Clerk's Stamp

COURT FILE NUMBER	2301-03179
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	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 DYNAMIC TECHNOLOGIES GROUP INC., DYNAMIC ATTRACTIONS LTD., DYNAMIC ENTERTAINMENT GROUP LTD., DYNAMIC STRUCTURES LTD. and DYNAMIC ATTRACTIONS INC.
APPLICANTS	DYNAMIC TECHNOLOGIES GROUP INC., DYNAMIC ATTRACTIONS LTD., DYNAMIC ENTERTAINMENT GROUP LTD., DYNAMIC STRUCTURES LTD. and DYNAMIC ATTRACTIONS INC.
DOCUMENT	**BRIEF OF THE APPLICANTS (REVERSE VESTING ORDER and SALE APPROVAL AND VESTING ORDER)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. On March 9, 2023, the Applicants, Dynamic Technologies Group Inc. ("**DTGI**"), Dynamic Attractions Ltd. ("**DAL**"), Dynamic Entertainment Group Ltd. ("**DEGL**"), Dynamic Structures Ltd. ("**DSL**") and Dynamic Attractions Inc. ("**DAI**", together with DTGI, DAL, DEGL, and DSL, the "**Companies**" or the "**Dynamic Group**") were granted protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**")[1] by the Honourable Justice J.A. Fagnan pursuant to an initial order, as subsequently amended (the "**Initial Order**") appointing FTI Consulting Canada Inc. to act as Monitor (the "**Monitor**"). On May 22, 2023, the U.S. Bankruptcy Court granted an Order granting joint administration under Chapter 15 of the United States *Bankruptcy Code*.

2. This Brief is submitted in support of the Dynamic Group's application (the "**Application**") for approval of a transaction agreement (the "**PEL Transaction Agreement**") among DAI, DTGI, DEGL, DAL, and DSL (collectively, the "**Vendors**"), and Promising Expert Limited ("**PEL**"), 2523613 Alberta Ltd. ("**Canadian Holdco**"), 15102545 Canada Inc. ("**Canadian Subco**"), PEL Dynamic Acquisition (US) Corp. ("**US Subco**"; together with PEL, Canadian Holdco and Canadian Subco, the "**Purchaser**") to be implemented through the proposed draft approval and reverse vesting order (the "**ARVO**") and sale approval and vesting order (the "**SAVO**"), resulting in the subscription for the DTGI Share and a transfer of the remaining Purchased Shares by the Purchaser and the sale of the US Assets to US Subco (the "**Proposed Transaction**").

3. The Proposed Transaction is the only substantive bid received for the purchase of the assets of the Applicants on a going-concern basis that has emerged following the completion of a sale and investment solicitation process ("**SISP**") approved by the Honourable Justice D.R. Mah on March 16, 2023 (the "**SISP Order**").[2]

4. The Proposed Transaction contemplates that upon implementation of the Proposed Transaction, all shares of DTGI, DAL, DSL and DEGL (collectively, the "**RVO Entities**") will be cancelled and certain remaining liabilities, contracts and remaining assets of the

[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**"), at **TAB A**.
[2] Affidavit of Allan Francis, sworn on June 13, 2023 (the "**Fourth Affidavit**"), at para. 19.

RVO Entities will be vested in a numbered company to be incorporated by DTGI ("**ResidualCo**"), which is a wholly-owned subsidiary of DTGI.[3]

5. There is clear evidence that the ARVO structure is necessary and appropriate to preserve the going-concern value of the Dynamic Group's business in these circumstances. The granting of the ARVO is a condition of the Proposed Transaction, which is justified to preserve the business and operations of the Dynamic Group and the significant value of the Applicants' intellectual property rights.

6. The Proposed Transaction should therefore be approved and the ARVO and SAVO should be granted, together with the related relief including the releases, on the basis that the Proposed Transaction represents the best possible outcome for all stakeholders.

II. BACKGROUND

7. The facts supporting this Application are set out in the Affidavit of Allan Francis, sworn on June 13, 2023 (the "**Fourth Affidavit**"), and the prior Affidavits of Allan Francis sworn on March 8, 2023, March 14, 2023, March 16, 2023, May 16, 2023, and June 1, 2023.

8. The Dynamic Group is in the business of designing, producing, engineering, manufacturing, commissioning, warrantying and providing ongoing parts and services to theme park owners around the world. The Dynamic Group has produced award-winning and cutting-edge theme park ride systems and attraction developments. The Dynamic Group has manufactured and engineered rides for major theme park owner/operators, including Universal Studios and Disney, over the past 20 years and has 100 employees worldwide. DTGI also uses these same turn-key services for special projects such as large optical telescope enclosures, specialty engineering, and custom steel fabrication services.[4]

9. The Applicants filing for protection under the CCAA was precipitated by a significant downturn in people attending theme parks during the global COVID-19 crisis, similar to other businesses supporting the theme park industry. Many theme parks were forced to shut down due to COVID-19 restrictions, and when they re-opened, they operated at

[3] Fourth Affidavit, at para. 5(b).

[4] Affidavit of Allan Francis, sworn on March 8, 2023 (the "**First Affidavit**"), at para. 25.

reduced capacity. This loss of revenue by the theme parks had a flow-down effect on ride suppliers like the Dynamic Group. Many ride projects previously awarded by theme parks were cancelled and almost two years of theme park ride capital expenditure planning time was lost, limiting the number of large ride projects available for bidding. It also had a detrimental effect on many contracts that required extensive fabrication, commissioning and retrofitting on-site as these trades were hampered by COVID-19 restrictions and quarantining of site personnel and countless mobilization, demobilization and remobilization orders, none of the significant costs of which were covered in the pre COVID-19, lump sum contract prices committed to by DAL.[5]

10. In addition, the Dynamic Group's current and recent historical financial performance has been negatively impacted by multiple "first-generation" projects which are defined as projects that were first of a kind in nature, posing significant technical and financial risks to the Dynamic Group to overcome these risks and deliver the projects successfully from a commercial standpoint. Overcoming these risks has been costly and has resulted in negative financial performance and significant liquidity constraints.[6]

11. On March 16, 2023, following the granting of the Initial Order on March 9, 2023, Justice D.R. Mah granted an Order extending the stay of proceedings respecting the Applicants to May 26, 2023 and further granted the SISP Order.

12. On May 26, 2023, Justice B.B. Johnston granted an Order extending the stay of proceedings respecting the Applicants to July 28, 2023.

13. Pursuant to the SISP Order, on May 5, 2023, the Monitor issued to the Applicants the notice required under the SISP indicating that it would be terminating the SISP in three days.[7]

14. On May 9, 2023, the Monitor terminated the SISP and advised all other bidders that the Applicants and the Monitor were proceeding with the Transaction submitted by PEL.[8]

[5] First Affidavit, at para. 28.
[6] First Affidavit, at para. 103.
[7] Fourth Affidavit, at para. 20.
[8] Fourth Affidavit, at para. 21.

15. The Applicants have worked since the termination of the SISP to negotiate definitive transaction documents with PEL and move forward the transaction set out in the PEL Transaction Agreement.[9]

16. The SISP has resulted in only one viable transaction to preserve the business and operations of the Dynamic Group as a going-concern. The SISP thoroughly canvassed the market to try and find potential parties to invest in or purchase the Dynamic Group's business.[10] The Applicants now seek this Court's approval of the Proposed Transaction, together with certain other ancillary relief.

