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Justice Romaine

COURT FILE NUMBER	2101-05019
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF SECTION 193 OF THE *BUSINESS CORPORATIONS ACT*, RSA 2000, c B-9, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF COALSPUR MINES (OPERATIONS) LTD.
DOCUMENT	**BENCH BRIEF**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Norton Rose Fulbright Canada LLP 400 3rd Avenue SW, Suite 3700 Calgary, Alberta T2P 4H2 CANADA Telephone: +1 403.267.8222 Fax: +1 403.264.5973 **Attention**: Gunnar Benediktsson | Matthew Longstaff gunnar.benediktsson@nortonrosefulbright.com | matthew.longstaff@nortonrosefulbright.com Lawyers for Cline Trust Company LLC File no.: 1001160123

1. INTRODUCTION

1 There are two applications before this Court, both of which relate to the disclaimer by Coalspur Mines (Operations) Ltd. (**Coalspur**), pursuant to section 32(1) of the *Companies' Creditors Arrangement Act*, RSC 1985 c. C-36, as amended (the ***CCAA***) of three agreements between Coalspur and Ridley Terminals Inc. (**Ridley**, and the **Ridley Disclaimer**).

2 This brief of law is submitted on behalf of Cline Trust Company LLC (**CTC**), in support of the application of Coalspur and in opposition to the application of Ridley.

3 CTC is a secured lender of Coalspur. As at the filing date for this proceeding, Coalspur was indebted to CTC for in excess of $297,505,000 USD ($380,836,000 CDN). In

addition, CTC is the interim lender to CMO pursuant to a court-approved interim loan term sheet and agreement, and has advanced $26,000,000 USD to CMO by way of interim financing to support this restructuring.

4 Given the likely prospect that Coalspur's senior secured creditor, Trafigura Pte. Ltd. will be repaid in full during these proceedings, CTC is the likely fulcrum creditor in any restructuring of Coalspur. CTC is thus a key stakeholder in respect of the proposed disclaimers.

5 The Ridley Disclaimers are valid pursuant to the provisions of the *CCAA,*[1] and are beneficial to a successful restructuring of the affairs of Coalspur. Moreover, the Ridley Disclaimers, and the entry into more economical substitute contracts with Westshore Terminals, will benefit Coalspur's stakeholders generally. Ridley has not and cannot show that the Ridley Disclaimer will cause it any unique or particular financial hardship. It follows that the Ridley Disclaimer should be upheld.

2. FACTS

6 The facts summarized in the brief of law of even date herewith tendered by CMO (the **Coalspur Brief**) are repeated and adopted herein. Capitalized terms not defined herein have the meaning given in the Coalspur Brief, or in the Third Report of the Monitor filed herein.[2] CTC offers the following incremental comments with respect to the facts.

7 The affidavit evidence tendered by Ridley included comments, the relevance of which is not immediately clear to CTC, regarding the nature of Coalspur's indebtedness to CTC, and the security granted by Coalspur to CTC.[3]

8 To the extent the CTC debt becomes relevant to a future application or matter brought before this Court, CTC is prepared, and reserves the right, to lead evidence of its own on the matter.

9 In the meantime, CTC submits that the best evidence as to the history of how Coalspur came to be indebted to CTC, and the validity and enforceability of that debt, is the

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[1] *Companies Creditors Arrangement Act,* RSC 1985, c C-36 at s 32(1) [***CCAA***].
[2] Third Report of FTI Consulting Canada Inc., In Its Capacity as Monitor of Coalspur Mines (Operations) Ltd., filed June 28, 2021 [**Third Report of the Monitor**].
[3] See, generally, Affidavit of Cordell Dixon dated May 21, 2021 at paras 39-52.

company's own evidence, tendered in support of Coalspur's application for an initial order under the *CCAA*. Ridley's witness, Mr. Cordell Dixon, is not in a position to know anything about the CTC debt that is not included in Coalspur's evidence already; his uninformed speculation and opinions on the matter are of no relevance.[4]

10 The evidence of Coalspur shows the following with respect to the CTC secured debt:

(a) CTC has provided term loans to Coalspur by way of various promissory notes (the **Notes**) pursuant to a credit agreement dated March 19, 2019 (the **Credit Agreement**);[5]

(b) Coalspur was indebted to CTC, as at the filing date, in the amount of $380,836,000 CAD under the Credit Agreement;[6]

(c) the obligations of Coalspur under the Notes are secured against all present and after acquired property of Coalspur pursuant to the Credit Agreement, as well as a Security Agreement, Demand Debenture, and Debenture Pledge Agreement,[7] and other security;[8]

(d) the commencement of this proceeding by Coalspur constitutes an event of default under the Credit Agreement;[9]

(e) CTC has provided significant support to Coalspur since 2019, including:

(i) supporting Coalspur's liquidity by subordinating its security to Coalspur's obligations to Trafigura under the Inventory Pledge Agreement,[10] and to Caterpillar in respect of equipment leases;[11] and

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[4] For instance, Mr. Dixon opines that in 2019, when security was granted by Coalspur to CTC, CTC was "insolvent on a balance sheet basis": Dixon Affidavit, para 45. Balance sheet insolvency is of course a matter of law, but to the extent evidence on the subject is required, this bare statement is contradicted by Coalspur's *audited* financial statements, which are attached to Mr. Beyer's affidavit at Exhibit "C".
[5] Affidavit of Michael Beyer dated April 19th, 2021 [**Beyer Affidavit #1**] at para 63 and Exhibit "E". At Exhibits "F" through "I," the Beyer Affidavit attaches the various Notes, amendments, modifications, and related documents evidencing the CTC debt and security. Notably, as Coalspur's CEO, Mr. Beyer has direct knowledge of these matters.
[6] Beyer Affidavit #1 at para 50(b) and Exhibit "E".
[7] Beyer Affidavit #1 at para 67 and Exhibits "J" through "L"
[8] Beyer Affidavit #1 at paras 68 and 69 and Exhibits "M" through "R".
[9] Beyer Affidavit #1 at para 70.
[10] Beyer Affidavit #1 at para 71.
[11] Beyer Affidavit #1 at para 72.

(ii) entering into various modifications to the Notes including to increase the amounts of certain term loans and reducing the interest rates payable thereunder.[12]

11 CTC has been a key stakeholder and supporter of Coalspur since the interest in the Vista mine was acquired: historically (as reported by Coalspur's auditor) Coalspur's "operating losses and capital investments have been funded primarily by Cline Trust Company."[13]

12 CTC has agreed to continue to support Coalspur through this restructuring, including by providing interim financing to support Coalspur's operations and to permit the operations at the Vista mine to restart, which would have been impossible without funding from CTC.[14] As a direct result, approximately 250 employees have been able to return to work.[15]

13 CTC is thus a key stakeholder in this process. Other than with respect to leased equipment, CTC is subordinate in priority only to Trafigura, and is accordingly the likely fulcrum creditor in any Coalspur restructuring.

3. LAW

a. There is no basis for Ridley to object to the disclaimer

14 Section 32 of the *Companies Creditors Arrangement Act* authorizes a debtor company to disclaim executory pre-filing arrangements.[16] In considering the validity of such disclaimers, the Court is to consider, among other things:

(a) Whether the monitor approved the proposed disclaimer or resiliation;

(b) Whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

[12] Beyer Affidavit #1 at para 66.
[13] Beyer Affidavit #1 at Exhibit "C", Audited Financial Statements of Coalspur, years ended December 31, 2019 and December 31, 2018, at page 9, emphasis added.
[14] Supplemental Affidavit of Michael Beyer dated April 23, 2021 at para 8 and Exhibit "B", "Start-up Cash Flow Projection".
[15] Affidavit of Michael Beyer #3 dated April 30, 2021 at para 9(a).
[16] *CCAA* at s 32(1).

(c) Whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.[17]

15 There is no issue as to the Monitor's approval of the Ridley Disclaimer.[18] Accordingly, there are only two issues relating to the validity of the Ridley Disclaimer: whether the disclaimer will enhance the prospects of a viable compromise or arrangement, and whether the Ridley Disclaimer will cause Ridley to suffer "significant financial hardship." In considering these issues, Courts have given significant weight to the Monitor's approval of the disclaimer and its consideration of the factors under s. 32(4) of the *CCAA*.[19]

16 To satisfy the second branch of the test, a proposed disclaimer need not be essential to the prospects of a successful restructuring; it need only be beneficial or advantageous to the making of a plan.[20] The evidence amply shows that the Ridley Disclaimer will be beneficial and advantageous to a restructuring of Coalspur.

17 In *Aveos,* the Monitor's decision to approve a disclaimer considered the cost of continuing the agreement against pursuing a cheaper alternative service provider, with a narrower scope.[21] The Monitor determined that cancelling the agreement would enhance the prospect of filing an arrangement because the agreement was both expensive and undesirable, because it was born out of a "failed business relationship" and the parties' expectations regarding the services being provided were never collectively met.[22]

18 This case is similar to *Aveos*: the Monitor's approval of the Ridley Disclaimer is backed by its review of both the Ridley Agreement and the alternate agreement Coalspur has entered into with Westshore; the Monitor estimates that depending on prevailing coal prices, "Coalspur will save approximately $39.2 million to $72.4 million (on a non-discounted basis) through April 2027 with $7.4 million to $8.0 million accruing in 2021."[23] The Monitor's conclusion is that this significant and immediate cost savings will

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[17] *CCAA* at s 32(4).
[18] Third Report of the Monitor at para 34.
[19] *Laurentian University v Sudbury University*, 2021 ONSC 3392 at para 30(d) [***Laurentian***].
[20] *Re Aveos Fleet Performance Inc*, 2012 QCCS 6796 at para 49 [***Aveos***].
[21] *Aveos* at para 43.
[22] *Aveos* at paras 43-44.
[23] Third Report of the Monitor at para 33.

"enhance the prospects of a viable compromise or arrangement being made in respect of Coalspur."[24] According to the company's estimates, the savings may be even higher.

19 There can be no doubt that a savings of this magnitude enhances the prospects of a successful restructuring by Coalspur, as both the company and the Monitor have concluded. As a key stakeholder in this process CTC thus supports Coalspur's position and its disclaimer of the Ridley Agreement.

20 The only remaining issue is thus whether Ridley will suffer significant financial hardship as a result of the disclaimer. Ridley bears the onus of proof on this issue.[25] The burden is high: Ridley must show more than that it will suffer some loss; indeed, financial loss is the inherent result of almost any contractual disclaimer.[26]

21 Given Ridley's high burden, and its onus of proof, the evidence it tenders on the subject is thus surprisingly thin. Ridley has not produced its financial statements, as some courts have required.[27] Mere estimates and guesswork are not enough.[28]

22 Nor has Ridley established any special or particular loss to itself or to the community of Prince Rupert that is not easily balanced against corresponding gains to other stakeholders in this process, including 250 previously laid off workers at the Vista mine who have now returned to work. As the Ontario Superior Court held in *Target Co.*, the Court's consideration of a disclaimer must consider not only the impact on the party whose contract is being disclaimed, but "the interests of all creditors."[29] Indeed, "any financial consequences" accruing to Ridley as a result of the Ridley Disclaimer, "must be balanced with the overall financial considerations in the restructuring."[30]

b. Ridley is an unsecured creditor

23 Ridley's position, at its core, would require this Court to order Coalspur to perform an uneconomical contract, knowing that a more financially beneficial alternative exists, thus forgoing tens of millions of dollars in transportation cost savings to the direct and

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[24] Third Report of the Monitor at para 35.
[25] *Arrangements relatifs a Nemaska Lithium Inc.*, 2020 QCCS 482 at para 56 [***Nemaska***].
[26] *Nemaska* at para 57.
[27] *Nemaska* at paras 56-57.
[28] *Nemaska* at paras 56-59; *Laurentian* at paras 34-39.
[29] *Target Canada Co., (Re)*, 2015 ONSC 1028 at para 24.
[30] *Laurentian* at para 39.

immediate detriment of Coalspur's other creditors, including CTC. CTC is a *secured* creditor, and entitled to the protection of its security, and its priority position.

24 In *Bellatrix Exploration Ltd (Re),* this Court considered the priority issue that arises as between an unsecured claim in the breach or disclaimer of a contract, and the debtor's secured creditor.[31] In a nutshell, this Court saw no reason why the breach *or* disclaimer of an executory contract would in any way diminish the "valid and enforceable first priority security interest" of a secured creditor, when the resulting claim in contract would be unsecured.[32] The party to such a contract must "participate in the *CCAA* proceedings on the same footing as other creditors".[33]

25 As this Court noted in *Bellatrix*, imposing an obligation on a debtor to perform uneconomical contracts throughout insolvency proceedings would "thwart the objectives of the *CCAA*, since compelling a *CCAA* debtor to perform [a contract] that it cannot afford to perform would in many ways affect its ability to restructure."[34]

26 The contractual obligations of Coalspur under the Ridley Agreement, and any claim by Ridley as a result from either the Ridley Disclaimer, or the breach, of the Ridley Agreement, are a matter for Coalspur, Ridley, and this Court to determine. CTC, however, is in the unique position of being a crucial stakeholder (and perhaps the fulcrum creditor) of a debtor company that stands to benefit to the tune of tens of millions of dollars from the exercise of a statutory right granted to it by the *CCAA*.

27 It is this background that sets the stakes for these applications. Ridley asks this Court to direct, contrary to previous authority, that Coalspur be ordered to perform under an uneconomic contract. Such an order would not only prejudice Coalspur and its ability to restructure, it would come at the direct and immediate cost of impairing CTC's ability to enforce on its *secured* debt. In short, and like *Bellatrix*, these applications at their core raise an issue of priority: Ridley seeks an order that would effectively invert the scheme of priorities such that performance of the Ridley contracts takes precedence over Coalspur's secured obligations, including to CTC. Such an order would be contrary to prior authority, and inappropriate.

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[31] 2020 ABQB 809, leave to appeal dismissed 2021 ABCA 85 [***Bellatrix***].
[32] *Bellatrix* at paras 26, 119.
[33] *Bellatrix* at para 39 citing *Re Blue Range Resources Corp,* 2000 ABCA 239 at para 9.
[34] *Bellatrix* at paras 43 and 84.

4. CONCLUSION

28 Based on the foregoing, CTC respectfully requests that the Ridley application be dismissed, and the Coalspur application be allowed, each with costs payable by Ridley.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of July, 2021.

NORTON ROSE FULBRIGHT CANADA LLP

Per: 

Gunnar Benediktsson | Matthew Longstaff
Lawyers for Cline Trust Company LLC

Table of Authorities

Tab No.	Authority
1	*Companies' Creditors Arrangement Act,* RSC 1986, c C-36
2	*Laurentian University v Sudbury University*, 2021 ONSC 3392
3	*Re Aveos Fleet Performance Inc*, 2012 QCCS 6796
4	*Arrangements relatifs a Nemaska Lithium Inc.,* 2020 QCCS 482
5	*Target Canada Co., (Re),* 2015 ONSC 1028
6	*Bellatrix Exploration Ltd. (re),* 2020 ABQB 809, leave to appeal refused 2021 ABCA 85

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to June 16, 2021

Last amended on November 1, 2019

À jour au 16 juin 2021

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Decision

(8) The decision of the Superintendent of Bankruptcy after the hearing, together with the reasons for the decision, must be given in writing to the monitor not later than three months after the conclusion of the hearing, and is public.

Review by Federal Court

(9) A decision of the Superintendent of Bankruptcy given under subsection (8) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside under the *Federal Courts Act*.

2005, c. 47, s. 131; 2007, c. 36, s. 75.

Delegation

31 (1) The Superintendent of Bankruptcy may, in writing, authorize any person to exercise or perform, subject to any terms and conditions that he or she may specify in the authorization, any of the powers, duties or functions of the Superintendent of Bankruptcy under sections 29 and 30.

Notification to monitor

(2) If the Superintendent of Bankruptcy delegates in accordance with subsection (1), the Superintendent or the delegate must give notice of the delegation in the prescribed manner to any monitor who may be affected by the delegation.

2005, c. 47, s. 131.

Agreements

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to

Décision

(8) La décision du surintendant des faillites est rendue par écrit, motivée et remise au contrôleur dans les trois mois suivant la clôture de l'audition, et elle est publique.

Examen de la Cour fédérale

(9) La décision du surintendant, rendue et remise conformément au paragraphe (8), est assimilée à celle d'un office fédéral et est soumise au pouvoir d'examen et d'annulation prévu par la *Loi sur les Cours fédérales*.

2005, ch. 47, art. 131; 2007, ch. 36, art. 75.

Pouvoir de délégation

31 (1) Le surintendant des faillites peut, par écrit, selon les modalités qu'il précise, déléguer les attributions que lui confèrent les articles 29 et 30.

Notification

(2) En cas de délégation, le surintendant des faillites ou le délégué en avise, de la manière réglementaire, tout contrôleur qui pourrait être touché par cette mesure.

2005, ch. 47, art. 131.

Contrats et conventions collectives

Résiliation de contrats

32 (1) Sous réserve des paragraphes (2) et (3), la compagnie débitrice peut — sur préavis donné en la forme et de la manière réglementaires aux autres parties au contrat et au contrôleur et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel elle est partie à la date à laquelle une procédure a été intentée sous le régime de la présente loi.

Contestation

(2) Dans les quinze jours suivant la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), toute partie au contrat peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner que le contrat ne soit pas résilié.

Absence d'acquiescement du contrôleur

(3) Si le contrôleur n'acquiesce pas au projet de résiliation, la compagnie peut, sur préavis aux autres parties au

a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

contrat et au contrôleur, demander au tribunal d'ordonner la résiliation du contrat.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de résiliation, le cas échéant;

b) la question de savoir si la résiliation favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

c) le risque que la résiliation puisse vraisemblablement causer de sérieuses difficultés financières à une partie au contrat.

Résiliation

(5) Le contrat est résilié :

a) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), si aucune demande n'est présentée en vertu du paragraphe (2);

b) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1) ou à la date postérieure fixée par le tribunal, si ce dernier rejette la demande présentée en vertu du paragraphe (2);

c) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (3) ou à la date postérieure fixée par le tribunal, si ce dernier ordonne la résiliation du contrat en vertu de ce paragraphe.

Propriété intellectuelle

(6) Si la compagnie a autorisé par contrat une personne à utiliser un droit de propriété intellectuelle, la résiliation n'empêche pas la personne de l'utiliser ni d'en faire respecter l'utilisation exclusive, à condition qu'elle respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce pour la période prévue au contrat et pour toute période additionnelle dont elle peut et décide de se prévaloir de son propre gré.

Pertes découlant de la résiliation

(7) En cas de résiliation du contrat, toute partie à celui-ci qui subit des pertes découlant de la résiliation est réputée avoir une réclamation prouvable.

CITATION: Laurentian University v. Sudbury University, 2021 ONSC 3392
COURT FILE NO.: CV-21-656040-00CL
DATE: 20210507

SUPERIOR COURT OF JUSTICE – ONTARIO

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 LAURENTIAN UNIVERSITY OF SUDBURY

RE: Laurentian University of Sudbury, Applicant/Responding Party

AND:

University of Sudbury, Moving Party

BEFORE: C. Gilmore, J.

