreement and Freshlocal's intention to achieve a going-concern sale(s) under the SISP.

[47] I acknowledge that stability is a factor to be considered. However, coincidental with the SH Agreement being presented for approval, is the Court approving, with the support of all stakeholders, a SISP which is intended to market

the assets and achieve a sale as soon as possible. As the Monitor notes, stakeholders are being advised of the sales efforts underway to the extent that this news provides stability in the circumstances.

[48] Freshlocal does not provide any specific instances of any stakeholder, let alone a supplier or employee, expressing support of the SH Agreement and concerns if it is not approved.

3) The Timing Perspective

[49] To a certain extent, the timing of the SH Agreement does not support its approval.

[50] The Term Sheet did not result in TEC obtaining court approval of what was then a future stalking horse bid to be received. TEC began seeking information from Freshlocal only after the full amount of the interim financing was approved on May 26, 2022.

[51] Freshlocal's efforts to advance a sales process coalesced in late June 2022 when it engaged Desjardins (June 21) and also, entered into the binding LOI with TEC (June 23). The SH Agreement was signed on June 23, 2022. Freshlocal and Desjardins immediately started to canvass interested parties by responding to inbound enquiries and developing the SISP procedures.

[52] By the time of these arrangements in late June 2022, Desjardins had set up a data room and initiated the usual sale procedures. TEC's information requests and Freshlocal's responses were part of the information used to populate the data room.

[53] By June 28, 2022, only a week after Desjardins was engaged, 23 parties had expressed interest in the assets and executed non-disclosure agreements (NDAs). There are now over 25 parties who are evaluating a potential offer of the assets. However, what is significant is that under the terms of the LOI, Freshlocal agreed that it would only engage in negotiations with TEC and that it would have no contact

with any other potential bidder. Accordingly, it is no surprise that Freshlocal did not seek a stalking horse offer from any other potential bidder after that time.

[54] With these past and ongoing sales efforts—and the results to date—the Bridge Lenders and EDC raise the legitimate question issue as to what benefit could be achieved by the SH Agreement. In the usual course, negotiations and the execution of a stalking horse agreement take place *before* any further sales efforts. This is consistent with the idea that one of the benefits of a stalking horse bid is that other bidders can rely to some extent on the due diligence that has already been done by the stalking horse bidder and that future and duplicative negotiations with alternative parties are avoided by the debtor and those parties.

[55] In this case, other potential bidders have already entered the process and presumably are conducting their own due diligence. In that event, little or no benefit arises in that respect from the SH Agreement.

4) Who Supports/Objects?

[56] Freshlocal's counsel submits that its board of directors support the SH Agreement in their business judgment and that, therefore, judicial deference is owed to that decision. I appreciate that Freshlocal's position brings a broader perspective to the table in terms of the more general benefits to be achieved by any stalking horse offer. I accept that the broader stakeholder group must be considered in this respect.

[57] However, it should be noted that Freshlocal confirms that it feels that it is "contractually obligated" to put the SH Agreement forward in the face of TEC's position on the effect of the Term Sheet, as noted above. These circumstances would strongly suggest that Freshlocal's board of directors were circumscribed in their pursuit of a stalking horse transaction by the Term Sheet already executed: *contra Quest University* at para. 63(a). In that event, little or no deference is warranted from this Court.

[58] Based on the financial information before the Court, it is quite apparent that the Bridge Lenders and EDC will be directly and materially affected by any monies that will be payable under the charges sought in relation to the SH Agreement. This factor must be considered.

[59] It is also important to note that this same financial information (mostly sealed) supports the conclusion that the Bridge Lenders and EDC are the stakeholders who mostly stand to *benefit* from any enhancements to the SISP, including through any stalking horse offer. I consider this an important factor, given the significant priority position held by both secured creditors, who are directly affected by the SH Agreement. As stated by the Bridge Lenders' counsel, the Bridge Lenders are the fulcrum creditor here in relation to the non-Food-X assets.

[60] For reasons not entirely apparent, the Monitor seemingly pays scant attention to the views of the Bridge Lenders and EDC. The Monitor states that the market will determine their interests and that is unquestioned. The more salient consideration are the views—and business judgment—of the Bridge Lenders and EDC who stand to bear the brunt of the consequences of approval of the SH Agreement in relation to the SISP.

5) What is the True Cost of the SH Agreement?

[61] As noted by the Monitor, the financial terms of a stalking horse offer can be justified by intended benefits in the SISP, such as reducing the legal expenses of other bidders and reducing Freshlocal's legal and other expenses.

[62] I accept that the amounts of the Break Fee and Expense Reimbursement proposed in the SH Agreement are in the range of such amounts that Canadian courts have approved in other *CCAA* proceedings.

[63] Yet, there are troubling aspects of the SH Agreement in terms of the financial compensation that is sought by TEC.

[64] Firstly, TEC takes the position that the Break Fee and Expense Reimbursement are intended to partially offset the interest and fees charged under the interim financing facility, which is said to be "conspicuously low" for interim financing. The Monitor states in its report that TEC views the SH Agreement as "part of the broader economics" of the Term Sheet and emphasizes that Freshlocal very much wishes to maintain a productive relationship with its interim lender, TEC. I can only read Freshlocal's position in that light as support for a stakeholder in this proceeding who holds considerable power over a critical aspect of this proceeding, namely the purse strings.

[65] In any event, TEC's submission on this point is objectionable on many fronts. Firstly, the Term Sheet was approved based on its specific terms and nothing more. Secondly, it was expressly acknowledged at the earlier May 2022 hearing that approval of the Term Sheet did not result in any court approval of a stalking horse bid or any intended terms. TEC's counsel was present at the May 26, 2022 hearing and made no contrary submissions.

[66] TEC's efforts to now link the appropriateness of the SH Agreement to an earlier decision of this Court is to introduce considerations that are simply irrelevant. It is inappropriate to argue that the SH Agreement should be assessed on considerations that were apparently only known to TEC, were not expressed in the documentation and are contrary to submissions made to the Court as to substance of the proposed transaction (i.e. regarding the interim financing).

[67] Secondly, financial incentives, such as the Break Fee and Expense Reimbursement are, fundamentally, intended to recompense TEC for its "up front" expenses in negotiating and presenting the SH Agreement in the event that another party ends up as the ultimate successful purchaser: *Quest University* at para. 55.

[68] However, the SH Agreement provides that part of the purchase price *includes* the Expense Reimbursement, which is an unusual provision since bidders will typically cover their own expenses. Effectively, TEC recovers its expenses in any event, whether the SH Agreement is the winning bid or not.

[69] Thirdly, in the SH Agreement, Freshlocal agrees that, up to the closing, it will obtain such consents or waivers reasonably required by TEC. These are conditions to TEC's obligation to close the transaction and are not unusual. The unusual provision follows, however, which provides:

> In the event that any of the foregoing conditions are not performed or fulfilled at or before the Closing, TEC and [Freshlocal] may terminate this Agreement, in which event … the Expense Reimbursement will be due and payable, and, provided that if [Freshlocal] engages in a further sales process for the business and assets of [Freshlocal], then the Break Fee will become due and payable, and, subject to the foregoing, [Freshlocal] will also be so released unless the Vendor was reasonably capable of causing such condition or conditions to be fulfilled or unless the Vendor has breached any of its covenants or obligations in or under this Agreement. The foregoing conditions are for the benefits of [TEC] only and accordingly [TEC] will be entitled to waive compliance with any such conditions if it seems fit to do so, without prejudice to its rights and remedies at law and in equity and also without prejudice to any of its rights of termination in the event of non-performance of any other conditions in whole or in part.
>
> [Emphasis added.]

[70] The meaning of the above clause is far from clear but it suggests considerable exposure to Freshlocal and its stakeholders if Freshlocal does not succeed in obtaining the third party consents or waivers by closing that TEC requires, and the agreement terminates. In that event, it appears that Freshlocal will still owe the Expense Reimbursement to TEC. Further, this clause suggests that, if the SH Agreement should fail to close for any reason, including difficulties with third parties over whom Freshlocal has no control, TEC is still entitled to claim the break fee in any later sales process. Clearly, such provisions are unusual and there is no apparent reason for them. More importantly, the latter provision has the potential to prejudice later recoveries from the assets and there is no apparent justification for this payment to TEC.

[71] In my view, the above three aspects of the SH Agreement are either inappropriate or evidence financial terms favouring TEC that are not fair and reasonable in the circumstances. As the Court stated in *Boutique Euphoria* at para. 71, fees in relation to a stalking horse bid must be "related to the stalking horse bid process itself and the efforts undertaken towards that end."

[72] Finally, even more objectionable were TEC's counsel's submissions to this Court in support of the SH Agreement to the effect that any refusal to approve the SH Agreement could result in default under the interim lending facility. TEC's counsel did not refer to any terms of the interim financing that would support such argument. There is no merit to this comment.

6) Is there an Alternative?

[73] The Bridge Lenders and EDC submit that the sales process should go forward without the involvement of the SH Agreement.

[74] I accept that there is no guarantee that a better offer or offers will be received through the SISP beyond what TEC has put forward in the SH Agreement. However, the circumstances of the persons who have expressed interest to date, and signed NDAs, suggest a market for the assets. TEC remains fully able to present an offer for the assets that it wishes to acquire, within the terms of the SISP.

[75] Freshlocal's counsel suggests that if no transaction emerges from the SISP without the SH Agreement, SVB may be at risk. That is true, however, SVB's counsel takes no position on this application, suggesting there is little concern that this scenario will arise. Similarly, Freshlocal's counsel states that TEC is not at risk in respect of the interim lending facility.

[76] At bottom, if the SISP does not result in a better offer or offers, it will be the Bridge Lenders and EDC who bear the brunt of that. To that extent, their decision to oppose the SH Agreement has considerable force, as they are the stakeholders who will benefit or suffer at the end of the day.

CONCLUSION/POSTSCRIPT

[77] On July 15, 2022, I approved the SISP and the FA Engagement, as requested by Freshlocal, and extended the stay of proceedings.

[78] Having considered all of the circumstances, I concluded on a balance of probabilities that approval of the SH Agreement was not appropriate. Having come

to that conclusion, there is no need to specifically consider whether the charge for the financial incentives are appropriate. Accordingly, I dismissed the relief sought relating to the SH Agreement and the charges for the Break Fee and Expense Reimbursement. At that time, I advised counsel that I expected that the SISP would need to be amended to remove reference to the SH Agreement and directed them to attend before the Court later that day.

[79] When counsel reattended, Freshlocal's counsel advised that Desjardins was not prepared to continue with the SISP which simply removed references to the SH Agreement. He advised that Freshlocal was engaging with Desjardins to discuss revised terms for the FA Engagement arising from the rejection of the SH Agreement.

[80] On July 20, 2022, counsel attended with an amended SISP and an amended FA Engagement. No party opposed these amended terms and they were approved by the Court.

"Fitzpatrick J."

TAB 12

COURT FILE NO.: 09-CL-7950
DATE: 20090723

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICANTS

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al**

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF

S. Philpott, for the Former Employees

K. Zych, for Noteholders

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited

A. Kauffman, for Export Development Canada

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM

HEARD &
DECIDED: JUNE 29, 2009

E N D O R S E M E N T

INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

[2] I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[3] An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

[4] The following are my reasons for granting these orders.

[5] The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

[6] The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

[7] The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

BACKGROUND

[8] The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

[9] At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

[10] The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

[11] In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

[12] On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

[13] In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

[14] Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

[15] Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

[16] In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

[17] The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

[18] The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

[19] The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

[20] The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

[21] Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

[22] Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

[23] The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

ISSUES AND DISCUSSION

[24] The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

[25] The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

[26] Counsel to the Applicants submitted a detailed factum which covered both issues.

[27] Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

[28] The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

[29] The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*. (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. ("ATB Financial").

[30] The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra*, at paras. 43-52.

[31] However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

[32] In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc*. (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

[33] Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc*. (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

[34] Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc*. (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

Financial Services Ltd. v. Hardrock Paving Co. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

[36] In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> …we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

[37] Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

[38] Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

[39] In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the "old company" is not

> feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

[40] I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

[41] Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc*. (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc*. (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.

[42] Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale…be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*. (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

[43] In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

[44] I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

[46] At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"…Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged…

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the means contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary…

[47] It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

[48] I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

[49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

[51] Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

[52] The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

[53] Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

DISPOSITION

[54] The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

[55] Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

[56] I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[57] Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

[58] In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

[59] Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

MORAWETZ J.

Heard and Decided: June 29, 2009

Reasons Released: July 23, 2009

TAB 13

COURT FILE NO.: 09-8482-00CL
DATE: 20091218

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC.