III. ISSUE

17. The issue to be determined on this motion is whether the Proposed Transaction should be approved and the ARVO and SAVO granted, together with the releases and other ancillary relief sought.

IV. LAW AND ARGUMENT

A. The ARVO and SAVO are Appropriate and Should be Granted

18. The Court has the jurisdiction to authorize the implementation of reverse protection transactions similar to the proposed structure of the Proposed Transaction under section 11 the CCAA, which gives the Court broad powers to make any order it thinks appropriate in the circumstances.[11] Many Courts have also referred to the jurisdiction of the Court under section 36 of the CCAA, which contemplates court approval for the sale of the debtor company's assets out of the ordinary course of business. Courts agree that the factors set out in section 36(3) of the CCAA should guide the Court in evaluating a reverse vesting order.[12]

19. In approving a reverse vesting order, the Quebec Superior Court held that sections 11 and 36 should be interpreted broadly and in accordance with the policy and remedial objectives of the CCAA, as well as the wide discretionary power vested in the presiding

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[9] Fourth Affidavit, at para. 22.

[10] Fourth Affidavit, at para. 25.

[11] CCAA, section 11, at **TAB A**.

[12] CCAA, section 36, at **TAB A**; *Arrangement relatif à Black Rock Metals Inc.,* 2022 QCCS 2828 ("***Black Rock Metals***"), at para. 87, at **TAB B**; *Quest University (Re)*, 2022 BCSC 1883, ("***Quest University***"), at para. 27, at **TAB C**; *Harte Gold (Re),* 2022 ONSC 653 ("***Harte Gold***"), at paras. 36-37, at **TAB D**.

Justice.[13] Similarly, the Court in *Quest University (Re)* stated that such relief must be appropriate in the circumstances and all stakeholders must be treated as fairly and reasonably as the circumstances permit.[14]

20. Reverse vesting orders are generally appropriate in at least three types of circumstances: (a) where the debtor operates in a highly-regulated environment in which its existing permits, licences or other rights are difficult or impossible to assign to a purchaser; (b) where the debtor is party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser; and (c) where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.[15]

21. Courts, including those in Alberta, have previously authorized purchase transactions where the assets and liabilities not assumed by the purchaser were either transferred into a "newco" or to a debtor whose operations were not continued by the purchaser:

    a. *Arrangement relatif à Black Rock Metals Inc*.;[16]

    b. *Quest University (Re)*;[17]

    c. *Harte Gold (Re)*, 2022 ONSC 653;[18]

    d. *Plasco Energy Group Inc*., Order granted on July 17, 2015 (ONSC);[19]

    e. *Stornoway Diamonds Inc*., Order granted on October 7, 2019 (QCCS);[20]

    f. *Wayland Group Corp*., Order granted on April 21, 2020 (ONSC);[21]

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[13] *Blackrock Metals*, at para. 88, at **TAB B**, citing *Nemaska: Arrangement relatif à Nemaska Lithium inc*., 2020 QCCS 3218, only available in French.

[14] *Quest University*, at para. 157, at **TAB C**, citing *Century Services Ltd. v. Canada (Attorney General),* 2010 SCC 60 at para. 70.

[15] *Blackrock Metals*, at paras. 114-116, at **TAB B**; *Harte Gold*, at para. 71, at **TAB D**; *Quest University*, at para. 136, at **TAB C**, citing *Re Comark Holdings Inc et al*, [2020] (Ont SCJ [Commercial List]) at para. 142, and *JMB Crushing Systems Inc. (Re)* 2020 ABQB 763.

[16] *Black Rock Metals*, at **TAB B**.

[17] *Quest University*, at **TAB C**.

[18] *Harte Gold*, at **TAB D**.

[19] *Plasco Energy Group Inc*., Order granted on July 17, 2015 (ONSC), at **TAB E**.

[20] *Stornoway Diamonds Inc*., Order granted on October 7, 2019 (QCCS), at **TAB F**.

g. *Beleave Inc*., Order granted September 18, 2020 (ONSC);[22]

h. *JMB Crushing Systems Inc.*, Order granted March 31, 2021 (ABQB);[23]

i. *Nemaska Lithium Inc*., Order granted October 15, 2020 (ONSC);[24]

j. *Just Energy Group Inc. et. al. v. Morgan Stanley* Capital;[25]

k. *Southern Pacific Resource Corp. et al,* Order granted on May 13, 2022 (ABQB)*;*[26]

l. *Enterra Feed Corporation, et al*, Order granted on March 2, 2023 (ABKB);[27]

m. *Bellatrix Exploration Ltd.*, Order granted June 22, 2021 (ABQB).[28]

22. The ARVO is necessary in this case to preserve the going-concern value of the businesses for the benefit of stakeholders, maintain the Vendors' relations with suppliers and customers to the greatest extent possible, and preserve the ongoing employment of most of the remaining employees of the Applicants.[29]

23. The Applicants also hold a number of patents and registrations to protect their intellectual property (collectively, the "**Intellectual Property**") in the ride systems they have developed using leading engineering and technology expertise, which are filed in registries in Canada and around the world.[30] The Intellectual Property and engineering know-how to design and build some of the most complex rides and theme park projects in the world is one of the Dynamic Group's most significant assets.[31] The ARVO preserves the significant value associated with the Intellectual Property and ensures no additional and major steps need to be taken to transfer such Intellectual Property rights to another entity.

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[21] *Wayland Group Corp*., Order granted on April 21, 2020 (ONSC), at **TAB G**.
[22] *Beleave Inc*., Order granted September 18, 2020 (ONSC), at **TAB H**.
[23] *JMB Crushing Systems Inc.*, Order granted March 31, 2021 (ABQB), at **TAB I**.
[24] *Nemaska Lithium Inc*., Order granted October 15, 2020 (ONSC), at **TAB J**.
[25] *Just Energy Group Inc. et. al. v. Morgan Stanley* Capital, 2022 ONSC 6354 ("***Just Energy***"), at **TAB K**.
[26] *Southern Pacific Resource Corp. et al,* Order granted on May 13, 2022 (ABQB), at **TAB L**.
[27] *Enterra Feed Corporation, et al* ("***Enterra***"), Order granted on March 2, 2023 (ABKB), at **TAB M**.
[28] *Bellatrix Exploration Ltd. ("**Bellatrix**")*, Order granted June 22, 2021 (ABQB), at **TAB N**.
[29] Fourth Affidavit, at para. 26.
[30] Fourth Affidavit, at para. 9 and Exhibit "B".
[31] Fourth Affidavit, at para. 10.

24. Transferring the various Intellectual Property registrations would be a complex process involving a certain amount of risk that some transfers would not be effected on a timely basis. By way of anecdote, the wait time to register a trademark at Canada's trademark office is approximately two years. Further, even if the Applicants had an extended period of time to transfer the Intellectual Property, such a process would be uncertain.

