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COURT FILE NUMBER	2001-05630
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
APPLICANTS	**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 DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC, and DOMINION FINCO INC.**
DOCUMENT	**REPLY BENCH BRIEF OF THE APPLICANTS** **June 19, 2020 Hearing - continuation of hearing commenced May 29, 2020** **SECOND AMENDED AND RESTATED INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BLAKE, CASSELS & GRAYDON LLP** Barristers and Solicitors 3500 Bankers Hall East 855 – 2nd Street SW Calgary, Alberta T2P 4J8 Attention: Peter L. Rubin / Peter Bychawski / Claire Hildebrand / Morgan Crilly Telephone No.: 604.631.3315 / 604.631.4218 / 604.631.3331 / 403.260.9657 Email: peter.rubin@blakes.com / peter.bychawski@blakes.com / claire.hildebrand@blakes.com / morgan.crilly@blakes.com Fax No.: 604.631.3309

PART I – INTRODUCTION

1. This Bench Brief is submitted on behalf of Dominion (the CCAA Applicants) in reply to the affidavit of Mr. Hoff (dated June 17, 2020) tendered by the Ad Hoc Noteholder Group, the affidavit Mr. Quinlan (dated June 16, 2020) and bench briefs of the noteholder parties (both the Ad Hoc Group and the Trustee) and DDMI.

2. The bench brief of DDMI was not served until midday on Wednesday June 17 and the material of the Ad Hoc Noteholder Group and Trustee were not served until late in the evening on Wednesday June 17. Given the time constraints, these reply submissions are brief.

3. The submissions are divided into four parts: (a) DDMI; (b) the Affidavit of E. Hoff and Noteholder Factual Issues; (c) Noteholder Legal Objections; and (d) Quinlan Objections.

A. DDMI

4. The DDMI affiant, Mr. Croese, references a confidential Exhibit #1 in his affidavit sworn with respect to this hearing.[1] This exhibit that DDMI has created does not tell the whole story. The exhibit has been prepared without reference to the applicable cash calls and dates of diamond deliveries that demonstrate the full picture.

5. Mr. Croese references the Diavik JVA Cover Payments made by DDMI to date ($51M by June 12), estimates further Diavik JVA Cover Payments that may be made to the end of October 2020 ($54M) and then references the two diamond delivery dates of May 20 and June 10 and the value of the diamonds related to those two deliveries.

6. What is missing are the following facts:[2]

   (a) the June 10 diamond delivery is only for the diamond production period ending May 27 (not June 10);

   (b) there are seven (7) more diamond delivery dates between now and October 2020; and

[1] Affidavit of T. Croese dated June 16, 2020 ("**Croese Affidavit**"), para. 22.

[2] Affidavit of K. Kaye dated May 6, 2020, Confidential Exhibits 4 – 5.

(c) the Diavik JV cash calls are highest in March, April and May and then drop off by 50% to 65% in the six (6) months from June to December (but as noted above there is continued diamond delivery).

7. As such, cash calls drop dramatically and diamond deliveries continue.

8. With respect to DDMI's security, it is not the case that DDMI's sole source of recovery will be the diamonds withheld by DDMI during the CCAA proceedings. DDMI will retain its rights or lien under the Diavik JVA including those rights in its joint venture partner's 40% interest in the Diavik Mine.

9. Through its proposed changes to the SISP, DDMI is trying to foreclose possible outcomes. It is asking this Court to prejudge issues now without the benefit of the facts, evidence, and full legal argument. This is neither right nor appropriate in the circumstances.

10. DDMI argues that paragraph 22(c) of the SISP (which the Applicants have deleted) "is required by the CCAA".[3] The Applicants support the Monitor's proposed revisions to paragraph 22(c) of the SISP. Whether or not the outcome DDMI desires in 22(c) is mandated by the CCAA on a sale or assignment motion is irrelevant at this stage. DDMI may or may not be correct. However, that argument is properly dealt with at the appropriate time (as noted above) and not on this application. Issues such as this should not be prejudged today. Further, if DDMI is correct that such a paragraph is required by the CCAA, then the language is not needed in the SISP.

11. DDMI states that it should be entitled to keep the "entirety" of Dominion's diamonds even if the value of those diamonds exceeds the Diavik JVA Cover Payments. This is another example of DDMI's changing position and their continual asking for "more". The Monitor also does not support this ask by DDMI.

12. When DDMI first brought their application to be permitted to hold diamonds at the May 8 hearing, they sought an order that "DDMI be and is hereby authorized to hold an amount of Dominion Diamond's share of production from the Diavik Mine equal to the total value of JVA Cover Payments made by DDMI."[4] Now that Dominion has agreed to that language, DDMI asks for more – they want to keep the entirety of Dominion's diamonds.

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[3] Bench Brief of DDMI for June 19, 2020 hearing, para. 9.

[4] Tab 1 of Bench Brief of DDMI for May 8, 2020 hearing, Tab 1, para. 19.

13. DDMI makes the statement – in response to Dominion's and other stakeholders' questions about why DDMI should be over-collateralized and entitled to keep diamonds over and above the amount of the Diavik JVA Cover Payments – that there is no explanation as to why Dominion "needs to take possession in a circumstance where it has no capacity to monetize".[5] This response miscasts the issue. These are Dominion's diamonds, not DDMI's. Furthermore, there may be an ability to monetize the diamonds – that is an unknown.

14. DDMI's assertion that Dominion only adopted the position that DDMI had wronged Dominion "after taking offence" to DDMI's position with respect to the Restructuring Proposal is factually incorrect.[6] On April 27, 2020, well before the May 29 hearing, Dominion wrote a detailed letter to DDMI outlining the DDMI "wrongs".[7]

B. THE AFFIDAVIT OF E. HOFF AND NOTEHOLDER FACTUAL ISSUES

15. The affidavit of Mr. Hoff tendered by the Ad Hoc Noteholder Group should be viewed with care. In most respects the affidavit reads like a lawyer's bench brief making arguments rather than offering factual evidence that could be considered by the Court.

16. Most notably, Mr. Hoff's affidavit should be read in the context of, and be compared to, the affidavits of:

(a) Mr. Startin and his eighteen (18) years of direct corporate advisory and metals and mining practice experience as a senior Managing Director with Evercore, who is responsible for Evercore's global metals, minerals, and mining practice and has previously held the role of Managing Director and head of Metals and Mining with Goldman Sachs; and

(b) Mr. Bell and his direct experience in the Northwest Territories, including with the government and in private industry with diamond mines and his direct prior experience with sales transactions involving the very assets in issue.

[5] Bench Brief of DDMI for June 19, 2020 hearing, para. 22.
[6] Bench Brief of DDMI for June 19, 2020 hearing, para. 22.
[7] Croese Affidavit, Exhibit "C".

17. Mr. Hoff criticizes Dominion for using its time since the hearing on June 3 to advance the Stalking Horse APA, Interim Financing Term Sheet, and SISP.[8] That criticism is also misplaced.

18. On June 5, Dominion and the Monitor spoke with the Ad Hoc Noteholder Group's counsel. Dominion advised that if the Ad Hoc Noteholder Group intended to make a proposal to the Applicants, whether it be their own interim financing proposal, sales investment and solicitation process, stalking horse bid or any other proposal, they should do so as soon as possible to allow the company to consider it. At the time, Dominion had a Friday June 12 filing deadline. Notwithstanding the above, and notwithstanding the fact that the Stalking Horse Bid was served on May 21, 2020, the Ad Hoc Noteholder Group did not provide any proposal to Dominion (whether it be a different stalking horse bid, interim financing proposal, or sales process proposal). On the evening of June 17, the Ad Hoc Noteholder Group finally proposed an interim financing proposal but not a sales proposal. There is no proper criticism of the company.

19. The Hoff Affidavit makes the following notable statements:

(a) Mr. Hoff criticizes the provision in the Stalking Horse Bid that provides that the Stalking Horse Bid does not "automatically" terminate if the financing condition is not met. Instead, the Dominion Vendors have the right to terminate with the consent of the First Lien Lenders. That is a protection mechanism "for" Dominion – to force the Stalking Horse Bidder to continue to have to make commercially reasonable efforts to satisfy their condition – at the company's and First Lien Lenders option if it is determined that this is of benefit.[9]

(b) Mr. Hoff says the Rio Condition creates uncertainty. As noted previously, this condition must be satisfied or waived by July 31 and prior to the Phase II Bid Deadline. As also noted previously, it is likely any purchaser will need this type of flexibility.[10]

(c) Mr. Hoff adopts a tortured reading of the Stalking Horse APA to suggest that the Stalking Horse Bidder will not make available the US $20 million amount for cure costs and will not assume any contracts. The Stalking Horse Bidder has an obligation to make those funds available and the suggestion that a buyer will buy

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[8] Affidavit of E. Hoff sworn June 17, 2020, ("**Hoff Affidavit**"), para. 17.
[9] Hoff Affidavit, para. 22(a).
[10] Hoff Affidavit, para. 22(b).

this asset and not take any operational contracts makes no commercial sense and is specious.[11]

It is also odd that on the one hand the Ad Hoc Noteholder Group complains that on their reading of the Stalking Horse APA, the Stalking Horse Bidder may not make “any” of the $20 million available and might make no cure payments – then on the other hand complains about the fact that cure costs are being paid to unsecured trade creditors who rank in priority below them.

(d) Mr. Hoff complains that the Stalking Horse APA provides that substantially all employees are to be retained. He complains because it might not be 100% and so there is “uncertainty”.[12]

20. Mr. Hoff then sets out the following further complaints:

(a) Mr. Hoff says that there will be a break fee “if the Company selects a different transaction”.[13] This not accurate. The break fee is payable only if both the Rio Condition and the Financing Condition are waived or satisfied by July 31 and there is a superior transaction.

(b) Mr. Hoff complains about the potential (as it is only a possibility as noted above in (a)) that other bidders may have to bid $5.8 million more than the Stalking Horse Bid.[14] Is that really a problem in the context of the Ad Hoc Noteholder Group holding $550 million of notes? Are the noteholders really worried that the potential overbid requirements might force a purchaser to pay this amount more than the Stalking Horse Bid? Are the noteholders really trying to protect the ability of another bidder to pay only, for example, $3 million more than the Stalking Horse Bid?

(c) Mr. Hoff says that the Stalking Horse Bidder “would gain a huge head start in conducting due diligence” and that “it could gain immediate access to critical business partners which other bidders might not have until much later in the SISP

[11] Hoff Affidavit, para. 22(c).
[12] Hoff Affidavit, para. 22(d).
[13] Hoff Affidavit, para. 23(a).
[14] Hoff Affidavit, paras. 23(a) and 35(b).

process".[15] That is not factually accurate. The SISP, including paragraphs 9, 10, 11 and 41(c), gives all bidders the same access and information as the Stalking Horse Bidder. This protection is built directly in the SISP.

21. All the above are examples of Mr. Hoff trying to throw whatever he can at the wall in the hopes that something sticks. Mr. Hoff goes so far as to state that in his view "psychology often works in favour of the stalking horse bidder"[16] as support for the proposition that the Stalking Horse Bid should be rejected.

22. Mr. Hoff also asserts that there needs to be far better checks and balances and says that no one driving the process is incentivized to seek a higher and better price.[17] Those statements ignore the professional qualifications and reputation of Evercore, Mr. Bell, the Applicants generally and, in particular, the Monitor, who is directly involved in all aspects of the SISP.

23. The Ad Hoc Noteholder Group has said they are going to bid on the Applicants' assets. They can clearly do so under the SISP and so it is fully within their control if they want to own these assets. When they do bid, they can decide whether to disclaim all contracts and not pay any amounts to pre-filing trade as part of their bid. They can also decide whether to decline to take on any employee plans or benefits such as pension plans.

24. There appears to be a suggestion in the various material filed by the Ad Hoc Noteholder Group and the Trustee (as well as Mr. Quinlan) that all is well with Dominion's business but for COVID-19. As noted in the material filed in support of the company's application for CCAA protection, Dominion has a highly levered capital structure. Even before COVID-19, Dominion has lost significant amounts of money since it was purchased in 2017. As shown in the financial statements filed on the initial application for CCAA protection, Dominion lost $62 million in 2019 and $270 million in 2018.[18]

25. In 2020, Dominion was insolvent. As compared to 2017, the current state of the company is as follows:

(a) Dominion lost a combined $332 million in 2018 and 2019;

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[15] Hoff Affidavit, para. 23(b).
[16] Hoff Affidavit, para. 23(d).
[17] Hoff Affidavit, para. 25.
[18] Affidavit of K. Kaye dated April 21, 2020, Exhibit "D" (Consolidated Statement of Loss).

(b) the Ekati Mine is on care and maintenance and not operating;

(c) the company runs out of money next week and currently has no ability to make Ekati Mine care and maintenance payments without a new money investor, and significant interim financing is required just to keep it on care and maintenance in the meantime;

(d) Dominion has stopped making, and has no ability to make, its cash calls with respect to the Diavik Mine, some of which are being made by DDMI; and

(e) Dominion Diamond is insolvent and is in CCAA protection with significant prepetition arrears.

26. Against that backdrop, it is reasonable to assume that the company is not now worth what it once was. It is also worth noting that the noteholders have not put any evidence whatsoever before the Court as to what they say the value of the company is. The speculation is simply that it should be worth more now because it was once worth more before it filed for insolvency protection.

C. NOTEHOLDER LEGAL OBJECTIONS

27. The Trustee takes issue with the Stalking Horse APA on the grounds that it results in an "unprecedented reordering of the priorities under Canadian insolvency law."[19] With respect, it is the Trustee's opposition to a standard occurrence in CCAA sale transactions that is unprecedented.