APPLICANTS

BEFORE: **MORAWETZ J.**

COUNSEL: **Jay Swartz and Jim Bunting, for the Applicants**

G. Moffat, for Deloitte & Touche Inc., Monitor

Joseph Bellissimo, for Roynat Capital Inc.

Peter J. Osborne, for R. N. Singh and Purchaser

Edmond Lamek, for the Toronto-Dominion Bank

D. Dowdall, for Noteholders

D. Ullmann, for Procom Consultants Group Inc.

HEARD & DECIDED: **DECEMBER 11, 2009**

E N D O R S E M E N T

[1] At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

[2] The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

[3] The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

[4] The Monitor recommends that the motion be granted.

[5] The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

[6] Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

[7] Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

[8] The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

[9] Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

[10] The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

[11] It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

[12] Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

[13] The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp*. [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(a) Is a sale transaction warranted at this time?

(b) Will the sale benefit the whole "economic community"?

(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?

[14] The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

[15] Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

[16] Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

[17] I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[18] In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

[19] In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

[20] With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue

has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

[21] For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

[22] For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

[23] The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

[24] Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

[25] An order shall issue to give effect to the foregoing.

MORAWETZ J.

DECIDED: December 11, 2009

REASONS: December 18, 2009

TAB 14

CITATION: CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750
COURT FILE NO.: CV-12-9622-00CL
DATE: 20120315

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: CCM Master Qualified Fund, Ltd., Applicant

AND:

blutip Power Technologies Ltd., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Rogers and C. Burr, for the Receiver, Duff & Phelps Canada Restructuring Inc.

A. Cobb and A. Lockhart, for the Applicant

HEARD: March 15, 2012

REASONS FOR DECISION

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

[1] By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

[2] D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

[3] The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two

convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

[4] At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

[5] As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

[6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

---

[1] (1991), 7 C.B.R. (3d) 1 (C.A.).

[7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,[2] *BIA* proposals,[3] and *CCAA* proceedings.[4]

[8] Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.[5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

[9] The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

[10] Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the

---

[2] *Re Graceway Canada Co*., 2011 ONSC 6403, para. 2.
[3] *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 15.
[4] *Re Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13; *Re White Birch Paper Holding Co*., 2010 QCCS 4382, para. 3; *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 2, and (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.); *Re Indalex Ltd*., 2009 CarswellOnt 4262 (S.C.J.).
[5] Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding – Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

[11] The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

[12] The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

[13] The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.[6]

C. Analysis

[14] Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the

---

[6] *Re Parlay Entertainment*, 2011 ONSC 3492, para. 12; *Re White Birch Paper Holding Co.*, 2010 QCCS 4915, paras. 4 to 7; *Re Nortel Networks Corp.* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.), para. 12.

prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

[15] In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

[16] Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.[7]

[17] For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

[18] Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

[19] As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

[20] Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that

---

[7] *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.), para. 7; *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 5; *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 58.

secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

[21] I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc. (Re)*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> …
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.[8]

[22] In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a

---

[8] 2012 ONSC 1299 (CanLII).

receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

[23] In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

[24] The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

[25] May I conclude by thanking Receiver's counsel for a most helpful factum.

(original signed by)
D. M. Brown J.

Date: March 15, 2012

TAB 15

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107

Date: 20160126
Docket: S1510120
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 as Amended

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57, as Amended

And

In the Matter of a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	Marc Wasserman Mary I.A. Buttery Tijana Gavric Joshua Hurwitz
Counsel for United Mine Workers of America 1974 Pension Plan and Trust:	John Sandrelli Tevia Jeffries
Counsel for Steering Committee of First Lien Creditors of Walter Energy, Inc.:	Matthew Nied
Counsel for Her Majesty the Queen in Right of the Province of British Columbia:	Aaron Welch
Counsel for Morgan Stanley Senior Funding, Inc.:	Kathryn Esaw

Counsel for KPMG Inc., Monitor:	Peter Reardon Wael Rostom Caitlin Fell
Counsel for Canada Revenue Agency:	Neva Beckie
Counsel for the United States Steel Workers, Local 1-424:	Stephanie Drake
Place and Date of Hearing and Ruling given to Parties with Written Reasons to Follow:	Vancouver, B.C. January 5, 2016
Place and Date of Written Reasons:	Vancouver, B.C. January 26, 2016

Introduction and Background

[1] On December 7, 2015, I granted an initial order in favour of the petitioners, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*").

[2] The "Walter Group" is a major exporter of metallurgical coal for the steel industry, with mines and operations in the U.S., Canada and the U.K. The petitioners comprise part of the Canadian arm of the Walter Group and are known as the "Walter Canada Group". The Canadian entities were acquired by the Walter Group only recently in 2011.

[3] The Canadian operations principally include the Brule and Willow Creek coal mines, located near Chetwynd, B.C., and the Wolverine coal mine, near Tumbler Ridge, B.C. The mine operations are conducted through various limited partnerships. The petitioners include the Canadian parent holding company and the general partners of the partnerships. Given the complex corporate structure of the Walter Canada Group, the initial order also included stay provisions relating to the partnerships: *Lehndorff General Partner Ltd. (Re)* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.); *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 21.

[4] The timing of the Canadian acquisition could not have been worse. Since 2011, the market for metallurgical coal has fallen dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines were placed in care and maintenance between April 2013 and June 2014. The mines remain in this state today, at an estimated annual cost in excess of $16 million. Similarly, the U.K. mines were idled in 2015. In July 2015, the U.S. companies in the Walter Group filed and sought creditor protection by filing a proceeding under Chapter 11 of the U.S. *Bankruptcy Code*. It is my understanding that the U.S. entities have coal mining operations in Alabama and West Virginia.

[5] From the time of the granting of the initial order, it was apparent that the outcome of the U.S. proceedings would have a substantial impact on the Walter

Canada Group. A sales process completed in the U.S. proceeding is anticipated to result in a transfer of the U.S. assets to a stalking horse bidder sometime early this year. This is significant because the U.S. companies have historically supported the Canadian operations with funding and provided essential management services. This is a relevant factor in terms of the proposed relief, as I will discuss below.

[6] The Walter Canada Group faces various significant contingent liabilities. The various entities are liable under a 2011 credit agreement of approximately $22.6 million in undrawn letters of credit for post-mining reclamation obligations. Estimated reclamation costs for all three mines exceed this amount. Further obligations potentially arise with respect to the now laid-off employees of the Wolverine mine, who are represented by the United Steelworkers, Local 1-424 (the "Union"). If these employees are not recalled before April 2016, the Wolverine partnership faces an estimated claim of $11.3 million. As I will discuss below, an even more significant contingent liability has also recently been advanced.

[7] This anticipated "parting of the ways" as between the U.S. and Canadian entities in turn prompted the filing of this proceeding, which is intended to provide the petitioners with time to develop a restructuring plan. The principal goal of that plan, as I will describe below, is to complete a going concern sale of the Canadian operations as soon as possible. Fortunately, as of early December 2015, the Walter Canada Group has slightly in excess of US$40.5 million in cash resources to fund the restructuring efforts. However, ongoing operating costs remain high and are now compounded by the restructuring costs.

[8] As was appropriate, the petitioners did not seek extensive orders on December 7, 2015, given the lack of service on certain major stakeholders. A stay was granted on that date, together with other ancillary relief. KPMG Inc. was appointed as the monitor (the "Monitor").

[9] The petitioners now seek relief that will set them on a path to a potential restructuring; essentially, an equity and/or debt restructuring or alternatively, a sale and liquidation of their assets. That relief includes approving a sale and solicitation

process and the appointment of further professionals to manage that process and complete other necessary management functions. They also seek a key employee retention plan. Finally, the petitioners seek an extension of the stay to early April 2016.

[10] For obvious reasons, the financial and environmental issues associated with the coal mines loom large in this matter. For that reason, the Walter Canada Group has engaged in discussions with the provincial regulators, being the B.C. Ministry of Energy and Mines and the B.C. Ministry of the Environment, concerning the environmental issues and the proposed restructuring plan. No issues arise from the regulators' perspective at this time in terms of the relief on this application. Other stakeholders have responded to the application and contributed to the final terms of the relief sought.

[11] The stakeholders appearing on this application are largely supportive of the relief sought, save for two.

[12] Firstly, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan") opposes certain aspects of the relief sought as to who should be appointed to conduct the sales process.

[13] The status of the 1974 Pension Plan arises from somewhat unusual circumstances. One of the U.S. entities, Jim Walter Resources, Inc. ("JWR") is a party to a collective bargaining agreement with the 1974 Pension Plan (the "CBA"). In late December 2015, the U.S. bankruptcy court issued a decision that allowed JWR to reject the CBA. The court also ordered that the sale of the U.S. assets would be free and clear of any liabilities under the CBA. As a result, the 1974 Pension Plan has filed a proof of claim in the U.S. proceedings advancing a contingent claim against JWR with respect to a potential "withdrawal liability" under U.S. law of approximately US$900 million. The U.S. law in question is the *Employee Retirement Income Security Act of 1974*, 29 USC § 101, as amended, which is commonly referred to as "*ERISA*".

[14] The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

[15] It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to assess the 1974 Pension Plan's contingent claim. No claims process has even been contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

[16] Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

[17] At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

The Sale and Investment Solicitation Process ("SISP")

[18] The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

[19] It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

[20] Approvals of SISPs are a common feature in *CCAA* restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750. At para. 6, Brown J. (as he then was) stated that in reviewing a proposed sale process, the court should consider:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[21] Although the court in *CCM Master Qualified Fund* was considering a sales process proposed by a receiver, I agree that these factors are also applicable when assessing the reasonableness of a proposed sales process in a *CCAA* proceeding: see *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840 at paras. 17-19.

[22] In this case, the proposed timelines would see a deadline of March 18 for letters of intent, due diligence thereafter with a bid deadline of May 27 and a target closing date of June 30, 2016. In my view, the timeline is reasonable, particularly with regard to the need to move as quickly as possible to preserve cash resources pending a sale or investment; or, in the worst case scenario, to allow the Walter Canada Group to close the mines permanently. There is sufficient flexibility built into the SISP to allow the person conducting it to amend these deadlines if the circumstances justify it.

[23] The SISP proposed here is consistent with similar sales processes approved in other Canadian insolvency proceedings. In addition, I agree with the Monitor's assessment that the SISP represents the best opportunity for the Walter Canada Group to successfully restructure as a going concern, if such an opportunity should arise.

[24] No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

Appointment of Financial Advisor and CRO

[25] The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

[26] The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

[27] In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

[28] A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

[29] The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

[30] Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

[31] In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

[32] The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

[33] In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *Mobilicity Group (Re)*, 2013 ONSC 6167 at para. 17). No question arises as to his extensive qualifications to fulfil this role.

[34] The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from the 1974 Pension Plan as to the appropriateness of his

involvement. However, after submissions by the petitioners' counsel, I am satisfied that there was a thorough consideration of potential candidates and their particular qualifications to undertake what will no doubt be a time-consuming and complex assignment. In that regard, I accept the recommendations of the petitioners that Mr. Aziz is the most qualified candidate.

[35] The Monitor was involved in the process by which PJT and BlueTree/Mr. Aziz were selected. It has reviewed both proposals and supports that both PJT and BlueTree are necessary appointments that will result in the Walter Canada Group obtaining the necessary expertise to proceed with its restructuring efforts. In that sense, such appointments fulfill the requirements of being "appropriate", in the sense that that expertise will assist the debtor in achieving the objectives of the *CCAA*: see s. 11; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*., 2007 SKQB 121 at para. 19.

[36] The 1974 Pension Plan does not mount any serious argument against the need for such appointments, other than to note that the costs of these retainers will result in a very expensive process going forward. The matter of PJT and the CRO's compensation was the subject of some negative comment by the 1974 Pension Plan. However, the 1974 Pension Plan did not suggest any alternate way of proceeding with the SISP and the operations generally. When pressed by the Court on the subject, the 1974 Pension Plan acknowledged that time was of the essence in implementing the SISP and it did not contend that a further delay was warranted to canvas other options.

[37] PJT is to receive a monthly work fee of US$100,000, although some savings are achieved since this amount will not be charged until the completion of the U.S. sale. In addition, PJT will receive a capital raising fee based on the different types of financing that might be arranged. Lastly, PJT is entitled to a transaction or success fee, based on the consideration received from any transaction.

[38] At the outset of the application, the proposed compensation for the CRO was similar to that of PJT. The CRO was to obtain a monthly work fee of US$75,000. In

addition, the CRO was to receive a transaction or success fee based on the consideration received from any transaction. After further consideration by the petitioners and BlueTree, this proposed compensation was subsequently renegotiated so as to limit the success fee to $1 million upon the happening of a "triggering event" (essentially, a recapitalization, refinancing, acquisition or sale of assets or liabilities).