25. In addition, DAL and DSL have received certification by the International Organization for Standardization (the "**ISO Certificates**") for design, fabrication and assembly of dynamic complex dynamic structural and mechanical steel products and amusement rides.[32] The ISO Certificates are recognized globally as the leading certification of quality management systems and have substantial value in marketing DAL and DSL as a premium provider of ride system equipment and attractions.[33]

26. The ISO Certificates are crucial to DAL and DSL's manufacturing business and cannot be transferred to a third-party purchaser, who would ultimately have to go through a substantial vetting and audit process to obtain its own ISO Certification. DAL and DSL invest tens of thousands of dollars annually to maintain their ISO Certificates, and have done so since their initial certification in 1990.[34]

27. Finally, the RVO Entities have unique tax attributes, estimated to total approximately $88,650,661.00 (the "**Tax Attributes**"). The parties expect the Tax Attributes will provide significant value to a restructured Dynamic Group going forward. The most practical and efficient way for the stakeholders to realize on the value of the Tax Attributes is through the PEL Transaction Agreement and the ARVO, which preserves the Tax Attributes and makes them available to the Purchaser.[35]

28. The Intellectual Property, the ISO Certificate and the Tax Attributes provide significant value to the Purchaser but are not easily transferred or cannot be transferred to a third-party purchaser through a standard approval and vesting order. As a result, the only feasible structure for the Proposed Transaction is a sale of the equity of the RVO Entities by means of the RVO and a sale of the US Assets by means of the SAVO. Any other

[32] Fourth Affidavit, at para. 13 and Exhibit "C".
[33] Fourth Affidavit, at para. 16.
[34] Fourth Affidavit, at para. 14.
[35] Fourth Affidavit, at para. 18.

structure risks exposing the Applicants and their shareholders to the risk of losing the value of the their Intellectual Property, the ISO Certificates and the Tax Attributes

29. The Applicants are also seeking approval of a sale approval and vesting order (the "**SAVO**") respecting the sale and assignment of the US Assets and Assigned Contracts from DAI to the US Subco, free and clear of all Claims, Liabilities and Encumbrances, except for the Permitted Encumbrances and Retained Liabilities (as those terms are defined in the PEL Transaction Agreement) (the "**DAI Transaction**"). The SAVO largely follows the Alberta Template Approval and Vesting Order to effect the DAI Transaction.

30. The DAI Transaction is a key piece of the Proposed Transaction as it ensures the transfer of, among other things, DAI's active contracts, accounts receivables, books and records, inventory, equipment and intellectual property to the US Subco.[36] DAI's shares will not be cancelled and it is currently exclusively owned by DTGI (if and until the PEL Transaction Agreement closes, at which point in time DAI will be owned by ResidualCo).

31. Further to the reasons set out below, the Applicants submit that in addition to the ARVO, the SAVO should also be approved as part of the larger Proposed Transaction.

B. The Transaction, the ARVO, and the SAVO are Fair and Reasonable

32. Where the circumstances supporting the use of the ARVO structure are present, the Court must also be satisfied that the Proposed Transaction is fair and reasonable.[37]

33. In making this determination, CCAA Courts have referred to the factors set out under section 36 of the CCAA. In particular, the relevant factors include: (a) whether the process leading to the proposed transaction is reasonable in the circumstances; (b) whether the Monitor approved the process leading to the transaction; (c) whether the Monitor has filed a report stating its opinion that the transaction would be more beneficial to creditors than a sale or disposition in a bankruptcy; (d) the extent to which the creditors were consulted; (d) the effects of the proposed transaction on the creditors and other interested parties; and (f)

[36] Fourth Affidavit, at Exhibit "A", Schedule "F", page 0057.

[37] *Blackrock Metals*, at paras. 110-112, at **TAB B**; *Quest University*¸ at paras. 157, 174-177, at **TAB C**; *Harte Gold*, at paras. 40-69, at **TAB D**.

whether the consideration to be received for the assets is fair and reasonable, taking into account their market value.[38]

34. The section 36(3) factors are, on their face, not intended to be exhaustive. Nor are they intended to be a formulaic checklist that must be followed in every sale transaction under the CCAA.[39] Specifically, there is no requirement for the Monitor or the Company to provide a liquidation analysis for the debtor company in order for a sale under section 36 to be approved.

35. Additionally, as with an order under section 36 of the CCAA for the sale of assets through a traditional vesting order, the Court should consider the principles set out in *Soundair* – namely, whether sufficient efforts to get the best price have been made and the parties have acted providently; the efficacy and integrity of the process followed; the interests of the parties; and whether any unfairness resulted from the process.[40]

36. In finding that the ARVO is key to the completion of the Proposed Transaction, the Monitor considered the following:

    a. whether a reverse vesting order concept was necessary as set out in the proposed ARVO;

    b. whether the ARVO structure provided an economic result at least as favourable as another viable alternative;

    c. whether key stakeholder(s) were worse off under the ARVO structure that they would have been under another viable structure; and

    d. is the consideration paid for the Applicants' business reflective of the importance and value of the intangible assets being preserved under the ARVO structure?[41]

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[38] *Blackrock Metals*, at para. 87, referring to section 36(3) of the CCAA, at **TAB B**; *Harte Gold*, at para. 37, at **TAB D**; *Clearbeach and Forbes (Re)*, 2021 ONSC 5564 ("***Clearbeach***") at paras. 24-25, at **TAB O**; *Green Relief (Re)*, 2020 ONSC 6837 ("***Green Relief***") at para. 5, at **TAB P**.

[39] *White Birch Paper Holding Co. (Re).*, 2010 QCCS 4915, at para. 48, at **TAB Q**.

[40] *Blackrock Metals*, at para. 95, at **TAB B**, citing *Harte Gold*, and *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (Ont. CA); *Clearbeach*, at para. 25, at **TAB O**; Green Relief, at para. 6, at **TAB P**.

[41] The Monitor's Third Report, dated June 15, 2023 (the "**Third Report**"), at para. 31.

37. The Monitor found that the ARVO is demonstrably necessary in this case as it is critical to the completion of the Proposed Transaction and allows for the Intellectual Property to be conveyed without the additional costs and time associated with transferring the registration of the Intellectual Property in multiple countries. Further, the ARVO preserves the Applicants' ISO Certification, which is non-transferable and would require a newly formed entity to complete the entire certification process again which would negate the significant annual costs DAL and DSL have incurred to maintain this certification since 1990 as well as taking significantly more time and expense to obtain if starting the audit process from the beginning. The Tax Attributes provide significantly higher value in the ARVO structure given the ability to apply the Tax Attributes against future operational revenues whereas a new entity or third party purchaser would likely only ascribe nominal value to them.[42]

38. The Proposed Transaction also represents the highest and best recovery available to the Applicants' stakeholders in the circumstances. Additionally, the Proposed Transaction was the only viable alternative to effect a going-concern transaction and is a requirement of the Purchaser.[43]

39. The Monitor was also not aware of any stakeholder that would be worse off under the PEL Transaction Agreement as opposed to another viable transaction structure. Further, none of the other bids received by the Monitor would have been sufficient to repay the PEL first-priority secured debt making PEL the fulcrum creditor and key stakeholder in these proceedings. No other subordinate creditors will receive a return and therefore no creditors would be worse off because of the ARVO structure.[44]

(i) The SISP Was Fair and Transparent and was Complied With

40. The SISP was developed by the Dynamic Group in consultation with the Monitor, under the Monitor's supervision, and in compliance with the SISP Order.

41. The SISP was launched on March 16, 2023.[45]

[42] Third Report, at para. 32.
[43] Third Report, at para. 33.
[44] Third Report, at para. 34.
[45] Third Report, at para. 14(a).