COUNSEL: *D.J. Miller, Mitchell Grossell, Andrew Hanrahan, Fraser Hughes* and *Derek Harland*, Counsel for the Applicant/Responding Party

Ashley Taylor, Elizabeth Pillon and *Ben Muller* for the Court-appointed Monitor, Ernst & Young

Vern W. DaRe for the DIP Lender

André Claude and *Ronald W. Caza* for University of Sudbury Counsel for the Moving Parties

Demetrios Yiokaris and *Eugene Meehan* for Thorneloe University

Francis Poulin and *Charlotte Servant-L'Heureux* for the Assemblée de la francophonie de l'Ontario

Charles Sinclair for the Laurentian University Faculty Association

Tracey Henry and *Danielle Stampley* for the Laurentian University Staff Union

Peter J. Osborne and *David Salter* for the Board of Governors of Laurentian University

Aryo Shalviri and *Cristina Cataldo* for Royal Bank of Canada

Dylan Chochla for Toronto-Dominion Bank

Virginie Gauthier for Lakehead University

Natalie Levine for Huntington University

Donia Hashem for the Canada Foundation for Innovation

Sarah Godwin and *Immanuel Lanzaderas* for Canadian Association of University Teachers

Mark G. Baker and *Andre Luzhetskyy* for Laurentian University Students' General Association

HEARD: April 30, 2021

ENDORSEMENT

OVERVIEW

[1] Laurentian University ("LU") experienced a financial crisis and sought protection under *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36, ("CCAA") on February 1, 2021. The CCAA protection included a stay of proceedings to February 10, 2021. The stay was subsequently extended to April 30, 2021. On April 29, 2021, the stay was extended to May 2, 2021 at 11:00 p.m. On May 2, 2021, the stay was extended to August 31, 2021.

[2] Since February 1, 2021, LU has undergone an overhaul of its entire financial and operational structure in order to create a sustainable operational future for the delivery of academic services. One component of the restructuring involved LU terminating its relationship with its three Federated Universities: the University of Sudbury ("SU"), Thornloe University ("Thornloe") and Huntington University ("Huntington") (together "the Federated Universities"). On April 1, 2021, LU issued a Notice of Disclaimer ("the Disclaimer") pursuant to s. 32 of the CCAA, in order to disclaim certain contracts between LU and the Federated Universities and in furtherance of the termination of the relationship with the Federated Universities.

[3] Huntington has come to an agreement with LU as to how to dissolve its partnership. Both Thornloe and SU proceeded with their motions to set aside the Disclaimer. Thornloe's motion was heard on April 29, 2021 by Chief Justice Morawetz. He extended the stay to May 2, 2021 at 11:00 p.m. and subsequently to August 31, 2021. I heard SU's motion on April 30, 2021. On May 2, 2021, Justice Morawetz and I released a brief endorsement dismissing both motions. In those endorsements it was indicated that detailed reasons for the dismissals would follow. These are the reasons on the dismissal of SU's motion.

BACKGROUND FACTS

[4] LU has been experiencing financial problems for many years. The crisis peaked in the spring of 2020 when LU's liabilities reached $322M. In August 2020, LU retained Ernst & Young to assist with its financial restructuring. On February 1, 2021, LU sought CCAA protection.

[5] LU sought and received Court approval for DIP financing of $25M. After Thornloe and SU filed their motions opposing the Disclaimer, LU filed a motion for an extension of the stay to August 31, 2021. LU sought additional DIP funding of $12M. The DIP lender agreed to provide additional funding of $10M; however, the Disclaimer of the agreements with Federated Universities was a pre-condition of the second advance.

[6] Under CCAA protection, LU's Senate passed a resolution in April 2021 approving its academic restructuring. This included the closure of 38 English-language and 27 French-language undergraduate programs and 11 graduate programs (4 in French and 7 in English) as they were identified as unsustainable.

[7] On April 7, 2021, LU signed agreements with its labour partners which included terminations, declarations that 116 positions were redundant, salary decreases and unpaid furlough days.

[8] LU operates within a federated structure whereby it has contracts with the three Federated Universities. Each of Thornloe, Huntington and SU is a separate legal entity with its own Board of Governors. Programs for all of the Federated Universities are offered through LU and receive credits towards a degree that is granted by LU. As of the Fall 2020 academic term, there were 69.6 full-time equivalent students at SU.

[9] LU entered into its Federation Agreement with SU on September 10, 1960. The Federation Agreements are substantially similar and include the following important terms:

a. Each of the Federated Universities agreed to suspend its degree-conferring powers (with certain limited exceptions) in favour of LU;

b. LU agreed to distribute to each Federated University a portion of the revenue it received for each student as reflected in the Financial Distribution Notice;

c. LU reserved certain land on its campus for the Federated Universities and the allocation was completed pursuant to indentures.

[10] Each of the Federation Agreements contains the following aspirational statement:

> Both Laurentian University and [Sudbury University] declare and express the firm hope and conviction that the relationship between the Universities established by this agreement will be a permanent one … and to build a great institution of learning which shall forever be bilingual and non-denominational in its character.

[11] Each of the Federated Universities leases land from LU on which they have constructed their own buildings. The lease terms are for 99 years from September 1, 1963 with the possibility of further renewal. The indentures are not the subject of the Disclaimer.

[12] SU has two buildings on the LU campus; a main building for administration and a residence. The buildings were constructed at a cost of $5M.

[13] Pursuant to the Financial Distribution Notices, LU transfers to each of the Federated Universities a portion of the revenue it receives from the provincial government. The Financial Distribution Notices also provide that LU is permitted to assess a 15% administrative service fee ("the service fee") on grant and tuition revenue received. The net amount is then passed on to the Federated Universities. The service fee relates to LU's provision of central computing services, administration of pension and employee benefits, security and student support services.

[14] In 2020, LU transferred $7.7M to the Federated Universities, net of the service fee. According to the Monitor, LU requires this amount as part of its restructuring plan. That is, LU seeks to have the former students of SU, Thornloe and Huntington as part of its student body so that it is no longer required to transfer that revenue to the Federated Universities.

[15] Discussions with the Federated Universities about LU's financial crisis began in June 2020. According to the evidence of Dr. Robert Haché, the President and Vice-Chancellor of LU, he informed the Federated Universities from the start of negotiations that all options were on the table including ending the existing agreements with the Federated Universities.

THE ISSUES

Issue #1 - Discretion under the CCAA and the Duty of Good Faith

[16] Where a party seeks an order disallowing a Notice of Disclaimer, s. 32(4) of the CCAA requires the Court to consider the following list of non-exhaustive factors when deciding whether or not to permit or reject the disclaimer of an agreement:

a. First, whether the Monitor approved the proposed Disclaimer;

b. Second, whether the Disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

c. Third, whether the Disclaimer would likely cause significant financial hardship to a party to the agreement.

[17] Other relevant provisions in the CCAA include a requirement to act in good faith pursuant to s. 18.6:

> 18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

[18] Further, relief granted under the CCAA is limited to what is "reasonably necessary for the continued operations of the debtor company" as per section 11.001:

> Relief reasonably necessary

> 11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[19] SU argues that the duty of good faith in s.18.6 extends to Disclaimer Notices. SU relies on *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, a recent decision of the Supreme Court of Canada. The Court reiterated, at para. 49, that "the discretionary authority conferred by the CCAA…is not boundless" and that the Applicant (in this case LU) bears the burden of demonstrating that the order it seeks is appropriate in the circumstances, and that it has acted in good and with due diligence.

[20] The Court in *Callidus* goes on to explore the fairness element required in CCAA proceedings and that the Court must exercise its discretion to control the process if a party is acting in a manner that runs counter to the objectives of the CCAA or is acting for an "improper purpose": at para. 70.

[21] In the *Re Dallas/North Group Inc.* (2001), 148 OAC 288 (C.A.), the Court was critical of certain non-parties who brought bankruptcy proceedings against two debtors for an improper purpose. The Court was clear that the bankruptcy process cannot be used for such a collateral purpose.

[22] SU argues that LU has acted in bad faith by attempting to disclaim the Federation Agreement. Specifically, SU alleges that LU seeks to use the CCAA restructuring process for a collateral and improper purpose by effectively destroying a competitor. This is an abuse of process.

[23] In support of its position, SU referred to the case of *Dimples Diapers Inc. v. Paperboard Industries Corp.*, 1992 CarswellOnt 192 (Gen. Div.), at para 34, the Court quotes L. W. Houlden and C. H. Morawetz, *Bankruptcy Law of Canada*, 3rd. (Toronto: Carswell, 1989) at p. 2-45:

> When the effect of an agreement between the petitioning creditor and some non-creditors was to embroil the petitioning creditor in an improper objective of the purchasers of a business who as non-creditors had no status in the bankruptcy proceedings and were intermeddling in it, and the objective was to bring about the bankruptcy of the debtors, held — the whole proceeding was tainted and the petition must be dismissed: *Re Pappy's Good Eats Ltd*. (1985), 56 C.B.R. (N.S.) 304 (Ont. S.C.).

[24] SU submits that it is false to say that students of SU are all students of LU. They are students of the Federation. The fact that they enrol and receive their diplomas through LU is only because of the agreed upon structure of the Federation. SU has existed as an independent entity since 1910 and is on the same level as LU.

[25] SU claims that LU is attempting to use the CCAA for an illegitimate purpose. Using the bankruptcy system for an illegitimate purpose has been met with disapproval. In *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.), the Court held that the

CCAA should not be used by a debtor company for any purpose other than a "legitimate reorganization" and not for an "improper purpose": at para. 84.

[26] At its most basic level, the disclaimer or termination of a contract must be "fair, appropriate, reasonable, and must have been issued after good faith negotiations": *Re Allarco Entertainment Inc.*, 2009 ABQB 503, at para. 59. SU argues that LU could have but did not attempt alternate solutions, such as a renegotiation of its service fee with LU. It did not enter into the required good faith negotiations with SU.

[27] Further, the financial arguments advanced by LU in support of the disclaimer are not borne out. The expectation was that LU would charge a service fee sufficient to cover its administrative costs resulting in no net cost for LU for administering the enrolment of SU students. Terminating such a "net net" arrangement is contrary to LU's obligation to act in the best interest of the Federated Universities.

[28] Dr. Haché did not agree that there was no cost to LU for the administration of SU's students. His evidence on cross-examination was that having students take courses at SU resulted in a loss of potential revenue to LU. SU's position was that LU had provided no research or modeling to justify or confirm that this was the case. LU has already saved $30M with its restructuring. Destroying the Federated Universities over unproven revenues of $7M does not justify the resulting devastation to SU.

Analysis

[29] I do not agree that LU has sought a Disclaimer of the Federation Agreements for a collateral, improper or illegitimate purpose. This is not a matter of putting a competitor out of business, it is simply a matter of putting an end to an unsustainable financial model within the context of difficult and urgent circumstances.

[30] It is important to review several facts which go to the core of this Disclaimer:

a. All of the students who attend SU are LU students;

b. SU currently has the equivalent of 108 students whereas LU has 9,000 students.

c. The Federation Agreements can be legitimately disclaimed pursuant to s. 32 of the CCAA.

d. The Disclaimer is approved by the Monitor. This recommendation is given significant weight under the statute.

e. Disallowing the Disclaimer would seriously diminish the prospects of a viable plan to be put to creditors. That is, a plan which includes funds that continue to flow away from LU is not viable.

f. Without the Disclaimer proceeding, the DIP lender will not make the additional $10M advance which would remove the ability of LU to file a proposal.

g. LU has been able to achieve significant costs savings, but this only places them at a break even point and without resources to pay its creditors.

h. The Federation Agreements contain only an aspirational clause with respect to their permanency.

i. There is nothing in the business plan which would preclude SU from independently providing religious or francophone-based offerings. It would simply no longer be possible to obtain an LU degree there.

j. In 2019, LU did try a new arrangement, with respect to its service fees, with the Federated Universities. Unfortunately, that was insufficient to overcome its financial distress.

k. With respect to its duty to consult SU, LU attempted negotiations with the Federated Universities as far back as the spring of 2020. The negotiations were only partially successful. As LU is now under the supervision of a Monitor in a Court proceeding, such negotiations are still available through the Court-appointed mediator who has worked hard and achieved good results with Huntington and the various employment stakeholders.

l. I reject the submission by SU that the Disclaimer came "out of the blue." As indicated by Dr. Haché, the concept of a termination of the Federation has always been on the table since LU's financial situation turned to crisis mode. As early as his affidavit of January 30, 2021, Dr. Haché deposed:

> The Laurentian 2.0 framework seeks to accomplish the foregoing through:
>
> (a) Restructuring the Academic Model by streamlining academic programming and delivery through the reduction of number of programs, restructuring academic supports and **terminating the agreements and relationship with the Federated Universities** [Emphasis added];…

m. I do not find that LU has a legal duty to act in the interests of the Federation. LU's most significant duty at this time is to its creditors. As mentioned above, LU engaged in two months of intensive mediation with all of its stakeholders. It achieved positive results with Huntington and its unions. I agree with counsel for LU that failing to achieve a resolution with Thornloe and SU does not mean that LU was not making good faith attempts at resolution.

[31] SU provided a significant amount of case law to the Court. Unfortunately, none of it related to bad faith or an improper purpose in the context of Disclaimer Notice under s. 32 of the CCAA.

[32] Further, and contrary to SU's assertions, Dr. Haché's evidence was that LU has evolving modeling which includes the ending of the Federations Agreements.

[33] In summary, I find that the Disclaimer meets the requirements of s. 32(4) (a) and (b) in that the Monitor has approved the Disclaimer and that without the additional revenue from SU and the other Federated Universities, LU will not be able to put forward a viable plan for its creditors and will jeopardize further necessary DIP funding.

Issue #2 – Financial Hardship to SU and the DIP Lender Issue

[34] SU submits that termination of its employees will cost $4M and that the cost of maintaining its buildings is $400,000 per year. Without student tuition revenue it has no resources to pay these amounts.

[35] Mr. Pierre Riopel is the Chair of the Board of Regents of SU. In his cross-examination on April 24, 2021, he was asked about the $4M cost relating to employee terminations. He was frank in conceding he had no idea where that number came from but advised it was a collaboration with a lawyer, human resources and university staff.

[36] An undertaking was given to provide an analysis of that number. The answer to the undertaking is set out below:

> The $4M figure is a combination of statutory notice costs and severance payable to USudbury employees pursuant to the *Employment Standards Act*, worth approximately $800,000. The balance of the figure is a rounded liability estimate for additional compensation claimed by employees which may be owed pursuant to collective bargaining agreements as a result of permanent loss of employment.

[37] With respect to the $400,000 annual amount to maintain the SU buildings, Mr. Riopel also had no personal information as to how that number was arrived at, other than by university administrative staff. An undertaking was given to provide an explanation of those costs. The answer to the undertaking is set out below:

> The $400,000 figure is comprised of an estimate of the annual costs for building maintenance and repairs, including a figure for minimal staff salaries and benefits. This figure is based on USudbury not delivering any courses to Laurentian students, meaning no student and faculty and no operation of the residences.

[38] I find that the answers to the undertakings do not provide any form of reliable financial analysis as to the actual amounts for which SU submits it will be liable. They appear to be estimates only.

[39] There is no doubt that SU will suffer financial consequences as a result of the Disclaimer. However, the evidence provided by SU is insufficient to meet the threshold of a "significant financial consequence" required to disallow a disclaimer under the CCAA. Further, any financial consequences suffered by SU must be balanced with the overall financial considerations in the restructuring which go far beyond SU's speculations of insolvency.

[40] SU submits that the Court is put in a difficult position. The Disclaimer is an abuse of process; yet, without it, the DIP Lender will not advance funds. SU adds that it was not permitted to cross-examine the DIP Lender or access communication between the DIP Lender and LU. Insolvencies under the CCAA should be pursued in accordance with the relevant law and not at the whim of the DIP Lender.

[41] I do not agree with SU that the DIP Lender is running this process or, as it submits, that the DIP Lender has "ousted the jurisdiction of the Superior Court." First, the terms of the original DIP financing of $25M in February 2021, including its expiry on May 1, 2021, was well known to all stakeholders and approved by the Court. The funds were advanced at a critical time when instructors were being allocated for the 2021/22 academic year and offers being made to Grade 12 students. That is, it was critical that planning and resources for the Fall 2021 term be in place.

[42] The DIP Lender made submissions at the motion. While SU seemed concerned that such submissions were permitted, I saw no reason for the concern. Not surprisingly, the DIP Lender simply confirmed what was already widely known; the DIP Lender is a stranger to LU and was not a pre-filing lender. It is an arm's length commercial lender who has risk in a novel lending situation where its security is over a public institution. It has already advanced a significant amount and has specific conditions on advancing more. One of those conditions is that the Disclaimers are in place such that LU can increase its revenues.

[43] SU complained that it was not given access to information as between LU and the DIP Lender so that it could satisfy itself that the Disclaimer was truly an essential term of the second advance. SU was given the opportunity to submit written questions but was dissatisfied with the answers.

[44] More importantly, however, it is LU who is under CCAA protection and not SU. The only way for LU to put forward a viable plan for its creditors is to temporarily increase its liabilities. It is bound to comply with the terms of the DIP Lender who advised the Court, through its counsel, that it had done a financial analysis which indicated that the Disclaimer of the Federated Agreements was essential for an increased revenue stream for LU.

[45] The Court also heard from the Monitor. The Monitor was of the view that the Disclaimer was necessary for LU to make a viable proposal to its creditors. The Monitor provided pre and post restructuring projections for the next five fiscal years, starting with 2021/22. Without any restructuring, LU is forecasted to have an operating deficit of $42M in 2021/22 and approximately $25M per year in the following four years. That is without accounting for any payments to the DIP Lender or other creditors.

[46] The post restructuring projections include a DIP facility of $35M, an assumption that the Notices of Disclaimer become effective on May 1, 2021 and that the claims of other creditors will be paid over time. That projection will result in a deficit of $12.5M in 2021/22 and an average surplus of $14M over the next four years. However, from this surplus must come the repayment of the DIP Lender at $4 to $10M per year and payments to creditors from a large claims pool (pre-filing lenders are owed over $100M).

[47] There is no reason not to accept the financial projections presented by the Monitor. They were not challenged by SU. The projections make it clear that the revenue gained by LU from the Disclaimer is essential for its survival in this restructuring. It is an unavoidable and somewhat stark reality.

Issue #3 – The Disclaimer's Effect on French Language Programming and Services

[48] SU makes the following arguments with respect to French Language rights and the effect of the Disclaimer on those rights:

a. SU is a designated "public service agency" within the meaning of the *French Language Services Act*, R.S.O. 1990, c. F.32. As such, the public has the right to receive services from it in French and the Province of Ontario must provide funding to ensure this.

b. Under s. 23 of the *Charter of Rights and Freedoms*, the Province of Ontario must implement institutional measures to give effect to the Franco-Ontarian community's right to receive an educational experience in French including the allocation of appropriate resources to entities such as the SU.

[49] Given the above considerations, LU must take the needs of the Franco-Ontarian community into account within the context of CCAA proceedings. SU submits that the Franco-Ontario community is concerned about the impact of these proceedings, including a disproportionate effect on French programs, courses and services. As SU points out, in the affidavit of the President of LU in support of the CCAA proceeding, he does not once mention French language rights.

[50] SU is concerned about the lack of French used in this proceeding and LU's failure to honour its commitments to French-language programs, courses and services. Those failures have been brought to LU's attention in the past by the Franco-Ontarian community.

[51] For several years, the Franco-Ontario community has expressed a desire for a university by and for francophones. A "bilingual" institution is not enough as English tends to be the dominant language in such institutions.

[52] On March 11, 2021, in consultation with the *Assemblée de la Francophonie de l'Ontario* ("AFO"), francophone stakeholders from Sudbury and other northern Ontario communities announced a resolution to become a university controlled by and for the Franco-Ontarian community.

[53] SU offered to take over all of LU's French courses to attain this goal. LU refused. SU submits that if the Disclaimer is permitted to proceed, LU will not be in a position to fulfill its obligations to the francophone community. Those obligations were already in jeopardy before the restructuring. With 40% fewer courses available for LU students this fall, it is simply a slap in the face to the francophone community to permit the Disclaimer to proceed.

Analysis

[54] It is clear from SU's resolution made in March 2021 (and prior to the Disclaimer being delivered) that SU found itself incompatible with the current bilingual and tri-cultural mandate of the Federated Universities. Indeed, the language in the agreement between LU and SU, dated September 10, 1960, is mandatory in that it requires SU and LU to work together to build an institution of learning "which shall forever be bilingual and non-denominational in character": at para. 17.