28. The Trustee's objection is premised on there being something improper about the Second Lien Lenders' position in the following hypothetical circumstances:

> The closing of the transactions contemplated by the Stalking Horse Term Sheet would therefore see: (i) the Applicants' equity holders (indirectly through their affiliates in the Equity) maintain ownership of substantially all of the assets of the Applicants; (ii) the Interim Lender paid in full; (iii) the significant fees of the professionals engaged by all parties paid in full; (iv) the Senior Lenders and their counsel paid in full; (v) the liabilities of unsecured creditors being assumed by the Stalking Horse Bidder (and presumably paid in full); and (vi) the interest of the

[19] Bench Brief of the Trustee for June 19, 2020 hearing, para. 17.

second lien Noteholders being extinguished in the amount of approximately CAD $800,000,000.

29. The Trustee's position that there is something unusual, let alone "patently unfair" or "unprecedented", about the potential outcome of the closing of the transaction contemplated by the Stalking Horse APA is not supportable at law.

30. ***First***, the Trustee acknowledges the "uncontroversial position" that a bidder can elect to assume certain unsecured obligations, while excluding other unsecured obligations.[20] However, the Trustee appears to take the view that this "uncontroversial position" applies only in the context of a third-party bid, and not where the current equity holder is advancing the transaction. There is no basis for this distinction.

31. The status of the Stalking Horse Bidder as an equity holder in and related party to these CCAA Applicants does not violate any provision of the CCAA or any commercial norms. This is not a case where a payment is proposed to be made to holders of equity claims in circumstances where non equity claims have not been paid in full contrary to section 6(8) of the CCAA. There is no basis in the text of the CCAA or the applicable case law to refuse to approve the SISP and Stalking Horse APA on this basis. To the contrary, the text of the CCAA and applicable case law expressly authorizes the sale of assets in the context of the CCAA to "insiders" and "related parties."[21]

32. Moreover, the negotiations of this transaction contemplated by the Stalking Horse APA have lasted approximately two (2) months. The negotiations have involved consultation with the Monitor, and some have played out before this Court. Washington has made concessions in the context of these discussions in the form of SISP and Interim Financing Term Sheet and the Monitor has proposed its own forms of the SISP and Second ARIO that consider the concerns of stakeholders. The result of this process has been a transaction that is supported by the Applicants, Dominion Diamond's Independent Director, the Monitor, Evercore, the First Lien Lenders, and other parties in interest. This process has not been collusive.

33. Neither the text of the CCAA, the case law, or commercial practice suggest that there is anything unusual or improper regarding the type of transaction contemplated by the Stalking Horse APA. The Trustee's assertion that "insider" stalking horse bids are "extraordinarily rare in

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[20] Bench Brief of the Trustee for June 19, 2020 hearing, para. 23.

[21] See section 36(4) of the CCAA.

Canada" is not supported by any authority. There is no indication that the court approving such a bid in *Brainhunter* considered it to be unprecedented.[22] As another example, the Trustee's own brief cites to the precedent of the CCAA proceedings of Signature Aluminum Canada Inc., where the court approved a credit bid from a related party to the equity holder as a stalking horse bid offer at the initial application stage.[23] No examples have been cited by the Trustee to suggest that a proposed stalking horse bid has been rejected by any court for the reasons raised by the Trustee.

34. In any event, the SISP will be carried out with the oversight of the Monitor and if the Stalking Horse APA is the successful bid it will be subject to additional scrutiny by this Court at the approval hearing, at which the factors applicable to sale transactions to related persons can be assessed.

35. ***Second***, there is nothing improper or unfair about an interim lender being paid in full in priority to secured creditors such as the Second Lien Lenders. Section 11.2 of the CCAA expressly provides that this Court may order that the Interim Lenders' Charge rank in priority over the claims of the Second Lien Lenders and any other secured creditor.

36. ***Third***, there is nothing improper or unfair about the fees of professionals having the benefit of a court-ordered charge being paid in full in priority to the claims of secured creditors such as the Second Lien Lenders. Section 11.52 of the CCAA expressly provides that this Court may order that fees of professional advisors rank in priority over the claims of the Second Lien Lenders and any other secured creditor.

37. ***Fourth***, while the authorities on priorities law cited by the Trustee provide correct statements of the law in the context of the issue of how to determine the allocation of liquidation proceeds among various classes of creditors, they have no application to a proposed sale transaction.

38. In the context of the approval of a CCAA *sale process*, one question before the court is whether the proposed sale will benefit the whole "economic community,"[24] with broader issues of whether such sale satisfies the CCAA section 36 sale approval criteria being the proper subject

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[22] *Brainhunter Inc. (Re)* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 11 [*Brainhunter*].

[23] Tab 1 of Bench Brief of the Trustee for June 19, 2020 hearing, footnote 23.

[24] Bench Brief of the Applicants for May 29, 2020 hearing, para. 58, citing *Nortel Networks Corp (Re)*, 2009 CarswellOnt 4467 (S.C.J.), paras. 47-58 and *Brainhunter*, para. 13.

of an approval hearing. The Trustee's suggestion that this Court should focus its analysis of the proposed SISP and Stalking Horse APA on the rigid scheme of priorities that governs the distribution of liquidation proceeds rather than the benefit that the proposed sale process will have on the community of Dominion's stakeholders turns the purpose of the CCAA on its head.

39. Far from being "unprecedented", this very Court approved a sale transaction in the CCAA proceedings of *Bellatrix* less than one month ago that provided no recovery for approximately $290 million of secured debt obligations but nevertheless resulted in the payment or assumption of substantial unsecured obligations relating to assumed contracts, cure costs, and environmental and reclamation obligations. As noted by Hollins J., the transaction at issue in *Bellatrix*:

> […] would produce sufficient funds to pay the *CCAA* priority charges and a substantial portion of the first lienholder notes, as well as providing for the assumption of other contractual and statutory obligations. It would not be sufficient to pay the entire first lienholder debt and would leave nothing for the second or third lien note holders.[25]

40. Consistent with the purpose of the CCAA and the factors set out in section 36 of the CCAA, this Court in *Bellatrix* focused its analysis on the effects of the proposed sale or disposition on the creditors and other interested parties, rather than on narrow priority-based issues advanced by the Trustee. Specifically, while recognizing that creditor interests are important considerations when approving a sale, this Court approved the transaction before it notwithstanding that such approval would provide benefits to unsecured creditors, employees, and other stakeholders in circumstances where certain of the debtor's secured lenders would not receive any recovery:[26]

> The Spartan Bid will see the first lien noteholders paid a portion of their outstanding debt but not all. The second and third lien noteholders will receive nothing […]
>
> The Spartan Asset Purchase Agreement obligates Spartan to assume the obligations and liabilities, except relating to excluded assets. This will include environmental liabilities, as well as employment, regulatory and contractual obligations. The parties represented at the approval hearing included various contracting parties and regulators, all of whom supported the Spartan Bid. While they cannot be assumed to be overly concerned about which of Bellatrix's creditors receive payment, it is important to remember that these other stakeholders do represent the beneficiaries of a sale of the company as a going

[25] *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 332 [*Bellatrix*], para. 2 [Tab 1].

[26] *Bellatrix*, paras. 59-62.

> concern. From an overarching economic view, keeping contracts intact and people employed is a significant and positive factor.
>
> It is axiomatic that considering someone's interests is not the same thing as satisfying those interests. I accept the submissions of Bellatrix, the Monitor, BMO and the other parties supporting the Spartan bid that the interests of all parties and particularly the creditors were considered. [Emphasis added]

41. In other words, a month ago this very Court approved an outcome that the Trustee states to be "unprecedented in Canadian law."

42. This Court's decision in *Bellatrix* is by no means novel. In *Re Nelson Education Limited*,[27] the Ontario court approved a credit bid transaction by the first lien lenders that provided no recovery for approximately $200 million owing to second lien lenders. The transaction provided for "the assumption by the purchaser of substantially all of Nelson's trade payables, contractual obligations and employment obligations incurred in the ordinary course and as reflected in its balance sheet […]"[28]. In approving the relevant transaction, the court noted:

> The positive effect is that all ordinary course creditors, employees, suppliers and customers will be protected. The effect on the second lien lenders is to wipe out their security and any chance of their loans being repaid. However, apart from their being deemed to have consented to the sale, it is clear the second lien lenders have no economic interest in the Nelson assets except as might be the case some years away if Nelson were able to improve its profitability to the point that the second lien lenders could be paid something towards the debt owed to them. RBC puts this time as perhaps five years and it is clearly conjecture. The first lien lenders however are not obliged to wait in the hopes of some future result.[29]

43. Ultimately, affording a measure of discretion to a purchaser to assume some liabilities and not others allows a purchaser to address the needs of employees, suppliers, pensioners and social stakeholders that are important, in its judgment, to the ongoing function of the business. If it could not do so, unless and until it paid all prior ranking creditors, the purchaser would be placed in a judicial straight jacket where it is proscribed from taking the steps necessary to secure needed ongoing services and supplies.

44. No one is suggesting that this Court does not have a supervisory role in connection with the discretion exercised by the purchaser and it is free for any stakeholder to object at the sale

[27] *Nelson Education (Re)*, 2015 ONSC 5557 [*Nelson Education*] [Tab 2].

[28] *Nelson Education*, para. 21(b)).

[29] *Nelson Education,* para. 38(e).

hearing. The Court is ultimate arbiter of whether a proposed sale is fair and reasonable and should be approved. To suggest, however, at the solicitation stage that it should be disqualifying for a purchaser to propose to comply with Section 11.3(4) of the CCAA and state that it wishes to assume certain liabilities, while forgoing others, would lead to a commercial absurdity.

45. Each of the four points referenced above are grounded in the text and purpose of the CCAA. The thrust of the Trustee's submissions with respect to them turns solely on the addition of what is clearly intended to be a pejorative prefix of "insider" to the Restructuring Proposal before this Court. The Trustee's position is that the use of this "insider" prefix can convert four outcomes that, taken individually, are proper and routine in CCAA proceedings into a breach of fundamental norms of insolvency law when taken collectively. This approach is not logical, not grounded in the purpose or text of the CCAA, and not supported by the case law. It should be rejected.

46. Stepping back, if the Trustee's argument were to be accepted by this Court, and the Second Lien Lenders could not be repaid in full, then its logical conclusion would be that any purchaser of the Applicants' assets must:

(a) Not assume any pre-filing employee obligations.

(b) Not assume any financial obligations under the Applicants' collective bargaining agreement or pension plan (thereby immediately crystallizing and stranding the significant pension plan deficiency).

(c) Not assume any environmental or reclamation obligations.

(d) Not assume any agreements with the Applicants' suppliers or business partners that have pre-filing arrears, even though payment of such arrears is expressly required in connection with any assignment of such contracts pursuant to section 11.3 of the CCAA.

47. The result of the Trustee's position would be the social and economic devastation associated with bankruptcy that restructurings under the CCAA are intended to prevent.

D. QUINLAN OBJECTIONS

48. Mr. Quinlan worked for Dominion for 16 months. He was paid an annual salary of $400,000 plus various benefits including a bonus and long-term incentive plans. As set out in the

material filed by Mr. Quinlan, he also received a total of $2,148,931 upon closing of the transaction with Washington.[30]

49. Mr. Quinlan's claim in these proceedings is with respect to the payment of $1.25 million arising from a settlement agreement entered into in connection with a wrongful termination action. The timing of Mr. Quinlan's settlement is unfortunate in the context of these proceedings because he was not paid prior to Dominion's filing for CCAA protection. However, Mr. Quinlan's unfortunate position is no different than what happens in many, if not most, insolvencies. Creditors who are owed money have outstanding claims. In the present case, there are approximately $39 million of pre-filing trade related payables. Mr. Quinlan is not alone in that those obligations were similarly not paid prior to Dominion's CCAA filing.

50. What if there had been no settlement with Mr. Quinlan in March 2020? Would anything be different for Mr. Quinlan? The answer is no – the litigation would have continued until trial, which would have been held at a future date. The claim would still be an unsecured one. Mr. Quinlan's settlement simply crystallized his claim amount.

51. Mr. Quinlan's legal objection to Stalking Horse Bid before this Court is that, "with respect to unsecured creditors, it is unfair that many will receive full payment [were the Stalking Horse Bid to be the successful bid] while others receive nothing for past debts which rank equally at law."[31]

52. The Applicants would of course prefer that the outcome Mr. Quinlan complains about not occur and that all their creditors be paid in full – but the Applicants do not control what potential purchasers will pay for the business or what liabilities they may assume.

53. Mr. Quinlan's statement that almost all creditors will be getting close to 100% and he will be paid nothing is also not accurate.

54. Mr. Quinlan's suggestion that the Applicants are not in financial difficulty and they can simply wait matters out is also not borne out by the facts. His statement in relation to positive "cash flow from operating activities" does not account for a variety of expenses and costs that must be paid from that top line number.[32]

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[30] Affidavit of M. Quinlan sworn June 16, 2020 ("**Quinlan Affidavit**"), Exhibit "C", para. 49.
[31] Quinlan Affidavit, para. 24.
[32] Quinlan Affidavit, para. 23.

55. What is clear is that since this business was purchased in 2017, Dominion has lost significant amounts of money. As shown in the financial statements filed on the initial application, Dominion lost $62,000,000 in 2019 and $270,000,000 in 2018. In 2020 they were insolvent.[33]

56. In any event, Mr. Quinlan's legal objection that, "with respect to unsecured creditors, it is unfair that many will receive full payment while others receive nothing for past debts which rank equally at law" has no application to either this application or the sale of assets under the CCAA.

57. While there is no issue that it is a fundamental tenet of insolvency law that in the context of the allocation of liquidation proceeds all unsecured creditors are to receive equal treatment with their debts being paid *pari passu*, unsecured creditors can not prevent a company from restructuring on the basis that they must get paid or else there can be no sales process and sale of the business. That is simply not how the process works.