42. Between March 21 and March 27, 2023, the Monitor placed notices in the Globe and Mail, National Edition and Global Newswire, sent targeted emails to approximately 225 parties and posted a copy of a letter summarizing the opportunity on the Monitor's website.[46]

43. The Phase 1 Bid Deadline was April 28, 2023, at which time the Monitor received 4 non-binding LOIs, which included a bid presented by PEL.[47]

44. The Monitor determined that the PEL bid met the requirements of a High Value LOI (as defined in the SISP) and terminated the SISP on May 9, 2023.[48]

45. The SISP was thorough, far-reaching and provided sufficient time and opportunity for interested parties to be involved and carry out the necessary due diligence required to form a view on the opportunity and ultimately submit a bid. The Monitor made significant solicitation efforts including by contacting third parties who were identified as strategic partners/buyers, private equity investors, or other parties who were contacted during the sales processes completed by the Applicants prior to these CCAA Proceedings. Additionally, the SISP was also extensively advertised by the Applicants.[49]

46. The process was conducted in an open and transparent manner. The PEL bid met the requirements of the High Value LOI set forth in the SISP and, if approved, would allow the Applicants to move forward with their restructuring efforts in an expedited manner, particularly in light of their cash constraints.[50]

(ii) The Market Has Been Thoroughly Canvassed

47. The Proposed Transaction is the culmination of a broad-based and efficient sales process (that was built on two previous processes completed in 2019 and 2021 by the Applicants) and the market has been thoroughly canvassed.

[46] Third Report, at para. 14(b).
[47] Third Report, at para. 14(c).
[48] Third Report, at para. 14(d).
[49] Third Report, at para. 15.
[50] Third Report, at para. 16.

48. The SISP fully canvassed the market for potential parties to invest in or purchase the assets of the Dynamic Group. The Purchaser was the only party that came forward with a going-concern transaction.[51]

49. The SISP also built on the previous solicitation and investment processes that were conducted by the Dynamic Group prior to the CCAA filing, including a fulsome process run by Canaccord in October of 2019 and a follow-up process in 2021 to market its co-venture business that was run by Everleaf Capital Corp.[52]

(iii) Benefits of the Transaction

50. The Proposed Transaction is the only viable option for a purchase of the applicants on a going-concern basis. It represents the highest and best value for the Dynamic Group and their stakeholders.[53] The Proposed Transaction has numerous tangible benefits, including, but not limited to:

a. preserving the going-concern value of the business for the benefit of stakeholders;

b. maintaining the Vendors' relations with suppliers and customers to the greatest extent possible; and

c. preserves the ongoing employment of most of the remaining 27 employees of the Applicants.[54]

51. The market testing under the SISP resulted in the Proposed Transaction, which represents the maximum value available in this proceeding. If there were any other transaction available in the market that could provide a higher purchase price and therefore higher recoveries for the creditors of the Dynamic Group than is provided under the Proposed Transaction, there has been more than enough opportunity for such a superior transaction to emerge.

[51] Fourth Affidavit, at para. 23.
[52] Fourth Affidavit, at para. 24.
[53] Fourth Affidavit, at para. 25.
[54] Fourth Affidavit, at para. 26.

52. Given the facts and circumstances of these proceedings, including the fact that the proceeds available for distribution to creditors are insufficient to repay the secured lender in full and there are no funds available for distribution to subordinate secured creditors, unsecured creditors or equity holders, the Proposed Transaction is the only viable alternative and maximizes value for the stakeholders who have an economic interest in the Dynamic Group. Even if the Proposed Transaction were implemented through a traditional vesting order, the Dynamic Group's unsecured creditors would not receive any recoveries.[55]

53. As set out in *Blackrock* Metals, in considering an ARVO it should be considered whether unsecured creditors would be in a worse position with an ARVO than they would under a traditional asset sale.[56] In approving an ARVO, the Court held:

> It is true that the RVO will result in the claim of unsecured creditors being transferred to ResidualCo, an empty shell where all unassumed liabilities will be transferred. This transfer simply reflects the fact that the BlackRock's value, as tested in the market through the SISP and for many years prior to the current restructuring, is not high enough to generate value for these unsecured creditors.[57]

54. If the Proposed Transaction were implemented through a traditional vesting order, the Applicants' unsecured creditors would recover only to the extent that the amount of the purchase price exceeded the value of all secured claims. It has been demonstrated in these proceedings that such value is not available in the market. There is no other viable option that would produce a different result, nor is there any basis on which the Purchaser can be compelled to pay more, let alone to specifically provide for such recoveries.

55. As a result, there is no unfairness in the fact that the claims of unsecured creditors will be transferred to the ResidualCo, which will have no material assets from which to satisfy those claims.

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[55] Fourth Affidavit, at para. 42.

[56] *Blackrock Metals*, at para. 120, at **TAB B**.

[57] *Blackrock Metals*, at para. 109, at **TAB B**.

C. Other Relief is Appropriate

(i) Cancellation and Issuance of Shares

56. The Proposed Transaction provides for DTGI and DSL to file articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the steps necessary for reorganization.

57. Section 191(2) of the *Canada Business Corporations Act* (the "**CBCA**") provides that, where a corporation is subject to an order under section 191(1), its articles may be amended by such order to effect any change that might lawfully be made under section 173.[58] Section 173 permits the articles of the corporation to be amended to "add, change or remove any rights, privileges, restrictions and conditions … in respect of all or any of its shares".[59] Additionally, subsection 176(1)(b) of the CBCA expressly refers to effecting (among other things) a cancellation of "all or part of the shares of a class".[60] Both of these provisions have been held to permit the Court to approve the cancellation of outstanding shares as part of a corporate reorganization that gives effect to a CCAA restructuring transaction.[61]

58. Section 192 of the Alberta *Business Corporations Act* further provides that if a Court makes an order for reorganization, the Court may also "authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fax the terms of those debt obligations.[62]

59. There are two conditions for a reorganization under section 192 of the Alberta *Business Corporations Act* to be approved by the Court: (i) that the corporation be "subject to an order for reorganization", and (ii) that the proposed amendments be authorized by section

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[58] *Canada Business Corporations Act*, RSC 1985, c C-44 (the "**CBCA**") at section 191(2), at **TAB R**.

[59] CBCA, section 173(1)(g),(n), and (o), at **TAB R**.

[60] CBCA, section 176(1)(b), at **TAB R**.

[61] *Harte Gold*, at para. 62, at **Tab D**; *Blackrock Metals*, at para. 122, at **TAB B**; *Laidlaw (Re)*, 2003 CarswellOnt 787 (SCJ) at para. 9, at **TAB S**.

[62] *Business Corporations Act* (Alberta), RSA 2000, c B-9 at section 192(1), at **TAB T**.

173 of the Alberta *Business Corporations Act*. In the circumstances both conditions are met.[63]

60. As contemplated by section 192(1) of the Alberta *Business Corporations Act*, where an order is made under an "Act of the Legislature that affects the rights among the corporation, its shareholders and creditors", such order constitutes an "order for reorganization" under the Alberta *Business Corporations Act*, thereby authorizing the Court to approve the issuance of debt obligations and entitling the corporation to amend its articles to affect the reorganization.[64]

61. If a corporation is subject to an order for reorganization its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 173 of the Alberta *Business Corporations Act*, which includes the cancellation of shares.[65]

62. Given the foregoing, the Receiver submits that this Court has the jurisdiction to authorize the transactions contemplated in the Reorganization Steps.