[55] Given SU's clear dissatisfaction with bilingual programming, and its criticisms of LU's commitment to the provision of French-language courses and services, it is hard to understand why SU is objecting to the Disclaimer.

[56] On the contrary, the March 2021 resolution sets out a completely different path for SU. That resolution specifically states that SU is to immediately take steps toward a university managed and controlled by Ontario francophones to offer courses and services in French, that the working language at SU will be French, that SU assumes the responsibilities of a designated service provider under the *French Language Services Act*, provides training for its instructors as required under the *Charter,* and develops partnerships with other (presumably francophone) post-secondary institutions.

[57] Following the March 2021 resolution, SU commissioned a business plan, dated April 2021, for the "Université francophone de Sudbury" which charted the transition for SU to reach its new goal. Its vision included the establishment of an independent secular university that offered French language programs to develop leadership, while preserving a francophone identity and offering a practical curriculum which was not constrained solely by academics. This is a laudable and important goal which it is hoped that SU can achieve in the near future.

[58] Finally, it would not benefit the francophone community if LU is forced into bankruptcy. That would no doubt result in no educational offerings to the francophone community at all. LU has made a firm commitment to continuing as a bilingual and tri-cultural institution. Indeed, much of its funding is tied to compliance with those goals. The current restructuring will ensure that the number of students currently enrolled in French courses (43 programs) is maintained.

[59] Previously, the majority of courses offered by SU were in English. Post Disclaimer, SU is free to re-invent itself as a francophone university and without the constraints of the Federation Agreements. Indeed, providing such an option to the northern community would be desirable and would not be impeded by LU's restructuring.

SUMMARY AND ORDERS

[60] It is this Court's view that a bankruptcy for LU must be avoided in keeping with the objectives of the CCAA. The bankruptcy for LU will displace students and faculty, and will have a detrimental effect on stakeholders, suppliers and service providers in the Sudbury community. Avoidance of a bankruptcy and all of its deleterious effects on LU and its community means, amongst other consequences, a dissolution of the Federation Agreements. Difficult decisions must sometimes be made with unpleasant consequences. This is one of those decisions.

[61] Given all of the above, I make the following orders:

a. The motion brought by the University of Sudbury is dismissed.

b. Costs of this motion are to be discussed amongst counsel. If no resolution can be reached, I can be spoken to by way of a scheduled Case Conference.

c. La traduction officielle en français suivra.

C. Gilmore, J.

Date: May 7, 2021

SUPERIOR COURT

Commercial Division

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-042345-120

DATE : November 20, 2012

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 c. C-36:

AVEOS FLEET PERFORMANCE INC. /
AVEOS FLEET PERFORMANCE AÉRONAUTIQUE INC.
Insolvent Debtor/Petitioner

and

AERO TECHNICAL US, INC.
Insolvent Debtor

and

FTI CONSULTING CANADA INC.
Monitor

and

NORTHGATEARINSO CANADA INC.
Petitioner

and

CREDIT SUISSE AG CAYMAN ISLANDS BRANCH
Secured creditor

JS 1319

JUDGMENT

INTRODUCTION

[1] Aveos Fleet Performance Inc. ("Aveos") is subject to an order under the *Companies' Creditors Arrangement Act* ("C.C.A.A.')[1] It has sold or seeks to sell all of its assets and is not operating its business. Can it invoke Section 32 C.C.A.A. to cancel an executory contract? This is the principal issue before this Court.

FACTS

[2] Aveos and its related entity, Aero Technical US, Inc. (collectively, the "debtors") applied for and this Court issued an initial order under the C.C.A.A. on March 19, 2012. A stay was issued until April 5, 2012, at that time and has subsequently been extended. F.T.I. Consulting Canada Inc. was named monitor. The record of the Court and particularly the orders and reasons of the undersigned indicate that in the hours following the initial order, the entire board of directors (but one) of Aveos resigned. Most of the remaining employees (i.e. those who had not been laid off prior to the C.C.A.A. filing) were laid off immediately following the initial order and the day-to-day operations of Aveos were shut down.

[3] The remaining director signed the affidavit in support of a Motion Seeking the Appointment of a Chief Restructuring Officer ("C.R.O."), in virtue of which Mr. Jonathan Solursh of the firm R.e.I. Consulting Group, an independent consultant, was named C.R.O. and has acted in such capacity since then. The remaining director resigned following such appointment.

[4] Much time and effort were spent in the month following the filing with the emergency situations of a company not having sufficient cash to operate in the normal course, being in possession of property claimed by third parties and having 2800 former or present employees owed millions of dollars in the aggregate. Nevertheless, the C.R.O. quickly concluded with the support of the Monitor that Aveos had to be sold.

[1] R.S.C. 1985, c. C-25

[5] On April 29, 2012, this Court issued an order approving the "Divestiture Process" put forward by the C.R.O. in virtue of which Aveos was offered for sale. The C.R.O. determined that Aveos' three (3) divisions (i.e. engines, components and air frames) should be marketed with a view to separate sales as it was unlikely that anyone would purchase all three (3) divisions. The C.R.O. believed that the value could be maximized by seeking to split Aveos into three (3) enterprises although there was no impediment to any one person acquiring all three (3) divisions. It was certainly hoped that all three (3) divisions would be sold on a going concern basis and would recommence operations and this in the interest of all stakeholders.

[6] As the Court record indicates, at no time did any party bring a motion to end the stay period with a view to petitioning Aveos into bankruptcy.

[7] The C.R.O. and Monitor have reported on an ongoing basis and also gave evidence in the present matter before the undersigned. The Divestiture Process has given rise to over 10 transactions. Unfortunately, only one sale (for the components division) has been made on a going concern basis where approximately 200 jobs should be conserved. However, and significantly, although the process of seeking bids has ended, the C.R.O. and the Monitor testified before the undersigned that a "latecomer" has appeared, and is performing a due diligence investigation with a view to making an offer to acquire the engine maintenance division of Aveos. The engine maintenance equipment remains in the hands of a liquidator but the scheduled auction has now been postponed. The interested party is in the same type of business, so that the tax losses of Aveos may have value as part of the transaction and this could potentially lead to the filing of a plan of arrangement with some benefit for unsecured creditors. Though the engine maintenance contract with Air Canada was sold as part of the Divestiture Process, it represented approximately 55 % of the engine maintenance business. Accordingly, there is a potential value in the business enterprise beyond the liquidation value of the tangible assets.

[8] Against this status update of the C.C.A.A. file is the dispute between Aveos and the present Petitioner, Northgatearinso Canada Inc. ("N.G.A.").

[9] Aveos was created as a result of the C.C.A.A. restructuring of Air Canada. It was the former maintenance department of Air Canada. Initially, it depended on Air Canada's support for payroll and human resources. As part of the process of separating Aveos from Air Canada, Aveos sought to outsource its human resources and payroll departments. To this end, a process to select a service provider was put in place. The goal of Aveos

was to have a completely outsourced human resources and payroll system that would include computer access for employees through a portal where they could access their files and view their status (e.g. benefit accruals) and even input information (e.g. change beneficiaries in insurance plans). The service would include a call center to handle employee questions.

[10] The establishment of the system had many challenges and complicating factors, such as the fact that some Aveos' personnel were Air Canada's employees that had been seconded to Aveos.

[11] Originally, an operating system completely independent from Air Canada and its services providers was targeted for autumn 2010. This date was extended due to extraneous considerations to July 14, 2011, which was fortunate given all of the developmental problems experienced as will be addressed below.

[12] The "Global Master Services Agreement" ("G.M.S.A.") with N.G.A. was signed between Aveos and N.G.A. in January 2011. By the time of the C.C.A.A. filing in March 2012 not all outstanding operational issues had been resolved. The relationship was fraught with frustration on both sides. Aveos felt that N.G.A. took too long to install systems and was unable to provide certain services altogether. Costs ran over those stipulated in the G.M.S.A. for services not covered under the agreement. All of this caused Aveos to lose confidence in N.G.A.

[13] N.G.A. was frustrated by the ongoing changes in Aveos management personnel charged with the implementation of the system, so that from N.G.A.'s point of view, once it finally "educated" one member of the Aveos team he she was replaced so that Aveos throughout did not fully understand what the system was designed to do, and by extension, what the system could not do.

[14] Aveos felt that N.G.A. as the expert should tell it not merely what was needed, but what was missing in the system to address Aveos' needs. Instead, the Aveos' personnel in charge learned piecemeal that features that they wanted or needed were not available or at least not included in the contract price. This situation was severe enough to cause Aveos to engage the services of Deloitte at the beginning of 2012 as a consultant to help Aveos resolve the continuing issues arising during implementation of the services to be provided by N.G.A. under the G.M.S.A.

[15] N.G.A. felt not only did Aveos fail to understand the system, but it provided incomplete or incorrect data to N.G.A. for input and thus further complicated matters.

[16] The problems with N.G.A. were such that Aveos has sought cancellation of the G.M.S.A. not only under Section 32 C.C.A.A. but also Aveos seeks resiliation for cause pursuant to the law of contracts generally based on N.G.A.'s alleged faulty execution of its obligations.

[17] The level of frustration existing between N.G.A. and Aveos continued after the C.C.A.A. filing. The lay-offs and the shut down of day-to-day operations required services not contemplated by the G.M.S.A. Obtaining such services in a timely manner from N.G.A. was the subject of ongoing extensive and tense negotiations over a period of approximately one month. Aveos was now represented by the C.R.O. and his staff with the support of the Monitor.

[18] Before the undersigned, the representative of the Monitor diplomatically described the situation between N.G.A. and Aveos prior to the C.C.A.A. filing as a "failed business relationship". Unfortunately, the situation did not improve during the post-filing period.

[19] Upon learning of the initial filing under the C.C.A.A., N.G.A. communicated with Aveos. The thrust of N.G.A.'s written and verbal communications were either a refusal to continue services under the existing contract and seeking assurance of payment going forward (according to Aveos) or a request as to what would be required given the change of operations and personnel as described above (according to N.G.A). There followed a series of exchanges including numerous conference calls which gave rise, in succession, to three Memoranda of Understanding dated March 26, April 10 and April 13, 2012 which outlined the services to be provided by N.G.A. to Aveos and the pricing in respect thereof.

[20] Aveos had payroll needs because 120 employees had been recalled. Also payroll periods which fell on both sides of the C.C.A.A. filing date required special attention. Certain "claw-back" amounts previously set off against amounts due to employees had to be paid post-filing. Records of employment had to be issued in order for employees to be able to claim benefits from the government unemployment insurance program.

[21] Other ongoing services under the G.M.S.A. were obviously not required as Aveos' operations were not continuing as had been the case prior to the C.C.A.A. filing.

[22] From N.G.A.'s point of view, the demands being made by Aveos were exorbitant mainly because the time delays were extremely aggressive. Many of the services requested were not what the system was designed to do. For example, records of employment resulting from mass layoffs were

not designed into the system, nor were reversing deductions from past pay periods and ledgering these reversals in the former pay period already closed for purposes of data entry. The system had to be (re-)designed to accommodate these needs.

[23] From the C.R.O's point of view, N.G.A.'s performance failures experienced by Aveos pre-filing now continued into the post-filing period. N.G.A.'s difficulty to meet tight time deadlines imposed by the C.C.A.A. circumstances and the exorbitant pricing made it such that Aveos, through the C.R.O., sought and engaged an alternate payroll service provider as of May 1st, 2012. The price for a one-year contract albeit encompassing far less extensive services than those under the G.M.S.A., is one-half of N.G.A.'s monthly fee. Indeed, the representative of the C.R.O. testified that the exorbitant pricing under the three (3) Memoranda of Agreement was only accepted because there was no alternative at that time. As such, $240,000.00 was paid by Aveos to N.G.A. for the 4-week period between the end of March and the end of April 2012.

[24] In one instance, where the payroll included the reversal of amounts previously set off, N.G.A. could not produce the work product at all or at least on time such that the C.R.O. organized staff to produce 800 pay cheques manually. Moreover, the data in question was entered into the database by N.G.A. in the current as opposed to the old, pre-filing period in consideration of which the payments were being made. This caused Services Canada to question whether the employees were indeed eligible for Unemployment Insurance ("UIC") benefits. Apparently, much energy was expended in order to correct this situation and the results were additional delays for employees to receive their UIC benefits.

[25] Effective May 1st, 2012, Aveos gave notice to N.G.A. that it was cancelling the G.M.S.A. and the three (3) Memoranda of Agreement for faulty performances both pre and post-filing. Alternatively, Aveos took the position that it was cancelling and repudiating the agreements pursuant to its rights to do so under Section 32 C.C.A.A. N.G.A. claims $501,381.00 which is the indemnity provided by the G.M.S.A. where cancellation is for "convenience", i.e. without cause. N.G.A. also claims the sum of $91,377.00 for unpaid services rendered under the three (3) Memoranda of Agreement.

[26] Crédit Suisse, the secured creditor, has taken the position that whatever sums might be due to N.G.A., they fall within the definition of "claim" in Sections 2 and 19 C.C.A.A. and are not post-filing claims as postulated by N.G.A. Thus, any payment would be subordinate to the rights of Crédit Suisse.

ISSUES

[27] Is Section 32 C.C.A.A. available to Aveos as a means to resiliate or cancel the G.M.S.A.?

[28] Aside from Section 32 C.C.A.A., does Aveos have the right to resiliate the G.M.S.A. because of the alleged faulty execution by N.G.A. of its obligations there under?

[29] Does N.G.A. have the right to claim the cancellation indemnity of $501,381.00 foreseen by the G.M.S.A.? If so, is the amount due immediately by Aveos as a claim arising after the C.C.A.A. filing, and as such not subject to the stay of proceedings? In the alternative, is the amount due but subject to be treated as a (pre-filing) ordinary or unsecured claim to be dealt with under an arrangement, if any, or a bankruptcy?

[30] Is the sum of $91,377.00 due immediately for services rendered by N.G.A. to Aveos after the C.C.A.A. filing?

POSITION OF N.G.A.

[31] N.G.A. contends that Section 32 C.C.A.A. does not apply in the circumstances where Aveos ceased to carry on business, is being liquidated and as such will not propose an arrangement to its creditors. N.G.A. argues that Section 32(1)(b) C.C.A.A. does not apply to such a scenario. The purpose of Section 32 C.C.A.A. is to allow a debtor company to rid itself of contractual obligations which are an impediment to an arrangement. Where no arrangement will be filed, Section 32 C.C.A.A. should not apply according to N.G.A.

[32] Moreover, since the G.M.S.A. contains a provision allowing for cancellation without cause, such recourse must be used before reverting to a statutory mechanism to seek cancellation of the contract. In other words, according to N.G.A., Aveos must pay the stipulated cancellation penalty of $501,381.00 to achieve cancellation in such manner rather than having recourse to Section 32 C.C.A.A.

[33] The resiliation of the G.M.S.A. for faulty execution is not available to Aveos because on the facts of the case, N.G.A. is not at fault having fulfilled its contractual obligations at all relevant times.

[34] The $501,381.00 cancellation penalty is not a claim provable within the meaning of the C.C.A.A., but rather is a post-filing claim. This claim arises from the unilateral cancellation of the G.M.S.A. by Aveos after the

C.C.A.A. filing. N.G.A. continued to render services after the filing albeit in a modified manner, at Aveos' request and in order to respond to Aveos' needs in the situation as it unfolded after the C.C.A.A. filing. On or about May 1st, 2012, approximately five (5) weeks after the C.C.A.A. filing, Aveos cancelled the G.M.S.A. and as such the obligation of Aveos to pay the penalty of $501,381.00.00 arose after the filing. Consequently, it is not a provable claim, but rather an amount arising and payable after the C.C.A.A. filing.

[35] Similarly, the $91,377.00 representing charges for services rendered after the filing, and at the request of and as agreed with Aveos, are currently due. This is not a claim provable to be dealt with under an arrangement, according to N.G.A. As such, it should be paid by Aveos immediately, as were the other amounts for services rendered after the C.C.A.A. filing, the whole as pleaded by N.G.A.

DISCUSSION

[36] Section 32 C.C.A.A. provides a mechanism for a debtor company to "disclaim or resiliate" agreements to which it is a party at the time of the initial C.C.A.A. filing. This disclaimer is achieved by notice given by the debtor to the co-contracting party.

[37] The debtor company's notice to disclaim may be contested by the other party to the contract as N.G.A. has done in the present case. It then falls upon the Court to make (or not) an order of disclaimer :

[38] Section 32(4) C.C.A.A. provides as follows :

> "Factors to be considered
>
> In deciding whether to make the order, the court is to consider, among other things,
>
> a) whether the monitor approved the proposed disclaimer or resiliation;
>
> b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement."

[39] On the face of the drafting of Section 32(4) C.C.A.A., the matters listed are not an exhaustive enumeration of the matters that this Court may consider in deciding whether to approve the cancellation of a contract where the notice is contested.

[40] Section 37(4)(c) C.C.A.A. is not in issue in these proceedings because N.G.A. did not allege nor prove any financial hardship arising from the G.M.S.A. There is the obvious lack of revenue stream when the contract is cancelled (approximately $80,000.00 per month), but it was not contended that the loss of this, *per se* constituted, in this particular case, the "financial hardship" to which subparagraph (c) refers.

[41] Section 32(4)(b) C.C.A.A. addresses the issue of whether the cancellation of the contract would "enhance the prospects of a viable" arrangement being made.

[42] The Monitor filed a report and its representative, Ms. Toni Vanderlaan, testified before the undersigned.

[43] The Monitor confirmed that it had approved the proposed cancellation of the G.M.S.A. as foreseen by Section 32(4)(a) C.C.A.A. In so doing, the Monitor considered the cost of continuing the G.M.S.A., which as indicated above represents approximately $80,000.00 per month prior to the C.C.A.A. filing. The alternate provider engaged by Aveos after May 1st (Ceridian), was considerably cheaper at $40,000.00 per year albeit that the scope of the service under the G.M.S.A. provided by N.G.A. was much broader than those provided by Ceridian. In any event, the Monitor determined that the G.M.S.A. was far too expensive given the cash position of Aveos and its payroll and human resources needs in any scenario post C.C.A.A. filing.

[44] In addition to cost, the Monitor concluded that cancelling the G.M.S.A. would enhance the prospect of filing an arrangement. The Monitor underlined that not merely was the G.M.S.A. expensive, but it was undesirable. As stated above, Ms. Vanderlaan summarized the relations between N.G.A. and Aveos at the time of the C.C.A.A. filing as a "failed business relationship". It is clear to the Court that the systems provided by N.G.A. either did not do what they were supposed to do or if they did do what they were supposed to do, then there was a breakdown in communication between N.G.A. as service provider and Aveos as consumer as to what the requirements of Aveos were.

[45] The representative of N.G.A., Mr. Latulippe, referred on a number of occasions to the fact that the representatives of Aveos responsible for the negotiation and implementation of the G.M.S.A. with N.G.A. did not properly

understand what the system was designed to do. This may have been so, but it became evident during the hearing before the undersigned that N.G.A. was lacking in its ability both before and after the C.C.A.A. filing to understand its client's needs and to address them adequately or where that was not possible to explain such inability in a timely and comprehensible fashion. It was therefore not conceivable that Aveos could use the G.M.S.A. going forward because of all of the problems associated with it.

[46] Moreover, the system described in the G.M.S.A. was designed for a company with approximately 3,000 employees. After the C.C.A.A. filing, Aveos only had a fraction of that number on a descending basis. Since the Divestiture Process was based on the premise that no one acquirerer would seek to purchase all three (3) divisions of Aveos, then any possible purchasers would not want the contract based purely on the number of employees. Aside from such consideration, the system did not work very well and the likelihood was that any acquirerer would be an operator in the industry and already have its own payroll and human resources systems in place. The sale or assignment of the G.M.S.A. as part of a sale of assets was not an alternative in the view of the Monitor even absent all the problems experienced by Aveos with the system. Thus, in any possible scenario, the G.M.S.A. was of no use to Aveos and could not enhance, in any scenario, the making of an arrangement.