[39] To secure the success fees of PJT and the CRO, the Walter Canada Group seeks a charge of up to a maximum of $10 million, with each being secured to a limit of half that amount. Any other fees payable by the Walter Canada Group to PJT and the CRO would be secured by the Administration Charge granted in the initial order.

[40] The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the *CCAA*:

> 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[41] In *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 22, Justice Wilton-Siegel commented on the necessity of such a charge in a restructuring, as it is usually required to ensure the involvement of these professionals and achieve the best possible outcome for the stakeholders. I concur in that sentiment here, as the involvement of PJT and BlueTree is premised on this charge being granted.

[42] In *Canwest Publishing Inc.*, 2010 ONSC 222 at para. 54, Justice Pepall (as she then was) set out a non-exhaustive list of factors to consider when determining

whether the proposed compensation is appropriate and whether charges should be granted for that compensation:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

[43] I am satisfied that the Walter Canada Group's assets and operations are significantly complex so as to justify both these appointments and the proposed compensation. I have already referred to the significant regulatory and environmental issues that arise. In addition, relevant employment issues are already present. Any transaction relating to these assets and operations will be anything but straightforward.

[44] The factors relating to the proposed role of the professionals and whether there is unwarranted duplication can be addressed at the same time. As conceded by the petitioners' and Monitor's counsel, there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is *unwarranted* duplication of effort. I am satisfied that the process has been crafted in a fashion that recognizes the respective roles of these professionals but also allows for a coordinated effort that will assist each of them in achieving their specific goals. Each has a distinct focus and I would expect that their joint enterprise will produce a better result overall.

[45] Any consideration of compensation will inevitably be driven by the particular facts that arise in the proceedings in issue. Even so, I have not been referred to any material that indicates that the proposed compensation and charge in favour of PJT and the CRO are inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings. In that regard, I accept

the petitioners' submissions that the task ahead justifies both the amount of the fees to be charged and the protections afforded by the charge. In short, I find that the proposed compensation is fair and reasonable in these circumstances.

[46] The secured creditors likely to be affected by the charges for PJT and the CRO's fees have been given notice and do not oppose the relief being sought.

[47] Finally, the Monitor is of the view that the agreed compensation of PJT and the CRO and the charge in their favour are appropriate.

[48] In summary, all circumstances support the relief sought. Accordingly, I conclude that it is appropriate to appoint the CRO and approve the engagement of PJT on the terms sought. In addition, I grant a charge in favour of PJT and the CRO to a maximum of $10 million to secure their compensation beyond the monthly work fees, subject to the Administration Charge, the Director's Charge and the KERP Charge (as discussed below).

Key Employee Retention Plan ("KERP")

[49] The Walter Canada Group also seeks approval of a KERP, for what it describes as a "key" employee needed to maintain the Canadian operations while the SISP is being conducted. In addition, Mr. Harvey states that this employee has specific information which the CRO, PJT and the Monitor will need to draw on during the implementation of the SISP.

[50] The detailed terms of the KERP are contained in a letter attached to Mr. Harvey's affidavit #3 sworn December 31, 2015. In the course of submissions, the Walter Canada Group sought an order to seal this affidavit, on the basis that the affidavit and attached exhibit contained sensitive information, being the identity of the employee and the compensation proposed to be paid to him.

[51] I was satisfied that a sealing order should be granted with respect to this affidavit, based on the potential disclosure of this personal information to the public: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at

para. 53; *Sahlin v. The Nature Trust of British Columbia*, 2010 BCCA 516 at para. 6. A sealing order was granted on January 5, 2016.

[52] The proposed KERP must be considered in the context of earlier events. This individual was to receive a retention bonus from the U.S. entities; however, this amount is now not likely to be paid. In addition, just prior to the commencement of these proceedings, this person was given a salary increase to reflect his additional responsibilities, including those arising from the loss of support and the shared services from the U.S. entities. This new salary level has not been disclosed to the court or the stakeholders.

[53] The Walter Canada Group has proposed that this employee be paid a retention bonus on the occurrence of a "triggering event", provided he remains an active employee providing management and other services. The defined triggering events are such that the retention bonus is likely to be paid whatever the outcome might be. In addition, to secure the payment of the KERP to this employee, Walter Energy Canada seeks a charge up to the maximum amount of the retention bonus.

[54] The amount of the retention bonus is large. It has been disclosed in the sealed affidavit but has not been disclosed to certain stakeholders, including the 1974 Pension Plan. The Monitor states in its report:

> The combination of the salary increase and proposed retention bonus … were designed to replace the retention bonus previously promised to the KERP Participant by Walter Energy U.S.

[55] I did not understand the submissions of the 1974 Pension Plan to be that the granting of a KERP for this employee was inappropriate. Rather, the concern related to the amount of the retention bonus, which is to be considered in the context of the earlier salary raise. At the end of the day, the 1974 Pension Plan was content to leave a consideration of the level of compensation to the Court, given the sealing of the affidavit.

[56] The authority to approve a KERP is found in the courts' general statutory jurisdiction under s. 11 of the *CCAA* to grant relief if "appropriate": see *U.S. Steel Canada* at para. 27.

[57] As noted by the court in *Timminco Ltd. (Re)*, 2012 ONSC 506 at para. 72, KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

[58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

[59] I will discuss those factors and the relevant evidence on this application, as follows:

a) Is this employee important to the restructuring process?: In its report, the Monitor states that this employee is the most senior remaining executive in the Walter Canada Group, with extensive knowledge of its assets and operations. He was involved in the development of the Wolverine mine and has extensive knowledge of all three mines. He also has strong relationships in the communities in which the mines are located, with the Group's suppliers and with the regulatory authorities. In that sense, this person's expertise will enhance the efforts of the other professionals to be involved, including PJT, the CRO and the Monitor: *U.S. Steel* at para. 28;

b) Does the employee have specialized knowledge that cannot be easily replaced?: I accept that the background and expertise of this employee is such that it would be virtually impossible to replace him if he left the employ of the Walter Canada Group: *U.S. Steel* at para. 29;

c) Will the employee consider other employment options if the KERP is not approved?: There is no evidence here on this point, but I presume

that the KERP is more a prophylactic measure, rather than a reactionary one. In any event, this is but one factor and I would adopt the comments of Justice Newbould in *Grant Forest Products* at paras. 13-15, that a "potential" loss of this person's employment is a factor to be considered;

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?: The Monitor has reviewed the proposed KERP, but does not appear to have been involved in the process. Mr. Harvey confirms the business decision of the Walter Canada Group to raise this employee's salary and propose the KERP. The business judgment of the board and management is entitled to some deference in these circumstances: *Grant Forest Products* at para. 18; *U.S. Steel Canada* at para. 31; and

e) Does the Monitor support the KERP and a charge?: The answer to this question is a resounding "yes". As to the amount, the Monitor notes that the amount of the retention bonus is at the "high end" of other KERP amounts of which it is aware. However, the Monitor supports the KERP amount even in light of the earlier salary increase and after considering the value and type of assets under this person's supervision and the critical nature of his involvement in the restructuring. As this Court's officer, the views of the Monitor are also entitled to considerable deference by this Court: *U.S. Steel* at para. 32.

[60] In summary, the petitioners' counsel described the involvement of this individual in the *CCAA* restructuring process as "essential" or "critical". These sentiments are echoed by the Monitor, who supports the proposed KERP and charge to secure it. The Monitor's report states that this individual's ongoing employment will be "highly beneficial" to the Walter Canada Group's restructuring efforts, and that this employee is "critical" to the care and maintenance operations at

the mines, the transitioning of the shared services from the U.S. and finally, assisting with efforts under the SISP.

[61] What I take from these submissions is that a loss of this person's expertise either now or during the course of the *CCAA* process would be extremely detrimental to the chances of a successful restructuring. In my view, it is more than evident that there is serious risk to the stakeholders if this person does not remain engaged in the process. Such a result would be directly opposed to the objectives of the *CCAA*. I find that such relief is appropriate and therefore, the KERP and charge to secure the KERP are approved.

Cash Collateralization / Intercompany Charge

[62] Pursuant to the initial order, the Walter Canada Group was authorized and directed to cash collateralize all letters of credit secured by the 2011 credit agreement within 15 days of any demand to do so from the administrative agent, Morgan Stanley Senior Funding Inc. ("Morgan Stanley"). This order was made on the basis of representations by the Monitor's counsel that it had obtained a legal opinion that the security held by Morgan Stanley was valid and enforceable against the Walter Canada Group.

[63] On December 9, 2015, Morgan Stanley demanded the cash collateralization of approximately $22.6 million of undrawn letters of credit. On December 21, 2015, Morgan Stanley requested that the Walter Canada Group enter into a cash collateral agreement (the "Cash Collateral Agreement") to formalize these arrangements.

[64] The Walter Canada Group seeks the approval of the Cash Collateral Agreement, which provides for the establishment of a bank account containing the cash collateral and confirms Morgan Stanley's pre-filing first-ranking security interest in the cash in the bank account. The cash collateralization is intended to relate to letters of credit issued on behalf of Brule Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership and Willow Creek Coal Partnership. However, only the Brule Coal Partnership has sufficient cash to collateralize all these letters of credit.

[65] Accordingly, the Walter Canada Group seeks an intercompany charge in favour of Brule Coal Partnership, and any member of the Walter Canada Group, to the extent that a member of the Walter Canada Group makes any payment or incurs or discharges any obligation on behalf of any other member of the Walter Canada Group in respect of obligations under the letters of credit. The intercompany charge is proposed to rank behind all of the other court-ordered charges granted in these proceedings, including the charges for PJT and the CRO and the KERP.

[66] No objection is raised in respect of this relief. The Monitor is of the view that the intercompany charge is appropriate.

[67] In my view, this relief is simply a formalization of the earlier authorization regarding the trusting up of these contingent obligations. On that basis, I approve the Cash Collateral Agreement. I also approve the intercompany charge in favour of the Brule Coal Partnership, on the basis that it is necessary to preserve the *status quo* as between the various members of the Walter Canada Group who will potentially benefit from the use of this Partnership's funds. Such a charge will, as stated by the Monitor, protect the interests of creditors as against the individual entities within the Walter Canada Group.

Stay Extension

[68] In order to implement the SISP, and further its restructuring efforts in general, the Walter Canada Group is seeking an extension of the stay and other relief granted in the initial order until April 5, 2016.

[69] Section 11.02(2) and (3) of the *CCAA* authorizes the court to make an order extending a stay of proceedings granted in the initial application. In this case, the evidence, together with the conclusions of the Monitor, support that an extension is appropriate and that the petitioners are acting in good faith and with due diligence. No stakeholder has suggested otherwise.

[70] As noted above, it is anticipated that the Walter Canada Group will have sufficient liquidity to continue operating throughout the requested stay period.

[71] Further, as the Phase 1 deadline in the SISP is March 18 2016, an extension of the stay until April 5, 2016 will provide sufficient time for PJT to solicit, and the CRO (in consultation with the Monitor and PJT) to consider, any letters of intent. At that time, the process may continue to Phase 2 of the SISP, if the CRO, in consultation with the Monitor and PJT, deems it advisable. In any event, at the time of the next court date, there will be a formal update to the court and the stakeholders on the progress under the SISP.

[72] The only issue relating to the extension of the stay arises from the submissions of the Union, who represents the employees at the Wolverine mine owned and operated by the Wolverine Coal Partnership ("Wolverine LP"). The Union wishes to continue with certain outstanding legal proceedings outstanding against Wolverine LP, as follows:

a) In June 2015, the B.C. Labour Relations Board (the "Board") found that Wolverine LP was in breach of s. 54 of the *Labour Relations Code,* R.S.B.C. 1996, c. 224 (the "*Code*"). The Board ordered Wolverine LP to pay $771,378.70 into trust by way of remedy. This was estimated to be the amount of damages owed by Wolverine LP, but the Union took the position that further amounts are owed. In any event, this amount was paid and is currently held in trust;

b) In November 2015, Wolverine LP filed a proceeding in this court seeking a judicial review of the Board's decision on the s. 54 issue. As a result, the final determination of the damages arising from the *Code* breach has not yet occurred and may never occur if Wolverine LP succeeds in its judicial review; and

c) Following layoffs in April 2014, the Union claimed that a "northern allowance" was payable by Wolverine LP to the employees, including those on layoff. This claim was rejected at arbitration, and upheld on review at the Board. In February 2015, the Union filed a proceeding in this court seeking a judicial review of the Board's decision.