58. As noted in the case of *Grafton-Fraser v. Cadillac* (in a case dealing with the approval of a sale, not a sale process):[34]

> […] <u>in the context of the sale of a company's business under the CCAA, there is no requirement that creditors be treated equally</u>. That is not to say that their interests are to be ignored. Rather, the effects of the proposed sale on the creditors are one of the factors that must be considered. But they are considered in the larger context of the proposed sale and weighted against the other above noted factors, including the interests of the debtor and the stakeholders generally.
>
> The above principle was applied in *Re Nelson Education Ltd.*, 2015 ONSC 5557, 29 C.B.R. (6th) 140 (Ont. S.C.J.) where Newbould J., in approving a sale of substantially all of Nelson's assets pursuant to a credit bid pursuant to the CCAA, noted at para. 39 that while there were some excluded liabilities and a small amount owing to former employees that would not be paid, the monitor indicated there was no reasonable prospect of any alternative solution that would provide recovery for those creditors.

59. As with the priority-based objections of the Trustee, Mr. Quinlan's concerns with the Stalking Horse APA, which should only be considered in the context of an approval hearing, must ultimately be weighed against all the other relevant factors supporting the granting of the relief sought by the Applicants, including the evidence that the Stalking Horse Bid contemplates the continued employment of nearly all of Dominion's employees and the maintenance of a business

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[33] Affidavit of K. Kaye dated April 21, 2020, Exhibit D (Consolidated Statement of Loss).

[34] *Grafton-Fraser v Cadillac*, 2017 ONSC 2496, paras. 23-24 [Tab 3].

partner to the significant number of companies, First Nations, and local communities who conduct business with Dominion is a significant benefit to those who depend on Dominion's business operations for their livelihoods and economic well being.[35]

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th DAY OF JUNE, 2020

BLAKE, CASSELS & GRAYDON LLP

Peter Rubin / Peter Bychawski /
Claire Hildebrand / Morgan Crilly
Counsel of the Applicants

[35] Affidavit of Brendan Bell, sworn May 21, 2020, para. 39.

TAB 1

2020 ABQB 332
Alberta Court of Queen's Bench

Bellatrix Exploration Ltd., Re

2020 CarswellAlta 966, 2020 ABQB 332

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

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

M.H. Hollins J.

Heard: May 7, 2020
Judgment: May 21, 2020
Docket: Calgary 1901-13767

Counsel: Robert J. Chadwick, Caroline Descours, Andrew Harmes, for Bellatrix Exploration Ltd
Sean F. Collins, for Winslow Resources Inc.
Tom Cumming, Caireen Hanert, Warren Foley, Ram Sankaran, for Yangarra Resources Ltd.
Kelly Bourassa, James Reid, Peter Bychawski, for First Lien Lenders
Michael Hanlon, Adam Maerov, Kourtney Rylands, for U.S. Bank National Association, in its capacities as Second Lien Notes Trustee and Third Lien Notes Trustee
Ed Halt, for First Lien Lenders
Josef G. A. Kruger, Robyn Gurofsky, for Monitor
Maria Lavelle, for Alberta Energy Regulator
Howard A. Gorman, Q.C., Gunnar Benediktsson, for BP Canada Energy Group ULC
Guy Martel & Danny Vu, for EIG/KKR
Michael Shakra, Kevin J. Zych, Chris Simmard, Kristopher Hanc, for Ad Hoc Committee of Second Lien and Third Lien Noteholders
Alexis Teasdale, Karen Dawson, for Bull Moose Capital Ltd.
Randal Van de Mossalaer, Emily Paplawski, for Keyera Patrnership
Brad Angove, for Nelson Brothers Oilfield Services 1997 Ltd. and Gen7 Environmental Solutions Ltd.
Joseph Reynaud, Leland Corbett, for Stream Asset Financial Lumos LP, by its General Partner Stream Asset Financial Lumos Corp
Kelsey Meyer, for SCCP Ferrier Facility LP
Louis Belzil, for Jo-Anne Reynolds
Shane King, for Bidell Gas Compression
Marian Baldwin Fuerst, for Delaware Trust Company
Mikkel Arnston, for Thomas Group Inc.
Jennie Buchanan, Frankie Deni, for Mark Stephen
Christa Nicholson, Andrew MacGregor, for TAQA North Ltd
Colin Feasby, for Bank of Montreal
Jordan Milne, Lori Williams, for Indian Oil and Gas Canada (IOGC)
Jeffrey Poole, Ian Carruthers, for O'Chiese First Nation

Subject: Insolvency
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s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 36(3) — considered

APPLICATION for approval of asset purchase agreement.

***M.H. Hollins J.*:**

1 Bellatrix Exploration Ltd. is an oil and gas company involved in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36 (*CCAA*). It has been soliciting offers to purchase its assets or shares over approximately the last six months. On Thursday, May 7, 2020, I heard Bellatrix' application for an Order approving the Asset Purchase Agreement it signed with Winslow Resources Inc. on April 22, 2020. Winslow's offer was backed by its parent company, Return Energy Inc. doing business as Spartan Delta Corp. For consistency with other material filed in this Action, that purchaser is referred to herein as Spartan.

2 The Spartan Asset Purchase Agreement, if approved, would produce sufficient funds to pay the *CCAA* priority charges and a substantial portion of the first lienholder notes, as well as providing for the assumption of other contractual and statutory obligations. It would not be sufficient to pay the entire first lienholder debt and would leave nothing for the second or third lien note holders.

3 The application to approve was opposed by a group of creditors holding the majority of the second lien notes of Bellatrix, namely FS/EIG Advisor LLC and FS/KKR Advisor LC (EIG/KKR), as well as the remaining minority of second lien noteholders, separately represented.

4 EIG/KKR cross-applied for an adjournment of Bellatrix' application for a period of just less than 3 weeks in order to put an alternative, and in their opinion, better offer before the Court. The adjournment application was opposed by all the parties supporting the Spartan bid, namely Bellatrix, the Monitor PricewaterhouseCoopers Inc. (PWC), the first lien noteholders and their lenders, the prospective purchaser and by numerous other parties with which Bellatrix does business.

5 I dismissed EIG/KKR's application for the adjournment and approved the Spartan Asset Purchase Agreement. I provided brief oral reasons on May 8, 2020 with these written reasons to follow.

Background

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6 Bellatrix Exploration Ltd. is a Calgary-based oil and gas company with assets in Saskatchewan, Alberta and British Columbia. Its President/Chief Executive Officer deposed to a number of market conditions which have depressed commodity prices and created uncertainty in the market, resulting in Bellatrix seeking *CCAA* protection. An Initial Order under the *CCAA* was granted on October 2, 2019. That was quickly followed by the Order approving the Sales and Investment Solicitation Process (SISP) on October 9, 2019.

7 The first phase of the SISP was to solicit non-binding expressions of interest in the purchase of the assets or shares of Bellatrix. From those received, Bellatrix and the court-appointed Sale Advisor, Bank of Montreal Capital Markets (BMO), would then select parties to participate in second phase, during which those parties would complete their due diligence and formulate binding bids.

8 Under the SISP, Phase I ran to November 13, 2019. The parties proceeding to Phase II were to submit binding bids by a date to be chosen by the Bellatrix, called the Binding Bid Deadline (ultimately February 6, 2020). The SISP required Binding Bids to be, *inter alia*, irrevocable and accompanied by an irrevocable financial commitment from any entity financing a particular bid.

9 Bellatrix' existing creditors were also entitled to participate in the sales process. These creditor bidders were not required to participate in Phase I of the SISP and in fact were not required to submit their bid by the Binding Bid Deadline. They were entitled to be advised whether any third-party bids being considered would be sufficient to pay out the Secured Notes (defined as the first, second and third lien noteholders collectively) and to receive detailed information about any such third-party bids.

10 Bellatrix and the Monitor were permitted, but not required, to consult with any bidders, including the potential creditor bidders, after the Binding Bid Deadline. Subject to consulting with the Monitor, Bellatrix retained discretion to reject any bid, regardless of compliance with the SISP.

11 The second lien noteholders had negotiated some provisions into the SISP to protect their position in the bidding process. One, referred to above, was their ability to submit bids after the third-party bidding was concluded. A second advantage was their ability to include the value of their debt as part of an offer. However, any credit bid was still required to have any financing firmly in place. The language of Clause 13 of the SISP is as follows:

> For certainty, a Potential Credit Bidder shall provide written evidence of all required funding or financing to advance the cash consideration necessary to satisfy such priority payments and the New Money Notes [defined in the second note indenture] in full in cash or otherwise assume such obligations in full, and that any such credit bid shall not be conditional upon obtaining financing, acceptable to each of the Sale Advisor and the Monitor in their sole discretion.

12 EIG/KKR had indicated as early as December of 2019 that they might participate in the bid process, depending on the extent to which the Binding Bids received addressed their financial interests.

13 Bellatrix received no qualifying Binding Bids by February 6, 2020 but, along with BMO and the Monitor, continued to consult with interested parties, including EIG/KKR. The resulting bid from Spartan was to purchase substantially all Bellatrix' oil and gas assets for $87,357,000 (the Spartan Bid). This would pay all amounts owing under the Key Employee Retention Plan (KERP) approved in the Initial Order, all priority charges of BMO, the Monitor, the Bellatrix Directors and the Interim Financing (as described in paragraph 42 of the Initial Order) and a substantial portion of the first lien noteholders' debt, which totaled approximately $90M.

14 On March 10, 2020, the Monitor advised EIG/KKR that the bid under consideration would not generate any payment to them as it was not likely to completely pay out the first lien noteholders. The second lien noteholders held approximately $197M in debt and the third lien noteholders approximately another $66M. Beginning April 1, 2020, counsel for EIG/KKR and for Bellatrix began to trade mark ups of the EIG/KKR proposal.

15 On April 13, 2020, EIG/KKR submitted a draft term sheet proposing a purchase backed by financing from the First Lien Lenders (a syndicate of National Bank, Canadian Western Bank and Alberta Treasury Branches), which financing would

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be replaced within 12 months of closing, plus some new cash from the second lien noteholders. On April 20, 2020, a revised term sheet was provided by EIG/KKR which replaced the reference to financing from the First Lien Lenders to financing from unidentified third-party lenders with whom EIG/KKR was "in discussions". At some later point, a company name was inserted in that part of the EIG/KKR term sheet but by the time of this application, that had changed again and CIBC was the proposed financier of the EIG/KKR offer.

16 After receipt of the third version of the non-binding bid of EIG/KKR on April 20, 2020, the Board of Directors of Bellatrix met to consider their options. They voted to approve the Spartan Bid and on April 22, 2020, signed the Asset Purchase Agreement, subject to the court approval now sought.

Adjournment

17 The request of EIG/KKR for an adjournment was intertwined with its objection to Bellatrix' approval of the Spartan bid. The additional time requested was for the purpose of finalizing its offer so that it could be more fairly considered alongside the Spartan Bid. By the time of the court application, EIG/KKR confirmed that it was in discussions with Westbrick Energy Ltd, a local oil and gas operator owned mostly by EIG/KKR, about participating in the EIG/KKR bid. It was submitted that, even with financing, a successful purchaser would need to partner with a company with industry knowledge.

18 Westbrick had been one of the early third-party bidders in its own right, having submitted several non-binding bids through Phases I and II but dropping out of the bidding in late February. When the Spartan Bid was received by Bellatrix on March 10, 2020, Westbrick was contacted again but did not participate further until its name came up as part of EIG/KKR's alternative non-binding bid.

19 Westbrick's interest at this approval stage is still subject to confirmatory due diligence. In fact, one of the bases on which EIG/KKR sought the adjournment was the refusal of the Monitor to allow Westbrick into the data room in the days before the application, which EIG/KKR argued had delayed its progress. The Monitor provided no written explanation to EIG/KKR at the time but it became apparent during the course of argument that its reluctance to do so was based, at least in part, on the fact that Westbrick had participated in earlier phases of the process and so already had that information about the Bellatrix assets. The fact that it wanted to do further due diligence as part of a credit bid when it had already failed to capture the interest of Bellatrix, BMO or the Monitor earlier in the process was not compelling to the Monitor, nor to this Court.

20 Westbrick's equivocal commitment was only part of EIG/KKR's problems, second to the lack of any firm financing commitment. As mentioned, CIBC was proposing to lend an amount sufficient to pay the priority charges plus the first lien noteholder debt, with the second lien noteholders proposing to then convert their debt to an equity position in the company. However, the borrower (presumably a partnership of EIG/KRR and Westbrick, or their respective designates) would still need to qualify to assume all the liabilities and obligations of the ongoing business of Bellatrix.

21 More importantly, CIBC expressly was not yet committed to providing that funding. Its willingness to proceed was contingent on a number of outstanding items, including:

a. satisfactory final negotiations;

b. the absence of any material adverse change (which could include the claims already anticipated by at least two of the counterparties to Bellatrix contracts);

c. acceptable arrangements being made between CIBC and Westbrick or another operator; and

d. no adverse change in the capital markets generally.

22 Against the backdrop of the precarious current oil and gas market, all these outstanding conditions limited EIG/KKR's ability to present this proposal as close enough to final to justify putting everything on hold for another few weeks in hopes that all the pieces would fall into place.

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23 EIG/KKR quite properly emphasized that they are significant stakeholders in the proceedings generally and the most significant stakeholders at this precise juncture, given the consequences to them if the Spartan Bid is effectively the only option left. EIG/KKR also pointed out that the company had sufficient short-term financing to continue operating during the requested adjournment, courtesy of their agreement to provide the interim financing under the Initial Order. EIG/KKR said that their willingness to provide that interim financing, without which the SISP could not have been conducted, was part of their plan to protect their position, should that become necessary.