[47] However, and as stated above, N.G.A. contends that cancellation under Section 32 C.C.A.A. is not available because Section 32(4)(b) C.C.A.A. does not apply. According to N.G.A., there is no discussion to be had about the prospect of an arrangement since early on in the C.C.A.A. process, Aveos shut down its normal operations and went into liquidation mode. Thus, no plan of arrangement will be made, so that an essential element for the application of Section 32 C.C.A.A. is not met according to N.G.A.

[48] The text of Section 32(4)(b) C.C.A.A. does not impose as a condition for resiliation that there be a plan of arrangement or even the certainty that there will be a plan of arrangement filed. Rather 32(4)(b) C.C.A.A. requires that the cancellation of the G.M.S.A. enhance the prospects of a viable arrangement. It is clear from the Monitor's analysis referred to above that the cancellation would rid Aveos of an expensive contract for a system which never functioned in a completely satisfactory manner, and that under the best of circumstances was inappropriate for a company with less than 2,800 employees, and where the relationship with the service provider (both pre and post C.C.A.A. filing) had failed. Viewed in this way, the disclaimer could only enhance the possibility of an arrangement.

[49] It is accepted by the case law that the disclaimer need not be essential but merely advantageous to a plan [2]. There need not be any certainty that there will be a plan of arrangement but just that cancellation of the contract in question would be beneficial to the making of a plan.

[50] Section 32 C.C.A.A. applies even where there is a sales process in place as is the situation with Aveos [3]. Prior to Section 36 C.C.A.A. coming into force in 2009, it was broadly accepted that liquidating while under C.C.A.A. protection was not contrary to the Act.[4] Now, Section 36 C.C.A.A. explicitly provides for sales out of the ordinary course of business, with Court approval.

[51] A sales process, particularly when assets are offered on a going concern basis together with intangible property (e.g. customer contracts) can lead to a result where one or several operating business entities similar to those operated by the debtor pre C.C.A.A. filing, continues after the C.C.A.A. process is completed. The ability to file an arrangement can largely be a function of the sales proceeds received and the amounts available to different stakeholders, particularly secured creditors. The point is that the existence of a sales process or "liquidation" does not *per se* mean that an arrangement is not a possibility. The fact that Aveos ceased operations was a function of cash (or the lack thereof), but the sales process was specifically designed to enhance the possibility of going-concern sales. Indeed, the timetable was short, specifically so as to limit the deterioration of critical mass of such things as customer base and labour pool. Despite the fact that only one division (components) of Aveos was sold on a going concern basis through the process, the C.R.O. testified at the hearing that a new prospective purchaser had come forward to possibly purchase the engine maintenance center together with tax losses arising from Aveos' operations. This could result in a plan of arrangement being filed with benefit for unsecured creditors.

[52] Accordingly, in the view of this Court, the shutdown of Aveos' normal operations and the implementation of a sales process does not in itself, eliminate the application of Section 32 C.C.A.A. as argued by N.G.A.

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[2] *Timminco Limited (Re)*, 2012 ONSC 4471 at par. 52 to 57; *Boutique Jacob inc. (Arrangement relatif à),* 2011 QCCS 276 at par. 38 to 41 and 46; *Homburg Invest inc. (Re)*, 2011 QCCS 6376 at par. 103-106; *9145-7978 Québec inc. (arrangement relatif à*), 2007 QCCA 768 at par. 26 to 29.

[3] *Timminco Limited* (Re), op.cit, at par. 52-27

[4] *Sproule vs. Nortel Networks Corporation 2009 ONCA 833; First Leaside Wealth Management Inc. (Re),* 2012 ONSC 1299; *PCAS Patient Care Automation Services Inc. (Re),* 2012 ONSC 3367; *Brainhunter Inc. (Re),* (2009) 62 C.B.R. (5th) 41 (ONSC); *Anvil Range Mining Corp. (Re)*, (2002) 34 C.B.R. (4th) (ONCA)

[53] As indicated above, the undersigned has considered the evidence of the C.R.O. with respect to the late bidder. C.C.A.A. issues generally must be decided in "real time" if for no other reason so as to achieve the broad remedial purpose of the legislation[5] of providing a means for financially-strapped enterprises to correct problems and continue in business. This is all the more so in a process such as the Aveos Divestiture Process where the parties' business judgment dictates that the debtor be offered for sale but the parties do not know ahead of time what the outcome of such process will be. The situation evolves constantly and rapidly. The Court's decisions along the way cannot be frozen in time lest those decisions be unrealistic and unhelpful to the process. In any event, even if the undersigned only considered the facts as they were at the date of the notice to disclaim the G.M.S.A. as urged by N.G.A., the undersigned would still be of the opinion that Section 32 C.C.A.A. is available to Aveos for the reasons given above pertaining to the interpretation of Section 32 C.C.A.A.

[54] N.G.A. also submitted that since the G.M.S.A. contains a mechanism to cancel where cancellation for cause under the common law of contracts is not available, then Section 32 C.C.A.A. cannot apply. The argument put forward by N.G.A. is based on the decision in the matter of Hart Stores [6] where Mongeon, J.S.C. held that Section 32 C.C.A.A. did not apply to the cancellation or termination of verbal contracts of employment having no fixed term.

[55] The reasoning in that case was that the mechanism in Section 32 C.C.A.A. was inappropriate to cancel a verbal contract of indeterminate term where the law (Article 2091 of the Civil Code of Québec) provided a mechanism for unilateral cancellation. In this Court's opinion that reasoning does not apply to a written service agreement of determinate term such as the G.M.S.A.

[56] Moreover taken to its logical conclusion, the argument is not really of any help to N.G.A. for the following reason. If Aveos could not rely on Section 32 C.C.A.A. and was obliged to rely on the cancellation for convenience clause in the G.M.S.A., the penalty of $501,381.00 would nonetheless constitute a provable claim payable under an eventual plan of arrangement or bankruptcy.

[57] "Claim" is defined in Section 2 of the C.C.A.A. by reference to the *Bankruptcy and Insolvency Act* ("B.I.A.") [7]. Section 19 C.C.A.A. introduced

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[5] *Century Services Inc. vs. Canada (Attorney General),* [2010] 3 S.C.R. 379
[6] Re *Hart Stores Inc*., 2012 QCCS 1094
[7] R.S.C. *c*. B.-3

in the 2007 amendments which came into force in 2009, includes in claims that can be dealt with under a plan of arrangement the following:

> "19.(1)(*b*) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (*a*)(i) and (ii)."

This is precisely the situation with the cancellation indemnity claimed by N.G.A. in this case. Though Aveos may have triggered the cancellation penalty after the C.C.A.A. filing, the obligation stems from a contract to which it was bound pre-C.C.A.A. filing.

[58] The claim for the cancellation penalty would also be a claim provable in a bankruptcy (see Section 2 and Section 121 of the *B.I.A.* which are substantially similar to Section 19 C.C.A.A.).

[59] Accordingly, in any and all scenarios, the $501,381.00 claimed by N.G.A. for the cancellation indemnity would be a claim provable and would not have the status of a "post-filing claim" payable immediately, i.e. prior to the claims of other creditors.

[60] The Courts have said on numerous occasions that pre-filing creditors cannot under the guise of making a post-filing claim, obtain a preference over other creditors. [8] This applies even to employees for severance claims arising from termination of employment after the C.C.A.A. filing [9]. The equitable treatment of creditors' demands that claims for contractual damages arising from the termination of contracts after filing under the C.C.A.A. be treated on a par with other provable claims [10].

[61] Consequently, N.G.A.'s argument based on the cancellation of the G.M.S.A. without cause after the C.C.A.A. filing date is not helpful to N.G.A., since even if correct, the argument would give rise to a claim provable only.

[62] Moreover, the parties cannot write out part of the C.C.A.A. from contracts. [11] This is against public policy. Parties to a contract cannot exclude in advance the application of the C.C.A.A. It would be offensive to the wording of Section 32 and the C.C.A.A. in general if Section 32 C.C.A.A. could not achieve its purpose as a result of the drafting of the contract which

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[8] *Pine Valley Mining Corporation (Re),* 2008 B.C.S.C. 368 para. 37-42; *Canwest Global Communications Corp. (Re),* 2010 O.N.S.C. 1746, para. 29-31, 33-35

[9] *Canwest Global Communications Corp. (Re),* op.cit.

[10] *Timminco Limited (Re*), op.cit., para. 44

[11] Section 8 C.C.A.A.

the debtor sought to cancel. This would defeat the rehabilitative purpose of the C.C.A.A. and thus would be contrary to the public policy of the C.C.A.A.

[63] Consequently, Section 32 C.C.A.A. is available to Aveos in order to cancel the G.M.S.A. The appropriate order will issue.

[64] Because of the manner in which the Court has answered the first issue set forth hereinabove (i.e. the application of Section 32 C.C.A.A.) it is not necessary to analyse whether Aveos could cancel the G.M.S.A. for cause because of alleged faulty execution by N.G.A. in virtue of the law of contracts generally.

[65] Regarding the $501,381.00 cancellation indemnity, the following should be added. Section 32(7) C.C.A.A. provides that any loss suffered in relation to the disclaimer is a provable claim. The Court renders no judgment on whether the amount of any such claim is $501,381.00 or any other amount in the circumstances. That will have to be determined at a later date, if necessary.

[66] The final issue requiring determination is the matter of N.G.A.'s claim for $91,377.00 for system maintenance. This amount represents the fee of $10,153.00 per week stipulated in the memorandum of understanding of April 13th. Such an amount was paid for the period up to the end of April 2012. The $91,377.00 represents $10,153.00 per week for the 9-week period commencing April 30, 2012, i.e. the expiry of the term of the last memorandum of understanding.

[67] N.G.A. needed the data maintained in the system to complete the records of employment ("R.O.E.") for each of the employees. It had contracted to make "best efforts" to complete those R.O.E.s by April 28, 2012. Mr. Latulippe, N.G.A.'s representative, testified that N.G.A. completed all of the R.O.Es by April 28th, except for 50 which were problematic and could not be completed until the end of June. Accordingly, N.G.A. required the data to be maintained until that time. He conceded that there was no explicit agreement in place after April 30, 2012 for Aveos to pay such weekly system maintenance fee.

[68] Even though N.G.A. only contracted to make best efforts to complete the R.O.E.s before April 28th, if N.G.A. needed to maintain the data in the system after April 28th, it was not justified, without Aveos' consent, to charge the $10,153.00 per week to maintain the data in the system. The "best efforts" clause may have attenuated N.G.A.'S obligation to complete by April 28th but did not impose an obligation on Aveos after that date without its consent. It had been agreed after the C.C.A.A. filing that the services to be provided by N.G.A. and paid for by Aveos were set

forth in the memoranda of understanding. There was no obligation to pay for system maintenance after April 28th.

[69] The Court adds that the fact that the cancellation of the G.M.S.A. takes effect according to Section 32(5) C.C.A.A. on the 30th day following Aveos' notice of May 7, 2012 does not entitle N.G.A. to charge for services under the M.G.S.A. not provided nor for services not agreed to under the memoranda of understanding. Accordingly, the claim for $91,377.00 will be denied.

FOR ALL OF THE FOREGOING REASONS, THE COURT :

[70] **DISMISSES** Northgatearinso Canada Inc.'s "Amended Motion to Strike *De Bene Esse* Notice by Debtor Company to Disclaim or Resiliate an Agreement and for Payment of Post-filing Obligations", dated July 9, 2012;

[71] **DECLARES** and **ORDERS** resiliated as of June 6, 2012 the following agreement, namely: "Global Master Services Agreement" between Aveos Fleet Performance Inc. and Northgatearinso Canada Inc. dated June 30, 2010 as amended from time to time including, *inter alia*, by subsequent Memoranda of Agreement".

[72] THE WHOLE with costs against Northgatearinso Canada Inc.

Montreal, November 20, 2012

MARK SCHRAGER, J.S.C.

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Monitor

Dates of Hearings: September 28, October 18, 19 and 30, 2012

COUR SUPÉRIEURE
(Chambre commerciale)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-11-057716-199

DATE : Le 18 février 2020

SOUS LA PRÉSIDENCE DE : L'HONORABLE LOUIS J. GOUIN, J.C.S.

DANS L'AFFAIRE DE LA *LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES* :

NEMASKA LITHIUM INC.
NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC.
NEMASKA LITHIUM P1P INC.
NEMASKA LITHIUM WHABOUCHI MINE INC.
NEMASKA LITHIUM INNOVATION INC.
Débitrices
et
PRICEWATERHOUSECOOPERS INC.
Contrôleur
et
NEMASKA EENOU, J.V.
Créancière/Requérante

JUGEMENT

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[1] Le 23 décembre 2019, les débitrices ont obtenu la protection du Tribunal aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*[1] («***LACC***») et le soussigné supervise leur restructuration.

[1] L.R.C. 1985, c. C-36.

[2] Le Tribunal est maintenant saisi d'une «Demande modifiée par la créancière Nemaska Eenou, J.V. en déclaration d'inapplicabilité de l'avis de résiliation du contrat et pour ordonnance de paiement des obligations courantes» datée du 12 février 2020 (la «**Demande**»), la version initiale de la Demande étant datée du 24 janvier 2020.

1. ORDONNANCE INITIALE

[3] L'Ordonnance initiale rendue par le Tribunal le 23 décembre 2019, telle que modifiée le 7 janvier 2020 par l'«*Amended and Restated Initial Order*», (l'«**Ordonnance initiale**») comprend, entre autres, les dispositions suivantes :

> [27] ORDERS that, except as otherwise provided to the contrary herein, the Debtors shall be entitled but not required to pay all reasonable expenses incurred by the Debtors 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; and
>
> (b) payment for goods or services actually supplied to the Debtors following the date of this order [(les «**Dépenses *post-filing***»)].
>
> [40] DECLARES that, to facilitate the orderly restructuring of their business and financial affairs (the "**Restructuring**") but subject to such requirements as are imposed by the CCAA, the Debtors shall have the right, subject to approval of the Monitor or further order of the Court, to:
> […]
> (e) subject to the provisions of Section 32 of the CCAA, disclaim or resiliate, any of their agreements, contracts or arrangements of any nature whatsoever, with such disclaimers or resiliation to be on such terms as may be agreed between the Debtors, as applicable, and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan; and
> […]
>
> (le Tribunal ajoute les [__])

2. DROIT

2.1 Article 32 *LACC*

[4] L'article 32 *LACC*, en vigueur depuis le 18 septembre 2009, prévoit, entre autres, ce qui suit :

Résiliation de contrats

32 (1) Sous réserve des paragraphes (2) et (3), la compagnie débitrice peut — sur préavis donné en la forme et de la manière réglementaires aux autres parties au contrat et au contrôleur et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel elle est partie à la date à laquelle une procédure a été intentée sous le régime de la présente loi.

Contestation

(2) Dans les quinze jours suivant la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), toute partie au contrat peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner que le contrat ne soit pas résilié.

Absence d'acquiescement du contrôleur

(3) Si le contrôleur n'acquiesce pas au projet de résiliation, la compagnie peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner la résiliation du contrat.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de résiliation, le cas échéant;

b) la question de savoir si la résiliation favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

c) le risque que la résiliation puisse vraisemblablement causer de sérieuses difficultés financières à une partie au contrat.

Résiliation

(5) Le contrat est résilié :

a) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), si aucune demande n'est présentée en vertu du paragraphe (2);

b) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1) ou à la date postérieure fixée par le tribunal, si ce dernier rejette la demande présentée en vertu du paragraphe (2);

c) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (3) ou à la date postérieure fixée

> par le tribunal, si ce dernier ordonne la résiliation du contrat en vertu de ce paragraphe.
>
> […]
>
> **Pertes découlant de la résiliation**
>
> (7) En cas de résiliation du contrat, toute partie à celui-ci qui subit des pertes découlant de la résiliation est réputée avoir une réclamation prouvable.
>
> […]
>
> (le Tribunal souligne)

2.2 Jurisprudence

[5] Le Tribunal retient, entre autres, les règles suivantes établies et réitérées par la jurisprudence relativement à l'article 32 *LACC* :

a. l'acquiescement du contrôleur au projet de résiliation est une simple question factuelle[2];

b. «…it is not necessary that a proposed disclaimer be essential for the restructuring; it has to be advantageous and beneficial.»[3];

c. dans son analyse de la question de savoir si la résiliation projetée favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la débitrice, le Tribunal prend en considération l'intérêt de tous les créanciers [le portrait global] et non seulement celui du créancier opposant[4];

d. ainsi, le traitement équitable des créanciers d'une même catégorie favorise la conclusion d'une transaction ou d'un arrangement viable à l'égard de la débitrice[5];

e. Le créancier opposant a le fardeau d'établir que la résiliation projetée lui causera vraisemblablement de sérieuses difficultés financières, et non seulement des pertes de revenus[6];

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[2] *Boutique Jacob inc. (Arrangement relatif à)*, 2011 QCCS 276, par. [37]; *Target Canada Co. (Re)*, 2015 ONSC 1028, par. [16]

[3] AbitibiBowater Inc. (Re), 2009 CarswellQue 4937 (Qué. C.S.), par. [23]; *Boutique Jacob inc. (Arrangement relatif à)*, précité note 2, par. [41]; *Homburg Invest Inc. (Arrangement relatif à)*, 2011 QCCS 6376, par. [103]; *Timminco Limited (Re)*, 2012 ONSC 4471, par. [54].

[4] *Timminco Limited (Re)*, précité note 3, par. [62]; *Target Canada Co. (Re)*, précité note 2, par. [23] - [24].

[5] *Timminco Limited (Re)*, précité note 3, par. [52], [53] et [62].

[6] *Boutique Jacob inc. (Arrangement relatif à)*, précité note 2, par. [47], [48], [52], [53] et [55]; *Timminco Limited (Re)*, précité note 3, par. [60]; *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à)*, 2012 QCCS 6796, par. [40].

f. tel que prévu à l'article 32(7) *LACC*, les pertes résultant de la résiliation d'un contrat constituent une réclamation prouvable.

(le Tribunal souligne)

[6] Par ailleurs, une Dépense *post filing* aux termes de l'Ordonnance initiale est celle née après l'émission de l'Ordonnance initiale et résulte d'une obligation née après l'émission de l'Ordonnance initiale[7].

3. PRÉAVIS

[7] Le 20 janvier 2020, conformément au paragraphe [40](e) de l'Ordonnance initiale, la débitrice Nemaska Lithium Whabouchi Mine inc.[8] («**Whabouchi**») notifie à la créancière/requérante Nemaska Eenou, J.V. («**Eenou**») un «Préavis de résiliation de contrat par la compagnie débitrice (Formulaire 4)» (le «**Préavis**»)[9] aux termes de l'article 32(1) de la *LACC*, incluant l'acquiescement du contrôleur PricewaterhouseCoopers inc. (le «**Contrôleur**») à cet effet.

[8] Par le Préavis, Whabouchi donne préavis à Eenou de son intention de résilier le contrat (le «**Contrat**»)[10] suivant :

> «Contrat relatif à la prestation de services (et à l'approvisionnement en produits connexes) : Contrat n°WS-1686-00 intervenu entre Nemaska Lithium Whabouchi Mine Inc. et le Cocontratant [Eenou] le 31 mars 2019.»
>
> (le Tribunal ajoute les [__])

[9] De plus, Whabouchi précise ce qui suit dans le Préavis:

> 3. En vertu du paragraphe 32(2) de la Loi [*LACC*], toute partie au contrat peut, sur préavis aux autres parties au contrat et au Contrôleur, dans les quinze jours suivant la date du présent avis, demander au tribunal d'ordonner que le contrat ne soit pas résilié.
>
> 4. En vertu de l'alinéa 32(5)a) de la Loi, si aucune demande n'est présentée en vertu du paragraphe 32(2) de la Loi, le contrat est résilié le 19 février 2020, soit trente jours après la date du présent préavis.
>
> (le Tribunal souligne)

[7] Arrangement relatif à Métaux Kitco inc., 2017 QCCA 268, par. [77].
[8] Pièce C-1.
[9] Pièce N-1.
[10] Pièce C-2.