[73] The Union's counsel has referred me to my earlier decision in *Yukon Zinc Corporation (Re)*, 2015 BCSC 1961. There, I summarized the principles that govern applications by a creditor to lift the stay of proceedings to litigate claims:

> [26] There is also no controversy concerning the principles which govern applications by creditors under the *CCAA* to lift the stay of proceedings to litigate claims in other courts or forums, other than by the procedures in place in the restructuring proceedings:
>
> a) the lifting of the stay is discretionary: *Canwest Global Communications Corp.*, 2011 ONSC 2215, at paras. 19, 27;
>
> b) there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application: *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200, at para. 32, 183 A.C.W.S. (3d) (Ont. S.C.J.) ("*Canwest* (2009)"), as applied in *Azure Dynamics Corporation (Re)*, 2012 BCSC 781, at para. 5 and *505396 B.C. Ltd. (Re)*, 2013 BCSC 1580, at para. 19;
>
> c) there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest* (2009) at para. 33;
>
> d) relevant factors will include the status of the *CCAA* proceedings and what impact the lifting of the stay will have on the proceedings. The court may consider whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action: *Canwest* (2009) at para. 32;
>
> e) particularly where the issue is one which is engaged by a claims process in place, it must be remembered that one of the objectives of the *CCAA* is to promote a streamlined process to determine claims that reduces expense and delay; and
>
> f) as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay: *Canwest* (2009); *Azure Dynamics* at para. 28.

[74] I concluded that the Union had not met the "heavy onus" on it to justify the lifting of the stay to allow these various proceedings to continue. My specific reasons are:

a) The Union argues that the materials are essentially already assembled and that these judicial reviews can be scheduled for short chambers matters. As such, the Union argues that there is "minimal prejudice" to Wolverine LP. While this may be so, proceeding with these matters will

inevitably detract both managerial and legal focus from the primary task at hand, namely to implement the SISP, and as such, potentially interfere with the restructuring efforts;

b) The Union argues that any purchaser of Wolverine LP's mine will inherit outstanding employee obligations pursuant to the *Code*. Accordingly, the Union argues that it will be more attractive to a buyer for the mine to have all outstanding employee claims resolved. Again, while this may come to pass, such an argument presupposes an outcome that is anything less than clear at this time. Such a rationale is clearly premature;

c) The Union argues that it is unable to distribute the $771,378.70 to its members until Wolverine LP's judicial review is addressed. Frankly, I see this delay as the only real prejudice to the Union members. However, on the other hand, one might argue that the Union members are in a favourable position with these monies being held in trust as opposed to being unsecured creditors of Wolverine. In any event, the Union's claim to these monies has not yet been determined and arises from a dispute that dates back to April 2014. Therefore, there is no settled liability that would allow such payment to be made; and

d) The Union claims that these matters must be determined "in any event" and that they should be determined "sooner rather than later". However, the outcome of the SISP may significantly affect what recovery any creditor may hope to achieve in this restructuring. In the happy circumstance where there will be monies to distribute, I expect that a claims process will be implemented to determine valid claims, not only in respect of the Union's claims, but all creditors.

[75] In summary, there is nothing to elevate the Union's claims such that it is imperative that they be determined now. There is nothing to justify the distraction and expense of proceeding with these actions to the detriment of the restructuring

efforts. If it should come to pass that monies will be distributed to creditors, such as the Union, then I expect that the usual claims process will be implemented to decide the validity of those claims.

[76] In the meantime, if it becomes necessary to determine the validity of these claims quickly (such as to clarify potential successor claims for a purchaser), the Union will be at liberty to renew its application to lift the stay for that purpose.

[77] Accordingly, I grant an extension of the stay of proceedings and other ancillary relief until April 5, 2016.

"Fitzpatrick J."

TAB 16

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely

distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation

engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least $65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50,000,000 on the winding-up of Soundair.

On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario

Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer which was acceptable, and the 922 offer which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it

> contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)
I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In Crown Trust v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a

sale should be considered by the court. The first is Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to

show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that

the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced

that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see Crown Trust Co. v. Rosenberg, supra, and Re Selkirk (1986, Saunders J.), supra. However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as Crown Trust Co. v. Rosenberg, supra, Re Selkirk (1986, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), supra, and Cameron, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to Re Selkirk (1986), supra, where Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

While those remarks may have been made in the context of a

bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

(Emphasis added)

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways

in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 109 O.R., p. 548 D.L.R.:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated

purchaser would require in order to make a serious bid.

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

Moreover, I am not prepared top find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it

contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline

which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as

to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

The Royal Bank's support of the 922 offer is so affected by

the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that

Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in

no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not having a roving commission to decide what

> is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority

of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are

they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a

deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other

offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg

J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not

include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be

noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however,

contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

> ... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to

negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of

its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

In Re Beauty Counsellors of Canada Ltd., supra, Saunders J. said at p. 243 C.B.R.:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the

law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and

procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to

court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

TAB 17

CITATION: DCL Corporation, 2023 ONSC 3686
COURT FILE NO.: CV-22-00691990-00CL
DATE: 20230517

SUPERIOR COURT OF JUSTICE – ONTARIO – COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DCL CORPORATION (the "Applicant")

RE: DCL Corporation, Applicant

BEFORE: Peter J. Osborne J.

COUNSEL: Linc Rogers, Alexia Parente and Milly, Chow, for the Applicant

Josh Nevsky and Stephen Ferguson, for the Canadian Monitor, Alvarez & Marsal Canada Inc.

Marc Wasserman and Martino Calvaruso, Counsel to the Canadian Monitor

Joseph Bellissimo and Shayne Kukulowicz, Canadian Counsel to the Term Loan Lenders and Term Loan Agent

Joe Latham and Erik Axell, Canadian Counsel to Pre-Petition Agent and DIP Agent

Heather Meredith, Counsel to Vale Canada Limited

HEARD: February 27, 2023

ENDORSEMENT

1. The Applicant, DCL Corporation (the "Applicant" or "DCL") moves for an order authorizing DCL to enter into a stalking horse agreement, deeming that agreement to be a Qualified Bid, approving bidding procedures in connection with the solicitation and identification of bids for the purpose of selling substantially all of the assets of DCL, and a sealing order.

2. At the conclusion of the hearing of this motion on February 22, 2023, I granted the relief sought with reasons to follow. These are those reasons.

3. Defined terms in this Endorsement have the meaning given to them in the motion materials and/or the Second Report of the Monitor dated February 16, 2023.

4. None of the relief sought by DCL is opposed, and it is supported by the Term Loan Lenders and Term Loan Agent, the Pre-Petition Agent and DIP Agent and is recommended by the Monitor.

5. The Applicant relies principally on the affidavit of Mr. Scott Davido sworn February 15, 2023 and exhibits thereto, the affidavit of Ms. Nancy Thompson sworn February 22, 2023 and exhibits thereto, and the Second Report of the Monitor.

Background, Stalking Horse APA and Final Bidding Procedures

6. DCL obtained protection under the CCAA by Initial Order of Justice Conway of this Court dated December 20, 2022. On the same date, DCL's US-based affiliates commenced voluntary proceedings pursuant to Chapter 11 of the *United States Bankruptcy Code* before the United States Bankruptcy Court for the District of Delaware (the "US Proceedings").

7. On February 21, 2023, The Honourable J. Kate Stickles of the US Bankruptcy Court granted companion relief to that sought on this motion.

8. DCL seeks authorization to enter into an agreement, *nunc pro tunc*, between Pigments Holdings Inc. and the DCL Group dated as of December 21, 2022, as amended and restated pursuant to an amended and restated asset purchase agreement dated February 13, 2023 (the "Stalking Horse APA"). Pursuant to the Stalking Horse APA, the purchaser would acquire substantially all of the assets of the DCL Group, inclusive of assets held by the Applicant.

9. DCL began exploring options for restructuring its business prior to the commencement of these proceedings. An initial sales process to solicit interest in its business was conducted. DCL retained TM Capital to assist and evaluate strategic options. DCL and TM Capital developed a list of potentially interested parties, prepared a CIM and virtual data room and invited potential bidders to conduct due diligence.

10. That strategic process resulted in numerous letters of intent. DCL's term loan lenders submitted a credit bid which ultimately resulted in the agreement dated December 21, 2022 described above. Subsequently, the parties negotiated amendments to that agreement to reflect discussions with the Committee of Unsecured Creditors ("UCC") and its counsel and financial advisor.

11. The Applicant submits that approval of the Stalking Horse APA will provide demonstrated stability through this going concern solution. The Stalking Horse APA is the highest and best initial offer received as part of the pre-filing marketing process and, if approved, will be used as a floor or baseline to incentivize prospective bidders to submit other competitive offers for the Assets as against the minimum terms represented by the Stalking Horse APA itself.

12. The Stalking Horse APA would, if completed, provide for the purchase and sale of the Assets of the DCL Group on a going concern basis (other than the Ajax Plant) for an aggregate purchase price range of USD$166.2 million to USD$170.9 million. It reflects the Global Settlement reached with the UCC, and among other things clarifies the

mechanics for the funding of the Designated Amount of USD$2 million (as defined in the Stalking Horse APA) and provides for the CCAA Cash Pool funded in the amount of USD$750,000. There is no due diligence or financing condition.

13. The proposed purchaser is sophisticated, is an affiliate of the Term Lenders and is therefore familiar with the business and operations of the DCL Group.

14. The proposed Final Bidding Procedures will govern the solicitation and evaluation of additional bids for the Assets all with the objective of producing the highest or otherwise best available recovery for affected stakeholders.

15. TM Capital has continued to actively market the Assets and has reached out to over 150 potential bidders, a number of whom have expressed interest.

16. The Final Bidding Procedures are described in detail in Mr. Davido's affidavit. They contemplate a bid deadline of March 10, 2023, an auction commencement date of March 13, 2023 if necessary and sale approval hearings in both this Court and in the US Bankruptcy Court on March 16, 2023. Closing of the successful bid would occur the following day, assuming the requisite approvals are granted. The process will be overseen by the Monitor.

17. Each bid is required to have a 10% deposit and a minimum overbid, in excess of the Stalking Horse APA of USD$2,250,000. The bid increment thereafter would be USD$250,000.

The Applicable Factors to a Consideration of a Sale Process and Stalking Horse Bid

18. This Court has held that when considering a sales solicitation process, including the use of a stalking horse bid, the Court should assess the following factors (See *CCM Master Qualified Fund v. Bluetip Power Technologies*, 2012 ONSC 1750 at para. 6):

    a. the fairness, transparency and integrity of the proposed process;
    b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
    c. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

19. These factors are to be considered in light of the well-known *Soundair* Principles, which, while applicable to the test for approving a transaction following a sales process, not surprisingly track the same principles applicable to that process itself. (See *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

    a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
    b. the interests of all parties;
    c. the efficacy and integrity of the process by which the party obtained offers; and
    d. whether the working out of the process was unfair.

20. In *Re Nortel Networks Corp.,* [2009] O.J. No. 3169, Morawetz, J. (now Chief Justice) described several factors to be considered in a determination of whether to approve a proposed sales process, including:

    a. is a sale transaction warranted at this time?
    b. Will it benefit the whole economic community?
    c. Do any of the debtor's creditors have a *bona fide* reason to object to a sale? and
    d. is there a better viable alternative?

21. Subsequent to that decision, the CCAA was amended in 2009 to clarify the jurisdiction of this Court to authorize a sale of assets of the debtor outside a plan of arrangement according to the non-exhaustive list of factors set out in section 36 of the CCAA. The section 36 factors apply to approval of a sale rather than a sale process, but Chief Justice Morawetz' *Nortel* factors continue to apply post-2009 amendments (*Brainhunter Inc*., 2009 62 CBR (5^{th}) 41).

22. Notwithstanding that the section 36 factors are not directly applicable to the relief sought on this motion, in my view they should be kept in mind since they will be considered when this Court is asked to approve a sale resulting from the very process now under consideration.

23. The use of stalking horse bids to set a baseline for a sales process can be a reasonable and useful approach. As observed by Justice Penny of this Court, they can maximize value of a business for the benefit of stakeholders and enhance the fairness of the sales process as they establish a baseline price and transactional structure for any superior bids. (See *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 20).

24. Recently, Justice Fitzpatrick of the British Columbia Supreme Court surveyed the Canadian authorities relevant to consideration of stalking horse bids, including those referred to above, and considered as a useful summary of relevant questions to consider in assessing the merits of a proposed stalking horse bid, the following:

    a. How did the stalking horse agreement arise?
    b. What are the stability benefits?
    c. Does the timing support approval?
    d. Who supports or objects to the stalking horse agreement?
    e. What is the true cost of the stalking horse agreement? and
    f. is there an alternative?