24 It appears that EIG/KKR thought they would have more time and more opportunity to finalize a competing proposal than what was afforded to them. They pointed out, legitimately, that the COVID pandemic has created logistical challenges and has introduced even more uncertainty into financial markets, making it more difficult to get the Westbrick bid in a final form.

25 Bellatrix, along with all the other parties backing the Spartan Bid, argued that EIG/KKR had had more than ample time to negotiate the financing for a Binding Bid, having known from October of last year that they could end up needing to put a competing offer forward. More importantly, as of March 10, 2020, EIG/KKR knew unequivocally that the only offer in play was going to see them receive no recovery on their debt at all. From that point, if not before, it was incumbent on them to move quickly, presumably building on work done beforehand, to finalize their competing bid.

26 They were unable to do this. I accept that the COVID pandemic, which was narrowly preceded by a severe and historic drop in the commodity prices for oil, made it very difficult to secure the missing financial and operational commitments. However, it is equally obvious that these factors may continue to affect market conditions negatively for some unknown period of time. Indeed, the uncertainty around the likely duration of these negative market forces is the reason given by the Bellatrix Board of Directors for approving the Spartan Bid. While the Spartan Bid is not ideal — certainly not for Bellatrix' creditors — it does allow the transfer of the company as a going concern to a bidder who had its financing secured and was ready to close on time, removing as much uncertainty around this transaction as possible. It is the proverbial bird in hand.

27 This Court has discretion to allow or deny requests for adjournment of proceedings before it. However, that discretion, as all judicial discretion, must be exercised with a view to the fairness of the proceedings to all parties. The impact of denying EIG/KKR's adjournment application is devastating to them and to the investors they represent. However, putting the *CCAA* proceedings on hold for the next few weeks carries it owns costs and risks to the other participating parties.

28 Spartan, as the successful bidder, was not shy about arguing the unfairness inherent in a process that imposed a number of conditions and deadlines on bidders, all of which it met in order to make a firm financial commitment in the midst of a difficult and uncertain market, only to be forced to unilaterally leave its offer on the table while a competing offer is further developed.

29 Certainly, there is more than ample jurisprudence for considering the integrity of the process itself in this analysis; *Grant Forest Products Inc., Re*, 2010 ONSC 1846 (Ont. S.C.J. [Commercial List]) at paras.28-33. In *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (Ont. C.A.) at para. 22, the Ontario Court of Appeal adopted the caution of the Nova Scotia Court of Appeal in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S. C.A.) at p.11:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

30 The application to approve the sale in a *CCAA* proceeding is not a "rubber stamp" exercise. The Court must retain and execute its mandate to balance the interests of stakeholders affected by any offer, even one arriving late. However, an important factor in that exercise may be protecting the predictability of the process, for these participants and possibly for others in future proceedings. While buyers, including Spartan, know that their purchase is subject to court approval, any arbitrary exercise of that discretion may well discourage similar transactions necessary to promote the purposes of this legislation.

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31 While there was no imminent threat of Spartan withdrawing its offer, the Asset Purchase Agreement approved and executed by Bellatrix' Board of Directors has a June 30, 2020 closing date. No one wants to see that date jeopardized and it already appears that there are a number of pre-closing issues that will need to be addressed in short order to preserve this sale.

32 And practically speaking, while Bellatrix does have access to interim financing, whatever additional costs and losses are incurred over the next few weeks would come directly from the residue of the purchase price going to the first lien noteholders because that financing is a priority charge. They are the ones financing the adjournment and they object to doing so.

33 I am balancing the ongoing costs, not just in Bellatrix' operations but in the continued involvement in this litigation of these many parties, their executives, lawyers and the third-party advisors, as well as the risk, small but serious in consequence, of losing the one Binding Bid made against the chance for EIG/KKR to finalize a proposal in a matter of weeks that has not crystallized in months and still seems somewhat fluid and uncertain.

34 As difficult as the decision is, in my view, the sales process must continue as scheduled. The adjournment request is denied.

Approval of the Asset Purchase Agreement

35 Apart from dismissing the application by EIG/KKR for an adjournment, this Court must still review the Spartan Bid against the statutory and common law criteria for approval. EIG/KKR and the remaining second lien noteholders opposed the sale to Spartan because it provides no recovery to them or any subsequent creditors. Although some parties reserved their rights to argue about the form of Order and their inclusion or exclusion on the anticipated s.11.3 application, no other parties opposed the Spartan Bid.

36 Although the *CCAA* itself contains no description of its objectives, a number of purposes of this legislation have been identified in case law. For our purposes, the most germane include the goal of permitting a company to stay in business and thereby avoid the social and economic costs of liquidation and the goal of giving the company the chance of finding an arrangement acceptable to its creditors or which, at least, seeks to balance the interests of the company's stakeholders.

37 Section 36(3) of the *CCAA* sets out a non-exhaustive list of factors to consider on an application to approve a sale. The related criteria from the common law are included in this list where relevant.

A. Whether the Sales Process was Reasonable

38 There was no real complaint at this application about the form of the SISP approved by this Court in October, 2019. As is often the case, much of the work necessary to proffer the assets for sale had been done prior to the court order. BMO was appointed as the Sale Advisor to assist Bellatrix in soliciting and developing potential bids. The process was to be overseen by the Monitor, as appointed in the Initial Order.

39 The first phase, as mentioned, was just over one month. The deadline for binding bids in Phase II was not included in the SISP or in the SISP Order but was to be set by Bellatrix with the Monitor's consent.

40 The process as envisioned was reasonable. It was also designed to be efficient; *Soundair* at para.16. Bellatrix set the deadline for binding bids at January 13, 2020 and then extended that deadline to February 7, 2020. There was no suggestion that this information was not communicated in a proper and timely way. The period of time between October 9, 2019 and February 7, 2020 was short enough to protect the value of the company assets for sale and long enough to provide Bellatrix with a good look at the market prospects, as discussed *infra*.

41 Not only was there no dispute about the reasonability of the SISP before me, there had been no dispute about the final form of the SISP before the issuing Justice on October 9, 2019. As is often the case, the parties had negotiated their own concessions which were represented in that Order. Indeed, even EIG/KKR made the point that they had negotiated certain concessions in the form of the SISP before it was approved by the Court.

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42 I will also address the implementation of the sales process at this juncture, although I realize that is often done separately from a review of the mechanics of the process itself. The relevant cases make it clear, and it is completely intuitive, that the process must not only be designed to be fair but must be fairly implemented.

43 EIG/KKR complained of a number of developments they felt were unfair; that they provided the necessary interim financing in order to protect their interests and then were "cut out" of the final bidding, that the First Lien Lenders opted to finance the Spartan Bid even though EIG/KKR had approached them first) and that EIG/KKR had made it known throughout the sales process that they might wish to put in a credit bid if whatever offer(s) came out of the SISP did not provide for recovery for the second lien noteholders.

44 While it is true that EIG/KKR did provide the interim financing without which Bellatrix would not have had the opportunity to look for a purchaser under the protection of the *CCAA*, it is equally true that EIG/KKR's *quid pro quo* for doing so are the fees and interest payments they will receive in a priority position. It should not be treated as consideration for a strategic advantage to a credit bidder, at least not beyond what was negotiated in the SISP.

45 The First Lien Lenders chose to back the Spartan Bid, even though that offer meant that the first lien debt advanced by that syndicate would not be paid out to those noteholders in full. It did so knowing that EIG/KKR was working on an alternative that would, if successful, see a more full recovery. It is safe to infer that the certainty of the Spartan Bid outweighed the possibility of increased recovery under a much less certain scenario.

46 The Bellatrix Affidavit filed for this application also indicated that the Monitor had been notified at some prior point in time that Spartan might received confidential information that it ought not to have had. The Monitor investigated and determined that this had not affected the process or provided any advantage to Spartan as a bidder. Given what little information I had about this information and its source, combined with the fact that it was not much pursued in argument, I am similarly convinced that it evidences no impropriety that has affected the sales process or the result.

B. Whether the Monitor approved of the SISP

47 The Monitor supported the Court's approval of the SISP at the October 9, 2019 application.

C. Whether the Monitor Supports the Proposed Sale

48 The Monitor supports the proposed sale of the Bellatrix assets to Spartan for the reasons set out in its Sixth Report. Those reasons included the experience of BMO as the Sale Advisor, the interest expressed in the Bellatrix assets from industry participants, the time taken to market the assets and its own experience in overseeing sales processes similar to this one. The Monitor's opinion was that the process was fair and open. While the Monitor, among others, engaged in ongoing discussions with EIG/KKR, those discussions did not culminate in a binding bid from EIG/KKR or any credit bidder.

49 Because the Monitor is assumed to be independent and experienced, the Court is entitled to rely on the opinion of the Monitor, albeit not blindly. As quoted in *Soundair* at paragraph 21:

> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role of the Receiver both in the perception of receiver and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers; ***Crown Trust Co v Rosenberg*** (1986), 60 OR (2d) 87 at p.112

50 In my view, the Monitor has discharged its duties to this point and its recommendation that the Spartan Asset Purchase Agreement be approved is entitled to due consideration.

D. The Extent to which the Company's Creditors were Consulted

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51 The Monitor's Report and the Affidavit of Mark Caiger of BMO outline the consultations undertaken with the various groups of creditors. EIG/KKR argued that they were not properly consulted because they were not provided with a copy of the final Spartan Asset Purchase Agreement, either as proposed or as signed. They say this was in contravention of Clause 7 of the SISP, which entitled them to receive further, detailed information about a competing third-party bid "in a form satisfactory to Bellatrix and the Monitor, more detailed information in respect of any such Binding Bid, including copies of the Binding Bid and any definitive agreement(s) in connection therewith" (Clause 7, SISP).

52 However, a careful reading of that paragraph shows that the Monitor and BMO expressly retained the ability to vet information given to any credit bidder. While no particularly satisfactory explanation was provided to me as to why that document was not provided to EIG/KKR, I cannot conclude that EIG/KKR suffered any disadvantage as a result.

53 In *Soundair*, the unsuccessful bidder complained it was not given needed information, specifically an offering memorandum. However, the Court found the bidder was not prejudiced by that decision of the Receiver, rather its offer was rejected because it contained a condition unacceptable to the Receiver; *Soundair* at paras.50-57. Similarly, the provision of the Spartan Asset Purchase Agreement itself was not necessary for EIG/KKR to get the financing in place that it was missing.

54 The most important thing for EIG/KKR to know as creditors and potential competing bidders was the information given to them on March 10, 2020; that the only offer left was one that would be insufficient to pay anything beyond a portion of the first lien noteholders. Their real complaint is that the SISP afforded them no set period of time in which to finalize their bid and that Bellatrix, the Monitor and BMO should have put Spartan on ice to afford EIG/KKR an adequate and mutually-communicated/ accepted period of time in which to finalize their competing bid.

55 While I understand why EIG/KKR would be unhappy about the way things unfolded, I cannot conclude that the process was unfair to them. The SISP, which they negotiated with Bellatrix and others, did not provide that cushion of time — it only said that credit bids could be submitted after third party bids. The SISP further reserved to BMO and the Monitor the "sole discretion" to decide whether the financing arrangements for any credit bid were satisfactory.

56 When the Bellatrix Board of Directors considered the Spartan offer on April 20, 2020, it opted to lock Spartan in by signing the Asset Purchase Agreement. EIG/KKR was not in a position at that time to give the Board any other viable options, nor had that changed appreciably by the time of this application.

57 Service of Bellatrix' application and supporting Affidavit was effected on April 27, 2020 although the date for the hearing was not set or communicated until April 30, 2020. There was almost two weeks between service of the application and the return date of the motion. EIG/KKR certainly moved quickly within that time to put together their own Affidavit and to provide written confirmation of CIBC's interest. However, it was not the timing of the motion that was problematic, it was the failure of EIG/KKR to advance a firm competing offer before that; if not after March 10, 2020 then after April 23, 2020 when they learned more specifics of the Spartan transaction from the public announcement.

E. The Effects of the Proposed Sale on Creditors and Other Stakeholders

58 While this Court is to consider the effect of the proposed sale on all stakeholders, the primary stakeholders are obviously the company's creditors. They have financed the company to their detriment and now hold compromised security for those debts. They have only the process itself to assist them.

59 The Spartan Bid will see the first lien noteholders paid a portion of their outstanding debt but not all. The second and third lien noteholders will receive nothing. While some of the earlier non-binding bids would have been sufficient to pay the first lien debt in full plus some of the second lien debt, making the second lien noteholders the fulcrum creditors, that shifted over time to the point where the only certain offer on the table no longer covered the first lien noteholders. As I understand the Monitor's argument, that meant that the first lien noteholders became the fulcrum creditors and thus their preferences took on more importance.

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60 Assuming that I am understanding the meaning of the term correctly, I accept the Monitor's submissions. That does not absolve the Monitor nor the Bellatrix Board from consideration of other creditors, nor was that suggested; *Soundair* at para.21. Rather, it was argued that the Bellatrix Board, with assistance from BMO and the Monitor, did consider the effect on these stakeholders before accepting the Spartan Bid.

61 The Spartan Asset Purchase Agreement obligates Spartan to assume the obligations and liabilities, except relating to excluded assets. This will include environmental liabilities, as well as employment, regulatory and contractual obligations. The parties represented at the approval hearing included various contracting parties and regulators, all of whom supported the Spartan Bid. While they cannot be assumed to be overly concerned about which of Bellatrix' creditors receive payment, it is important to remember that these other stakeholders do represent the beneficiaries of a sale of the company as a going concern. From an overarching economic view, keeping contracts intact and people employed is a significant and positive factor.