4. CONTRAT

[10] Le Contrat prévoit l'installation, la location et l'entretien de modules de logement (les «**Modules**»)[11] par Eenou à Whabouchi pour les fins de ses employés travaillant à la mine Whabouchi, les services offerts touchant la location de chambres/roulottes, leur entretien et la conciergerie.

[11] Par ailleurs, le Contrat[12] prévoit spécifiquement ce qui suit quant aux Frais de démobilisation (définis ci-après) :

> À la fin du Contrat le Fournisseur de service [sic] [Eenou] prendra en charge la désinstallation des bâtiments (414 chambres) incluant le débranchement aux services, la démobilisation et transport de retour au site du locateur des roulottes [(collectivement les «**Frais de démobilisation**»)] sans autre charge additionnelle à la Société [Whabouchi].
>
> (le Tribunal souligne et ajoute les [__])

[12] Quant au prix convenu (le «**Prix**»), le Contrat[13] prévoit ce qui suit :

> Le Fournisseur de services [Eenou] facturera les prix et/ou taux tels qu'indiqués dans les Bons de commandes et/ou Énoncés de travaux émis de temps à autre par la Société [Whabouchi].
>
> Le prix des Services se compose des montants suivants :
>
> ° Une somme forfaitaire de $ 5 460 031 $ pour le transport, la location des roulottes pour 12 mois, la désinstallation des roulottes ainsi que la démobilisation et le transport retour à la fin du Contrat [les Frais de démobilisation], et payable comme suit :
>
> - Un paiement de 1,500,000 $ pour la mobilisation et le transport (déjà payé au Fournisseur de services et ce dernier en accuse réception)
>
> - Un paiement de 1 320 010.33 $payable le 1er février 2019
>
> - Un paiement de 1 320 010.33 $ payable le 1er avril 2019

[11] Pièces C-9 et N-7.
[12] Pièce C-2, p. 6, 2e par.
[13] Pièce C-2, Annexe D.

> - Un dernier paiement de 1 320 010.33 $ payable le 1er juin 2019.
>
> Une somme pour l'exploitation du campement (414 chambres) avec service de maintenance pour la somme de $4 954 776.15 payable comme suit :
>
> - $412 898.01 par mois, payable au début de chaque mois dès l'entrée en service des chambres
>
> (extrait reproduit tel quel, sauf les [__] ajoutés par le Tribunal)

[13] Le Préavis ne concerne que les services reliés à la première composante du Prix, soit celle relative à la somme forfaitaire de 5 460 031 $ et, plus spécifiquement, le paiement de 1 320 010,33 $ qui était payable le 1er juin 2019, mais ne fut pas effectué[14].

[14] Les parties ont d'ailleurs entrepris des négociations de règlement dès l'automne 2019, entre autres, à cet égard[15], lesquelles ne furent pas concluantes, de telle sorte qu'aucune modification ne fut apportée au Contrat.

[15] Par contre, Eenou souhaite quand même retenir de ces négociations des éléments aux fins de justifier sa position à l'égard des Frais de démobilisation à titre de Dépenses *post filing* aux termes du paragraphe [27](b) de l'Ordonnance initiale, ce qui ne peut être retenu par le Tribunal, vu qu'aucune transaction n'est intervenue entre les parties dans le cadre de ces négociations de règlement.

5. CONTESTATION DU PRÉAVIS PAR LA DEMANDE

[16] Le 24 janvier 2020, soit à l'intérieur du délai de quinze jours prévu à l'article 32(2) *LACC*, Eenou dépose la version initiale de la Demande, modifiée le 12 février 2020, dans laquelle elle demande au Tribunal ce qui suit :

> **DÉCLARER** inapplicable à la Créancière NEMASKA EENOU, J.V. le préavis du 20 janvier 2020 de la Débitrice NEMASKA LITHIUM WHABOUCHI MINE INC. en résiliation du contrat;
>
> **ORDONNER** à la Débitrice de payer à la Créancière NEMASKA EENOU, J.V. dans les cinq (5) jours du jugement la somme de 276 918,65 $ **[sujet à ajustements vu les paiements effectués par Whabouchi les 3 et 14 février 2020]** (plus taxes) représentant partie résiduelle des obligations courantes à payer depuis le 23 décembre 2019 **[sujet à ajustements vu les paiements effectués**

[14] Pièces C-3.1, N-3 et N-4.
[15] Pièces C-3.2, C-4, C-4.1, C-4.2, C-5 et C-10.

> **par Whabouchi les 3 et 14 février 2020]** jusqu'à l'échéance du contrat C-2 au 31 mars 2020;
>
> **ORDONNER** à la Débitrice de payer à la Créancière NEMASKA EENOU, J.V. dans les cinq (5) jours du jugement la somme de 546 258,00 $ (plus taxes) afin de couvrir partie des frais de désinstallation, de démantèlement et du transport de retour vers Timmins Ontario de tous les modules loués [Frais de démobilisation et Dépenses *post filing*];
>
> **ORDONNER** à la Débitrice de faire procéder selon les normes au débranchement des services d'utilité publique (eau – gas [sic] – électricité) et de libérer les accès au plus tard au 31 mars 2020 pour permettre à la Créancière de reprendre possession des modules loués selon les termes du contrat C-2;
>
> **SUBSIDIAIREMENT** :
>
> **ORDONNER** à la Débitrice de payer à la Créancière NEMASKA EENOU, J.V. dans les cinq (5) jours du jugement la somme de 109 228,39 $ **[sujet à ajustements vu les paiements effectués par Whabouchi les 3 et 14 février 2020]** (plus taxes) représentant partie résiduelle des obligations courantes à payer depuis le 23 décembre 2019 **[sujet à ajustements vu les paiements effectués par Whabouchi les 3 et 14 février 2020]** jusqu'à l'ordonnance de terminaison du contrat C-2 au 19 février 2020 [Dépenses *post filing*];
>
> **ORDONNER** à la Débitrice de payer à la Créancière NEMASKA EENOU, J.V. dans les cinq (5) jours du jugement la somme de 546 258,00 $ (plus taxes) afin de couvrir partie des frais de désinstallation, de démantèlement et du transport de retour vers Timmins Ontario de tous les modules loués [Frais de démobilisation et Dépenses *post filing*];
>
> **ORDONNER** à la Débitrice de faire procéder selon les normes au débranchement des services d'utilité publique (eau – gas [sic] – électricité) et de libérer les accès au plus tard le 19 février 2020 pour permettre à la Créancière de reprendre possession des modules loués selon les termes du contrat C-2;
>
> (le Tribunal ajoute les [__])

[17] Par la Demande, Eenou soumet d'abord que le pouvoir de résiliation prévu au paragraphe [40](e) de l'Ordonnance initiale n'existe que pour les cas où une telle résiliation n'existe pas déjà dans le contrat liant les parties ou aux termes d'une loi.

[18] Or, vu que le Contrat prévoit un droit de résiliation lorsqu'il existe un événement de défaut[16], Eenou prétend que Whabouchi ne peut invoquer ledit paragraphe [40](e) de l'Ordonnance initiale, ni l'article 32 *LACC*, pour justifier l'envoi du Préavis.

[19] Ainsi, vu qu'aucun avis de défaut n'a été donné par Whabouchi à Eenou aux termes du Contrat relativement aux services reliés à la location des Modules, sa résiliation ne serait pas alors possible.

[20] Eenou appuie une telle prétention en référant à l'affaire *Hart Stores Inc./Magasins Hart inc. (Arrangement relatif à)*[17] (l'«***Affaire Hart***»).

[21] Le Tribunal rejette immédiatement cet argument d'Eenou, l'*Affaire Hart* ayant plutôt pour effet de ne pas éliminer, par l'effet de l'article 32 *LACC*, des dispositions contractuelles ou statutaires de résiliation existantes, lesquelles peuvent être plus simples et rapides que celles de l'article 32 *LACC*.

[22] Les dispositions de l'article 32 *LACC* sont additionnelles, supplémentaires aux dispositions contractuelles ou statutaires existantes.

[23] Par ailleurs, Eenou soumet que la résiliation du Contrat n'est pas nécessaire pour permettre à Whabouchi de conclure une transaction ou un arrangement viable et qu'elle sera directement préjudiciée par une telle résiliation, étant donné ses propres engagements contractuels auprès de ses sous-traitants.

[24] Par contre, aucun de ces engagements n'a été produit par Eenou.

[25] Qui plus est, vu qu'il ne reste qu'un mois et demi à courir aux termes du Contrat, il serait juste, selon Eenou, d'attendre cette échéance, et elle fait donc appel à la sympathie du Tribunal à cet égard.

[26] Aussi, Eenou prétend que Whabouchi a reconnu implicitement, et ce, dans le cadre de leurs négociations de règlement de l'automne dernier, que le dernier paiement aux termes du Contrat couvrait, entre autres, les Frais de démobilisation.

[27] Dans ces circonstances, le dernier paiement n'ayant pas encore été effectué par Whabouchi, Eenou soumet que les Frais de démobilisation deviennent ainsi des Dépenses *post filing* aux termes du paragraphe [27](b) de l'Ordonnance initiale et qu'elles doivent donc être payées par Whabouchi concurremment à la démobilisation des Modules, soit un montant qu'elle a évalué, lors desdites négociations, à 546 258 $.

[28] Par ailleurs, dans l'éventualité où le Tribunal confirmerait la résiliation du Contrat, Eenou réclame alors des frais de location des Modules pour la période entre le 23 décembre 2019, date de l'émission de la première version de l'Ordonnance initiale, et la

[16] Pièce C-2, Annexe G, clause 6.
[17] 2012 QCCS 1094.

date effective de la résiliation, le tout sujet à ajustements vu les paiements effectués par Whabouchi les 3 et 14 février 2020.

[29] Eenou établit ces frais de location à 123 764 $ par mois, et elle demande aussi qu'un délai de 30 jours soit pris en considération aux fins de préparer adéquatement la démobilisation des Modules, les frais de location devant être payés pendant ce délai.

[30] Enfin, Eenou réclame, à titre de Dépenses *post filing*, les frais reliés à l'utilisation du service Bell Express Vu (le «**Service Express Vu**») pour les téléviseurs situés dans les chambres des Modules.

[31] Même si les cartes d'accès au Service Express Vu ont déjà été retirées par Eenou pour les chambres non occupées des Modules, Eenou soumet que Whabouchi doit quand même payer le Service Express Vu pour toutes les chambres, étant donné que l'entente entre Eenou et Bell ne fait aucune distinction à cet égard. Cette entente ne fut pas produite.

[32] Le montant réclamé à ce chapitre est aussi sujet à ajustements, vu les paiements effectués par Whabouchi les 3 et 14 février 2020.

6. CONTESTATION DE LA DEMANDE

[33] Essentiellement, Whabouchi soumet qu'elle se doit de donner le Préavis vu que les travaux à la mine Whabouchi ont été suspendus depuis le 3 décembre 2019.

[34] Eenou a d'ailleurs été avisée de la gravité de la situation depuis au moins octobre 2019[18].

[35] Ainsi, Whabouchi n'ayant plus que 8 employés sur place, les Modules, prévus pour accueillir jusqu'à 326 employés, ne lui sont plus d'aucune utilité.

[36] Selon Whabouchi, les économies découlant du Préavis seront importantes et favoriseront la conclusion d'un arrangement viable à l'égard de l'ensemble de ses créanciers.

[37] De plus, le Contrôleur a approuvé l'envoi du Préavis.

[38] Par ailleurs, Whabouchi soumet qu'Eenou n'a présenté aucune preuve à l'effet que la résiliation du Contrat lui causerait de sérieuses difficultés financières, loin de là. Il est plutôt question de profits moins substantiels qu'anticipé.

[39] Bref, selon Whabouchi, considérant que la résiliation projetée du Contrat satisfait les trois facteurs énumérés à l'article 32(4) *LACC*, le Contrat doit donc être résilié, et ce, à compter du 19 février 2020, soit la date mentionnée dans le Préavis.

[18] Pièces N-2 et C-4.1.

[40] Quant aux Frais de démobilisation, ils constituent, selon Whabouchi, des frais de terminaison prévus au Contrat et font partie du Prix déjà convenu aux termes du Contrat.

[41] Par conséquent, Whabouchi soumet qu'elle n'a pas à assumer quelque montant additionnel que ce soit, et ce, même si les obligations d'Eenou à cet égard, nées avant l'émission de l'Ordonnance initiale, seront exécutées après l'émission de l'Ordonnance initiale.

[42] Quant aux frais reliés au Service Express Vu, Whabouchi a confirmé les avoir acquittés jusqu'au 31 janvier 2020, date à laquelle Eenou a retiré tout accès à ce service pour les chambres des Modules où il était encore opérationnel, les cartes d'accès ayant par ailleurs déjà été reprises par Eenou pour toutes les autres chambres des Modules, et ce, avant l'émission de l'Ordonnance initiale le 23 décembre 2019.

[43] Selon Whabouchi, même si Eenou doit quand même payer à Bell les frais du Service Express Vu, et ce, même si les chambres des Modules ne sont pas occupées ou les cartes d'accès ont été retirées, cela n'affecte aucunement Whabouchi, laquelle n'est aucunement liée par les termes de l'entente pouvant exister entre Bell et Eenou à cet égard[19].

[44] Enfin, dans sa contestation écrite de la Demande, Whabouchi réclame d'Eenou le paiement de ses honoraires extrajudiciaires encourus en lien avec sadite contestation.

[45] Aucune représentation ne fut faite à cet égard lors de l'audition de la Demande et le Tribunal tient pour acquis que Whabouchi a retiré cette réclamation.

7. POSITION DU CONTRÔLEUR

[46] Le Contrôleur confirme avoir déjà acquiescé au projet de résiliation du Préavis et réitère qu'il appuie la position de Whabouchi.

8. QUESTIONS EN LITIGE

[47] Le Tribunal identifie les trois questions suivantes :

a. À la lumière des dispositions de l'article 32 *LACC* et des règles applicables en la matière, le Préavis est-il justifié?

b. Les Frais de démobilisation constituent-ils des Dépenses *post filing* devant être acquittées par Whabouchi aux termes du paragraphe [27](b) de l'Ordonnance initiale?

[19] Pièce C-2, Annexe G, clause 14.

c. Est-ce que les frais reliés au Service Express Vu pour les chambres des Modules constituent des Dépenses *post filing* devant être acquittées par Whabouchi aux termes du paragraphe [27](b) de l'Ordonnance initiale, que ce service soit toujours disponible ou pas, et ce, pour la période allant au moins jusqu'à la résiliation du Contrat?

9. DISCUSSION

9.1 À la lumière des dispositions de l'article 32 *LACC* et des règles applicables en la matière, le Préavis est-il justifié?

[48] Le Tribunal est d'avis que le Préavis satisfait aux facteurs de l'article 32(4) *LACC* et que Whabouchi a justifié son envoi à Eenou.

[49] L'analyse du Tribunal à cet égard s'effectue toujours dans un cadre de «portrait global», et le Tribunal ne peut se permettre de le perdre de vue lorsqu'il considère un cas particulier, tel celui d'Eenou.

[50] Il doit en être ainsi afin d'assurer le traitement équitable des créanciers de Whabouchi, d'autant plus que cette dernière prévoit donner plus de 200 préavis de résiliation de contrats, et ce, afin de favoriser la conclusion éventuelle d'un arrangement viable.

[51] Certes, un seul cas, tel celui d'Eenou, n'est peut-être pas important dans la balance des contrats de Whabouchi, mais que dire à ceux qui recevront éventuellement de Whabouchi des préavis de résiliation et qui s'empresseront alors de demander d'obtenir le même traitement que celui d'Eenou.

[52] Le Tribunal ne peut permettre qu'il en soit ainsi, il en va de la crédibilité de l'exercice du pouvoir de résiliation octroyé à Whabouchi par l'Ordonnance initiale et l'article 32 *LACC*, et du rôle du Tribunal à cet égard.

[53] Il ne fait aucun doute que le «portait global» doit toujours prévaloir, permettant ainsi au Tribunal d'assurer un traitement équitable lors de cet exercice du pouvoir de résiliation par Whabouchi.

[54] De plus, refuser le Préavis au motif qu'il ne reste qu'un mois et demi à courir aux termes du Contrat ne peut être retenu, le Tribunal ne pouvant ainsi ajouter un facteur temporel à son analyse, constamment assujettie au critère du «portrait global».

[55] Un mois et demi peut sembler peu, mais 200 fois un mois et demi, c'est beaucoup. La sympathie ne peut remplacer l'équité!

[56] Par ailleurs, Eenou n'a nullement rencontré son fardeau de prouver le risque que la résiliation du Contrat puisse vraisemblablement lui causer de sérieuses difficultés financières.

[57] Aucun état financier d'Eenou n'a été produit et son représentant, Hamid Eddahir, n'a pas été en mesure de fournir quelque détail éclairant à cet égard. Il ne s'agissait que d'une simple évaluation approximative, sans preuve de pertes. Il est plutôt question de profits substantiels moins élevés que ceux anticipés.

[58] Que les revenus soient moins élevés que prévu, cela va de soi pour tous ceux qui seront affectés par des préavis de résiliation, mais encore faut-il que cela puisse vraisemblablement causer de sérieuses difficultés financières.

[59] Aucune telle preuve ne fut présentée par Eenou.

[60] Le Tribunal est donc d'avis que le Préavis, lequel inclut l'acquiescement du Contrôleur, est justifié dans les circonstances et qu'il constitue l'un des éléments mis en place par Whabouchi afin de favoriser éventuellement la conclusion d'un arrangement viable.

[61] Par contre, vu les dispositions de l'article 32(5)b) *LACC* et la preuve quant au délai raisonnable requis pour assurer une démobilisation efficace, ainsi que les représentations de Whabouchi à l'effet qu'elle fera le maximum afin de faciliter le tout et ainsi réduire, dans la mesure du possible, les Frais de démobilisation d'Eenou, le Tribunal déclarera que la résiliation du Contrat sera effective en date du 29 février 2020.

[62] Par conséquent, et vu que Whabouchi a déjà payé à Eenou les frais de location des Modules réclamés pour la période du 23 décembre 2019 au 19 février 2020, Whabouchi devra payer à Eenou les frais de location des Modules pour la période du 20 au 29 février 2020, soit 42 677,24 $ (123 764 $ ÷ 29 × 10).

9.2 Les Frais de démobilisation constituent-ils des Dépenses *post filing* devant être acquittées par Whabouchi aux termes du paragraphe [27](b) de l'Ordonnance initiale?

[63] Les Frais de démobilisation font partie du montant forfaitaire prévu au Contrat au chapitre du Prix des services, sans distinction à leur égard.

[64] Il ne peut être dit que le dernier paiement à venir a pour objet le paiement des Frais de démobilisation et qu'ils constituent des Dépenses *post filing* aux termes du paragraphe [27](b) de l'Ordonnance initiale au motif qu'ils sont effectivement engagés après l'obtention de l'Ordonnance initiale.

[65] Ces dépenses reliées à la fin du Contrat résultent des termes mêmes du Contrat et constituent des obligations d'Eenou existant avant l'émission de l'Ordonnance initiale.

[66] Les considérer maintenant comme constituant des Dépenses *post filing* signifierait finalement que tous ceux dont les contrats avec Whabouchi feront éventuellement l'objet d'un préavis de résiliation pourraient ainsi réclamer de tels frais de terminaison à titre de Dépenses *post filing*.

[67] Il ne peut en être ainsi. Les termes des contrats à cet égard doivent prévaloir.

[68] Par ailleurs, Whabouchi prétend que les échanges entre elle et Whabouchi, dans le cadre de leurs négociations de l'automne dernier relatives au règlement des montants alors dus, comprenaient un volet relatif aux Frais de démobilisation, fixés par Eenou à 546 258 $, et qu'ils devaient faire partie du dernier paiement à être effectué par Whabouchi à Eenou.