    (See *Re Freshlocal Solutions Inc.,* 2022 BCSC 1616 at paras. 24-32).

25. A sales process is warranted here. The Applicant is insolvent and cannot indefinitely continue operations.

26. The evidence relied on by the Applicant here is clear that the market has been extensively canvassed by TM Capital, and the Stalking Horse APA is the result of extensive

negotiations and represents the highest and best initial offer for the Assets. There were no limitations restricting potential bidders from submitting a stalking horse bid.

27. There is transparency. Both the proposed Purchase Price, and the components thereof, are described together with an estimate of the purchase price range which has been considered in consultation with the Monitor.

28. I am satisfied that the Stalking Horse APA will not only provide stability for the Applicant, but also demonstrate that stability to the marketplace with a view to maximizing potential recovery for stakeholders.

29. It remains to be seen whether the Stalking Horse APA will be the final or best bid. That is for another day, but for now, it sets the minimum price and thereby incentivizes prospective bidders. That benefits the economic community. It provides a going concern solution for DCL, preserving the jobs of active employees and important relationships with suppliers, customers and other stakeholders. It provides for the CCAA Cash Pool for the unsecured creditors.

30. During the hearing of this motion, I asked for and received submissions from counsel with respect to the minimum overbid of USD$2,250,000. It is required as a result of the fee of $2 million payable to TM Capital in the event there is at least one Qualified Bidder beyond the Stalking Horse APA.

31. The minimum overbid is therefore intended to provide for the payment of this fee and the equivalent of the subsequently applicable bid increment of USD$250,000 all with a view to permitting “an apples to apples” comparison of bids.

32. I was concerned that this could have a potentially chilling effect on the proposed bid procedure and auction since the amount is not immaterial, and therefore any other potential bidder would be required to submit a bid that was significantly higher than that represented by the Stalking Horse APA.

33. I accept that, as submitted by the Applicant and supported by all other parties represented in Court today, the potential for a chilling effect is mitigated by the fact that the Stalking Horse APA provides for a bid in an amount that is less than the full debt owed to that creditor (the pre-filing Term Lender, an affiliate of the bidder).

34. The idea is that recovery for stakeholders not be less favourable on a net basis as a result of a bid, for example, that exceeds the stalking horse bid by $250,000 since the creditors would be worse off as a result of the fee payable to TM Capital. It is for these reasons that the relief sought today including this provision is supported by the UCC.

35. As noted, the Stalking Horse APA is supported by the DIP Agent and DCL’s two principal secured creditors, and is recommended by the Court-appointed Monitor. The Monitor submits that in its view, creditors of the Applicant would not be materially prejudiced by approval of the Stalking Horse APA or the Final Bidding Procedures.

36. I am satisfied that there is no *bona fide* reason for creditors of DCL to object to the sale of the Assets or to the Final Bidding Procedures, and indeed none has done so. This provides additional comfort that there is no better viable alternative.

37. For all of these reasons, the Stalking Horse APA and the Final Bidding Procedures are approved.

Sealing Order

38. The Applicant seeks a sealing order over the Confidential Exhibit. That contains the unredacted disclosure schedules to the Stalking Horse APA. Those in turn contain personal information about employees as well as commercially sensitive information relating to material contracts.

39. Subsection 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.42, provides for the Court's authority to grant a sealing order. It provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed and not part of the public record.

40. The Supreme Court of Canada in *Sherman Estate v Donovan,* 2021 SCC 25, at para. 38, recast the test from *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41 (CanLII):

> The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core principles that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking the court to exercise discretion in a way that limits the open court presumption must establish that:
>
> a) court openness poses a serious risk to an important public interest;
>
> b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> c) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all of these prerequisites have been met can a discretionary limit on openness - for example, a sealing order, a publication ban, an order excluding the public from the hearing, or a redaction order - properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 at paras. 7 and 22).

41. Under the first branch of the three-part test, an "important commercial interest" is one that can be expressed in terms of the public interest in confidentiality. The Applicant here relies on the sanctity of contract (see *Sierra Club* at para. 55). The Supreme Court was clear that the interest in question cannot merely be specific to the party requesting the order and must be one which can be expressed in terms of a public interest in confidentiality.

42. Here, as in *Sierra Club*, the Applicant submits that the exposure of the information sought to be sealed would cause a breach of confidentiality agreements entered into between the DCL Group and other potential bidders which provide in part that the information must be kept confidential by those bidders and used only for the purposes described. Accordingly, the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information as well as maintaining the sanctity of contract.

43. The Supreme Court recognized the potential need for a sealing order where the parties have agreed to a confidentiality provision (see *Bombardier Inc. v. Union Carbide Canada Inc.,* 2014 SCC 35 at para. 49).

44. Further, in *Sierra Club* (at paras. 59-60), the Supreme Court recognized that the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test, provided however that certain criteria were met. The applicant must demonstrate that the information question has been treated at all relevant times is confidential and that on a balance of probabilities its proprietary, commercial and scientific interest could reasonably be harmed by the disclosure of the information. The information must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the court room doors closed".

45. Accordingly, I am satisfied that the first branch of the test is met here, in that there is an important public interest present to which court openness (in the form of the refusal to grant a sealing order) poses a serious risk. If a sealing order is not granted, there will be a serious risk to an important public interest of preserving, to the extent necessary, contractual obligations of confidentiality. (See *Bombardier*, at paras. 3, 29 and 51). The parties have, throughout, treated the information in the Confidential Exhibit as confidential and I am satisfied that the commercial interests of DCL could reasonably be harmed by the disclosure of the information.

46. I am also satisfied that the second requirement is met since the order sought is necessary to prevent the risks identified above is an important public interest because reasonably alternative measures will not prevent the risk.

47. The third requirement is also met. The balance of the materials in the Application (which constitutes the overwhelming proportion of the information) would not be sealed, and available to the public. That includes the disclosure schedules (over 45 pages) attached to Mr. Davido's affidavit. The proposed redactions are minimal and proportion yet achieve the objective of protecting privacy and preventing commercial harm. The gist of the issues would remain available to the public. On balance, I am satisfied that the benefits of the requested order outweigh its negative effects. The overall objective is to maximize the integrity of the proposed sales process and a successful outcome to maximize recovery for all stakeholders.

48. The sealing order shall have effect until further order of this Court. I note the general comeback provision in the Amended and Restated Initial Order of Justice Conway.

49. Counsel for DCL are directed to file physical copies of the sealed documents with the Commercial List Office in a sealed envelope marked: "confidential and sealed by Court order; not to form part of the public record".

Disposition

50. For all of the above reasons, I granted the order on February 26 with immediate effect and without the requirement that it be issued and entered. I am grateful to the parties for resolving the outstanding issues and objections such that the relief was sought today on an unopposed basis.

51. The proposed sale approval motion will be returnable before me on March 16, 2023 commencing at 9 AM via Zoom. The Applicant advises that it intends to seek companion sale approval from Judge Stickles that same day.

Osborne J.

Addendum: Following release of this endorsement, Counsel to the Court-appointed Monitor drew to my attention typographical errors in paras. 6 and 51. I have corrected those but made no other changes. I have directed counsel to the Monitor to release this corrected version of my endorsement to the Service List.

Osborne J.

March 2, 2023

TAB 18

CITATION: Terrace Bay Pulp Inc. (Re), 2012 ONSC 4247
COURT FILE NO.: CV-12-9566-00CL
DATE: 20120727

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TERRACE BAY PULP INC., Applicant**

BEFORE: **MORAWETZ J.**

COUNSEL: **Pamela Huff, Marc Flynn and Kristina Desimini, for the Applicant, Terrace Bay Pulp Inc.**

Alec Zimmerman and James Szumski, for Birchwood Trading, Inc.

M. Starnino, for the United Steelworkers

Alan Merksey, for Tangshan Sanyu Group Xingda Chemical Fiberco Limited

Alex Ilchenko, for Ernst & Young Inc, Monitor

Jacqueline L. Wall, for Her Majesty The Queen in Right of Ontario as represented by the Ministry of Northern Development and Mines

Janice Quigg, for Skyway Canada Ltd.

Fred Myers, for the Township of Terrace Bay

Peter Forestell, Q.C., for Aditya Birla Group and AV Terrace Bay Inc.

HEARD: **JULY 16, 2012**

ENDORSED: **JULY 19, 2012**

REASONS: **JULY 27, 2012**

ENDORSEMENT

[1] Terrace Bay Pulp Inc. (the "Applicant") brought this motion for, among other things, approval of the Sales Transaction (the "Transaction") contemplated by an asset purchase agreement dated as of July 5, 2012 (the "Purchase Agreement") between the Applicant, as seller, and AV Terrace Bay Inc., as purchaser (the "Purchaser").

[2] The Applicant also seeks authorization to take additional steps and to execute such additional documents as may be necessary to give effect to the Purchase Agreement.

[3] Further, the Applicant seeks a Vesting Order, approval of the Fifth Report of the Monitor dated June 12, 2012 and a declaration that the subdivision control provisions contained in the *Planning Act*, R.S.O. 1990, c. P.13 (the "*Planning Act*") do not apply to the vesting of title to the Real Property (as defined in the Purchase Agreement) in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer.

[4] Finally, the Applicant sought an amendment to the Initial Order to extend the Stay of Proceedings to October 31, 2012.

[5] Argument on this matter was heard on July 16, 2012. At the conclusion of argument, on an unopposed basis, I extended the Stay of Proceedings to October 31, 2012. This decision was made after a review of the record which, in my view, established that the Applicant has been and continues to work in good faith and with due diligence such that the requested extension was appropriate in the circumstances.

[6] On July 19, 2012, I released my decision approving the Transaction, with reasons to follow. These are the reasons.

[7] With respect to the motion to approve the Transaction, the Applicant's position was supported by the United Steelworkers and the Township of Terrace Bay. Counsel to Her Majesty The Queen in Right of Ontario, as Represented by the Ministry of Northern Development and Mines, consented to the Transaction and also supported the motion.

[8] The motion was opposed by Birchwood Trading, Inc. ("Birchwood") and by Tangshan Sanyu Group Xingda Chemical Fiberco Limited ("Tangshan").

[9] Counsel to the Applicant challenged the standing of Tangshan on the basis that it was "bitter bidder". Argument was heard on this issue and I reserved my decision, indicating that it would be addressed in this endorsement. For the purposes of the disposition of this motion, it is not necessary to address this issue.

[10] The Applicant seeks approval of the Transaction in which the Purchaser will purchase all or substantially all of the mill assets of the Applicant for a price of $2 million plus a $25 million concession from the Province of Ontario. The Monitor has recommended that this Transaction be approved.

[11] Birchwood submits that the Applicant and the Monitor have taken the position that a competing offer from Tangshan for a purchase price of $35 million should not be considered, notwithstanding that the Tangshan offer (i) is subject to terms and conditions which are as good or better than the Transaction; (ii) would provide dramatically greater recovery to the creditors of the Applicant, and (iii) offers significant benefits to other stakeholders, including the employees of the Applicant's mill.

[12] Birchwood is a creditor of the Applicant. It holds a beneficial interest in the Subordinated Secured Plan Notes (the "Notes") in the face amount of approximately $138,000 and is also the fourth largest trade creditor of the Applicant. If the Transaction is approved, Birchwood submits that it expects to receive less than 6% recovery on its holdings under the Notes and no recovery on its trade debt. In contrast, if the Tangshan offer were accepted, Birchwood expects that it would receive full recovery under the Notes, and that it may also receive a distribution with respect to its trade debt.

[13] Birchwood also submits that the Tangshan offer provides substantial benefits to the creditors and other stakeholders of the Applicant which would not be realized under the Transaction. These include:

(a) an increase in the purchase price for the mill assets, from an effective purchase price of $27 million to a cash purchase price of $35 million;

(b) the potential for the Province of Ontario to be repaid in full or, if the Province is prepared to offer the same debt forgiveness concession under the Tangshan offer that it is providing to the Purchaser, the potential to increase the "effective" purchase price of the Tangshan offer to $60 million;

(c) as a consequence of (a) and (b), additional proceeds available for distribution to creditors subordinate to the Province of Ontario of between $8 million and $33 million;

(d) employment of approximately 75 additional employees, plus the existing management of the mill;

(e) conversion of the mill into a dissolving pulp mill in 18 months, rather than 4 years, with a higher expected yield once the conversion is complete and a business plan which calls for the production of a more lucrative interim product during the conversion process.