(ii) Expanded Monitor Powers

63. The Dynamic Group seeks an order expanding the powers of the Monitor to, among other things, take all necessary steps respecting DAI and ResidualCo in the within proceedings including the authority to authorize and direct ResidualCo to make an assignment in bankruptcy and the Monitor shall be authorized to be appointed as trustee in bankruptcy of the estate of ResidualCo.

64. This relief is intended to facilitate the ARVO structure. Similar relief has been granted in other ARVO cases.[66]

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[63] *Raymor Industries Inc., Re*, 2010 QCCS 376, at paras. 49-53, at **TAB U**.

[64] *Business Corporations Act* (Alberta), RSA 2000, c B-9, section 192(1), at **TAB T**.

[65] *Business Corporations Act* (Alberta), RSA 2000, c B-9, section 173, at **TAB T**.

[66] *Quest University,* Expanded Monitor Powers Order, at para. 3, at **TAB C**; *Harte Gold*, at paras. 91-93, at **TAB D**.

(iii) The Reorganization Steps Should be Approved

65. The Applicants are seeking approval of the Reorganization Steps. Since it is contemplated that certain steps will be completed prior to the exit of the Dynamic Group from these proceedings.

(iv) The Releases Should be Granted

66. The ARVO contains typical broad releases applicable to the Applicants as well as certain other third parties, including the current and former directors, officers, employees, legal counsel and advisors of the Applicants and ResidualCo, the Monitor and its legal counsel, PEL, Canadian Holdco, Canadian Subco and US Subco, and their current and former directors, officers, employees, legal counsel and advisors (collectively, the "**Released Parties**").

67. The CCAA expressly contemplates that claims against the directors and officers of a debtor company can be compromised and released in a plan, subject to certain exceptions.[67] The same should apply where a CCAA restructuring does not involve a plan, as this Court has noted: "I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release."[68]

68. The same test for granting third party releases in a CCAA plan applies to a release in an ARVO. The Court must ask: (a) whether the parties to be released were necessary to the restructuring of the debtor; (b) whether the claims to be released are rationally connected to the purpose of the restructuring and necessary for it; (c) whether the restructuring could succeed without the releases; (d) whether the parties being released contributed to the restructuring; and (e) whether the releases benefit the debtors as well as the creditors

[67] *Blackrock Metals*, at para. 128, at **TAB B** citing *Green Relief* at paras. 23-25 at **TAB P**; *8640025 Canada Inc*., 2021 BCSC 1826 at para. 43, at **TAB V**.

[68] *Green Relief,* at para. 23, at **TAB P**.

generally.[69] It is not necessary for each of these factors to apply in order for the proposed release to be granted.[70]

69. This Honourable Court recently considered similar factors in support of a third-party release including, among other factors, the following:

    a. the directors and officers provided critical direction leading up to the CCAA proceedings;

    b. the directors and officers were instrumental in administering the sale and investment solicitation process;

    c. the directors and officers played an integral role in identifying and facilitating the potential transactions to explore;

    d. the releases would facilitate further monetary distributions to the secured creditor which would otherwise be held back for the charge to secure indemnity;

    e. creditors and stakeholders of the applicants were put on notice of the intention to apply for a release of claims;

    f. the release will not affect claims against directors and officers that are covered by an applicable insurance policy;

    g. the releases are subject to the limitations under section 5.1(2) of the CCAA;

    h. the releases provide certainty and finality of the CCAA proceedings in the most efficient manner;

    i. throughout the CCAA proceedings, the directors and officers acted in good faith and with due diligence; and

    j. the monitor and agent supported the release.[71]

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[69] *Blackrock Metals*, at para. 130, at **TAB B**, citing *Harte Gold*, at paras. 78-86 at **TAB D** and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.,* 2008 ONCA 587; *Green Relief*, at para. 27, at **TAB P**, citing *Lydian International Limited (Re),* 2020 ONSC 4006 (***Lydian International***") at para. 54 at **TAB W**.

[70] *Green Relief*, at para. 28, at **TAB P**; *Lydian International*, at para. 54, at **TAB W**.

70. It is well established that this Court has the jurisdiction to sanction releases in favour of the Applicants, its directors and officers, and other parties.[72]

71. The requested releases in this matter are necessary to bring finality to the CCAA proceedings, facilitate the release of the Court-ordered charges, including the D&O Charge, without requiring a reserve for potential claims against the Released Parties, which would prevent the Proposed Transaction from closing, and to protect the Released Parties from any and all claims, demands, causes of action, dealings, occurrences (or other matters including within the definition of "Released Claims" in the ARVO) which existed or took place prior to the Effective Time, or which were undertaken or completed in connection with or pursuant to the terms of the ARVO in respect of, relating to, or arising out of: (a) the Applicants, the business, operations, assets, property and affairs of the Applicants, the administration and/or management of the Applicants or the CCAA and/or the Chapter 15 Cases (as defined in the ARVO); or (b) the PEL Transaction Agreement, any agreement, document, instrument, matter or transaction involving the Applicants arising in connection with or pursuant to any of the foregoing, and/or the consummation of the Proposed Transaction (subject to the exclusions described below, collectively the "**Released Claims**").[73]

72. Third party releases can be found to be essential where it enhances certainty and creates finality of the transaction.[74]

73. The releases provided in the ARVO explicitly do not release or discharge:

    a. any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA; or

    b. any obligation of any of the Released Parties under or in connection with the PEL Transaction Agreement, the Closing Documents, and/or any agreement,

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[71] *Re ENTREC Corporation, 2020 ABQB 751 ("**ENTREC**")*, at para. 8, at **TAB X**.
[72] *ENTREC*, at para. 5, at **TAB X**.
[73] Fourth Affidavit, at para. 59.
[74] *Harte Gold*, at para. 84, at **TAB D**.

document, instrument, matter or transaction involving the Applicants arising in connection with or pursuant to any of the foregoing.[75]

74. The releases in the ARVO are rationally connected to the restructuring and essential to its success. The Released Parties have made significant and often critical contributions to the development and implementation of the Dynamic Group's exit from these CCAA proceedings. The Released Parties have worked diligently towards ensuring the implementation of the restructuring of the Applicants financial obligations and operations for the benefit of stakeholders. If the ARVO is granted and the Proposed Transaction is consummated, the RVO Entities and their businesses will continue, and their going concern value will be preserved for the benefit of stakeholders.[76]

75. The ARVO also includes various exculpations which the Applicants will request be approved by the US Bankruptcy Court in the US Recognition of Vesting Order. The ARVO provides that all of: (a) the current and former directors, officers, employees, legal counsel and advisors of the Applicants and ResidualCo (or any of them); (b) the Monitor and its legal counsel; and (c) the Purchaser and its current and former directors, officers, employees, legal counsel and advisors (in such capacities, collectively the "**Exculpated Parties**") are released and exculpated from any cause of action for any act or omission in respect of, relating to, or arising out of: (a) the PEL Transaction Agreement, (b) the consummation of the Proposed Transaction, (c) the CCAA and US Proceedings, (d) the formulation, preparation, dissemination, negotiation, filing, or consummation of the PEL Transaction Agreement, and all related agreements and documents, any transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Proposed Transaction, (e) the pursuit of approval and consummation of the Proposed Transaction or the recognition thereof in the US Bankruptcy Court, and/or (f) the transfer of assets and liabilities pursuant to the ARVO.[77]

76. The ARVO expressly does not release the Exculpated Parties from any Causes of Action (as defined in the ARVO) related to any act or omission that is determined in a final order

[75] Fourth Affidavit, at para. 60.