[69] Même si le Tribunal a permis que les échanges écrits entre Whabouchi et Eenou à cet égard soient produits, il n'en demeure pas moins que le Tribunal a indiqué clairement qu'il s'agissait d'échanges dans le cadre de négociations de règlement, lesquelles n'ont pas abouti et, tel que mentionné précédemment, ils ne peuvent pas servir d'assise aux prétentions d'Eenou.

[70] Eenou ne peut isoler de ces négociations des éléments favorisant sa position et modifier ainsi les termes du Contrat.

[71] Le Tribunal ne retient donc pas ces éléments et il s'en remet au Contrat à cet égard, les Frais de démobilisation découlant des obligations d'Eenou aux termes du Contrat.

9.3 Est-ce que les frais reliés au Service Express Vu pour les chambres des Modules constituent des Dépenses *post filing* devant être acquittées par Whabouchi aux termes du paragraphe [27](b) de l'Ordonnance initiale, que ce service soit toujours disponible ou pas, et ce, pour la période allant au moins jusqu'à la résiliation du Contrat?

[72] Le Tribunal est d'accord avec la position de Whabouchi à cet égard.

[73] Whabouchi ayant acquitté les frais reliés au Service Express Vu jusqu'au 31 janvier 2020, date à laquelle Eenou a retiré tout accès à ce service pour les chambres des Modules où il était encore opérationnel, Whabouchi n'a pas à payer pour ce service après le 31 janvier 2020.

[74] Parallèlement, les cartes d'accès pour toutes les autres chambres des Modules ayant été reprises par Eenou avant l'émission de l'Ordonnance initiale le 23 décembre 2019, Whabouchi n'a pas non plus à payer pour le Service Express Vu pour ces autres chambres.

[75] Eenou ne peut opposer à Whabouchi les termes de son entente avec Bell, laquelle n'a d'ailleurs pas été produite. Les termes du Contrat sont clairs à cet égard[20].

[20] Pièce C-2, Annexe G, clause 14.

10. CONCLUSION

[76] Le Tribunal déclarera donc le Contrat résilié en date du 29 février 2020 et ordonnera à Whabouchi de payer à Eenou, comme seules Dépenses *post filing*, les frais de location des Modules pour la période du 20 au 29 février 2020, soit la somme de 42 677,24 $.

[77] Le Tribunal prendra aussi acte de l'engagement de Whabouchi de faciliter la démobilisation des Modules par Eenou et de réduire, dans la mesure du possible, les Frais de démobilisation que doit assumer Eenou aux termes du Contrat.

11. FRAIS DE JUSTICE

[78] Vu les circonstances de cette affaire, chaque partie assumera ses frais de justice.

POUR CES MOTIFS, LE TRIBUNAL :

[79] **ACCUEILLE** en partie la Demande de Nemaska Eenou, J.V. («**Eenou**»);

[80] **ACCUEILLE** en partie la contestation de Nemaska Lithium Whabouchi Mine inc. («**Whabouchi**»);

[81] **DÉCLARE** que le Contrat sera résilié en date du 29 février 2020;

[82] **DÉCLARE** que les seules Dépenses *post filing* à être encore payées par Whabouchi à Eenou sont celles relatives aux frais de location des Modules pour la période du 20 au 29 février 2020, soit 42 677,24 $, et **ORDONNE** à Whabouchi de payer ce montant à Eenou dans les cinq (5) jours de ce Jugement;

[83] **PREND ACTE** de l'engagement de Whabouchi de faciliter la démobilisation des Modules par Eenou et de réduire, dans la mesure du possible, les Frais de démobilisation que doit assumer Eenou aux termes du Contrat;

[84] **LE TOUT** chaque partie payant ses frais de justice.

_____

LOUIS J. GOUIN, J.C.S.

Mes Jean-Philippe Mathieu, Alain Tardif et François-Alexandre Toupin
McCarthy Tétrault
Procureurs des Débitrices

500-11-057716-199

Mes Jean Fontaine et Nathalie Nouvet
Stikeman Elliott
Procureurs du Contrôleur

Me Jean-François Gauvin
Miller Thomson
Procureurs de la Créancière/Requérante

Dates d'audition : 13 et 14 février 2020

CITATION: Target Canada Co. (Re), 2015 ONSC 1028
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-02-18

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: *Jeremy Dacks, John MacDonald* and *Shawn Irving,* 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

William Sasso, Sharon Strosberg and *Jacqueline Horvat*, Proposed Representative Counsel for the Pharmacy Franchisee Association of Canada

Susan Philpott, Employee Representative Counsel for employees of the Applicants

Alan Mark, Melaney Wagner, Graham Smith and *Francy Kussner*, for the Monitor, Alvarez & Marsal Inc.

J. Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC

Andrew Hodhod, for Bell Canada

Harvey Chaiton, for the Directors and Officers

HEARD: February 11, 2015

RELEASED: February 18, 2015

ENDORSEMENT

[1] The Pharmacy Franchisee Association of Canada ("PFAC") brought this motion for the following relief:

a. appointing PFAC as the representative of the Pharmacists and Franchisees (collectively, the "Pharmacists") under the Pharmacy Franchise Agreements ("Franchise Agreements");

b. appointing Sutts, Strosberg LLP as the Pharmacists' Representative Counsel (the "Representative Counsel");

c. appointing BDO Canada ("BDO") as the Pharmacists' financial advisor;

d. directing that the Pharmacists' reasonable legal and other professional expenses be paid from the estate of the Target Canada Entities with appropriate administrative charges to secure payment;

e. directing that the "Disclaimer of Franchise Agreements" dated January 26, 2015 by the Franchisor, Target Pharmacy Franchising LP ("Target Pharmacy") be set aside;

f. declaring that the Franchise Agreements and/or related agreements may not be disclaimed without court order; and

g. directing that Target Pharmacy cannot deny the Pharmacists access to premises, discontinue supplies or otherwise interfere with a Pharmacist's operations without that Pharmacist's consent or a court order.

[2] On January 26, 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements and related agreements to each of the Pharmacists operating the pharmacies at 93 locations across Canada (outside Quebec), seeking to shut down these pharmacies in the Target Canada store locations within 30 days.

[3] The Pharmacists ask the court to deny Target Pharmacy's Disclaimer of the Franchise Agreements because (i) the Disclaimers will not enhance the prospects of a viable arrangement being made; and (ii) the Pharmacists will suffer significant financial hardship as a consequence of the disclaimer, with insolvency and/or bankruptcy awaiting many of them.

[4] Under the proposed wind-down, Target Pharmacy is not responsible for pharmacy shut-down costs. Instead, the Pharmacists are responsible for (i) the payment of salaries, severance pay and other obligations to their own employees, suppliers and contractors; (ii) the relocation costs of their pharmacies; and (iii) the continuation of services to their patients in accordance with professional standards.

[5] The Pharmacists recognize that they face numerous challenges as a result of Target store closures. In relocating, or winding-down pharmacy operations, the Pharmacists are required to comply with applicable legislation, regulations and standards governing the conduct of pharmacists in Canada, including such matters as: notice of pharmacy closure; notice of intention to open a new pharmacy; the safe-guarding of personal health records; providing notice to patients respecting their personal health information; and safeguarding and disposing of narcotics and controlled substances.

[6] The Pharmacists seem to accept that when a Target store closes, the pharmacy within that store will also close. They state that they require "breathing space" that may be afforded to them by an order that the Franchise Agreements are not to be disclaimed at this time. They ask the court to direct Target Pharmacy and its Affiliates not to deny them access to their licenced space or otherwise interfere with the Pharmacist's operations without the consent of or on terms directed by the court. Practically speaking, the Pharmacists want to postpone the effect of the disclaimer in the hope of obtaining a continuation of support payments from Target Canada for an unspecified time.

[7] There is no doubt that the closure or pending closure of Target Canada is causing and will cause significant dislocation for a number of parties. For the most part, Target Employees will lose their jobs. Representative Counsel have been appointed to assist employees in a process that includes an Employee Trust.

[8] The closure of Target Canada also impacts suppliers to Target, especially sole suppliers. The insolvency of Target Canada and its filing under the *Companies' Creditors Arrangement Act* (CCAA) has no doubt resulted in Target defaulting on a number of contractual relationships. These suppliers will have claims against Target Canada that will be filed in due course.

[9] The closure of Target Canada also affects the Pharmacists. The insolvency of Target and its filing under the CCAA has resulted in Target defaulting on its contractual relationships with the Pharmacists. Target wishes to disclaim the Franchise Agreements. The Monitor approved the proposed disclaimer and, as noted, disclaimer notices were sent on January 26, 2015.

[10] The Pharmacists are challenging the disclaimer and seek an order under s. 32(2) of the CCAA that the Franchise Agreements not be disclaimed. Section 32(4) of the CCAA references a section 32(2) order and provides:

> **Factors to be considered** – In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[11] The reality that the Target stores will be closing provides, in my view, the starting point to analyze the issue being brought forward by the Pharmacists.

[12] Following the closing of a particular Target Store, it is unrealistic for the Pharmacist to carry on the operation of the pharmacy. As noted by counsel to the Applicants, as soon as operations cease at a particular location, the store will "go dark" and there will no longer be employee or security support that would permit the Franchisees to continue to operate. Further, counsel to the Applicants submits it would not be either commercially reasonable or practical for the Franchisees to continue to operate in a closed store, nor would it be reasonable or in the interests of stakeholders to require these locations to remain open in order to serve the interests of the Franchisees.

[13] It is in this context that the issue of the disclaimer has to be considered.

[14] Counsel to the Pharmacists seem to appreciate the reality of the situation, as reflected in the following references in their factum.

> 49. It is cold comfort for the Pharmacists to be advised that their losses in relation to the disclaimer of the Franchise Agreement are provable claims in the CCAA proceedings. The Pharmacists must pay their employees now. It is problematic that a provable claim may result in the possible recovery of some part of those payments, at a future uncertain date, if the funds are available in the Target Pharmacy Estate.
>
> 50. Evidence that simply provides that a debtor company will be more profitable with the disclaimer contracts is insufficient. Setting aside the disclaimers in this case will provide the Pharmacists with flexibility and time to make informed decisions and carry out their own relocation and/or wind-down in a manner that causes the least amount of damages to themselves and those who depend on them. …
>
> 53. Respectfully, such disclaimer should not be permitted until the court receives an independent report of the circumstances of each of the Pharmacists and directs the orderly wind-down and/or relocation of such operations on terms that are fair and reasonable. …
>
> 55. In no respect is the 30-day termination of the Franchise Agreements fair, reasonable and equitable to the Pharmacists, their employees and the public they serve. For many Pharmacists, it minimizes their capacity to relocate, [and] will leave them without funds to pay their employees, or the capacity to meet their ongoing obligations to their patients.

[15] It seems to me, having considered these submissions, that the Pharmacists recognize that it is inevitable that the pharmacies will be shut down.

[16] With respect to the factors to be considered as set out in s. 32(4), the disclaimer notices were approved by the Monitor. The Pharmacists complain that no reasons were provided in the notice approved by the Monitor. However, there is no requirement in s. 32(1) for the Monitor to provide reasons for its approval. This is reflected in Form 4 – Notice by Debtor Company to Disclaim or Resiliate an Agreement.

[17] However, the absence of reasons does not lead necessarily to the conclusion that the Monitor did not consider certain factors prior to providing its approval.

[18] The Monitor has made reference to the issues affecting the pharmacies in its Reports.

[19] The pharmacies were specifically the subject of comment in the Monitor's First Report at sections 8.2 – 8.5, and in the Second Report at section 6. Section 6.1 (h) of the Second Report specifically comments on the disclaimer notices. A summary of the reasons is provided at section 6.2.

[20] The information contained in the Monitor's reports establishes that there was communication as between Target Canada, the Monitor and the Franchisees such that it was clear that the stores were being closed. Specific reference to the communication is set out in the Monitor's Report at section 6.1(f), which in turn references the second Wong affidavit, filed by the Applicants.

[21] I am satisfied that the Monitor considered a number of relevant factors prior to approving the disclaimer notices.

[22] With respect to the second factor to be considered, namely whether the disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company, the Applicants have indicated they may be filing a plan of arrangement. I note that a plan may be required to ensure an orderly distribution of assets to the creditors.

[23] The Applicants seek to achieve an orderly wind-down and maximization of realizations to the benefit of all unsecured creditors. It seems to me that if the disclaimers are set aside it would delay this process because it would extend the time period for Target Canada to make payments to one group of creditors (the Pharmacists) to the detriment of the creditors generally. Further, in the absence of an effective disclaimer, the Target Entities will continue to incur significant ongoing administrative costs which would be detrimental to the estate and all stakeholders.

[24] The interests of all creditors must be taken into account. In this case, store closures and liquidation are inevitable. The Applicants should focus on an asset realization and a maximization of return to creditors on a timely basis. Setting aside the disclaimer might provide limited assistance to the Pharmacists, but it would come at the expense of other creditors. This is not a desirable outcome. I expressed similar views in *Timminco Ltd., Re*, 2012 ONSC 4471 at paragraph 62 as follows:

> [62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

[25] I am satisfied that the disclaimer will be beneficial to the creditors generally because it will enable the Applicants to move forward with their liquidation plan without a further delay to accommodate the Pharmacists.

[26] The third factor is whether the disclaimer would likely cause significant financial hardship to a party to the agreement. This factor is addressed by Counsel to the Monitor at paragraph 27 of its factum.

> 27. On its own terms the CCAA effectively imposes a high threshold, beyond economic or financial loss, for the consideration under section 32(4): there must be evidence of financial *hardship*, it must be *significant* financial hardship, and it must be *likely* to be caused by the disclaimer. Financial loss or damage, without more, is not sufficient, in the Monitor's submission. It appears that Section 32 itself recognizes the distinction, providing expressly in ss. 32(7) that where a party suffers "a loss" in relation to the disclaimer the consequence is that such party "is considered to have a provable claim." (emphasis in original)

[27] In these circumstances, the pharmacies will inevitably close in the very near future whether or not the Franchise Agreements are disclaimed. I accept the submission of counsel to the Monitor to the effect that no Franchisee has adduced evidence that disallowing the Disclaimer and continuing to operate in otherwise dark, vacated premises would improve its financial circumstances.

[28] The situation facing the Pharmacists is not pleasant. However, in my view, setting aside the disclaimer will not improve their situation. Extending the time before the disclaimers take effect has the consequence of requiring Target Canada to allocate additional assets to the Pharmacists in priority to other unsecured creditors. This is not a desirable outcome.

[29] The Target Canada Entities, in consultation and with the support of the Monitor, have offered a degree of accommodation to the Pharmacists. The details are set out at paragraphs 64-66 of the affidavit of Mark Wong sworn February 16, 2015:

> 64. As outlined above, in consultation with and with the support of the Monitor, on February 9, 2015 the Target Canada Entities' legal advisors delivered an accommodation to PFAC's counsel intended to address the primary concern expressed by PFAC, namely that franchisees require additional time to transfer patient files and drug inventory and to relocate their respective pharmacy

businesses. Under the terms of the accommodation, TCC will permit the pharmacists to continue to operate at their respective existing TCC locations until the earlier of March 30, 2015 and three days following written notice by TCC to the pharmacist of the anticipated store closure at such pharmacist's location. The accommodation provides that the Notices of Disclaimer will continue in effect and the franchise agreements will be disclaimed on February 25, 2015, but the pharmacists will be entitled to remain on the premises for an additional period of time.

64. Under the terms of the accommodation, pharmacists will be able to continue operating in TCC stores for longer than the 30-day period contemplated. Depending on the date the Agent decides to vacate certain TCC stores, many pharmacists may be able to continue operating for 60 days or more following delivery of the Notices of Disclaimer and approximately 75 days following the date of the Initial Order. As I described above, at any time after the third anniversary of the opening date of the pharmacy, TCC Pharmacy would have the right to terminate the franchise agreement for any reason on 60 days' notice.

66. The March 30, 2015 date indicated in the accommodation made by Target Canada Entities is intended to be a reasonable compromise whereby pharmacist franchisees will get additional time to transfer patient files and inventory and relocate their businesses, while at the same time permitting the Target Canada Entities to undertake the orderly wind down of TCC pharmacy operations and the TCC retail stores as a whole. As I described above, in order to accommodate the continued operations of the pharmacies during the wind down process, TCC Pharmacy and TCC have not yet delivered notices of disclaimer to a number of third-party providers such as McKesson, Kroll and others, which TCC Pharmacy has maintained at considerable cost. The March 30, 2015 outside date for the operation of all TCC pharmacies will allow TCC Pharmacy to time the delivery of disclaimer notices to these third-party providers so as to avoid incurring additional unnecessary costs. The certainty provided by the firm outside date is also to the benefit of the pharmacies themselves, each of whom will be required to win down their operations and make alternate arrangements in the very short term as a result of the imminent closures of TCC retail stores.

[30] In the circumstances of this case, this accommodation represents, in my view, a constructive, practical and equitable approach to address a difficult issue.

[31] Having considered the factors set out in section 32(4) of the CCAA, the motion of PFAC for a direction that the disclaimer of the Franchise Agreements be set aside is dismissed, together with ancilliary relief related to the disclaimers. It is not necessary to address the standing issue raised by the Monitor.

[32] I turn now to the request of PFAC that it be appointed representative of the Franchisees and that Sutts, Strosberg LLP be appointed as the Pharmacists' Representative Counsel, and BDO as the Pharmacists' financial advisor.

[33] In view of my decision relating to the disclaimers, the scope of legal and financial services required by the Pharmacists may be limited. However, there are many transitional issues that remain to be addressed. First and foremost is dealing with the patient records and ensuring uninterrupted delivery of prescription drugs to all such patients. There is also interaction required between Target Pharmacy, the Franchisees, and the regulators, concerning the relocation or shut down of pharmacies and the return of certain products to suppliers. This is not a simple case where the Franchisee receiving the disclaimer notice can simply walk away from the scene. From a professional and regulatory standpoint, they still have to participate in the process.

[34] In addressing these transition issues and recognizing that similar circumstances exist for the Franchisees, there would appear to be some benefit in having a limited form of representation for the Franchisees. This would assist in ensuring that a consistent approach is followed not only in the wind-down or relocation aspect of the process, but also in the claims process. In my view, the estate could benefit if this process was coordinated.

[35] The Monitor and the Applicants would have a single point of contact which would likely result in a reduction in administrative time and costs during the liquidation and the claims process. I am satisfied that PFAC has the support of the majority of franchisees. PFAC is appointed as the Representative of the Pharmacists. Sutts, Strosberg LLP is appointed Representative Counsel and BDO is appointed as the Pharmacists financial advisor.

[36] The funding of this representational role is to be limited. The Applicants are to make available up to $100,000, inclusive of disbursements and HST, to PFAC to be used for legal and financial advisory services to be provided by Sutts, Strosberg, as Representative Counsel and BDO as financial advisor in these proceedings. PFAC can provide copies of invoices to the Monitor, who can arrange for payment of same. Any surplus funds at the conclusion of the representation are to be returned to the Applicants. The contribution to PFAC can be used only to cover legal and financial advisory services provided to date in these proceedings as well as to assist on the going forward matters, subject to the following parameters.

[37] Such assistance is to be limited to:

a. corresponding with the regulators concerning the wind-down process and the relocation process;

b. return of inventory; and

c. participating in the claims process.

[38] If the individual franchisees decide not to participate in PFAC, they should not expect any further accommodation in a financial sense.

[39] In arriving at this accommodation, I have taken into account that this limited funding will provide benefits to the Applicants under CCAA protection insofar as the legal and financial advisory services provided by Representative Counsel and BDO should reduce the overall administrative cost to the estate and will avoid a multiplicity of legal retainers. The representation and funding will also benefit the franchisees so that they can effectively shut-down or relocate their business and prepare any resulting claim in the CCAA proceedings.

[40] Given the limited nature of the Applicants' financial contribution, an administrative charge is not, in my view, required.