[14] Counsel to Birchwood submits that the substantial increase in the consideration offered by the Tangshan offer, which is a binding offer with terms and conditions that are at least as favourable as the Transaction, is sufficient to call into question the integrity and efficacy of the Sales Process (defined below). Counsel suggests that the market for the mill assets was not sufficiently canvassed, and provides evidence to support a finding that the criteria for approval of the sale as set out in s. 36 (3) of the CCAA and *Royal Bank v. Soundair Corp.* (1991) 7 C.B.R. (3d) 1 (C.A.) has not been met.

[15] Birchwood requests an adjournment of the Applicant's request for approval of the Transaction, or a refusal to approve the Transaction and a varying of the Sales Process to allow the Tangshan offer to be considered and, if appropriate, accepted by the Applicant. Tangshan supports the position of Birchwood.

[16] For the following reasons, I decline Birchwood's request and grant approval of the Transaction.

FACTS

[17] The Applicant filed the affidavit of Wolfgang Gericke in support of this motion. In addition, there is considerable detail provided in the Sixth Report of the Monitor and in the Supplemental Sixth Report of the Monitor.

[18] On January 25, 2012, the Initial Order was granted in the CCAA proceedings. The Initial Order authorized the Applicant to conduct, with the assistance of the Monitor and in consultation with the Province of Ontario, a sales process to solicit offers for all or substantially all of the assets and properties of the Applicant used in connection with its pulp mill operations (the "Sales Process").

[19] The Applicant and the Monitor conducted a number of activities in furtherance of the Sales Process, as outlined in detail in the Sixth Report.

[20] The Monitor received 13 non-binding Letters of Intent by the initial deadline of February 15, 2012. All of the parties that submitted Letters of Intent were invited to do further due diligence and submit binding offers by the March 16, 2012 deadline provided for in the Sales Process Terms (the "Bid Deadline").

[21] The Monitor received eight binding offers by the Bid Deadline and, based on the analysis of the offers received, the Monitor and the Applicant, in consultation with the Province, determined that the offer of AV Terrace Bay Inc. was the best offer. The ultimate parent of the Purchaser is Aditya Birla Management Corporation Private Ltd. ("Aditya"), one of the largest conglomerates in India.

[22] After identifying the Purchaser's offer as the superior offer in the Sales Process, and after extensive negotiations, the Applicant entered into the Purchase Agreement; executed July 5, 2012 for an effective purchase price in excess of $27 million.

[23] Counsel to the Applicant submits that in assessing the various bids, the Applicant and the Monitor, in consultation with the Province, considered the following factors:

(a) the value of the consideration proposed in the Transaction;

(b) the level of due diligence required to be completed prior to closing;

(c) the conditions precedent to closing of a sale transaction;

(d) the impact on the Corporation of the Township of Terrace Bay (the "Township"), the community and other stakeholders;

(e) the bidder's intended use for the mill site including any future capital investment into the mill; and

(f) the ability to close the Transaction as soon as possible, given the company's limited cash flow.

[24] Four parties expressed an interest in Terrace Bay after the Bid Deadline.

[25] The unchallenged evidence is that the Monitor informed each of the late bidders that they could conduct due diligence, but their interest would only be entertained if the Applicant could not complete a Transaction with the parties that submitted their offers in accordance with the Sales Process Terms (*i.e.* prior to the Bid Deadline).

[26] The Monitor states in its Sixth Report that it reviewed materials submitted by each late bidder. Tangshan, as one of the late bidders, submitted a non-binding offer on July 5, 2012 (the "Late Offer"). The terms of the Late Offer were subject to change, and Tangshan required final approval from regulatory authorities in China before entering into a transaction.

[27] It is also unchallenged that, before submission of the Late Offer, the Monitor had advised Recovery Partners Ltd., which submitted the Late Offer on Tangshan's behalf, that the Bid Deadline passed months before and that the Applicant was far advanced in negotiating and settling a purchase agreement with a prospective purchaser who submitted an offer in accordance with the Sales Process Terms.

[28] As indicated above, the Applicant executed the Purchase Agreement on July 5, 2012.

[29] The Monitor received a second non-binding offer from Recovery Partners Ltd., on behalf of Tangshan, on July 10, 2012 and a binding offer on July 12, 2012 (the "July Tangshan Offer") for a purchase price of $35 million.

[30] In its Sixth Report, the Monitor stated that it was of the view that it is not appropriate to vary the Sales Process Terms or to recommend the July Tangshan Offer for a number of reasons:

(a) the Applicant, in consultation with the Province, had entered into a binding purchase agreement with the Purchaser, which does not permit termination by Terrace Bay to entertain a new offer;

(b) the fairness and integrity of the Sales Process is paramount to these proceedings and to alter the terms of the court-approved Sales Process Terms at this point would be unfair to the Purchaser and all of the other parties who participated in the Sales Process in compliance with the Sales Process Terms;

(c) the Sales Process terms have been widely known by all bidders and interested parties since the outset of the Sales Process in January 2012;

(d) the Sales Process Terms provide no bid protections for the potential Purchaser;

(e) the Purchaser had incurred, and continues to incur, significant expenses in negotiating and fulfilling conditions under the Purchase Agreement. The Applicant has advised the Monitor that there is a significant risk that the Purchaser would drop out of the Sales Process if there were an attempt to amend the Sales Process Terms to pursue an open auction at this stage;

(f) to consider any new bids might result in a delay in the timing of the sale of the assets of the mill which, in the view of the Monitor, poses a risk due to the Applicant's minimal cash position;

(g) the Province, with whom the Applicant is required to consult, and which has entered into an agreement with the Purchaser, supports the completion of the Transaction;

(h) the Purchaser has made progress satisfying the conditions to closing, including meeting with the Applicant's employees and negotiating collective bargaining agreements with the unions.

[31] As set out in the affidavit of Mr. Gericke, the Purchaser is an affiliate of Aditya, a Fortune 500 company that intends to make a significant investment to restart the mill by October 2012 and invest more than $250 million to convert the mill to produce dissolving grade pulp.

[32] The purchase price payable is the aggregate of: (i) $2 million, plus or minus adjustments on closing, and (ii) the amount of the assumed liabilities.

[33] The obligation of the Applicant to complete the Transaction is conditional upon, among other things, all amounts owing by the Applicant to the Province pursuant to a Loan agreement dated September 15, 2010 (the "Province Loan Agreement") being forgiven by the Province and all related security being discharged (the "Province Loan Forgiveness").

[34] The Province is the first secured creditor of the Applicant, and is owed in excess of $24 million. The Province Loan Forgiveness is an integral part of the Transaction.

[35] The Applicant submits that as the net sale proceeds, subject to any super-priority claims, flow to the Province in priority to other creditors upon completion, the effective consideration for the Transaction is in excess of $27 million, namely the cash portion of the purchase price plus the Province Loan Forgiveness, plus the value of the assumed liabilities.

[36] The Monitor recommends approval of the Transaction for the following reasons:

(a) the market was broadly canvassed by the Applicant, with the assistance of the Monitor;

(b) the Purchase Agreement will result in a cash purchase price of $2 million, and will see the forgiveness of amounts outstanding, plus accrued interest and costs, under the Province Loan Agreement;

(c) the Transaction contemplated by the Purchase Agreement will result in significant employment in the region, as well as a substantial capital investment;

(d) the Transaction will also see a major multi-national corporation acquiring the mill, which will greatly improve the stability of the mill operations;

(e) the Transaction involves the expected re-opening of the mill in October 2012 and the Applicant will be rehiring the employees of the mill;

(f) the Monitor is aware of the late bids, including the July Tangshan Offer and has consulted the company and the Province in relation to same. The Monitor maintains that the Sales Process was conducted in accordance with the Sales Process Terms and provided an adequate opportunity for interested parties to participate, conduct due diligence, and submit binding purchase agreements and deposits within court-approved deadlines; and

(g) several further factors have been considered by the Monitor including, without limitation: the importance of maintaining the fairness and integrity of the Sales Process in relation to all parties, including the Purchaser; the terms of the Purchase Agreement; the fact that it has taken many weeks to negotiate various issues, and; the importance of certainty in relation to closing and the closing date.

[37] In its Supplement to the Sixth Report, the Monitor commented on the efforts that were made to canvass international markets. This Supplemental Report was prepared after the Monitor reviewed the affidavit of Yu Hanjiang (the "Yu Affidavit"), filed by Birchwood. The Yu Affidavit raised issues with the efficacy of the Sales Process. The Monitor stated, in response, that it is satisfied that the Sales Process was properly conducted and that international markets were canvassed for prospective purchasers. Specifically, one of the channels used by the Monitor to market the assets was a program managed by the Ministry of Economic Development in Innovation ("MEDI") for the Province of Ontario which had established an "international business development representative program" ("IBDR"). The IBDR program operates a network of contacts and agents throughout the world, including China, to enable the MEDI to disseminate information about investment opportunities in Ontario to a worldwide investment audience. The Monitor further advised that IBDR representatives provided the Sales Process documents to a global network of agents for worldwide dissemination, including in China.

[38] The Monitor restated that it was satisfied that the Sales Process adequately canvassed the market, and continues to support the approval of the Transaction.

[39] The Monitor also provided in the Supplemental Report an update with respect to the position of the Purchaser.

[40] The Purchaser advised the Monitor that it has negotiated an agreement in principle with executives of the Terrace Bay union locals regarding the terms of revised collective bargaining agreements. The Purchaser further advised that it is confident that the revised collective bargaining agreements will be ratified. Ratification of the collective agreements will remove one of the last conditions to closing, exclusive of court approval. It is noted that s. 9.2(e) of the Purchase Agreement specifically provides that a condition precedent to performance by the Purchaser is that on or before July 24, 2012, the Purchaser shall have obtained a five (5) year extension of the existing collective bargaining agreements on terms acceptable to the Purchaser acting reasonably.

[41] The Purchaser has further advised the Monitor that it is critical to complete the Transaction by the end of July 2012 in order that the mill can be restarted by October, prior to the onset of winter, to avoid increased carrying costs.

[42] The Purchaser also advised the Monitor directly that, if the Sales Process and the Sales Process Terms were varied, it would terminate its interest in Terrace Bay.

LAW AND ANALYSIS

[43] Section 36 of the CCAA provides the authority to approve a sale transaction. Section 36(3) sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction. It provides as follows:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the Monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than the sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[44] I agree with the submission of counsel on behalf of the Applicant that the list of factors set out in s. 36(3) largely overlaps with the criteria established in *Royal Bank of Canada v.*

Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*]. *Soundair* summarized the factors the court should consider when assessing whether to approve a transaction to sell assets:

(a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

[45] In considering the first issue, namely, whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently, it is important to note that Galligan J. A. in *Soundair* stated, at para. 21, as follows:

> When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trustco v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 112 [*Crown Trustco*]:
>
> > Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
> >
> > If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[46] In this case, the offer was accepted on July 5, 2012. At that point in time, the offer from Tangshan was of a non-binding nature. The consideration proposed to be offered by Tangshan

appears to be in excess of the amount of the Purchaser's offer. The Tangshan offer is for $35 million, compared with the Purchaser's offer of $27 million.

[47] The record establishes that the Monitor did engage in an extensive marketing program. It took steps to ensure that the information was disseminated in international markets. The record also establishes that a number of parties expressed interest and a number of parties did put forth binding offers.

[48] Tangshan takes the position, through Birchwood, that it was not aware of the opportunity to participate in the Sales Process. This statement was not challenged. However, it seems to me that this cannot be the test that a court officer has to meet in order to establish that it has made sufficient effort to get the best price and has not acted improvidently. In my view, what can be reasonably expected of a court officer is that it undertake reasonable steps to ensure that the opportunity comes to the attention of prospective purchasers. In this respect, I accept that reasonable attempts were made through IBDR to market the opportunity in international markets, including China.

[49] I now turn to consider whether the Monitor acted providently in accepting the price contained in the Purchaser's offer.

[50] It is important to note that the offer was accepted after a period of negotiation and in consultation with the Province. The Monitor concluded that the Purchaser's offer "was the superior offer, and provided the best opportunity to position the mill, once restarted, as a viable going concern operation for the long term".

[51] Again, it is useful to review what the Court of Appeal stated in *Soundair*. After reviewing other cases, Galligan J.A. stated at 30 and 31:

> 30. What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered *bona fide* into an agreement with the receiver, can only lead to chaos, and must be discouraged.
>
> 31. If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

[52] In my view, based on the information available at the time the Purchaser's offer was accepted, including the risks associated with a Tangshan non-binding offer at that point in time, the consideration in the Transaction is not so unreasonably low so as to warrant the court entering into the Sales Process by considering competitive bids.