[76] Fourth Affidavit at para. 57; *Green Relief,* at paras. 51-55, at **TAB P**.

[77] Fourth Affidavit, at para. 62.

of a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence.[78]

77. Pursuant to section 11 of the CCAA, this Honourable Court has the broad discretionary power to grant a variety of orders, including granting releases.[79]

78. This Honourable Court has summarized three "baseline considerations" in determining whether an application is consistent with the remedial objectives of the CCAA:

    a. the order sought is appropriate in the circumstances;

    b. the applicant has been acting in good faith; and

    c. the applicant has been acting with due diligence.[80]

79. Further, pursuant to section 5.1 of the CCAA this Honourable Court has the discretion to sanction a release of claims against directors arising before the commencement of CCAA proceedings where the directors are by law liable in their capacity as directors for the payment of such obligations.[81]

80. A release of claims against directors, pursuant to the CCAA, should be fair and reasonable in the circumstances and must not:

    a. include claims related to the contractual rights of another creditor; or

    b. be based on misrepresentations made by the director to creditors or the wrongful or oppressive conduct by the directors.[82]

81. This Honourable Court has noted, in applying section 5.1 of the CCAA, the judicial trend to exercise discretion to grant a release of claims against director and officers of a debtor company in the absence of a plan of arrangement.[83]

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[78] Fourth Affidavit, at para. 63.
[79] *CCAA,* s. 11, at **TAB A**.
[80] *ENTREC*, at para. 3, at **TAB X**.
[81] *CCAA*, s. 5.1(1), at **TAB A**.
[82] *CCAA*, s. 5.1(2) and (3), at **TAB A**.
[83] *ENTREC*, at para. 6, at **TAB X**.

82. Third party releases (i.e. releases in favour of parties other than the CCAA debtor company) have been granted both in CCAA plans and in RVOs. As the Quebec Court recently noted in *Blackrock Metals*, "it has now become commonplace for third-party releases, in favour of parties to a restructuring, their professional advisors, as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction."[84] There are numerous examples where such releases have been granted in RVO transactions.[85]

83. In the circumstances of this matter, the releases are essential to the success of the restructuring, the completion of the PEL Transaction Agreement, and ought to be approved by this Honourable Court.

V. REQUESTED RELIEF

84. The Companies respectfully requests this Honourable Court approve the Proposed Transaction and grant the ARVO and the SAVO.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16 day of June 2023.

MLT AIKINS LLP

Ryan Zahara/Catrina Webster
Counsel for Dynamic Technologies Group Inc., Dynamic Attractions Ltd., Dynamic Entertainment Group Ltd., Dynamic Attractions Inc., and Dynamic Structures Ltd.

[84] *Blackrock Metals*, at para. 128, at **TAB B** citing *Green Relief*, at paras. 23-25 at **TAB P**; *8640025 Canada Inc.*, 2021 BCSC 1826 at para. 43, at **TAB V**.

[85] *Harte Gold*, at paras. 78 to 86, at **TAB D**; *Quest University*, at paras. 123, 151, 179, at **TAB C**; *Clearbeach*, at para. 27(f), at **TAB O**; *Green Relief*, at paras. 23 and 27-29, at **TAB P**; *Just Energy*, at para. 67, at **TAB K**; *Enterra*, at para. 18, at **TAB M**; *Bellatrix*, at para. 16, at **TAB N**.

APPENDIX OF AUTHORITIES

TAB	DESCRIPTION
A.	*Companies Creditors Arrangement Act*, RSC 1985, c C-36
B.	*Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828
C.	*Quest University Canada (Re)*, 2022 BCSC 1883 and Expanded Powers of Monitor Order granted December 17, 2020
D.	*Harte Gold Corp. (Re)*, 2022 ONSC 653
E.	*Plasco Energy Group Inc.*, Order granted on July 17, 2015 (ONSC)
F.	*Stornoway Diamonds Inc.*, Order granted on October 7, 2019 (QCCS)
G.	*Wayland Group Corp.*, Order granted on April 21, 2020 (ONSC)
H.	*Beleave Inc.*, Order granted September 18, 2020 (ONSC)
I.	*JMB Crushing Systems Inc.*, Order granted March 31, 2021 (ABQB)
J.	*Nemaska Lithium Inc.*, Order granted October 15, 2020 (ONSC)
K.	*Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354
L.	*Southern Pacific Resource Corp. et al*, Order granted on May 13, 2022 (ABQB)
M.	*Enterra Feed Corporation, et al.*, Order granted on March 2, 2023 (ABKB)
N.	*Bellatrix Exploration Ltd.*, Order granted June 22, 2021 (ABQB)
O.	*Clearbeach and Forbes (Re)*, 2021 ONSC 5564
P.	*Re Green Relief Inc.*, 2020 ONSC 6837
Q.	*White Birch Paper Holding Co., Re.*, 2010 QCCS 4915

R.	*Canada Business Corporations Act*, RSC 1985, c C-44
S.	*Laidlaw, Re*, [2003] O.J. No. 865, 39 CBR (4th) 239
T.	*Business Corporations Act*, RSA 2000, c B-9
U.	*Raymor Industries Inc., Re*, 2010 QCCS 376
V.	*8640025 Canada Inc. (Re)*, 2021 BCSC 1826
W.	*Lydian International Limited (Re)*, 2020 ONSC 4006
X.	*ENTREC Corporation (Re)*, 2020 ABQB 751

TAB A

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to May 29, 2023

Last amended on April 27, 2023

À jour au 29 mai 2023

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Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

R.S., c. C-25, s. 5.

Transaction avec les créanciers garantis

5 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers garantis ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

Démission ou destitution des administrateurs

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres —

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

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

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

2005, c. 47, s. 131; 2007, c. 29, s. 109, c. 36, ss. 77, 112; 2012, c. 31, s. 421.

Obligations and Prohibitions

Obligation to provide assistance

35 (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

Obligation to duties set out in section 158 of the *Bankruptcy and Insolvency Act*

(2) A debtor company shall perform the duties set out in section 158 of the *Bankruptcy and Insolvency Act* that are appropriate and applicable in the circumstances.

2005, c. 47, s. 131.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Restriction

(9) Aucune ordonnance rendue au titre de la présente loi ne peut avoir pour effet de suspendre ou de restreindre le droit d'effectuer les opérations visées au paragraphe (8).

Valeurs nettes dues à la date de résiliation

(10) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par la compagnie à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée être un créancier de la compagnie relativement à ces sommes.

Rang

(11) Il ne peut être rendu, au titre de la présente loi, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

2005, ch. 47, art. 131; 2007, ch. 29, art. 109, ch. 36, art. 77 et 112; 2012, ch. 31, art. 421.

Obligations et interdiction

Assistance

35 (1) La compagnie débitrice est tenue d'aider le contrôleur à remplir adéquatement ses fonctions.

Obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité*

(2) Elle est également tenue de satisfaire aux obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité* selon ce qui est indiqué et applicable dans les circonstances.

2005, ch. 47, art. 131.

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Factors to be considered

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

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

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

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

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269.

Autorisation de disposer des actifs en les libérant de restrictions

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(5)a) et (6)a) s'il avait homologué la transaction ou l'arrangement.