[41] In the result, PFAC's motion for representation status is granted, with limitations set out above. The motion in respect of the disclaimers is dismissed.

R.S.J. Geoffrey Morawetz

Date: February 18, 2015

Court of Queen's Bench of Alberta

Citation: Bellatrix Exploration Ltd (Re), 2020 ABQB 809

Date: 20201222
Docket: 1901 13767
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

-and-

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I Introduction

[1] The ultimate issue in this application is whether BP Canada Energy Group ULC or the First Lien Lenders to Bellatrix Exploration Ltd. have priority to certain funds held by the Monitor and by Bellatrix pending resolution of disputed claims. These claims include BP's breach of contract claim arising from Bellatrix's purported disclaimer of, and ongoing failure to perform under, a GasEDI agreement between Bellatrix and BP.

[2] Bellatrix has obtained protection from its creditors under the *Companies Creditors' Arrangement Act*, RSC 1985, c. C-36, as amended. It holds approximately US$14.2 million of the funds in issue and approximately US$1.6 million is held by PricewaterhouseCoopers Inc. in its capacity as Court-appointed Monitor of Bellatrix.

II Relevant Facts

[3] Bellatrix and BP were parties to a GasEDI Base contract for the short-term sale and purchase of natural gas and a Special Provisions for GasEDI Base Contract, both dated as of March 1, 2010 (collectively, with transaction confirmations, the "GasEDI Agreement").

[4] Bellatrix and BP entered into two transaction confirmations pursuant to the terms of the GasEDI Agreement, dated as of December 12, 2017.

[5] Pursuant to the GasEDI Agreement, Bellatrix was required to deliver natural gas to an agreed delivery point in Alberta. BP would then purchase and take title to that natural gas. Pursuant to the transaction confirmations, BP agreed to pay for the natural gas in accordance with a pricing formula based on posted index prices at specific or designated downstream pricing hubs in the US and Ontario, on a month to month basis. The GasEDI Agreement does not provide BP with a security interest in respect of Bellatrix's obligations under the contract.

[6] Bellatrix was granted protection under the CCAA by an initial order dated October 2, 2019.

[7] On November 25, 2019, with the Monitor's approval, Bellatrix sent BP a Disclaimer Notice with respect to the GasEDI Agreement, pursuant to section 32(1) of the CCAA. The Disclaimer Notice provided that the disclaimer of the GasEDI Agreement, unless successfully objected to by BP, would not take effect until December 25, 2019, 30 days later.

[8] On November 25, 2019, BP responded to the Disclaimer Notice, advising Bellatrix of its view that the GasEDI Agreement constituted an eligible financial contract ("EFC") under the CCAA, and that therefore it could not be disclaimed.

[9] On November 26, 2019, Bellatrix stopped delivering gas to BP.

[10] On November 27, 2019, Bellatrix offered to resume delivery of natural gas under the GasEDI Agreement during the disclaimer period if BP would agree not to withhold revenues owed to Bellatrix. Bellatrix proposed that BP pay Bellatrix revenue without any set-off, reduction or deduction. On the same day BP responded, refusing to accept the terms of this proposal.

[11] On November 28 and November 29, 2019, BP sent letters reiterating its position that the GasEDI Agreement was an EFC and could not be disclaimed, and demanding that Bellatrix immediately resume performance under the contract. In its letters, BP stated that, even if the GasEDI Agreement was not an EFC, Bellatrix continued to be bound by the terms of the agreement until the expiry of the disclaimer notice period, and that Bellatrix's unilateral breach thereof constituted a post-filing breach.

[12] Bellatrix had delivered natural gas to BP in accordance with the GasEDI Agreement from November 1 to November 25, 2019. The amount payable to Bellatrix by BP for that natural gas was US$1,583,859.38, subject to any valid rights of set-off. That amount would ordinarily have been paid on December 24, 2019.

[13] On December 6, 2019, Bellatrix, BP and the Monitor entered into an agreement pursuant to which BP paid the December payment to the Monitor in trust pending further resolution of matters relating to Bellatrix's disclaimer of the GasEDI Agreement. The agreement reserved all rights of BP in respect of the December payment, including the right, if applicable, to set-off or net the December payment against any obligations of Bellatrix to BP under the GasEDI Agreement.

[14] BP filed an application seeking a declaration that the GasEDI Agreement is an EFC within the meaning of the CCAA. BP sought additional relief in its application, including an order enjoining Bellatrix from unilaterally suspending deliveries of gas under the agreement, but due to time constraints, the parties agreed to limit submissions to the single issue of whether the GasEDI Agreement is an EFC. If BP had proceeded with the other relief it sought and been

successful, Bellatrix would have been required to deliver gas to BP, but not entitled to receive the proceeds of sale.

[15] On February 4, 2020, Jones, J. held that the agreement was an EFC: *Re Bellatrix Exploration Ltd.* [2020] AJ No 329 (the "EFC Decision"). This decision is under appeal, leave granted 2020 ABCA 178. The decision makes no reference to any obligation of Bellatrix with respect to continued performance of the agreement.

[16] On February 6, 2020, BP counsel wrote to Bellatrix counsel advising, among other things, that, as a result of the EFC Decision, BP expected Bellatrix to resume performance of the GasEDI Agreement.

[17] On February 11, 2020, counsel to Bellatrix responded noting that the EFC Decision did not address any of the other relief sought in BP's application, including a requirement that Bellatrix perform its obligations under the GasEDI Agreement. The response reiterated Bellatrix's position that BP has an unsecured claim in Bellatrix's CCAA proceedings. The response also advised that Bellatrix did not expect any potential purchaser or credit bid party to assume the terms of the GasEDI Agreement.

[18] Counsel to BP filed an order with respect to the EFC Decision on March 5, 2020. The order, among other things, grants BP leave to apply to the Court for such further advice and direction as may be required with respect to the remainder of relief sought in the GasEDI Agreement application.

[19] BP brought no application to address the remainder of the relief sought in the EFC determination application until BP filed its cross-application on August 7, 2020 to the application filed by the Agent to the First Lien Lender, five months later.

[20] On March 20, 2020, Bellatrix applied for, among other things, an order extending the stay of proceedings under the CCAA to May 7, 2020. As a result of Court closures due to the COVID-19 pandemic, the application was made via desk application, subject to any interested party objecting to the application.

[21] There were no objections to the application, and on March 31, 2020, the Court granted an order extending the stay of proceedings to May 7, 2020. The order provided for a further automatic stay extension to June 8, 2020, subject to, among other things, any objections from interested parties.

[22] In a May 1, 2020 decision allowing leave to appeal the EFC Decision, Strekaf, J.A. directed that the determination of how the interests of BP and other parties to the CCAA proceedings could best be protected pending the hearing of the appeal of the EFC Decision should be determined by this Court. No party has sought a stay of the EFC Decision.

[23] There were no objections to the automatic stay extension on June 8, 2020 from any interested parties, and the stay has continued. Applications for the stay extension orders submit that Bellatrix has been acting in good faith and with due diligence in carrying out the terms of all orders of the Court and in respect of all matters relating to the CCAA proceedings.

[24] On May 8, 2020, Hollins, J. granted an Approval and Vesting Order approving the sale of substantially all of Bellatrix's assets to Spartan Delta Corp. Bellatrix closed the sale on June 1, 2020. The GasEDI Agreement was not assumed by the purchaser.

[25] Pursuant to the Spartan transaction, the purchaser acquired substantially all of Bellatrix's assets and assumed all of Bellatrix's liabilities in respect of its wells, environmental obligations, pre-filing cure costs in respect of assumed contracts and certain other assumed labilities. The Spartan transaction also permitted the purchaser to make offers of employment to Bellatrix's employees.

[26] The First Lien Lenders are secured creditors of Bellatrix pursuant to a credit agreement dated June 4, 2019 and certain security granted in relation to that agreement. In contrast to the GasEDI Agreement, the credit agreement and the security granted in relation thereto secure any indebtedness that may become owing by Bellatrix under any swap contracts or other derivative agreements with the First Lien Lenders. The Agent of the First Lien Lenders, on behalf of the lenders, has a registered, valid and enforceable first priority security interest in all of Bellatrix's present and after-acquired personal property and a first priority floating charge on all of Bellatrix's present and after-acquired real property.

[27] On May 22, 2020, the Court granted a Stay Extension and Distribution Order authorizing Bellatrix to distribute $47.5 million, a portion of the net proceeds from the Spartan sale, to the Agent of the First Lien Lenders in partial satisfaction of their secured claim. Bellatrix held back certain funds from distribution, including funds for disputed claims such as the BP claim.

[28] Bellatrix remains indebted to the First Lien Lenders in excess of $44.5 million. Bellatrix may not be able to pay the secured claim of the First Lien lenders in full given the results of the sale process. In the circumstances, a claims process has not been initiated in these CCAA proceedings.

[29] The First Lien Lenders seek a declaration that they have a first priority interest in all the property of Bellatrix, including funds held back in relation to the BP claim, a declaration that amounts owing to BP, if any, are an unsecured claim, and an order directing the Monitor to make a further distribution to the Agent in the amount of approximately $28.9 million. Bellatrix supports this position and submits that the Agent for the First Lien Holders is entitled to distribution of the sale proceeds and the December payment of approximately $1.6 million held in trust by the Monitor in priority to BP.

[30] In a cross application, BP seeks judgement for damages in an amount equivalent to US$14.2 million, an order lifting the stay in the CCAA proceedings to permit BP to enforce the judgement, and an order directing the Monitor to pay BP the approximately US$1.6 million December payment from the held-back funds, an order directing Bellatrix to pay the remainder of the claimed damages out of the sale of proceeds of its assets, or, in the alternate, granting BP a charge over the property of Bellatrix in the amount of the claimed damages with priority over the secured creditors and *pari passu* with the Interim Lenders Charge, or in the further alternative, an order declaring that any funds held by the Monitor and Bellatrix up to the amount of the claimed damages are held in trust for BP.

III Issues

[31] The main issue is whether the CCAA grants BP, as the non-insolvent counterpart to an EFC that has not chosen to terminate the agreement, any security or priority for its damages as a result of Bellatrix's ongoing failure to perform under the agreement. In other words, does the exception to the debtor's right to disclaim an EFC set out in section 34(7)(a) of the CCAA create an obligation for the debtor to continue to perform the EFC throughout insolvency proceedings?

[32] Other issues include the following:

(a) Is BP entitled to the funds held by the Monitor in respect of the December payment pursuant to a right of set-off?

(b) Is BP entitled to lift the stay to permit it to obtain and enforce a judgment against the sale proceeds?

(c) Is BP entitled to equitable relief?

(d) Has BP proved the amount of its claim for damages?

IV Analysis

A. Does the exception to the debtor's right to disclaim an EFC set out in section 34(7)(a) of the CCAA create an obligation for the debtor to continue to perform the EFC throughout insolvency proceedings?

[33] The stay provision of the CCAA, which prevents termination of an agreement because of a contractual counterparty's insolvency, does not apply to an EFC: section 34(7).

[34] Section 34(8)(a) of the CCAA allows solvent counterparties to EFCs certain "permitted actions" during the stay period if they are allowed to take such actions under the specific EFC agreement, including netting or setting off or compensation of obligations between the company and the other parties to the EFC. However, section 34(10) does not permit enforcement actions to recover net termination values once they are determined. Rather, if net termination values are owed by the company to another party to the EFC, section 34(10) deems the non-insolvent counterparty "to be a creditor of the company with a claim against the company in respect of those net termination values".

[35] As noted by the First Lien Lenders, the purpose of protection for EFCs under the CCAA is to provide stability to financial markets by allowing a non-defaulting counterparty the right to terminate and crystallize claims arising under an EFC.

[36] Like other creditors of the company, the net claims of a non-insolvent counterparty after termination are subject to the stay of proceedings. The Canadian Bankers Association in its submissions in favour of EFC amendments to the *Bankruptcy and Insolvency Act* in 1991 commented that:

> ... it cannot be overemphasized that our proposal is not to benefit either party to an eligible financial contract. ... Any net amount, if owed to the other party, would be fully subject to the proposed stay provisions. What would be achieved is that the rights of both parties would have been reduced to a fixed and certain amount, just like an amount owed under a regular contract at the time of the stay. (emphasis added): as cited in *Re Androscoggin Energy LLC*, [2005] OJ No. 395 at para 3.

[37] The Insolvency Institute of Canada Report of the Task Force on Derivatives dated September 26, 2013 notes at pages 2 and 3 that:

> EFC protection is a significant exception to the stay of proceedings under the CCAA and BIA. There are two main purposes of the EFC safe harbours: (i) to protect non-defaulting counterparties from the risk of increasing exposure to the insolvent counterparty under the EFC and (ii) to reduce systemic risk in Canadian

> and global financial markets. Non-defaulting counterparties may be at risk because, in certain instances, the amounts under the EFCs are very substantial and the value of the underlying products subject to EFCs are volatile in nature and can change dramatically during an insolvency proceeding. If the solvent counterparty to an EFC is subject to a stay of proceedings and therefore unable to terminate its EFCs with the insolvent counterparty, there is a risk that the value of such EFCs could deteriorate sufficiently (from the insolvent counterparty's perspective) to put the solvent counterparty at risk. Systemic risk may arise where the solvent counterparty is a systemically important institution or where the solvent counterparty has entered into EFCs with one or more other counterparties. In extreme cases, the failure of one counterparty could have a domino effect, where the failure of one counterparty, particularly a derivatives dealer, triggers the failure of a second counterparty who is also a derivatives dealer and the failure of the second counterparty could trigger the failure of others. Multiple insolvencies may cause a lack of liquidity in the financial sector and unavailability of credit to solvent enterprises and, ultimately, systemic risk. The systemic risk could spread to global markets and lead to world-wide financial instability and, in extreme cases, recession.

[38] The protection offered to non-insolvent counterparties to an EFC is the ability to terminate the EFC and crystallize its loss despite the stay provision of the CCAA, a protection not afforded to other creditors. The other protection is allowing set-off if the EFC agreement itself permits it. The exceptions were included in the *Act* for the protection of the derivative market generally from volatile and systemic risk. They do not compel a CCAA debtor to continue to perform an EFC that has not been terminated, nor does the CCAA provide the non-insolvent counterparty with any priority for its claim, apart from the protection of the exemption.

[39] Unless the non-insolvent counterparty to the EFC has a security interest, it is an unsecured creditor, and participates in the CCAA proceedings on the same footing as other creditors: *Re Blue Range Resource Corp.*, 2000 ABCA 239 at para 9.

[40] Therefore, assuming that the GasEDI Agreement is an EFC, BP is allowed to terminate it and crystallize its loss. However, as BP has not done so, its remedy for Bellatrix's breach of the GasEDI Agreement is a claim in the CCAA proceedings as an unsecured creditor unless there are other remedies available to it in the specific circumstances.

[41] BP submits that, unless it is granted the relief it seeks, the practical effect of Bellatrix's conduct would be to render the disclaimer rules of the CCAA meaningless. It notes that a valid disclaimer under section 32(7) of the CCAA results in a "provable claim", unsecured unless otherwise provided for in the disclaimed contract. However, if CCAA debtors are allowed to breach executory contracts at will, the result is identical: the solvent party has a provable claim, unsecured unless otherwise provided for under the contract. BP submits that, if that is true, section 32(7) of the CCAA is without a purpose, as there is no practical difference between contracts that can and cannot be lawfully disclaimed. Either way, if the debtor chooses to breach the contract, the solvent counterparty is left with the same remedy – which in many cases, is no remedy at all.

[42] Therefore, BP submits that the "clear implication" of the statutory disclaimer provisions of the CCAA is that a company is required to perform its obligations under executory contracts as of the filing date, unless and until those contracts can be validly disclaimed under section 32.

[43] As noted previously, the exception from EFCs included in the disclaimer provisions of the *Act* do not expressly provide that an EFC must be performed. Such a mandatory requirement would thwart the objectives of the CCAA, since compelling a CCAA debtor to performs an EFC that it cannot afford to perform would in many cases affect its ability to attempt to restructure.

[44] The disclaimer provisions, while initiated by the debtor, provide the solvent party to a disclaimable contract an opportunity to object to the disclaimer and a process for doing so. Section 32(4) of the *Act* sets out factors that the court must consider in deciding the issue.

[45] While the solvent party to a contract that the debtor merely stops performing may not have available to it the same statutory process, it may apply to the court for an order compelling performance as BP initially purported to do. The court supervising the CCAA proceedings in its consideration of such an application would likely take into account factors similar to those set out in section 32(4), including whether compelling performance would interfere with the prospect of a viable arrangement, and whether refusing such an order would cause significant financial hardship to a party to the contract.

[46] While the considerations may be similar, a disclaimer proceeding is initiated by the debtor, provides for a statutory process and mandates a termination date for the disclaimer. As noted by Morawetz, J. in *Re Target Canada Co*, 2015 CarswellOnt 3274, the disclaimer is beneficial to creditors generally because it enables the debtor to move forward with a liquidation plan without further delay. In contrast, the unilateral non-performance of a contract gives rise to uncertainty for both the debtor and the counterparty as to the status of the contract, including whether or not the solvent counterparty at its election will accept the termination of the contract as repudiated, and the date of its termination.

[47] The disclaimer provisions are thus not rendered meaningless by the existence of a less formal option, but provide an opportunity for orderly termination and certainty to the parties to the disclaimed contract. Implying an obligation to perform an uneconomic contract that may affect the ability of the CCAA debtor to attempt to restructure would require more direct statutory language.

[48] It must be noted that Bellatrix attempted to resolve the issue through the disclaimer option before the GasEDI Agreement was found to be an EFC.

> B. Is BP entitled to the funds held by the Monitor in respect of the December payment pursuant to the right of set-off?

[49] Assuming that the GasEDI Agreement is an EFC, section 34(8)(a) of the CCAA permits the netting or setting off of obligations between the debtor company and the other party to the EFC if the EFC is terminated on or after the commencement of the CCAA proceedings and if such action is "in accordance with the provisions of the contract".

[50] However, BP has not terminated the GasEDI Agreement and is not seeking to terminate and set-off its position to reduce exposure to risk. Therefore, the set-off provisions of section 34(8)(a) are not available to it.

[51] BP seeks to maintain Bellatrix's obligation to perform the agreement but set-off amounts it owes to Bellatrix for previously delivered product. Whether or not the GasEDI Agreement is an EFC, the agreement does not on its terms allow the set-off of the December payment.

[52] Section 10.2 of the base contract in the GasEDI Agreement permits the non-defaulting party to withhold any amounts owed to the defaulting party when there is an event of default or a potential event of default and to set-off such amounts against "any amounts owed to the Defaulting Party under the [GasEDI Agreement] whether or not yet due" and set-off against such withheld amounts "any amounts owed the non-Defaulting Party hereunder (whether or not yet due)". BP submits that it is entitled to set-off its damages claim against the December payment, relying on the language "whether or not due" in section 10.2.

[53] However, BP is the payor, not the payee under the agreement and Bellatrix was not obligated to pay BP anything "hereunder", either when the agreement to hold the funds in trust was entered into or when the funds would normally be paid later in December. Although an event of default includes a party's failure to deliver gas "for the greater of 4 cumulative days or 5% of the number of days in a Delivery Period .... in any one transaction", and BP may have a claim for damages in an amount has not yet been determined, there were no amounts "owed to" BP at the time of the December payment in respect of which it could exercise any contractual right of set-off.

[54] Section 10.5 of the agreement states that a "Performing Party" has the right to withhold any or all payments due the non-performing party for the period of the applicable non-performance and net or set-off amounts due the Performing Party against such withheld amounts. Bellatrix stopped delivering gas on November 26, 2019. The December payment was for the delivery of gas between November 1 and November 25, 2019. Therefore, for the same reasons, section 10.5 of the agreement does not give BP a right of set-off.