62 It is axiomatic that considering someone's interests is not the same thing as satisfying those interests. I accept the submissions of Bellatrix, the Monitor, BMO and the other parties supporting the Spartan bid that the interests of all parties and particularly the creditors were considered. The weighing of these competing interests and the ultimate decision by the Board to accept the Spartan bid are discussed below.

F. Is the Sale Price Fair and Reasonable?

63 For EIG/KKR, the price on the proposed sale does not seem fair or reasonable because it believes that, given more time, it could present an offer to purchase the Bellatrix assets for much more that Spartan has offered. As I said in my brief oral decision, if the Westbrick offer had included committed financing, was unconditional and irrevocable and for a much higher price, that may have changed the assessment of the Spartan bid. Where a substantially higher bid turns up at the approval stage, it may indicate that all reasonable attempts to get the best offer were not made; *Soundair* at para. 28 quoting from *Beauty Counsellors of Canada Ltd., Re* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.).

64 However, the Westbrick offer cannot be said to be truly comparable to the Spartan Bid because of its outstanding conditions. The Bellatrix Board of Directors, the first lien noteholders and all the independent advisors to the company recommended a lower but certain offer over a higher but uncertain offer. The Board of Directors, who have statutory and common law fiduciary obligations to act in the best interests of the company as a whole, considered their options and chose this proposal. In fact, they committed to the sale in order to make sure that the one Binding Bid they did have did not disappear before this application could be heard and decided. The exercise of their business judgment deserves a measure of deference.

65 The directors were assisted, as was Bellatrix and as is this Court, by an independent Monitor and an independent Sale Advisor, both of whom were working to find an arrangement that would benefit the entire economic community, with focus on the creditors. Bellatrix received six conditional non-binding offers during Phase II but no binding bids, plus two additional non-binding bids after February 6, 2020. Bellatrix, BMO and the Monitor then continued to work with all these bidders and with EIG/KKR to try and convert non-binding bids into binding bids.

66 I am satisfied that the sufficient efforts were made to find the best possible price. While it will satisfy only a small portion of the company's entire debt, it is still the only unconditional offer in play, notwithstanding the time anticipated by the SISP plus the additional time since Phase II officially expired in February. As so succinctly put in *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) at para.49, there is no better viable alternative.

Conclusion

67 The fact that the only offeror willing to make an unconditional, fully financed commitment will still result in a shortfall is not evidence that the process was flawed or unfair, that stakeholders were ignored or that the price is not reasonable. Rather, the fact that a court-approved and competently-managed sales process narrowed to only one viable offer when conditions had to be removed is reflective of the challenges in our economic markets and in this industry in particular.

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68 It is understandable, even if not ideal, that the Bellatrix directors ultimately concluded that accepting the Spartan offer was in the best interests of the company and its stakeholders collectively. The fact that that decision is now supported by virtually all affected parties is also important.

69 I am satisfied that Bellatrix has met the tests, both statutory and common law, for approving the Spartan Asset Purchase Agreement.

Sealing Orders

70 Bellatrix applied to seal confidential portions of and supplements to the Monitors' reports. EIG/KKR applied to seal the Affidavit of Eric Long. No parties opposed any of this relief. As the Spartan Asset Purchase Agreement has yet to close and having reviewed the information sought to be sealed, I am satisfied that the tests for doing so have been satisfied; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) at para.53

71 The sealing orders requested are granted. Counsel are requested to include in the form of Order time limits for the expiration thereof.

Application granted.

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TAB 2

2015 ONSC 5557
Ontario Superior Court of Justice [Commercial List]

Nelson Education Ltd., Re

2015 CarswellOnt 13576, 2015 ONSC 5557, 258 A.C.W.S. (3d) 465, 29 C.B.R. (6th) 140

In the Matter of the Companies' Lenders Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Nelson Education Ltd. and Nelson Education Holdings Ltd., Applicants

Newbould J.

Heard: August 13, 27, 2015
Judgment: September 8, 2015
Docket: CV15-10961-00CL

Counsel: Benjamin Zarnett, Jessica Kimmel, Caroline Descours for Applicants
Robert W. Staley, Kevin J. Zych, Sean Zweig for First Lien Agent and the First Lien Steering Committee
John L. Finnigan, D.J. Miller, Kyla E.M. Mahar for Royal Bank of Canada
Orestes Pasparaskis for Monitor

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Table of Authorities
Cases considered by *Newbould J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — followed

Brainhunter Inc., Re (2009), 2009 CarswellOnt 7627 (Ont. S.C.J. [Commercial List]) — referred to

Cruden v. Bank of New York (1992), 957 F.2d 961 (U.S. C.A. 2nd Cir.) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2014), 2014 ONSC 6973, 2014 CarswellOnt 17291, 20 C.B.R. (6th) 171, 17 C.C.P.B. (2nd) 10 (Ont. S.C.J. [Commercial List]) — referred to

Rainbow v. Swisher (1988), 72 N.Y.2d 106, 531 N.Y.S. 775, 527 N.E.2d 258 (U.S. N.Y. Ct. App.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

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s. 11 — considered

s. 36(3) — considered

MOTION by company for approval of sale; MOTION by bank for order that amounts owing to it and portion of consent fee be paid by company prior to sale.

***Newbould J.*:**

1 The applicants Nelson Education Ltd. ("Nelson") and Nelson Education Holdings Ltd. sought and obtained protection under the CCAA on May 12, 2015. They now apply for approval of the sale of substantially all of the assets and business of Nelson to a newly incorporated entity to be owned indirectly by Nelson's first ranked secured lenders (the "first lien lenders") pursuant to a credit bid made by the first lien agent. Nelson also seeks ancillary orders relating to the sale. The effect of the credit bid, if approved, is that the second lien lenders will receive nothing for their outstanding loans.

2 RBC is one of 22 first lien lenders, a second lien lender and agent for the second lien lenders. At the time of its motion to replace the Monitor, RBC did not accept that the proposed sale should be approved. RBC now takes no position on the sale approval motion other than to oppose certain ancillary relief sought by the applicants. RBC also has moved for an order that certain amounts said to be owing to it and their portion of a consent fee should be paid by Nelson prior to the completion of the sale. The applicants and the first lien lenders oppose the relief sought by RBC.

Nelson business

3 Nelson is a Canadian education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country.

4 The business and assets of Nelson were acquired by an OMERS entity and certain other funds from the Thomson Corporation in 2007 together with U.S. assets of Thomson for U.S. $7.75 billion, of which US$550 million was attributed to the Canadian business. The purchase was financed with first lien debt of approximately US$311.5 million and second lien debt of approximately US$171.3 million.

5 The maturity date under the first lien credit agreement was July 3, 2014 and the maturity date under the second lien credit agreement was July 3, 2015. Nelson has not paid the principal balances owing under either loan. It paid interest on the first lien credit up to the filing of this CCAA application. It has paid no interest on the second lien credit since April 2014. As of the filing date, Nelson was indebted in the aggregate principal amounts of approximately US$269 million, plus accrued interest, costs and fees, under the first lien credit agreement and approximately US$153 million, plus accrued interest, costs and fees, under the second lien credit agreement.

6 Because these loans are denominated in U.S. dollars, the recent decline in the Canadian dollar against the United States dollar has significantly increased the Canadian dollar balance of the loans. Nelson generates substantially all of its revenue in Canadian dollars and is not hedged against currency fluctuations. Based on an exchange rate of CAD/USD of 1.313, as of August 10, 2015, the Canadian dollar principal balances of the first and second lien loans are $352,873,910 and $201,176,237.

7 According to Mr. Greg Nordal, the CEO of Nelson, the business of Nelson has been affected by a general decline in the education markets over the past few years. Notwithstanding the industry decline over the past few years, Nelson has maintained strong EBITDA over each of the last several years.

Discussions leading to the sale to the first lien lenders

8 In March 2013, Nelson engaged Alvarez & Marsal Canada Securities ULC ("A&M"), the Canadian corporate finance arm of Alvarez & Marsal to assist it in reviewing and considering potential strategic alternatives. RBC, the second lien agent

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also engaged a financial advisor in March 2013 and the first lien steering committee engaged a financial advisor in June 2013. RBC held approximately 85% of the second lien debt.

9 Commencing in April 2013, Nelson and its advisors entered into discussions with stakeholders including the RBC as second lien agent, the first lien steering committee and their advisors. Nelson sought to achieve as its primary objective a consensual transaction that would be supported by all of the first lien lenders and second lien lenders. These discussions took place until September 2014. No agreement with the first lien lenders and second lien lenders was reached.

10 In April 2014, Nelson and the second lien lenders agreed to two extensions of the cure period under the second lien credit agreement in respect of the second lien interest payment due on March 31, 2014, to May 30, 2014. In connection with these extensions, Nelson made a partial payment of US$350,000 in respect of the March interest payment and paid certain professional fees of the second lien lenders. Nelson requested a further extension of the second lien cure period beyond May 30, 2014, but the second lien lenders did not agree. Thereafter, Nelson defaulted under the second lien credit agreement and failed to make further interest payments to the second lien lenders.

11 The first lien credit agreement matured on July 3, 2014. On July 7, 2014, Nelson proposed an amendment and extension of that agreement and solicited consent from its first lien lenders. RBC, as one of the first lien lenders was prepared to consent to the Nelson proposal, being a consent and support agreement, but no agreement was reached with the other first lien lenders and it did not proceed.

12 In September, 2014, Nelson proposed in a term sheet to the first lien lenders a transaction framework for a sale or restructuring of the business on the terms set out in a term sheet dated September 10, 2014 and sought their support. In connection with the first lien term sheet, Nelson entered into a first lien support agreement with first lien lenders representing approximately 88% of the principal amounts outstanding under the first lien credit agreement. The consenting first lien lenders comprised 21 of the 22 first lien lenders, the only first lien lender not consenting being RBC. Consent fees of approximately US$12 million have been paid to the consenting first lien lenders.

13 The first lien term sheet provided that Nelson would conduct a comprehensive and open sale or investment sales process (SISP) to attempt to identify one or more potential purchasers of, or investors in, the Nelson business on terms that would provide for net sale or investment proceeds sufficient to pay in full all obligations under the first lien credit agreement or that was otherwise acceptable to first lien lenders holding at least 66 2/3% of the outstanding obligations under the first lien credit agreement. If such a superior offer was not identified pursuant to the SISP, the first lien lenders would become the purchaser and purchase substantially all of the assets of Nelson in exchange for the conversion by all of the first lien lenders of all of the debt owing to them under the first lien credit agreement into a new first lien term facility and for common shares of the purchaser.

14 In September 2014, the company engaged A&M to assist with the SISP. By that time, A&M had been advising the Company for over 17 months and had gained an understanding of the Nelson Business and the educational publishing industry. The SISP was structured as a two-phase process.

15 Phase 1 involved (i) contacting 168 potential purchasers, including both financial and strategic parties located in Canada, the United States and Europe, and 11 potential lenders to ascertain their potential interest in a transaction, (ii) initial due diligence and (iii) receipt by Nelson of non-binding letters of interest ("LOIs"). The SISP provided that interested parties could propose a purchase of the whole or parts of the business or an investment in Nelson.

16 Seven potential purchasers submitted LOIs under phase 1, six of which were offers to purchase substantially all of the Nelson business and one of which was an offer to acquire only the K-12 business. Nelson reviewed the LOIs with the assistance of its advisors, and following consultation with the first lien steering committee and its advisors, invited five of the parties that submitted LOIs to phase 2 of the SISP. Phase 2 of the SISP involved additional due diligence, data room access and management presentations aimed at completion of binding documentation for a superior offer.

17 Three participants submitted non-binding offers by the deadline of December 19, 2014, two of which were for the purchase of substantially all of the Nelson business and one of which was for the acquisition of the K-12 business. All three

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offers remained subject to further due diligence and reflected values that were significantly below the value of the obligations under the first lien credit agreement.

18 On December 19, 2014, one of the participants advised A&M that it required additional time to complete and submit its offer, which additional time was granted. An offer was subsequently submitted but not ultimately advanced by the bidder.

19 Nelson, with the assistance of its advisors, maintained communications throughout its restructuring efforts with Cengage Learnings, the company that has the U.S. business that was sold by Thomson and which is a key business partner of Nelson. Cengage submitted an expression of interest for the higher education business that, even in combination with the offer received for the K-12 business, was substantially lower than the amount of the first lien debt. In February 2015, Cengage and Nelson terminated discussions about a potential sale transaction.

20 Ultimately, phase 2 of the SISP did not result in a transaction that would generate proceeds sufficient to repay the obligations under the first lien credit agreement in full or would otherwise be supported by the first lien lenders. Accordingly, with the assistance of A&M and its legal advisors, and in consultation with the first lien steering committee, Nelson determined that it should proceed with the sale transaction pursuant to the first lien support agreement.

Sale transaction

21 The sale transaction is an asset purchase. It will enable the Nelson business to continue as a going concern. It includes:

(a) the transfer of substantially all of Nelson's assets to a newly incorporated entity to be owned indirectly by the first lien lenders;

(b) the assumption by the purchaser of substantially all of Nelson's trade payables, contractual obligations and employment obligations incurred in the ordinary course and as reflected in its balance sheet, excluding some obligations including the obligations under the second lien credit agreement and an intercompany promissory note of approximately $102.3 million owing by Nelson to Nelson Education Holdings Ltd.;

(c) an offer of employment by the purchaser to all of Nelson's employees; and

(d) a release by the first lien lenders of all of the indebtedness owing under the first lien credit agreement in exchange for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the purchaser, and (ii) the obligations under a new US$200 million first lien term facility to be entered into by the Purchaser.