Restriction à l'égard de la propriété intellectuelle

(8) Si, à la date à laquelle une ordonnance est rendue à son égard sous le régime de la présente loi, la compagnie est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (6), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78; 2017, ch. 26, art. 14; 2018, ch. 27, art. 269.

Preferences and Transfers at Undervalue

Application of sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

Traitements préférentiels et opérations sous-évaluées

Application des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*

36.1 (1) Les articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité* s'appliquent, avec les adaptations nécessaires, à la transaction ou à l'arrangement sauf disposition contraire de ceux-ci.

Interprétation

(2) Pour l'application du paragraphe (1), la mention, aux articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, de la date de la faillite vaut mention de la date à laquelle une procédure a été intentée sous le régime de la présente loi, celle du syndic vaut mention du contrôleur et celle du failli, de la personne insolvable ou du débiteur vaut mention de la compagnie débitrice.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78.

TAB B

2022 QCCS 2828
Quebec Superior Court

Arrangement relatif à Blackrock Metals Inc.

2022 CarswellQue 10503, 2022 QCCS 2828, 2022 A.C.W.S. 5339, 2 C.B.R. (7th) 214, EYB 2022-458285

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36 OF: BLACKROCK METALS INC., BLACKROCK MINING INC., BRM METALS GP INC. AND BLACKROCK METALS LP. (DEBTORS) and DELOITTE RESTRUCTURING INC. (MONITOR) and INVESTISSEMENT QUÉBEC AND OMF FUND II H LTD. (SECURED CREDITORS) and 13482332 CANADA INC. (Shareholder Bidder) and WINNER WORLD HOLDINGS LIMITED, 4470524 CANADA INC., GOLDEN SURPLUS TRADING AND PROSPERITY STEEL (INTERVENORS)

Paquette C.J.Q.

Heard: May 30-31, 2022
Judgment: July 8, 2022 *
Docket: C.S. Montréal 500-11-060598-212

Proceedings: leave to appeal refused *Arrangement relatif à Blackrock Metals Inc.* (2022), EYB 2022-462867, 2022 QCCA 1073, 2022 CarswellQue 11443, Patrick Healy J.C.A. (C.A. Que.)

Counsel: Me Jean Legault, Me Jonathan Warin, Me Ouassim Tadlaoui, for Debtor
Me Jean-Yves Simard, Laurent Crépeau, for the Shareholder Bidder
Me Alain Riendeau, Me Brandon Farber, for the Monitor
Me Luc Morin, Me Guillaume Michaud, Me Noah Zucker, for the Secured Creditor, Investissement Québec
Me Doug Mitchell, for the Intervenor
Me David Bish, Me Julie Himo, for the Secured Creditor, OMF fund ii h ltd. (orion)
Me Brendan O'Neill, for the Special Committee of The Board Of Blackrock
Me Geneviève Cloutier, Me François Dandonneau, for The Grand Council Of The Crees And The Cree Nation Government
Me Gilles Robert, Me Kloé Sévigny, for The Canada Revenue Agency

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous Debtors were developing metals and materials manufacturing business — Debtors' project was still at early stage of its development and had yet to generate revenues — Debtors sought protection under Companies' Creditors Arrangement Act (CCAA) and initial order was granted — Parameters of sale and investment solicitation process for sale of debtors' assets were established — Debtors and their creditors entered into agreement of purchase and sale of debtors' assets — Shareholder bidder brought motion seeking to extend bid deadline under solicitation process — Debtors brought motion seeking approval of sale of their assets under agreement of purchase and sale — Bidder's motion dismissed; debtors' motion granted — CCAA primarily seeks to refinance and restructure insolvent companies rather than liquidate them — When selling debtor's assets, one objective is thus to achieve best possible price for assets — Here, evidence showed that bidder was still in process of seeking financial support for its bid — Debtors, creditors and appointed monitor objected to bidder's extension application — Hence, overarching remedial objectives of CCAA were better served by rejecting extension application — Refusal to extend solicitation process deadline left creditors as only qualified bidders — Exceptionally, reverse vesting order structure proposed by creditors was appropriate in present case — Therefore, agreement of purchase and sale should be approved as part of reverse vesting order.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation par le tribunal — Divers

Débitrices étaient en plein développement d'une entreprise de métaux et de matériaux — Projet des débitrices en était encore aux premières étapes de son développement et n'avait pas encore généré de revenus — Débitrices se sont placées sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) et une ordonnance initiale a été accordée — Paramètres du processus de sollicitation en vue de la vente et du financement des biens des débitrices ont été établis — Débitrices et leurs créanciers ont conclu une entente en vue de la vente des biens des débitrices — Actionnaire soumissionnaire a déposé une requête visant à obtenir le prolongement du délai du processus de sollicitation — Débitrices ont déposé une requête visant à obtenir l'approbation de la vente de leurs biens en vertu de l'entente de vente — Requête du soumissionnaire rejetée; requête des débitrices accordée — LACC vise principalement à assurer le refinancement et la restructuration des compagnies insolvables plutôt que leur liquidation — Au moment de procéder à la vente des biens d'un débiteur, un des objectifs est, ainsi, de rechercher le meilleur prix possible pour les biens — En l'espèce, la preuve indiquait que le soumissionnaire était toujours à la recherche de soutien financier pour les besoins de sa soumission — Débitrices, les créanciers et le contrôleur s'opposaient à la demande de prolongation du soumissionnaire — Ainsi, les objectifs principaux de la LACC visant à mettre en oeuvre une mesure correctrice étaient mieux servis par le rejet de la demande de prolongation — Refus de prolonger le délai du processus de sollicitation signifiait que les créanciers étaient les seuls soumissionnaires qualifiés — De manière exceptionnelle, la structure fondée sur une ordonnance de dévolution inversée proposée par les créanciers s'avérait appropriée dans le présent dossier — Par conséquent, l'entente portant sur la vente des biens devrait être approuvée dans le cadre d'une ordonnance de dévolution inversée.

MOTION by bidder seeking more time to file its submission; MOTION by debtors seeking approval of agreement entered into with their creditors for sale of their assets.

Paquette C.J.Q. [1] **:**

OVERVIEW

1 The debtors BlackRock Metals Inc., BlackRock Mining Inc., BlackRock Metals LP and BRM Metals GP Inc. (collectively: *BlackRock*) were established in 2008. They are developing a metals and materials manufacturing business with a mine in Chibougamau, and a metallurgical plant to be located at the Port of Saguenay (*Project Volt*).

2 The mine and plant to be built under Project Volt will eventually supply vanadium, high purity pig iron and titanium products, three specialty metals which are, according to BlackRock, central to the green materials transition in North America. BlackRock's business plan contemplates a forty-one year project life generating strong returns, with a small-scale mining operation.

3 As of now, BlackRock has been in the process of raising the necessary capital to start the construction and implementation of Project Volt, which is now being estimated to cost approximately US$1.02 billion. Considering the early stage of its development, no revenues have ever been generated by the project.

4 BlackRock's only secured creditors are OMF Fund II H Ltd. (*Orion*) and Investissement Québec (*IQ*). On January 18, 2019, BlackRock signed a loan credit agreement with Orion and IQ to supply the necessary working capital required to continue Project Volt. This loan was due and payable on December 1, 2022 and, as of now, Orion and IQ's secured claim amounts to approximately $100M, which constitutes the best part of BlackRock's pre-filing obligations. Orion and IQ also own, respectively, 18% and 12% of BlackRock's shares.