[55] BP thus has no contractual right of set-off with respect to the December payment but submits that it has a right of equitable set-off, citing *Re Blue Range Resource Corp.*, 2000 ABCA 200. In *Blue Range*, the appellants were allowed to set-off anticipated damages they would incur under certain natural gas marketing contracts against payments owed under those contracts for the delivery of natural gas.

[56] In that case, as in this, the cost to the appellants to replace the gas was higher than the cost they were paying under the contracts. The Court of Appeal in *Blue Range* set out the principles from the Supreme Court of Canada decision in *Telford v Holt* (1987), 41 D.L.R. (4th) 385(S.C.C.), at 398 that apply when dealing with equitable set-off:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands;
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed;
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim;

4. The plaintiff's claim and the cross-claim need not arise out of the same contract; and

5. Unliquidated claims are on the same footing as liquidated claims.

[57] The Court noted at para 19:

> The important point for invoking equitable set-off is the close connection of the transactions. Would it be manifestly unjust to require the appellants to pay the costs of the February and March deliveries in view of the fact that they will suffer significant losses due to the early termination of the same contract that called for the delivery of gas in February and March? In our view, such a requirement is unjust.

[58] In *Blue Range*, the CCAA debtor terminated the contracts. Here, BP's position is that the GasEDI Agreement has not been terminated, remains in full force and effect and that Bellatrix is required to perform the agreement.

[59] The First Lien Lenders and Bellatrix submit that BP does not meet the test for equitable set-off because it would not be "manifestly unjust" to allow Bellatrix to claim the December payment without taking into consideration the cross-claim.

[60] They point out that, in a letter dated February 11, 2020, Bellatrix's counsel advised BP on its position on the ability of a CCAA debtor to elect non-performance of an agreement. Bellatrix responded that the EFC Decision did not deal with the issue of performance or set-off. Bellatrix has been consistent in its position throughout the CCAA proceedings. Despite this, BP did not apply to lift the stay or to claim a right of set-off until this application was filed.

[61] While I have found later in this decision that BP's delay in taking action would not disentitle it from a equitable remedy, BP has not established an equitable ground for being protected, and therefore fails the *Telford* test for that reason. BP is not entitled to set-off the December payment, whether or not the GasEDI Agreement is an EFC.

[62] Bellatrix submits that, since BP does not fit within the permitted set-off provisions of section 34(8), but for the agreement among Bellatrix, BP and the Monitor to have the Monitor hold the December payment in trust, BP would have been in violation of the stay under the initial CCAA order had it purported to withhold the December payment. If it had unilaterally withheld the payment, BP would have deprived Bellatrix of substantial liquidity at a time when Bellatrix was seeking to pursue its strategic process to identify a going concern transaction for the benefit of its many stakeholders, relying on funds drawn under its Interim Financing Facility, and Bellatrix would have been unable to make various payments to secured and other unsecured creditors.

[63] However, as I have found that BP has neither a legal nor an equitable right of set-off, it is not necessary that I decide this issue.

C. Is BP entitled to lift the stay to permit it to obtain and enforce a judgement against the sale proceeds?

[64] As a corollary to the relief of lifting the stay, BP asks the Court to direct immediate payment of the alleged damages to BP out of the sale proceeds, less the December payment.

[65] The test for lifting a stay focuses on the totality of circumstances and the relative prejudice to the parties involved: *Alberta Energy Regulator v Lexin Resources Ltd*, 2019 ABQB 23 in the context of a receivership, citing *Alignvest Private Debt Ltd. v Surefire Industries Ltd.*, 2015 ABQB 148 (Alta. Q.B.) at para 40 and 43 (appeal on other grounds dismissed, [2015] A.J. No. 1234 (Alta. C.A.)).

[66] Guidance can be drawn from the provisisons of section 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as amended, in determining whether a stay in CCAA proceedings should be lifted. The Court should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant: *Re Ma*, [2001] O.J. No. 1189 (Ont. C.A.).

[67] Lifting the stay is not routine: there must be sound reasons to relieve against the stay: *Re Ma*, at para 3.

[68] In order for a party applying to lift the stay to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted: *Golden Griddle Corp. v Fort Erie Truck & Travel Plaza Inc.* (2005), 29 C.B.R. (5th) 62 (Ont. S.C.J.) at para 18-19. Examples may include hardship caused by the stay or necessity of payment or a situation where it is in the interests of justice to allow the stay to be lifted: *Re Canwest Global Communications Corp*, (2009), 61 CBR (5th) 200 (Ont S.C.J.). The prejudice to the applicant should be different qualitatively from that suffered by other creditors, who also lose, in whole or part, the benefit of their contracts by reason of the debtor's insolvency.

[69] BP submits that it suffers unique harm from the breach of the GasEDI Agreement, and argues that such prejudice favours the lifting of the stay to allow it to enforce its damages claim against Bellatrix. However, BP does not provide any valid reason why its damages claim is unique.

[70] First, BP submits that it is a post-filing creditor. This is incorrect: its damages claim arises from a pre-filing contract, whether it is an EFC or not.

[71] Second, BP notes, relying on *Bank of Montreal v Probe Exploration Inc*., [2000] AJ No 1752, that courts are reluctant to interfere with the rights of contractual parties in a liquidation scenario where the result would be to prefer the interests of the debtor and its primary secured creditor. However, I agree with the First Lien Lenders that the *Probe* case is distinguishable from the situation of Bellatrix's failure to perform under the GasEDI Agreement.

[72] In *Probe*, the unique facts included the existence of an intercreditor agreement that contemplated the mutual intent between the secured creditor and the party opposing the termination of the agreement at issue that any purchaser of Probe would be bound by Probe's obligations under the contract.

[73] BP submits in proposing the lifting of the stay that Bellatrix has abused and violated the CCAA process. As noted later in this decision, there is no basis for this allegation.

[74] BP also submits that the stay should be lifted because the GasEDI Agreement as an EFC is entitled to certain benefits. These benefits do not imply a right to lift the stay in the context of a damages claim. Section 34(10) of the *Act* makes it clear that such a claim merely makes the holder a creditor, in this case an unsecured creditor. The unique risks inherent in the status of an

EFC contract are recognized in the limited relief offered in section 34. The CCAA does not provide any special security or priority for a damages claim arising from an EFC.

[75] Finally, as noted by the Agent, this is the end of the CCAA process, and in the nature of a priorities dispute. There exists no valid reason to lift the stay or to order the immediate payment to BP of damages out of the sale proceeds or to grant BP a priority charge on the sale proceeds ranking *pari passu* with the Interim Lenders Charge unless consideration of good faith or equity compel that result.

D. Is BP entitled to equitable relief?

[76] BP seeks a declaration of constructive trust as a remedy for Bellatrix's breach of the GasEDI Agreement, arguing that Bellatrix's stakeholders have been unjustly enriched. BP also submits that Bellatrix has engaged in a pattern of abusive conduct and has unjustly appropriated approximately $14.5 million by breaching a contract that it is prohibited from disclaiming.

[77] The onus of proving a constructive trust rests with the claimant. It is a discretionary remedy that will not be imposed without taking into account the interest of others who may be affected by granting the remedy: *Re Hoard*, 2014 ABQB 426 at para 26.

[78] As noted at para 23 of *Hoard*, given that the BIA provides a code by which legislators have balanced the interest of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust. The same reasoning applies to the CCAA.

1. Unjust enrichment

[79] A constructive trust can be used to remedy unjust enrichment where monetary damages are inadequate and there is a link or causal connection between the claimant's contribution and the property in which the constructive trust is claimed: *Moore v Sweet*, 2018 SCC 52 at para 91. Therefore, even if the elements of unjust enrichment are satisfied in this case, there is no link between the funds that are the proceeds of sale of Bellatrix's assets and BP. The most that could be recovered through this remedy would be the December payment.

[80] The doctrine of unjust enrichment requires an enrichment, a corresponding deprivation, and the absence of a juristic reason for the enrichment: *Hoard*, at para 26.

[81] With respect to the requirement of enrichment, the Alberta Court of Appeal noted in *Luscar Ltd v Pembina Resources Ltd*, 1994 ABCA 356 at para 129 that:

> where there exists a contract under which parties are governed, and one party gains by the breach of the same, that party is not truly enriched, because the breaching party takes that gain subject to its liability for breach of contract.

[82] With respect to deprivation, BP was not required to provide any goods or services to Bellatrix or take on any financial risk or exposure. As noted in this decision, BP has failed to establish the amount of any financial hardship it may have suffered as a result of Bellatrix's disclaimer or breach of the GasEDI Agreement.

[83] BP concedes that the provisions of the CCAA can provide a juristic reason for an enrichment, but submits that BP is in a unique position as compared to other CCAA creditors in that Bellatrix has breached a contract that it was prohibited from breaching, both by the CCAA and by the Court.

[84] As noted previously, the CCAA does not prohibit a debtor from failing to perform a contract, be it an EFC or otherwise. Nor is it correct that in failing to perform the GasEDI Agreement, Bellatrix is in breach of a court order. There is nothing in either the EFC Decision or the order that emanates from it that compels performance of the agreement.

[85] The statutory priority of the First Lien Lenders under the CCAA constitutes a juristic reason to deny recovery to BP through the doctrine of unjust enrichment.

[86] BP submits that Bellatrix conceded in its submissions before the Court in the application to determine whether the agreement is an EFC that, if it was, Bellatrix would be obligated to perform it. However, Bellatrix actually stated that if the agreement was an EFC, it would be required either to perform it "or otherwise to pay damages to BP".

[87] Therefore, BP is not entitled to a constructive trust as a remedy for unjust enrichment.

2. Wrongful Conduct

[88] In *Soulos v Korkontzilas*, (1997) 36 C.B.R (3d) 1, the Supreme Court held that a constructive trust can also be used to right wrongful conduct. The following conditions must be met : the insolvent company must be under an equitable obligation in relation to the activities giving rise to the assets in its hands; the property in the hands of the insolvent company must be shown to have resulted from deemed or actual agency activities in breach of its equitable obligation to the claimant; the claimant must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the insolvent company remain faithful to their duties; and there must be no factors that would render the imposition of a constructive trust unjust in all the circumstances.

[89] Subsequent decisions emphasize that the property sought to be impressed with the trust must be the property obtained through the wrongful act, *Hoard* at para 35.

[90] BP submits that the timing of Bellatrix's purported disclaimer and breach of contract was not a coincidence, in that Bellatrix knew payments for gas delivery under the GasEDI Agreement would be subject to BP's contractual right to set them off against BP's damages for Bellatrix's breach of contract. It argues that Bellatrix timed its delivery of the disclaimer notice and its breach of contract for the day immediately after BP made its payment for October gas deliveries on November 25, 2019, thus depriving BP of the ability to set that payment off against damages.

[91] However, although it issued a disclaimer notice on November 25, 2019, Bellatrix continued to deliver gas under the agreement until November 24, 2019 and thus was not in breach of the contract until after that date. It did not mislead BP about the timing of its decision. While the decision on the timing of the disclaimer notice may have been strategic, it was not wrongful conduct.

[92] BP also alleges that the timing of the disclaimer notice put it in the position of being an involuntary interim lender, as Bellatrix was able to use funds that BP may have been able to set-off if it had known about the disclaimer earlier.

[93] BP's position is different from the position of an interim lender that advances funds to an insolvent debtor to finance an uncertain restructuring process. BP did not advance the roughly $14.5 million that Bellatrix estimated it would be able to achieve in additional revenue by selling its gas elsewhere, and BP it is not out of pocket for that amount.

[94] BP also submits that failure to perform the agreement allowed Bellatrix to sell the gas it would have been required to sell BP to other parties and use the proceeds to fund operations and pay other creditors, including the actual interim lender, and that this was wrongful conduct.

[95] As noted previously, Bellatrix's decision to cease performing an uneconomic contract during the CCAA process is not wrongful conduct: it allowed the company to generate increased revenue it would not be able to generate under the BP agreement to fund the company's operations while it attempted to restructure. BP was not required to pay for gas that was not delivered or provide any services to Bellatrix. While the outcome of the process was a liquidation, it was a going concern liquidation that was the best opportunity for the preservation of jobs and likely the maximization of value.

[96] As noted previously, there is no merit to the allegation that Bellatrix misled the Court. As was the case with unjust enrichment, there is no link or causal connection between the alleged wrongful acts and the proceeds of sale of Bellatrix's assets.

[97] In short, BP has no basis to claim a constructive trust based on wrongful conduct.

[98] In *Re Hollinger Inc*, 2013 ONSC 531 at para 39, leave to appeal denied in 2014 ONCA 282, the Ontario Court of Justice found that there is no legitimate reason for the proprietary remedy where the claimant relies on the remedy to try and gain a super-priority over other creditors in the CCAA. BP has an unsecured monetary damages claim and it should not be entitled to a constructive trust that would subvert the priorities of other creditors unless it has established that it would be unconscionable not to recognize such a trust. BP has not done so.

3. Bad Faith

[99] BP also relies on section 18.6 of the CCAA, a new provisison that provides that any interested person in any proceedings under the *Act* shall act in good faith with respect to the proceedings, and that if it is satisfied that an interested person fails to act in good faith, the Court may make the appropriate order. The duty of acting in good faith is not a new duty for a CCAA debtor: sections 11.02(3), 33(3), 50(12), 50.4(11) and 65.12(2)

[100] As I have noted previously, BP has not established any wrongful conduct by Bellatrix, which has merely used the tools available to it under the CCAA. Bellatrix was faced with an uneconomic agreement that it could not afford to perform while attempting to restructure. Bellatrix advised BP at an early stage of the proceedings that, in the circumstances, the agreement would never be accepted by a purchaser of Bellatrix's assets, which BP as a sophisticated party would likely have recognized. BP had the option of terminating the agreement as an EFC and exercising its right to set-off after termination, but chose the option of maintaining that Bellatrix was required to continue to perform the agreement.

[101] While Bellatrix breached the GasEDI Agreement by non-performance, it has been transparent and candid throughout with respect to its position and conduct. Although it did not abide by the statutory 30 days notice under its notice of disclaimer, that was after BP refused to accept the disclaimer and advised Bellatrix of its view that the agreement was an EFC.

[102] It is not unusual for a CCAA debtor to fail to perform uneconomic ongoing monthly contracts, both before and after filing, whether formally disclaimed or not, and such failure to perform is not per se bad faith.

[103] The December payment has been held in trust pending a resolution of the issues of set-off and priority, so Bellatrix has not failed to act in good faith with respect to the payment. The timing of the disclaimer notice, while strategic, was not bad faith conduct, and Bellatrix has not, as alleged by BP, misled the Court or failed to comply with a Court order.

[104] The Monitor has stated that it is satisfied that Bellatrix has acted in good faith throughout the proceedings.

[105] As noted by Dr. Janis Sarra in "La bonne foi est une considération de base – Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", Annual Review of Insolvency Law, eds Janis Sarra & Barbara Romaine, Toronto: Thomson Reuters Canada, 2014:

> The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.

[106] Bellatrix has not exhibited conduct that would fall within these categories and has not acted in bad faith.

[107] The First Lien Lenders and Bellatrix point out that BP failed to allege that Bellatrix was not acting in good faith through four stay applications, and only raised the allegation at the end of August, 2020. However, BP responds that, as Bellatrix as a concession to BP agreed to hold back an amount from the sale proceeds to cover BP's damages claim, it had no need to object to the stay extension. While I have not found bad faith by Bellatrix, I accept that BP's failure to object to the stay does not preclude its claim of bad faith in the circumstance.

4. Delay

[108] The First Lien Lenders and Bellatrix submit that it would be inequitable to grant BP the super-priority it seeks for damages in priority to the stakeholders of Bellatrix.

[109] They note that BP initially applied for various forms of relief, including orders directing Bellatrix to resume performance of the GasEDI Agreement and to remedy any existing default, but ultimately only pursued the issue of characterization of the GasEDI Agreement as an EFC. While BP may have been constrained by time limits in its initial application heard on January 23, 2020, it knew by February 25, 2020, that Jones, J's decision dealt only with the characterization of the GasEDI Agreement as an EFC, and that it was free to proceed with the remainder of the relief it sought before any other commercial duty judge. The order emanating from the decision grants BP leave to apply for further advice and direction with respect to the remaining relief.

[110] While the pandemic interfered with regular commercial duty chambers in March and April, during Bellatrix's May 22, 2020 application before Hollins, J. to make interim distributions to certain priority and secured lenders. BP advised the Court that it may have a priority claim against Bellatrix and asked the Court to set aside US$14.5 million to be held in trust pending resolution of the disclaimer dispute with Bellatrix. The Court refused and suggested that BP bring its own application if it was concerned that it was facing disadvantage. It was not until August 7, 2020, in response to First Lien Lenders priority application, that BP

brought a cross-application seeking relief similar to that it had originally sought in December, 2019.

[111] The First Lien Lenders submit that it would be inequitable and prejudicial to the First Lien Lenders if BP were now allowed a priority claim in relation to Bellatrix's breach of the GasEDI Agreement. Bellatrix remains indebted to the First Lien Lenders in excess of $44 million and it is clear that Bellatrix would not be able to pay the First Lien Lenders' secured claims in full if BP's unsecured damages claim is paid in priority to its claim.

[112] Bellatrix points out that BP did not proceed to seek the remainder of its relief at a time when Bellatrix may have been able to perform the contract if ordered to do so. Now, nine months later, it has no assets that would allow performance.

[113] BP responds that it has protested its treatment from the start, and that the First Lien Lenders have suffered no prejudice from the delay, as they and Bellatrix were aware of BP's claim from December, 2019, even though BP did not act on it until after the sale of assets had been concluded. As noted in *Re Blue Range Resources Corp.*, 2000 ABCA 285, albeit in a different context, the fact that creditors will receive less money if late claims are allowed is not prejudice. "Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31": *Blue Range* at para 40.

[114] Bellatrix and the First Lien Lenders were fully aware of BP's claim, and there is no evidence that earlier determination of the claim would have caused Bellatrix to do anything differently with respect to the sale of assets. This is not a case of a creditor "lying in the weeds", or even a case where BP implied that it had changed its position even though it did not take earlier action. In the specific circumstances of this case, including the disruption of court proceedings caused by the COVID pandemic, I would find that BP is not disentitled to relief on the basis of delay if I am incorrect on its entitlement to equitable relief.

E. Has BP proved the amount of its claim for damages?

[115] The amount of damages claimed by BP, in this application, $14.5 million, is equal to the amount that Bellatrix estimated, as part of the EFC determination application, that it could generate as additional revenue from the date of the disclaimer until the end of October, 2020, based on certain assumptions.

[116] BP concedes that its damages claim is based on this estimate. However, that estimate must be reduced by the fact that Bellatrix did not realize any revenues for its natural gas after the sale of its assets closed on June 1, 2020.

[117] I agree with Bellatrix and the First Lien Lenders that benefits to Bellatrix of the disclaimer do not necessarily equate to BP's entitlement to damages. BP has not provided any evidence of its actual damages relating to the disclaimer of or non-performance under the GasEDI Agreement, taking into account any mitigation BP would have been able to obtain by entering into other arrangements for the purchase of natural gas or otherwise.

[118] Therefore, the claim remains an unliquidated unsecured claim.

V Conclusion

[119] The First Lien Lenders are entitled to a declaration that they have a first priority interest in all the property of Bellatrix, including the December payment held in trust and funds held back from the sale of assets. Any amounts owing to BP are an unsecured claim. The Monitor is authorized to make a further distribution to the Agent in the amount of approximately $28.9 million, the exact amount subject to its final calculations.

[120] BP's cross-application is dismissed.

Dated at the City of Calgary, Alberta this 22nd day of December, 2020.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Kelly Bourassa and James Reid
for National Bank of Canada, as Agent

Robert J Chadwick and Caroline Descours
for Bellatrix Exploration Ltd.

Howard A Gorman, Q.C. and Gunnar Benidiktsson
for BP Canada Energy Group LLC

Joseph G.A. Kruger, Q.C. and Robyn Gorofsky
for the Monitor Pricewaterhousecoopers Inc.