22 The relief sought by the applicants apart from the approval of the sale transaction involves ancillary relief, including authorizing the distribution from Nelson's cash on hand to the first lien lenders of outstanding fees and interest, effecting mutual releases of parties associated with the sale transaction, and deeming a shareholders' rights agreement to bind all shareholders of the purchaser. This ancillary relief is opposed by RBC.

Analysis

(i) Sale approval

23 RBC says it takes no position on the sale, although it opposes some of the terms and seeks an order paying the second lien lenders their pre-filing interest and expense claims. Whether RBC is entitled to raise the issues that it has requires a consideration of the intercreditor agreement of July 5, 2007 made between the agents for the first lien lenders and the second lien lenders.

24 Section 6.1(a) of the intercreditor agreement provides that the second lien lenders shall not object to or oppose a sale and of the collateral and shall be deemed to have consented to it if the first lien claimholders have consented to it. It provides:

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> The Second Lien Collateral Agent on behalf of the Second Lien Claimholders agrees that it will raise no objection or oppose a sale or other disposition of any Collateral free and clear of its Liens and other claims under Section 363 of the Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) if the First Lien Claimholders have consented to such sale or disposition of such assets and the Second Lien Collateral Agent and each other Second Lien Claimholder will be deemed to have consented under Section 363 of the Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) to any sale supported by the First Lien Claimholders and to have released their Liens in such assets.
>
> (underlining added)

25 Section 6.11 of the intercreditor agreement contained a similar provision. RBC raises the point that for these two sections to be applicable, the first lien claimholders must have consented to the sale, and that the definition of first lien claimholders means that all of the first lien lenders must have consented to the sale. In this case, only 88% of the first lien lenders consented to the sale, the lone holdout being RBC. The definition in the intercreditor agreement of first lien claimholder is as follows:

> "**First Lien Claimholders**" means, at any relevant time, the holders of First Lien Obligations at that time, including the First Lien Collateral Agent, the First Lien Lenders, any other "Secured Party" (as defined in the First Lien Credit Agreement) and the agents under the First Lien Loan Documents.

26 The intercreditor agreement is governed by the New York law and is to be construed and enforced in accordance with that law. The first lien agent filed an opinion of Allan L. Gropper, a former bankruptcy judge in the Southern District of New York and undoubtedly highly qualified to express proper expert opinions regarding the matters in issue. Mr. Gropper did not, however, discuss the principles of interpretation of a commercial contract under New York law, and in the absence of such evidence, I am to take the law of New York so far as contract interpretation is concerned as the same as our law. In any event, New York law regarding the interpretation of a contract would appear to be the same as our law. See *Cruden v. Bank of New York*, 957 F.2d 961 (U.S. C.A. 2nd Cir. 1992) and *Rainbow v. Swisher*, 72 N.Y.2d 106, 531 N.Y.S. 775, 527 N.E.2d 258 (U.S. N.Y. Ct. App. 1988). Mr. Gropper did opine that the sections in question are valid and enforceable in accordance with their terms. [1]

27 The intercreditor agreement, like a lot of complex commercial contracts, appears to have a hodgepodge of terms piled on, or added to, one another, with many definitions and exceptions to exceptions. That is what too often appears to happen when too many lawyers are involved in stirring the broth. It is clear that there are many definitions, including a reference to First Lien Lenders, which is defined to be the Lenders as defined in the First Lien Loan Documents, which is itself a defined term, meaning the First Lien Credit Agreement and the Loan Documents. The provisions of the first lien credit agreement make clear that the Lenders include all those who have lent under that agreement, including obviously RBC.

28 Under section 8.02(d) of the first lien credit agreement, more than 50% of the first lien lenders (the "Required Lenders") may direct the first lien agent to exercise on behalf of the first lien lenders all rights and remedies available to. In this case 88% of the first lien lenders, being all except RBC, directed the first lien agent to credit bid all of the first lien debt. This credit bid was thus made on behalf of all of the first lien lenders, including RBC.

29 While the definition of First Lien Claimholders is expansive and refers to both the First Lien Collateral Agent (the first lien agent) and the First Lien Lenders, suggesting a distinction between the two, once the Required Lenders have caused a credit bid to be made by the First Lien Collateral Agent, RBC in my view is taken to have supported the sale that is contemplated by the credit bid.

30 It follows that RBC is deemed under section 6.11 of the intercreditor agreement to have consented to the sale supported by the first lien claimholders. It is nevertheless required that I determine whether the sale and its terms should be approved. It is also important to note that no sale agreement has been signed and it awaits an order approving the form of Asset Purchase Agreement submitted by Nelson in its motion materials.

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31 This is an unusual CCAA case. It involves the acquisition of the Nelson business by its senior secured creditors under a credit bid made after a SISP conducted before any CCAA process and without any prior court approval of the SISP terms. The result of the credit bid in this case will be the continuation of the Nelson business in the hands of the first lien lenders, a business that is generating a substantial EBITDA each year and which has been paying its unsecured creditors in the normal course, but with the extinguishment of the US $153 million plus interest owed to the second lien lenders.

32 Liquidating CCAA proceedings without a plan of arrangement are now a part of the insolvency landscape in Canada, but it is usual that the sale process be undertaken after a court has blessed the proposed sale methodology with a monitor fully participating in the sale process and reporting to the court with its views on the process that was carried out [2] . None of this has occurred in this case. One issue therefore is whether the SISP carried out before credit bid sale that has occurred involving an out of court process can be said to meet the *Soundair* [3] principles and that the credit bid sale meets the requirements of section 36(3) of the CCAA.

33 I have concluded that the SISP and the credit bid sale transaction in this case does meet those requirements, for the reasons that follow.

34 Alvarez & Marsal Canada Inc. was named the Monitor in the Initial Order over the objections of RBC, but shortly afterwards on the come-back motion by RBC, was replaced as Monitor by FTI Consulting Inc. The reasons for this change are contained in my endorsement of June 2, 2015. There was no suggestion of a lack of integrity or competence on the part of A&M or Alvarez & Marsal Canada Inc. In brief, the reason was that A&M had been retained by Nelson in 2013 as a financial advisor in connection with its debt situation, and in September 2014 had been retained to undertake the SISP process that has led to the sale transaction to the first lien lenders. I did not consider it right to put Alvarez & Marsal Canada Inc. in the position of providing independent advice to the Court on the SISP process that its affiliate had conducted, and that it would be fairer to all concerned that a different Monitor be appointed in light of the fact that the validity of the SISP process was going to be front and centre in the application of Nelson to have the sale agreement to the first lien lenders approved. Accordingly FTI was appointed to be the Monitor.

35 FTI did a thorough review of all relevant facts, including interviewing a large number of people involved. In its report to the Court the Monitor expressed the following views:

(a) The design of the SISP was typical of such marketing processes and was consistent with processes that have been approved by the courts in many CCAA proceedings;

(b) The SISP allowed interested parties adequate opportunity to conduct due diligence, both A&M and management appear to have been responsive to all requests from potentially interested parties and the timelines provided for in the SISP were reasonable in the circumstances;

(c) The activities undertaken by A&M were consistent with the activities that any investment banker or sale advisor engaged to assist in the sale of a business would be expected to undertake;

(d) The selection of A&M as investment banker would not have had a detrimental effect on the SISP or the value of offers;

(e) Both key senior management and A&M were incentivised to achieve the best value available and there was no impediment to doing so;

(f) The SISP was undertaken in a thorough and professional manner;

(g) The results of the SISP clearly demonstrate that none of the interested parties would, or would be likely to, offer a price for the Nelson business that would be sufficient to repay the amounts owing to the first lien lenders under the first lien credit agreement

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(h) The SISP was a thorough market test and can be relied on to establish that there is no value beyond the first lien debt.

36 The Monitor expressed the further view that:

(a) There is no realistic prospect that Nelson could obtain a new source of financing sufficient to repay the first lien debt;

(b) An alternative debt restructuring that might create value for the second lien lenders is not a viable alternative at this time;

(c) There is no reasonable prospect of a new sale process generating a transaction at a value in excess of the first lien debt;

(d) It does not appear that there are significant operational improvements reasonably available that would materially improve profitability in the short-term such that the value of the Nelson business would increase to the extent necessary to repay the first lien debt and, accordingly, there is no apparent benefit from delaying the sale of the business.

37 *Soundair* established factors to be considered in an application to approve a sale in a receivership. These factors have widely been considered in such applications in a CCAA proceeding. They are:

(a) whether sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently;

(b) whether the interests of all parties have been considered;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process.

38 These factors are now largely mirrored in section 36(3) of the CCAA that requires a court to consider a number of factors, among other things, in deciding to authorize a sale of a debtor's assets. It is necessary to deal briefly with them.

(a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances. In this case, despite the fact that there was no prior court approval to the SISP, I accept the Monitor's view that the process was reasonable.

(b) Whether the monitor approved the process leading to the proposed sale or disposition. In this case there was no monitor at the time of the SISP. This factor is thus not strictly applicable as it assumes a sale process undertaken in a CCAA proceeding. However, the report of FTI blessing the SISP that took place is an important factor to consider.

(c) Whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy. The Monitor did not make such a statement in its report. However, there is no reason to think that a sale or disposition under a bankruptcy would be more beneficial to the creditors. The creditors negatively affected could not expect to fare better in a bankruptcy.

(d) The extent to which the creditors were consulted. The first lien steering committee was obviously consulted. Before the SISP, RBC, the second lien lenders' agent, was consulted and actively participated in the reconstruction discussions. I take it from the evidence that RBC did not actively participate in the SISP, a decision of its choosing, but was provided some updates.

(e) The effects of the proposed sale or disposition on the creditors and other interested parties. The positive effect is that all ordinary course creditors, employees, suppliers and customers will be protected. The effect on the second

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lien lenders is to wipe out their security and any chance of their loans being repaid. However, apart from their being deemed to have consented to the sale, it is clear that the second lien lenders have no economic interest in the Nelson assets except as might be the case some years away if Nelson were able to improve its profitability to the point that the second lien lenders could be paid something towards the debt owed to them. RBC puts this time line as perhaps five years and it is clearly conjecture. The first lien lenders however are not obliged to wait in the hopes of some future result. As the senior secured creditor, they have priority over the interests of the second lien lenders.

There are some excluded liabilities and a small amount owing to former terminated employees that will not be paid. As to these the Monitor points out that there is no reasonable prospect of any alternative solution that would provide a recovery for those creditors, all of whom rank subordinate to the first lien lenders.

(f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. The Monitor is of the view that the results of the SISP indicate that the consideration is fair and reasonable in the circumstances and that the SISP can, and should, be relied on for the purposes of such a determination. There is no evidence to the contrary and I accept the view of the Monitor.

39 In the circumstances, taking into account the *Soundair* factors and the matters to be considered in section 36(3) of the CCAA, I am satisfied that the sale transaction should be approved. Whether the ancillary relief should be granted is a separate issue, to which I now turn.

(ii) Ancillary claimed relief

(a) Vesting order

40 The applicants seek a vesting order vesting all of Nelson's right, title and interest in and to the purchased assets in the purchaser, free and clear of all interests, liens, charges and encumbrances, other than the permitted encumbrances and assumed liabilities contemplated in the Asset Purchase Agreement. It is normal relief given in an asset sale under the CCAA and it is appropriate in this case.

(b) Payment of amounts to first lien lenders

41 As a condition to the completion of the transaction, Nelson is to pay all accrued and unpaid interest owing to the first lien lenders and all unpaid professional fees of the first lien agent and the first lien lenders outstanding under the first lien credit agreement. RBC does not oppose this relief.

42 If the cash is not paid out before the closing, it will be an asset of the purchaser as all cash on hand is being acquired by the purchaser. Thus the first lien lenders will have the cash. However, because the applicant is requesting a court ordered release by the first lien lenders of all obligations under the first lien credit agreement, the unpaid professional fees of the first lien agent and the first lien lenders that are outstanding under the first lien credit agreement would no longer be payable after the closing of the transaction. Presumably this is the reason for the payment of these prior to the closing.

43 These amounts are owed under the provisions of the first lien credit agreement and have priority over the interests of the second lien lenders under the intercreditor agreement. However, on June 2, 2015 it was ordered that pending further order, Nelson was prevented from paying any interest or other expenses to the first lien lenders unless the same payments owing to the second lien lenders. Nelson then chose not to make any payments to the first lien lenders. It is in effect now asking for an order nunc pro tunc permitting the payments to be made. I have some reluctance to make such an order, but in light of no opposition to it and that fact that it is clear from the report of the Monitor that there is no value in the collateral for the second lien lenders, the payment is approved.

(c) Releases

44 The applicants request an order that would include a broad release of the parties to the Asset Purchase Agreement as well as well as other persons including the first lien lenders.

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45 The Asset Purchase Agreement has not been executed. In accordance with the draft approval and vesting order sought by the applicants, it is to be entered into upon the entry of the approval and vesting order. The release contained in the draft Asset Purchase Agreement in section 5.12 provides that the parties release each other from claims in connection with Nelson, the Nelson business, the Asset Purchase Agreement, the transaction, these proceedings, the first lien support agreement, the supplemental support agreement, the payment and settlement agreement, the first lien credit agreement and the other loan documents or the transactions contemplated by them. Released parties are not released from their other obligations or from claims of fraud. The release also does not deal with the second lien credit agreement or the second lien lenders.

46 The first lien term sheet made a part of the support agreement contained terms and conditions, but it stated that they would not be effective until definitive agreements were made by the applicable parties and until they became effective. One of the terms was that there would be a release "usual and customary for transactions of this nature", including a release by the first lien lenders in connection with "all matters related to the Existing First Lien Credit Agreement, the other Loan Documents and the transactions contemplated herein". RBC was not a party to the support agreement or the first lien term sheet.