[53] It is noteworthy that, even after a further review of the Tangshan proposal as commented on in the Supplemental Report, the Monitor continued to recommend that the Transaction be approved.

[54] I am satisfied that the Tangshan offer does not lead to an inference that the strategy employed by the Monitor was inadequate, unsuccessful, or improvident, nor that the price was unreasonable.

[55] I am also satisfied that the Receiver made a sufficient effort to get the best price, and did not act improvidently.

[56] The second point in the *Soundair* analysis is to consider the interests of all parties.

[57] On this issue, I am satisfied that, in arriving at the recommendation to seek approval of the Transaction, the Applicant and the Monitor considered the interests of all parties, including the Province, the impact on the Township and the employees.

[58] The third point from *Soundair* is the consideration of the efficacy and integrity of the process by which the offer was obtained.

[59] I have already commented on this issue in my review of the Sales Process. Again, it is useful to review the statements of Galligan J.A. in *Soundair*. At paragraph 46, he states:

> It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with the receiver and entering into an agreement with it, a court will not likely interfere with the commercial judgment of the receiver to sell the asset to them.

[60] At paragraph 47, Galligan J.A. referenced the comments of Anderson J. in *Crown Trustco*, at p. 109:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

[61] In my view, the process, having been properly conducted, should be respected in the circumstances of this case.

[62] The fourth point arising out of *Soundair* is to consider whether there was unfairness in the working out of the process.

[63] There have been no allegations that the Monitor proceeded in bad faith. Rather, the complaint is that the consideration in the offer by Tangshan is superior to that being offered by the Purchaser so as to call into question the integrity and efficacy of the Sales Process.

[64] I have already concluded that the actions of the Receiver in marketing the assets was reasonable in the circumstances. I have considered the situation facing the Monitor at the time that it accepted the offer of the Purchaser and I have also taken into account the terms of the Late Offer. Although it is higher than the Purchaser's offer, the increase is not such that I would consider the accepted Transaction to be improvident in the circumstances.

[65] In all respects, I am satisfied that there has been no unfairness in the working out of the process.

[66] In my opinion, the principles and guidelines set out forth in *Soundair* have been adhered to by the Applicant and the Monitor and, accordingly, it is appropriate that the Transaction be approved.

[67] In light of my conclusion, it is not necessary to consider the issue of whether Tangshan has standing. The arguments put forth by Tangshan were incorporated into the arguments put forth by Birchwood.

[68] I have concluded that the Approval and Vesting Order should be granted.

[69] I do wish to comment with respect to the request of the Applicant to obtain a declaration that the subdivision control provisions contained in the *Planning Act* do not apply to a vesting of title to real property in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act* a conveyance by way of deed or transfer.

[70] The Purchase Agreement contemplates the vesting of title in the Purchaser of the real property. Some of the real property abuts excluded real property (as defined in the Purchase Agreement), which excluded real property is subsequently to be realized for the benefit of stakeholders of Terrace Bay.

[71] The authorities cited, *Lama v. Coltsman* (1978) 20 O.R. (2d) 98 (CO.CT.) [*Lama*] and *724597 Ontario Inc. v. Merol Power Corp*., (2005) O.J. No. 4832 (S.C.J.) are helpful. In *Lama*, the court found that the vesting of land by court order does not constitute a "conveyance" by way of "deed or transfer" and, therefore, "a vesting order comes outside the purview of the *Planning Act*".

[72] For the purposes of this motion, I accept the reasoning of *Lama* and conclude that the granting of a vesting order is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer. However, I do not think that it is necessary to comment on or to

issue a specific declaration that the subdivision control provisions contained in the *Planning Act* do not apply to the vesting of title.

[73] The Applicants also requested a sealing order. I have considered the *Sierra Club* principle and have determined that disclosure of the confidential information could be harmful to stakeholders such that it is both necessary and appropriate to grant the requested sealing order.

DISPOSITION

[74] In the result, the motion is granted subject to the adjustment with respect to aforementioned *Planning Act* declaration and an order shall issue approving the Transaction.

MORAWETZ J.

Date: July 27, 2012

TAB 19

2023 Hfx No. 523334

SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF: **Application by IMV Inc. and Immunovaccine Technologies Inc. and IMV USA Inc. (the "Applicants"), for relief under the *Companies' Creditors Arrangement Act***

Interim Distribution and WEPPA Order

Before the Honourable JUSTICE JOHN P. BODURTHA in chambers:

Sgd. JPB, J.

The Applicants propose to make a compromise or arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "**CCAA**") and they applied for an initial order and, now or in the future, other relief under the CCAA as may be sought on notice of motion.

The following parties received notice of this application: see attached at Schedule "A".

The following parties, represented by the following counsel, made submissions:

Party	Counsel
Applicant	**McCarthy Tétrault LLP** Alain N. Tardif François Alexandre Toupin **Stewart McKelvey Lawyers** Sara L. Scott
Monitor, FTI Consulting Canada Inc.	**Stikeman Elliott LLP** Maria Konyukhova Natasha Rambaran
Horizon Technology Finance Corporation, as collateral agent	**Aird & Berlis LLP** Miranda Spence Kyle Plunkett

On motion of the Applicants, the following is ordered and declared:

Service

1. The service of the Notice of Application in Chambers, and the supporting documents, as set out in the affidavit of service is hereby deemed adequate notice so that the motion is properly returnable today and further service thereof is hereby dispensed with.

2. Service of this Order is permitted at any time and place and by any means whatsoever.

Effective Time

3. This Order and all of its provisions are effective as of 12:01 a.m. Halifax time, province of Nova Scotia, on the date of this Order.

WEPPA

4. Pursuant to section 5(5) of the *Wage Earner Protection Program Act* (Canada), SC 2005, c 47, s 1 (the "**WEPPA**"), IMV Inc. and Immunovaccine Technologies Inc. and their collective former employees meet the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 and are individuals to whom the WEPPA applies as of the date of this Order.

Interim Distribution

5. Authorizes, directs and empowers the Applicants to distribute to Horizon Technology Finance Corporation, in its capacity as collateral agent for itself and Powerscourt Investments XXV, LP, in the amount of $2,000,000.

6. The Applicants are each hereby authorized, directed and empowered to take any further steps that they deem necessary or desirable to complete the distribution described in this Order.

7. Notwithstanding:

   (a) the pendency of these proceedings;

   (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") in respect of the Applicants and any bankruptcy order issued pursuant to any such applications;

   (c) any assignment in bankruptcy made in respect of the Applicants; or

   (d) the provisions of any federal or provincial legislation;

   any distribution made pursuant to this Order is final and irreversible and shall be binding upon any trustee in bankruptcy that may be appointed in respect of the Applicants, and shall not be void or voidable by creditors of the Applicants, nor shall any such distributions constitute or be deemed to be fraudulent preferences, assignments, fraudulent conveyances, transfers-at-undervalue or other reviewable transactions under the BIA or any other applicable federal or provincial law, nor shall they constitute conduct which is oppressive, unfairly prejudicial to or which unfairly disregards the interests of any person, and shall, upon the receipt thereof, be free of all claims, liens, security interests, charges or other encumbrances granted by or relating to the Applicants.

Approval of the Monitor's activities and fees

8. The activities of FTI Consulting Canada Inc., in its capacity as monitor (the "**Monitor**"), up to the date of this Order, as described in the Fourth Report of the Monitor dated September 1, 2023 (the "**Fourth Report**"), are hereby approved.

9. The Monitor has fulfilled its obligations pursuant to the CCAA and the orders of the Court up until and including the date of this Order.

10. The fees and disbursements of the Monitor and its legal counsel, Stikeman Elliott LLP, as detailed in the Fourth Report as well as the Affidavit of Jeffrey Rosenberg sworn September 1, 2023, attached as Appendix "B" to the Fourth Report and the Affidavit of Maria Konyukhova, sworn September 1, 2023, attached as Appendix "C" to the Fourth Report are hereby approved.

General

11. This Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

12. The aid and recognition of any Court, tribunal, regulatory or administrative body in Canada, the United States of America or elsewhere, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor or the authorized representative of the Applicants in any foreign proceeding, to assist the Applicants and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.

13. Each of the Applicants and the Monitor may apply to any court, tribunal, or regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and the Monitor may act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

Issued September 6, 2023

Vicki Carr

~~Prothonotary~~

VICKI CARR
Deputy Prothonotary

IN THE SUPREME COURT
COUNTY OF HALIFAX, N.S.
I hereby certify that the foregoing document, identified by the seal of the court, is a true copy of the original document on the file herein.

SEP 06 2023

Vicki Carr

Deputy Prothonotary

VICKI CARR
Deputy Prothonotary

Schedule "A" – Service List

2023 Hfx No. 523334

SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF: **Application by IMV Inc., Immunovaccine Technologies Inc. and IMV USA Inc. (the "Applicants"), for relief under the *Companies' Creditors Arrangement Act***

SERVICE LIST

Party	Method of Service
McCarthy Tétrault LLP 1000 De La Gauchetière Street West Suite MZ400 Montréal, QC H3B 0A2 *Counsel to the Applicants.*	**M^tre^ Alain N. Tardif** Tel : 514.397.4274 E-mail : atardif@mccarthy.ca **M^tre^ Gabriel Faure** Tel: 514.397.4182 E-mail: gfaure@mccarthy.ca **M^tre^ François Alexandre Toupin** Tel: 514.397.4210 E-mail: fatoupin@mccarthy.ca
Stewart McKelvey Queen's Marque 600-1741 Lower Water Street Halifax, NS B3J 0J2 *NS Counsel to the Applicants*	**M^tre^ Sara L. Scott** Tel : 514.397.4274 E-mail : sscott@stewartmckelvey.com
Aird & Berlis LLP Brookfield Place 181 Bay Street, Suite 1800 Toronto, ON M5J 2T9 *Counsel to the Horizon Technology Finance Corporation, as agent*	**M^tre^ Miranda Spence** Tel : 416.865.3414 E-mail : mspence@airdberlis.com **M^tre^ Graham Topa** Tel: 416.865.4739 E-mail : gtopa@airdberlis.com **M^tre^ Kyle Plunkett** Tel: 416.865.3406 E-mail : kplunkett@airdberlis.com
Ropes & Gray LLP Prudential Tower 800 Boylston Street Boston, MA 02199-3600 *US Counsel to the secured creditor Horizon Technology Finance Corporation, as agent*	**M^tre^ Cristine Schwarzman** Tel: 212.596.9635 E-mail : Cristine.Schwarzman@ropesgray.com **M^tre^ Patricia I. Chen** Tel : 617.951.7553 E-mail: patricia.chen@ropesgray.com

FTI Consulting Canada Inc. TD South Tower 79 Wellington Street West Suite 2010, P.O. Box 104 Toronto, ON M5K 1G8 *Monitor*	**Jodi Porepa** Tel : 437.332.5743 E-mail : Jodi.Porepa@fticonsulting.com **Jeffrey Rosenberg** Tel: 416.649.8073 E-mail: Jeffrey.Rosenberg@fticonsulting.com **Adsaran Vithiyananthan** E-mail : Adsaran.Vithiyananthan@fticonsulting.com
Stikeman Elliot LLP 5300 Commerce Court West 199 Bay Street Toronto ON M5L 1B9	**M^tre^ Maria Konyukhova** Tel : 416.869.5230 E-mail: mkonyukhova@stikeman.com **M^tre^ Natasha Rambaran** Tel : 416.869.5504 E-mail: nrambaran@stikeman.com *Counsel to the Appointed Monitor*
Atlantic Canada Opportunities Agency Legal Services Department of Justice / Government of Canada PO Box 6051 644 Main Street Moncton, NB E1C 9J8	**M^tre^ Corinne Godbout** E-mail: Corinne.Godbout@ACOA-APECA.GC.CA
Canada Revenue Agency	**M^tre^ Sophie Dupre** Department of Justice Tel: 902 407-7674 E-mail: Sophie.dupre@justice.gc.ca **General address for service:** E-mail: notificationPGC-AGC.fiscal-tax@justice.gc.ca notificationPGC-AGC.civil@justice.gc.ca
McInness Cooper 1969 Upper Water Street Suite 1300 McInness Cooper Tower – Purdy's Wharf Halifax, NS B3J 2V1	**M^tre^ Ben Durnford** Tel: 902.444.8454 E-mail: ben.durnford@mcinnescooper.com
Nova Scotia Securities Commission	**M^tre^ Doug Harris** Nova Scotia Securities Commission E-mail : Doug.harris@novascotia.ca **M^tre^ Daniel Boyle** Nova Scotia Department of Justice E-mail: Daniel.Boyle@novascotia.ca

Powerscourt Investments XXV 1251 Avenue of the Americas, 50th Floor New York, NY 10020	**Conan Sang** E-mail: CSang@waterfallam.com
Borden Ladner Gervais LLP Bay Adelaide Centre, East Tower 22 Adelaide St. W, Toronto, ON M5H 4E3	**M^tre^ Roger Jaipargas** Tel: 416.367.6266 E-mail: RJaipargas@blg.com **M^tre^ Krstina Skocic** Tel: 416.367.6451 E-mail: KSkocic@blg.com *Counsel to Zoetis*

Email distribution list:

Atardif@mccarthy.ca; fatoupin@mccarthy.ca; sscott@stewartmckelvey.com; Adsaran.Vithiyananthan@fticonsulting.com; Jodi.Porepa@fticonsulting.com; Jeffrey.Rosenberg@fticonsulting.com; mkonyukhova@stikeman.com; nrambaran@stikeman.com; mspence@airdberlis.com; gtopa@airdberlis.com; kplunkett@airdberlis.com; Cristine.Schwarzman@ropesgray.com; patricia.chen@ropesgray.com; Corinne.Godbout@ACOA-APECA.GC.CA; Sophie.dupre@justice.gc.ca; notificationPGC-AGC.civil@justice.gc.ca; notificationPGC-AGC.fiscal-tax@justice.gc.ca; ben.durnford@mcinnescooper.com; Daniel.Boyle@novascotia.ca; Doug.harris@novascotia.ca; CSang@waterfallam.com; RJaipargas@blg.com; KSkocic@blg.com

TAB 20

Court File No. CV-21-00655373-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 2nd
	)	
JUSTICE MCEWEN	)	DAY OF FEBRUARY, 2022

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FIGR BRANDS, INC., FIGR NORFOLK INC. AND 1307849 B.C. LTD.