47 The release in the Asset Purchase Agreement at section 5.12 provides that "each of the Parties on behalf of itself and its Affiliates does hereby forever release...". "Affiliates" is defined to include "any other Person that directly or indirectly...controls...such Person". The party that is the purchaser is a New Brunswick numbered company that will be owned indirectly by the first lien lenders. What instructions will or have been given by the first lien lenders to the numbered company to sign the Asset Purchase Agreement are not in the record, but I will assume that the First Lien Agent has or will authorize it and that RBC as a first lien lenders has not and will not authorize it.

48 Releases are a feature of approved plans of compromise and arrangement under the CCAA. The conditions for such a release have been laid down in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) at paras. 43 and 70. Third party releases are authorized under the CCAA if there is a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan. In *Metcalfe*, Blair J.A. found compelling that the claims to be released were rationally related to the purpose of the plan and necessary for it and that the parties who were to have claims against them released were contributing in a tangible and realistic way to the plan[4] .

49 While there is no CCAA plan in this case, I see no reason not to consider the principles established in *Metcalfe* when considering a sale such as this under the CCAA, with any necessary modifications due to the fact that it is not a sale pursuant to a plan. The application of those principles dictates in my view that the requested release by the first lien lenders should not be ordered.

50 The beneficiaries of the release by the first lien lenders are providing nothing to the first lien lenders in return for the release. The substance of the support agreement was that Nelson agreed to try to fetch as much as it could through a SISP but that if it could not get enough to satisfy the first lien lenders, it agreed to a credit bid by the first lien lenders. Neither Nelson nor the first lien agent or supplemental first lien agent or any other party gave up anything in return for a release from the first lien lenders. So far as RBC releasing a claim that it may have as a first lien lender against the other first lien lenders, nothing has been provided to RBC by the other first lien lenders in return for such a release. RBC as a first lien lender would be required to give up any claim it might have against the other parties to the release for any matters arising prior to or after the support agreement while receiving nothing in return for its release.

In the circumstances, I decline to approve the release by the first lien lenders requested by the applicants to be included in the approval and vesting order.

(d) Stockholders and Registration Rights Agreement

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51 The applicants seek to have a Stockholders and Registration Rights Agreement declared effective and binding on all persons entitled to receive common shares of Purchaser Holdco in connection with the transaction as though such persons were signatories to the Stockholders and Registration Rights Agreement.

52 The Stockholders and Registration Rights Agreement is a contract among the purchaser's parent company, Purchaser Holdco, and the holders of Purchaser Holdco's common shares. After implementation of the transaction, the first lien lenders will be the holders of 100% of the shares of Purchaser Holdco. The Stockholders and Registration Rights Agreement was negotiated and agreed to by Purchaser Holdco and the First Lien Steering Committee (all first lien lenders except RBC). The First Lien Steering Committee would like RBC to be bound by the agreement. The evidence of this is in the affidavit of Mr. Nordal, the President and CEO of Nelson, who says that based on discussions with Mr. Chadwick, the First Lien Steering Committee requires that all of the first lien lenders to be bound to the terms of the Stockholders and Registration Rights Agreement. This is of course double hearsay as Mr. Chadwick acts for Nelson and not the First Lien Steering Committee.

The effect of what is being requested is that RBC as a shareholder of Purchaser Holdco would be bound to some shareholder agreement amongst the shareholders of Purchaser Holdco. While the remaining 88% of the shareholders of Purchaser Holdco might want to bind RBC, I see nothing in the record that would justify such a confiscation of such shareholder rights. I agree with RBC that extending the Court's jurisdiction in these CCAA proceedings and exercising it to assist the purchaser's parent company with its corporate governance is not appropriate. The purchaser and its parent company either have the contractual right to bind all first lien lenders to terms as future shareholders, or they do not.

RBC Motion

(a) Second lenders' pre-filing interest and second lien agent's fees

53 RBC seeks an order that directing Nelson to pay to RBC in its capacity as the second lien agent the second lien interest outstanding at the filing date of CDN$1,316,181.73 and the second lien fees incurred prior to the filing date of US $15,365,998.83.

54 Mr. Zarnett in argument conceded that these amounts are owed under the second lien credit agreement. There are further issues, however, being (i) whether they continue to be owed due to the intercreditor agreement (ii) whether RBC is entitled under the intercreditor agreement to request the payment and (iii) whether RBC is entitled to be paid these under the intercreditor agreement before the first lien lenders are paid in full.

55 There is a distinction between a lien subordination agreement and a payment subordination agreement. Lien subordination is limited to dealings with the collateral over which both groups of lenders hold security. It gives the senior lender a head start with respect to any enforcement actions in respect of the collateral and ensures a priority waterfall from the proceeds of enforcement over collateral. It entitles second lien lenders to receive and retain payments of interest, principal and other amounts in respect of a second lien obligation unless the receipt results from an enforcement step in respect of the collateral. By contrast, payment subordination means that subordinate lenders have also subordinated in favour of the senior lender their right to payment and have agreed to turn over all money received, whether or not derived from the proceeds of the common collateral [5] . The intercreditor agreement is a lien subordination agreement, as stated in section 8.2.

56 Nelson and the first lien agent say that RBC has no right to ask the Court to order any payments to it from the cash on hand prior to the closing of the transaction. They rely on the language of section 3.1(a)(1) that provides that until the discharge of the first lien obligations, the second lien collateral agent will not exercise any rights or remedies with respect to any collateral, institute any action or proceeding with respect to such remedies including any enforcement step under the second lien documents. RBC says it is not asking to enforce its security rights but merely asking that it be paid what it is owed and is permitted to receive under the intercreditor agreement, which does not subordinate payments but only liens. It points to section 3.1(c) that provides that:

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> (c) Notwithstanding the foregoing (i.e. section 3.1(a)(1)) the Second Lien Collateral Agent and any Second Lien Claimholder may (1)... and may take such other action as it deems in good faith to be necessary to protect its rights in an insolvency proceeding" and (4) may file any... motions... which assert rights... available to unsecured creditors...arising under any insolvency... proceeding.

57 My view of the intercreditor agreement language and what has occurred is that RBC has not taken enforcement steps with respect to collateral. It has asked that payments owing to it under the second lien credit agreement up to the date of filing be paid.

58 Payment of what the second lien lenders are entitled to under the second lien credit agreement is protected under the intercreditor agreement unless it is as the result of action taken by the second lien lenders to enforce their security. Section 3.1(f) of the intercreditor agreement provides as follows:

> (f) Except as set forth is section 3.1(a) and section 4 to the extent applicable, nothing in this Agreement shall prohibit the receipt by the Second Lien Collateral Agent or any Second Lien Claimholders of the required payments of interest, principal and other amounts owed in respect of the Second Lien Obligations or receipt of payments permitted under the First Lien Loan Documents, including without limitation, under section 7.09(a) of the First Lien Credit Agreement, so long as such receipt is not the direct or indirect result of the exercise by the Second Lien Collateral Agent or any Second Lien Claimholders of rights or remedies as a secured creditor (including set off) or enforcement in contravention of this Agreement. ... (underlining added).

59 Section 3.1(a) prohibits the second lien lenders from exercising any rights or remedies with respect to the collateral before the first liens have been discharged. Section 4 requires any collateral or proceeds thereof received by the first lien collateral agent from a sale of collateral to be first applied to the first lien obligations and requires any payments received by the second lien lenders from collateral in connection with the exercise of any right or remedy in contravention of the agreement must be paid over to the first lien collateral agent.

60 It do not agree with the first lien collateral agent that payment to RBC before the sale closes of amounts owing pre-filing under the second lien credit agreement would be in contravention of section 4.1. That section deals with cash from collateral being received by the first lien collateral agent in connection with a sale of collateral, and provides that it shall be applied to the first lien obligations until those obligations have been discharged. In this case, the cash on hand before any closing will not be received by the first lien collateral agent at all. It will be received after the closing by the purchaser.

61 The first lien collateral agent has made a credit bid on behalf of the first lien lenders. Pursuant to section 3.1(b), that credit bid is deemed to be an exercise of remedies with respect to the collateral held by the first lien lenders. Under the last paragraph of section 3.1(c), until the discharge of the first lien obligations has occurred, the sole right of the second lien collateral agent and the second lien claimholders with respect to the collateral is to hold a lien on the collateral pursuant to the second lien collateral documents and to receive a share of the proceeds thereof, if any, after the discharge of the first lien obligations has occurred. That provision is as follows:

> Without limiting the generality of the foregoing, unless and until the discharge of the First Lien Obligations has occurred, except as expressly provided in Sections 3.1(a), 6.3(b) and this Section 3.1(c), the sole right of the Second Lien Collateral Agent and the Second Lien Claimholders with respect to the Collateral is to hold a Lien of the Collateral pursuant to the Second Lien Collateral Documents for the period and to the extend granted therein and to receive a share of the proceeds thereof, if any, after the Discharge of First Lien Obligations has occurred.

62 RBC points out that its rights under section 3.1(f) to receive payment of amounts owing to the second lien lenders is not subject to section 3.1(c) at all. It is not suggested by the first lien collateral agent that this is a drafting error, but it strikes me that it may be. The provision at the end of section 3.1(c) is inconsistent with section 3.1(f) as section 3.1(c) is not an exception to section 3.1(f).

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63 Both the liens of the first lien lenders and the second lien lenders are over all of the assets of Nelson. Cash is one of those assets. Therefore if payment were now made to RBC from that cash, the cash would be paid to RBC from the collateral for amounts owing under the second lien credit agreement before the obligations to the first lien lenders were discharged. The obligations to the first lien lenders will be discharged when the sale to the purchaser takes place and the first lien obligations are cancelled.

64 There is yet another provision of the intercreditor agreement that must be considered. It appears to say that if a judgment is obtained in favour of a second lien lender after exercising rights as an unsecured creditor, the judgment is to be considered a judgment lien subject to the intercreditor agreement for all purposes. Section 3.1(e) provides:

> (e) Except as otherwise specifically set forth in Sections 3.1(a) and (d), the Second Lien Collateral Agent and the Second Lien Claimholders may exercise rights and remedies as unsecured creditors against the Company or any other Grantor that has guaranteed or granted Liens to secure the Second Lien Obligations in accordance with the terms of the Second Lien Loan Documents and applicable law; provided that in the event that any Second Lien Claimholder becomes a judgment creditor in respect of Collateral as a result of its enforcement of its rights as an unsecured creditor with respect to the Second Lien Obligations, **such judgment Lien** shall be subject to the terms of this Agreement for all purposes (including in relation to the First Lien Obligations) as the other Liens securing the Second Lien Obligations are subject to this Agreement. (Emphasis added).

65 What exactly is meant by a "judgment Lien" is not stated in the intercreditor agreement and is not a defined term. If an order is made in this CCAA proceeding that the pre-filing obligations to the second lien collateral agent are to be paid from the cash on hand that Nelson holds, is that a "judgment Lien" meaning that it cannot be exercised before the first lien obligations are discharged? In this case, as the first lien obligations will be discharged as part of the closing of the transaction, does that mean that once the order is made approving the sale and the transaction closes, the cash on hand will go to the purchaser and the judgment Lien will not be paid? It is not entirely clear. But the section gives some indication that a judgment held as a result of the second lien agent exercising rights as an unsecured creditor cannot be used to attach collateral contrary to the agreement if the first lien obligations have not been discharged.

66 I have been referred to a number of cases in which statements have been made as to the need for the priority of secured creditors to be recognized in CCAA proceedings, particularly when distributions have been ordered. While in this case we are not dealing with a distribution generally to creditors, the principles are well known and undisputed. However, in considering the priorities between the first and second lien holders in this case, the intercreditor agreement is what must govern, even with all of its warts.

67 In this case, the cash on hand held by Nelson is collateral, and subject to the rights of the first lien lenders in that collateral. An order made in favour of RBC as second lien agent would reduce that collateral. The overall tenor of the intercreditor agreement, including section 3.1(e), leads me to the conclusion that such an order in favour of RBC should not be made. I do say, however, that the issue is not at all free from doubt and that no credit should be given to those who drafted and settled the intercreditor agreement as it is far from a model of clarity. I decline to make the order sought by RBC.

68 I should note that RBC has made a claim that that Nelson and the first lien lenders who signed the First Lien Support Agreement acted in bad faith and disregarded the interests of the second lien lenders under the intercreditor agreement. RBC claims that the first lien lenders induced Nelson to breach the second lien credit agreement and that this breach resulted in damages to the second lien agent in the amounts of US$15,365,998.83 on account of interest and CDN$1,316,181.73 on account of fees. RBC says that these wrongs should be taken into account in considering whether the credit bid should be accepted and that the powers under section 11 of the CCAA should be exercised to order these amounts to be paid to RBC as second lien agent.

69 I decline to do so. No decision on this record could be possibly be made as to whether these wrongs took place. The claim for inducing breach of contract surfaced in the RBC factum filed just two days before the hearing and it would be unfair to Nelson or the first lien lenders to have to respond without the chance to fully contest these issues. Moreover, even the release

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sought by the applicants would not prevent RBC or any second lien lender from bringing an action for wrongs committed. RBC is able to pursue relief for these alleged wrongs in a separate action.

(b) Consent fee

70 The first lien lenders who signed the First Lien Support Agreement were paid a consent fee. That agreement, and particularly the term sheet made a part of it, provided that those first lien lenders who signed the agreement would be paid a consent fee.

71 RBC contends that because the consent fee was calculated for each first lien lender that signed the First Lien Support Agreement on the amount of the loans that any consenting first lien lenders held under the first lien credit agreement, the consent fee was paid on account of the loans and thus because all first lien lenders were to be paid equally on their loans on a pro rata basis, RBC is entitled to be paid its share of the consent fees.