(collectively, the "**Applicants**")

ORDER
(Stay Extension, Distribution, WEPPA and Fee Approval)

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, for an order, *inter alia*: (i) approving an extension of the Stay Period; (ii) declaring that WEPPA (as defined below) applies to the former employees of FIGR Norfolk and FIGR Brands; (iii) approving the Proposed Distribution Methodology; (iv) authorizing, directing and empowering the Applicants, or the Monitor on behalf of the Applicants, to make one or more cash distributions; (v) approving the Administrative Reserve (as defined below); and (vi) approving the Eighth Report (as defined below) and the Monitor's activities and fees described therein, and certain related relief, was heard this day by Zoom videoconference as a result of the COVID-19 pandemic.

ON READING the Notice of Motion of the Applicants, the affidavit of Michael Devon sworn January 26, 2022 (the "**January 26 Devon Affidavit**"), the Eighth Report of FTI Consulting

Canada Inc. dated January 27, 2022 (the "**Eighth Report**"), in its capacity as Monitor of the Applicants (in such capacity, the "**Monitor**"), filed, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for Alliance One Tobacco Canada Inc., and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Aiden Nelms sworn and filed;

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS AND DECLARES** that all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order dated January 29, 2021 (as amended, the "**Initial Order**"), the January 26 Devon Affidavit or the Eighth Report, as applicable.

EXTENSION OF THE STAY PERIOD

3. **THIS COURT ORDERS** that the Stay Period be and is hereby extended until and including April 29, 2022.

WAGE EARNER PROTECTION PROGRAM ACT

4. **THIS COURT ORDERS AND DECLARES** that pursuant to section 5(5) of the *Wage Earner Protection Program Act (Canada),* SC 2005, c 47, s 1 ("**WEPPA**"), FIGR Norfolk, FIGR Brands and their collective former employees meet the criteria prescribed by section 3.2 of the

Wage Earner Protection Program Regulations, SOR/2008-222 and are individuals to whom the WEPPA applies as of the date of this Order.

DISTRIBUTION METHODOLOGY, ALLOCATION OF COSTS AND PROPOSED DISTRIBUTIONS

5. **THIS COURT ORDERS** that the Proposed Distribution Methodology (including the allocation of costs among the Applicants as set out in the Eighth Report) for the distributions to be made under this Order and for any subsequent distributions of the Property of the Applicants as set out in the Eighth Report, is hereby approved.

6. **THIS COURT ORDERS** that the Applicants are hereby authorized, directed and empowered to make one or more cash distributions to each Claimant holding a Proven Claim for their applicable *pro rata* amount, all in accordance with the Proposed Distribution Methodology.

7. **THIS COURT ORDERS** that all distributions shall be made in Canadian dollars, regardless of the currency indicated in the Proof of Claim, calculated by the Applicants, with the assistance of the Monitor, in accordance with paragraph 8 of the Claims Procedure Order.[1]

8. **THIS COURT ORDERS** that the Applicants or any other person facilitating distributions pursuant to this Order shall be entitled to deduct and withhold from any such distribution to any Claimant such amounts as may be required to be deducted or withheld under any applicable law and to remit such amounts to the appropriate governmental authority or other person entitled thereto as may be required by such law, including Employee Claims for which a withholding will be calculated by the Applicants' payroll provider.

[1] January 21, 2021 – USD 1:CAD 1.2627.

9. **THIS COURT ORDERS** that the Applicants are each hereby authorized, directed and empowered to take any further steps that they deem necessary or desirable to complete the distributions described in this Order.

10. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings or the termination of these proceedings;

(b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada), R.S.C. 1985 c. B-3, as amended (the "**BIA**") in respect of any of the Applicants and any bankruptcy order issued pursuant to any such application; or

(c) any assignment in bankruptcy made in respect of any of the Applicants,

any distributions made pursuant to this Order are final and irreversible and shall be binding upon any trustee in bankruptcy that may be appointed in respect of the Applicants, and shall not be void or voidable by creditors of the Applicants, nor shall any such distributions constitute or be deemed to be fraudulent preferences, assignments, fraudulent conveyances, transfers-at-undervalue or other reviewable transactions under the BIA or any other applicable federal or provincial law, nor shall they constitute conduct which is oppressive, unfairly prejudicial to or which unfairly disregards the interests of any person, and shall, upon the receipt thereof, be free of all claims, liens, security interests, charges or other encumbrances granted by or relating to the Applicants.

ESTABLISHMENT OF RESERVES

11. **THIS COURT ORDERS AND DIRECTS** the Applicants, with the assistance of the Monitor, to establish, hold and maintain a reserve from the funds remaining in the respective accounts of the Applicants in the amount of approximately $2.1 million (the "**Administrative Reserve**") to secure, among other things:

(a) the Applicants' and the Monitor's obligations to continue to administer these CCAA Proceedings; and

(b) the indemnity provided in paragraph 20 of the Initial Order.

12. **THIS COURT ORDERS** that following the completion of the distributions in the manner set forth in paragraphs 5-9 of this Order (other than the Pyxus Claims) the Administration Charge shall attach solely to the Administrative Reserve.

13. **THIS COURT ORDERS** that following the completion of the distributions in the manner set forth in paragraphs 5-9 of this Order (other than the Pyxus Claims) the Directors' Charge shall attach solely to the Administrative Reserve.

14. **THIS COURT ORDERS** that following the completion of the distributions in the manner set forth in paragraphs 5-9 of this Order (other than the Pyxus Claims), and notwithstanding paragraphs 12 and 13 of this Order, the Administration Charge and the Directors' Charge shall continue to have the same priorities as set out in the Initial Order.

15. **THIS COURT ORDERS** that notwithstanding anything else contained in this Order or the Initial Order, all distributions shall be free and clear of the Administration Charge, the Directors' Charge and each Intercompany Charge.

TERMINATION OF CHARGES

16. **THIS COURT ORDERS** that the DIP Lender's Charge shall be and is hereby terminated, released and discharged.

17. **THIS COURT ORDERS** that following the completion of the distributions in the manner set forth in paragraphs 5-9 of this Order, each Intercompany Charge shall be immediately terminated, released and discharged without any other act or formality.

THE MONITOR

18. **THIS COURT ORDERS** that the Monitor shall not incur any liability in connection with assisting the Applicants with respect to the distributions contemplated herein, whether in its personal capacity or in its capacity as the Monitor.

19. **THIS COURT ORDERS** that in carrying out the terms of this Order, the Monitor whether in its personal capacity or in its capacity as the Monitor:

(a) shall have all the protections provided to it as an officer of the Court, including the protections granted pursuant to the CCAA and other orders granted in these CCAA proceedings, including the stay of proceedings; and

(b) shall incur no liability or obligation as a result of carrying out any duties or work in connection with this Order, save and except for any gross negligence or willful misconduct on its part.

20. **THIS COURT ORDERS** that:

(a) by causing the Applicants to distribute any funds or in making any payments hereunder; and

(b) any payments or deliveries made in accordance with this Order that are assisted by the Monitor,

shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Applicants or "other person" for the purposes of Section 159 of the *Income Tax Act* (Canada), Section 270 of the *Excise Tax Act* (Canada), Section 46 of the *Employment Insurance Act* (Canada), Section 22 of the *Retail Sales Tax Act* (Ontario), Section 107 of the *Corporations Tax Act* (Ontario), or any other similar federal, provincial or territorial tax legislation in the Provinces or Territories that the Applicants conducted business in (collectively, the "**Statutes**"), and the Monitor in making any such payment or deliveries of funds in accordance with this Order is not "distributing", nor shall it be considered to have "distributed", such funds or assets for the purposes of the Statutes, and the Monitor shall not incur any liability under the Statutes for making any payments or deliveries in accordance with this Order or failing to withhold amounts, ordered or permitted hereunder, and the Monitor shall not have any liability for any of the Applicants' tax liabilities regardless of how or when such liabilities may have arisen, and is hereby forever released, remised and discharged from any claims against either the Monitor under

or pursuant to the Statutes or otherwise at law, arising as a result of the distributions and deliveries in accordance with this Order, and any claims of such nature are hereby forever barred.

APPROVAL OF THE EIGHTH REPORT AND THE MONITOR'S ACTIVITIES AND FEES

21. **THIS COURT ORDERS** that the Eighth Report, and the activities of the Monitor and its counsel referred to therein be and are hereby approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

22. **THIS COURT ORDERS** that the fees and disbursements of the Monitor and its counsel, as set out in the Eighth Report, be and are hereby approved.

GENERAL

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

24. **THIS COURT ORDERS** that the Applicants and the Monitor be at liberty and are each hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative

body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

25. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Toronto time on the date of this Order.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF FIGR BRANDS, INC., FIGR NORFOLK INC. AND 1307849 B.C. LTD.

Court File No.: CV-21-00655373-00CL

2 Feb 22

Order to go as per the draft filed and signed.
It is unopposed and supported by the Monitor.
Reasons will follow.

McEwen J.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings Commenced in Toronto

ORDER
(Stay Extension, Distribution, WEPPA and Fee Approval)

BENNETT JONES LLP
One First Canadian Place, Suite 3400
P.O. Box 130
Toronto, Ontario
M5X 1A4

Sean Zweig (LSO# 57307I)
Mike Shakra (LSO# 64604K)
Aiden Nelms (LSO# 74170S)

Telephone No: 416.863.1200
Facsimile No: 416.863.1716

Lawyers for the Applicants

TAB 21

2023 01G 0841

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF an application of Rambler Metals and Mining Canada Limited and 1948565 Ontario Inc.

AND IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**")

ORDER

BEFORE THE HONOURABLE JUSTICE MACDONALD

UPON IT APPEARING that Rambler Metals and Mining Canada Limited and 1948565 Ontario Inc. (the "Rambler Group") have applied for an order pursuant to section 5(5) of the *Wage Earner Protection Program Act*, SC 2005, c 47, s 1 ("**WEPPA**") and the Companies' Creditors Arrangement Act, RSC 1985, c C-36;

AND UPON READING the materials filed by the Rambler Group, and the Monitor's Third Report, dated April 5, 2023;

AND UPON HEARING Joe Thorne, of counsel for the Rambler Group; Alex MacFarlane, counsel for the Monitor; and such other counsel as may appear;

IT IS ORDERED THAT:

1. that the time for service of the Notice of Application and the materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this application is properly returnable today and hereby dispenses with further service thereof; and
2. pursuant to section 5(5) of WEPPA, the Rambler Group and their collective former employees meet the criteria prescribed by section 3.2 of the *Wage Earner Protection*

Filed Apr. 6, 2023 AD

Program Regulations, SOR/2008-222 and are a former employer, employees, and individuals to whom the WEPPA applies as of March 30, 2023.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 6th day of April, 2023.

COURT
OFFICER