72 Section 2.14 of the first lien credit agreement provides in part, as follows:

> If, other than as expressly provided elsewhere herein, **any Lender shall obtain on account of the Loans made by it**, or the participations in L/C Obligations and Swing Line Loans held by it, **any payment** (whether voluntary, involuntary, through the exercise of any right of setoff, or otherwise) **in excess of its ratable share** (or other share contemplated hereunder) thereof, such Lender shall immediately (a) notify the Administrative Agent of such fact, and (b) purchase from the other Lenders such participations in the Loans made by them and/or such subparticipations in the participations in L/C Obligations or Swing Line Loans held by them, as the case may be, as shall be necessary to cause such purchasing Lender to share the excess payment in respect of such Loans or such participations, as the case may be, pro rata with each of them ... [emphasis added].

73 RBC says that while the section refers to a first lien lender obtaining a payment "on account" of its loan, U.S. authorities under the U.S. Bankruptcy Code have held that the words "on account of" do not mean "in exchange for" but rather mean "because of." As the consent payments are calculated on the amount of the loan of any first lien lender who signed the term sheet, RBC says that they were made because of their loan and thus RBC is entitled to its share of the consent fees that were paid by virtue of section 2.14 of the first lien credit agreement.

74 I do not accept that argument. The consent fees were paid because the consenting first lien lenders signed the First Lien Support Agreement. The fact that their calculation depended on the amount of the loan made by each consenting first lien lender does not mean they were made because of the loan. RBC declined to sign the First Lien Support Agreement and is not entitled to a consent fee.

Conclusion

75 An order is to go in accordance with these reasons. As there has been mixed success, there shall be no order as to costs.

Company's motion granted; bank's motion dismissed.

Footnotes

1 I do not think that Mr. Gropper's views on what particular sections of the agreement meant is the proper subject of expert opinion on foreign law. Such an expert should confine his evidence to a statement of what the law is and how it applies generally and not express his opinion on the very facts in issue before the court. See my comments in *Nortel Networks Corp., Re* (2014), 20 C.B.R. (6th) 171 (Ont. S.C.J. [Commercial List]) para. 103.

2 See *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) at paras. 35-40 and *Brainhunter Inc., Re*, [2009] O.J. No. 5207 (Ont. S.C.J. [Commercial List]) at paras. 12-13.

3 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

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4 This case does not involve a plan under the CCAA. One of the reasons for this may be that pursuant to section 6.9(b) of the intercreditor agreement, in the event the applicants commence any restructuring proceeding in Canada and put forward a plan, the applicants, the first lien lenders and the second lien lenders agreed that the first lien lenders and the second lien lenders should be classified together in one class. The second lien lenders agreed that they would only vote in favour of a plan if it satisfied one of two conditions, there was no contractual restriction on their ability to vote against a plan.

5 See 65 A.B.A. Bus Law. 809-883 (May 2010).

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TAB 3

2017 ONSC 2496
Ontario Superior Court of Justice [Commercial List]

Grafton-Fraser Inc. v. Cadillac Fairview Corp.

2017 CarswellOnt 6473, 2017 ONSC 2496, 279 A.C.W.S. (3d) 18

IN THE MATTER OF THE COMPARNIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRAFTON-FRASER INC.

GRAFTON-FRASER INC. (Applicant) and CADILLAC FAIRVIEW CORPORATION LIMITED, ET AL. (Respondents)

L.A. Pattillo J.

Heard: April 20, 2017
Judgment: May 2, 2017
Docket: CV-17-11677-00CL

Counsel: Stuart Brotman, Dylan Chochla, for Applicant
Lily Coodin, for Cadillac Fairview Corporation Limited
J. Dietrich, M. Sassi, for Monitor
Gordon Meiklejohn, for Trade & Global Inc.
N. Renner, for Purchaser and DIP Lender
Linda Galessiere, for Various Landlords
Evan Cobb, for CIBC

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Table of Authorities
Cases considered by *L.A. Pattillo J.*:

Nelson Education Ltd., Re (2015), 2015 ONSC 5557, 2015 CarswellOnt 13576, 29 C.B.R. (6th) 140 (Ont. S.C.J. [Commercial List]) — followed

Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

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

Generally — referred to

s. 36 — considered

s. 36(3) — considered

APPLICATION by debtor company for order approving sale of its assets pursuant to Companies' Creditors Arrangement Act.

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***L.A. Pattillo J.*:**

Introduction

1 This is an application by Grafton-Fraser Inc. ("Grafton") for, among other things, an order approving the sale of its assets as set out in an asset purchase agreement dated January 24, 2017 with 1104307 B.C. Ltd. (now GSO GF Acquisition B.C. Ltd.) (the "Purchaser") pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") (the "Transaction").

2 The application is supported by the Third Report of Richter Advisory Group Inc. in its capacity as monitor for Grafton (the "Monitor").

3 The application is either agreed to or unopposed by all of the stakeholders with notice save and except for Tradex Global Inc. ("Tradex") who is an unsecured creditor and who objects to the Transaction as it affects the unsecured creditors.

4 For the reasons that follow, I approve the Transaction and grant the relief requested by Grafton. Notwithstanding that the Transaction does not treat all of Grafton's unsecured creditors equally, in my view, it meets the principles set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137, 7 C.B.R. (3d) 1 (Ont. C.A.) and s. 36 of the CCAA.

Background

5 On January 25, 2017, Grafton obtained an order from this court granting it protection pursuant to the CCAA (the "Order"). Among other things, the Order appointed the Monitor and granted Grafton the authority to enter into amended and restated forbearance agreements with its two primary and secured lenders, Canadian Imperial Bank of Commerce ("CIBC") and GSO Capital Partners LP ("GSO") as agent for the GSO Lenders.

6 Grafton is a leading retailer of men's clothing which, prior to the Order operated 158 stores in Canada under various names including "Tip Top Tailors" and "George Richards Big and Tall".

7 On January 30, 2017, the court issued a further order approving, among other things, the proposed sale and investment solicitation process for Grafton's business and assets to be carried out with the Monitor's assistance (the "SISP") and authorizing Grafton to enter into the Agreement which was to serve as the minimum bid under the SISP (the "Stalking Horse APA"). The Purchaser is a party related to GSO.

8 To protect confidential information, the SISP contemplated a two stage bidding process. During the first stage, potential bidders were given certain coded information. Bidders who submitted a qualified bid in the first stage would be invited to participate in the second stage with access to confidential information.

9 The Monitor, in consultation with Grafton, complied a list of 174 potential interested parties who were invited to participate in the SISP. Eight potential interested parties responded. Four signed non-disclosure agreements and were provided access to the data room. With the exception of the stalking horse bid, no other bids were submitted prior to the stage one bid deadline. The Purchaser was therefore the "successful bidder" under the SISP.

10 The Transaction is a credit-bid transaction. The Purchaser is acquiring, as a going concern, on an "as is, where is" basis substantially all of Grafton's business and assets (the "Purchased Assets"). The Purchaser will acquire 139 retail stores operated by Grafton as well as its head office. Seven days prior to the closing of the Agreement, the Purchaser will offer employment to no fewer than 1,100 Grafton employees on substantially similar terms and conditions to their existing employment with Grafton. The proposed closing date for the Transaction is on or before May 31, 2017.

11 The consideration for the Transaction includes, among other things:

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a) The assumption by the Purchaser of the principal, plus accrued interest and fees owing by Grafton to its operating lender, CIBC;

b) The assumption by the Purchaser of Grafton's secured indebtedness under the DIP Facility (as defined in the Agreement);

c) The release by GSO and certain of its affiliates of certain of the secured indebtedness owing by Grafton under the GSO Facility (as defined in the Agreement); and

d) The assumption by the Purchaser of certain of Grafton's obligations, including Supplier Liabilities (as defined in the Agreement, which are pre-filing amounts owed by Grafton to certain suppliers of goods/services to the extent agreements with such suppliers have been entered into with the Purchaser, on terms acceptable to CIBC and the Purchaser, establishing, among other things, the terms of continued supply).

12 The Purchaser has determined that certain suppliers are critical to the ongoing value and operations of the business and has agreed to assume Grafton's indebtedness to these creditors on terms satisfactory to the Purchaser. At full value, these claims total approximately $5.2 million.

13 At the date of the Order, Grafton had aggregate known unsecured liabilities of approximately $8 million together with contingent claims in excess of $2 million. In addition, Grafton has or will shortly disclaim a number of lease agreements and terminate the employment of a number of employees which it expects will give rise to significant unsecured claims.

Tradex

14 Tradex and its affiliated companies provided procurement and quality control services for Grafton's overseas purchases for a number of years pursuant to written agreements. The most recent agreements were mutually terminated on May 5, 2016. Tradex's evidence is that there was an oral agreement with Tradex that it would continue to supply services at the previously agreed prices, that it did so and it received payment for its services as late as October 7, 2016. It has since not been paid and alleges that to the date of the Order it is owed US $856,660.00 and Cdn. $383,316.00.

15 In correspondence between counsel, Grafton has denied that any amounts are owing to Tradex and advised that since the termination of the agreements, it has not engaged Tradex or any of its related parties.

16 Tradex is not among the suppliers and other creditors whose claims the Purchaser has agreed to assume upon closing of the Transaction.

Position of the Parties

17 Tradex submits that the Transaction, as structured, should not be approved. Rather, in order to ensure that all unsecured creditors are treated equally, the Purchaser must be required to make the $5.2 million and any other amounts it has committed to pay to Grafton's unsecured creditors, not just to a select group of unsecured creditors, but *pari passu* to all unsecured creditors.

18 Grafton has agreed, for the purposes of this motion only, and without admitting any liability, to accept that Tradex has an unsecured claim against it. It submits that the Transaction is beneficial to Grafton's stakeholders as it provides for the continuation of a substantial portion of its business and should be approved. Further, there is no requirement under the CCAA that creditors be treated equally.

Analysis

19 Section 36 of the CCAA provides that the court may authorize the disposition of assets of a debtor company outside the ordinary course of business. The factors to be considered by the court in approving such a disposition were first set out by our Court of Appeal in *Soundair* and are now largely set out in s. 36(3) of the CCAA which provides:

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s.36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

b) whether the monitor approved the process leading to the proposed sale or distribution;

c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

d) the extent to which the creditors were consulted;

e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

20 Considering the above factors in respect of the Transaction and the events leading up to it, I find the evidence establishes:

a) the SISP was reasonable in the circumstances and was approved by the court;

b) the Monitor approved the SISP and assisted Grafton in carrying out its terms;

c) the Monitor has confirmed in its Third Report that the Transaction would be substantially more beneficial to Grafton's creditors, as compared to the alternatives, which may result in the liquidation of Grafton's assets;

d) the Monitor and Grafton's two primary secured creditors, CIBC and GSO, are each supportive of the Transaction;

e) the Monitor is of the view that the Transaction represents the best opportunity to maximize recoveries for creditors of Grafton and provides the greatest benefit to all stakeholders (including landlords, employees, customers, go-forward suppliers, etc.), as it results in the continuation of Grafton's business;

f) that further marketing of Grafton's assets would not likely result in greater realizations as the market has been fully canvassed and all likely bidders have already been provided the opportunity to bid on the assets;

g) the Transaction represents the highest and best offer for the Purchased Assets and the short time-frame to closing will eliminate ongoing costs of the CCAA proceeding; and

h) Grafton's limited liquidity substantially eliminates the opportunity to further market the Purchased Assets for sale without putting the Transaction at risk and impairing recoveries.

21 There is no question that certain of Grafton's liabilities, including some of its unsecured creditors will not be paid, as a result of the Transaction as it is structured. In support of its submission that in the absence of all the unsecured creditors being treated equally, the Transaction should not be approved, Tradex relies on the decision of Newbould J. in *Nortel Networks Corp., Re*, 2015 ONSC 2987, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) and specifically the statement at para. 209 that "It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment."

22 There can be no issue that Newbould J.'s statement is a correct statement of the law. It was made, however, in the context of the issue of how to determine the allocation of liquidation proceeds from *Nortel's* business among its various creditors in multiple jurisdictions. The reasoning in *Nortel* does not apply in this case where the Transaction is a credit bid which gives rise to no proceeds of sale being available for distribution.

23 I am in agreement with Grafton's submission that, in the context of the sale of a company's business under the CCAA, there is no requirement that creditors be treated equally. That is not to say that their interests are to be ignored. Rather, the effects of the proposed sale on the creditors are one of the factors that must be considered. But they are considered in the larger

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context of the proposed sale and weighted against the other above noted factors, including the interests of the debtor and the stakeholders generally.

24 The above principle was applied in *Nelson Education Ltd., Re*, 2015 ONSC 5557, 29 C.B.R. (6th) 140 (Ont. S.C.J. [Commercial List]) where Newbould J., in approving a sale of substantially all of Nelson's assets pursuant to a credit bid pursuant to the CCAA, noted at para. 39 that while there were some excluded liabilities and a small amount owing to former employees that would not be paid, the monitor indicated there was no reasonable prospect of any alternative solution that would provide recovery for those creditors.

25 The Transaction is beneficial to Grafton's stakeholders as it provides for the continuation of a substantial portion of Grafton's business, thereby assuring a customer for go-forward suppliers, a tenant for the landlords of 139 retail stores, employment for a majority of Grafton's employees and an ongoing business for many of its customers. While the Transaction will result in some of the unsecured creditors, including Tradex, not being paid, when weighted against all the other relevant factors, that provision should not prevent approval of the Transaction, particularly when the likely alternative is liquidation which would result in no recovery for the unsecured creditors generally.

26 For the above reasons, therefore, the Transaction is approved. The relief requested in the Notice of Motion is approved and the draft Approval and Vesting Order at tab 2 of the Motion Record shall issue.

Application granted.

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