5 On December 22, BlackRock filed an Application for an Initial Order and other ancillary relief in the present *Companies' Creditors Arrangement Act* (*CCAA*) [2] restructuring proceedings.

6 On January 7, 2022, the Court issued a two-part order in view of the sale of the assets of BlackRock. Firstly, the Court established the parameters of a sale and investment solicitation process (*SISP*) for the sale of such assets.

7 Secondly, the Court approved the Agreement of Purchase and Sale signed by Orion and IQ as purchaser (*Stalking Horse Agreement*) and ordered that this agreement be considered as constituting the "Stalking Horse Bid" under the SISP. The agreed purchase price under the Stalking Horse Agreement is to be equal to the fair market value of BlackRock's secured debt towards Orion and IQ (approximately $100M).

8 Pursuant to the January 7, 2022 orders, Phase 2 Bids under the SISP were to be submitted before May 11, 2022, as will be discussed below.

9 Two Applications are before the Court in relation to the above:

9.1. Amended Application by the Shareholder Bidder, 13482332 Canada Inc. (**Canada Inc.**) to extend the Phase 2 Bid Deadline (**Bid Extension Application**); and

9.2. BlackRock' Application to approve a vesting order (**RVO application**)

10 In the Bid Extension Application, Canada Inc. seeks to extend the deadlines provided for in the January 7, 2022 orders, with the view of continuing to canvass the market for financial partners that would allow it to submit a Phase 2 Bid after the Phase 2 Bid deadline.

11 In the RVO Application, BlackRock seeks an order approving the sale of its assets essentially along the terms of the IQ and Orion's Stalking Horse Agreement (*Proposed Transaction*).

12 On May 31, 2022, due to time constraints, the Court rejected the Bid Extension Application and granted the RVO Application, with reasons to follow. The reasons are found below.

1. PROCEDURAL BACKGROUND (COURT ORDERS)

13 On December 22, 2021, BlackRock filed an Application for an Initial Order and other ancillary relief.

14 On December 23, 2021, the Court issued a First Day Initial Order pursuant to the CCAA and, *inter alia*, appointed Deloitte Restructuring Inc. as the monitor (*Monitor*).

15 On January 7, 2022, the Court issued an *Amended and Restated Initial Order* and an *Order Approving a Sale and Investment Solicitation Process (SISP) and Approving a Stalking Horse Agreement of Purchase and Sale*.

16 The January 7, 2022 orders (*Initial Orders*) provided that BlackRock was authorized to borrow from Orion and IQ, as interim lenders, such amounts from time to time as BlackRock may consider necessary or desirable, up to a maximum principal amount of $2M outstanding at any time, to fund the ongoing expenditures of BlackRock and to pay such other amounts as may be permitted (*Interim Facility*). The Court also authorized a corresponding Interim Charge, for a maximum amount of $2.4M, in favor or IQ and Orion.

17 The Initial Orders also approved a SISP to be conducted in accordance with the approved procedures (*Bidding Procedures*);

17.1. authorized the Monitor and BlackRock to implement the SISP;

17.2. approved the Stalking Horse Agreement, solely for the purposes of:

(i) constituting the "stalking horse bid" under the SISP; and

(ii) approving the Expense Reimbursement (as defined in the Stalking Horse Agreement), and subject to further Order of this Court.

18 Pursuant to the Initial Orders and at the request of the Intervenors (shareholders), the Court extended the SISP by an additional 30 days beyond what was originally contemplated.

19 The Stay of proceedings was thereafter extended to June 30, 2022, in accordance with further requests made and in accordance with the debate arising from the two Motions identified above.

2. PHASES OF THE SISP

20 The objective of the SISP was to solicit interest either (i) in one or more sales or partial sales of all, substantially all, or certain portions of the BlackRock's business; and/or (ii) for an investment in a restructuring, recapitalization, refinancing or other form of reorganization of BlackRock or its business.

21 The Bidding Procedures provide that a party interested in participating in the SISP must sign and deliver to the Monitor a non-disclosure agreement (*NDA*) and upon doing so, is considered a "*Phase 1 Qualified Bidder*", following which the Monitor will provide to such party a confidential information memorandum (*CIM*) and access to the confidential virtual data room (*VDR*) set up by BlackRock and the Monitor.

22 The Bidding Procedures further provide that if a Phase 1 Qualified Bidder wishes to submit a bid, it must deliver to the Monitor a non-binding letter of intent (*LOI*) which must conform to certain specified requirements (*Phase 1 Qualified Bid*) no later than 5:00 p.m. on March 9, 2022 (*Phase 1 Bid Deadline*).

23 Following the Phase 1 Bid Deadline, BlackRock shall determine, in consultation with the Monitor, if an LOI qualifies as a "*Phase 1 Successful Bid*", in which case the bidder is thereafter deemed a "*Phase 2 Qualified Bidder*".

24 Phase 2 Qualified Bidders shall thereafter submit their Phase 2 Qualified Bid no later than 5:00 p.m. on May 11, 2022, or such other date or time as may be agreed by the Monitor in consultation with BlackRock and with the authorization of Orion and IQ as Stalking Horse Bidders, acting reasonably (*Phase 2 Bid Deadline*).

25 Also pursuant to the Bidding Procedures, the Stalking Horse Bidders are Phase 2 Qualified Bidders for all purposes under the SISP.

26 Therefore, Canada Inc. had until May 11, 2022, 5:00 p.m. (Eastern Standard Time) to submit its Phase 2 Qualified Bid (*Phase 2 Bid Deadline*).

3. TASKS PERFORMED BY THE MONITOR IN ACCORDANCE WITH THE SISP

27 Further to the Initial Orders, the Monitor undertook the following steps to conduct the solicitation process in accordance with the SISP:

a. the Monitor contacted 415 potentially interested parties;

b. 374 potentially interested parties received the Teaser according to email confirmations received by the Monitor;

c. 232 potentially interested parties were contacted directly by the Monitor, in addition to the general distribution that occurred on January 10, 2022;

d. 65 potentially interested parties participated in more serious discussions about the opportunity or confirmed that they were not interested;

e. 7 interested parties executed an NDA and were granted access to the VDR; and,

f. 1 interested party (Shareholder Bidder) submitted a non-binding Letter of Interest (LOI) prior to the Phase 1 Bid Deadline. [3]

4. CANADA INC.'S LOI

28 Canada Inc. was incorporated on March 8, 2022, as a special purpose vehicle to participate in the SISP and submit a bid.

29 Canada Inc.'s shares are owned by 3 individuals, Mr. Edward Yu, Mr. Solomon (Sam) Pillersdorf and Mr. Leslie A. Wittlin, who, directly or through corporate entities under their control, own approximately 50% of the outstanding shares of BlackRock. Mr. Yu, Mr. Pillersdorf and Mr. Wittlin also act as directors and officers of the company. Canada Inc.'s representatives submit that they have well established links into the mining industry and, based on same, have assembled a team of experienced advisory professionals in the field.

30 The Monitor did not receive any other LOI on or before the Phase 1 Bid Deadline. Therefore, Canada Inc.'s non-binding LOI [4] of March 9, 2022 is the only Phase 1 Successful Bid.

31 In its LOI, Canada Inc. proposes a purchase price for BlackRock's shares that shall be either the sum of $100M or such greater amount as would be required to exceed the minimum purchase price as defined in the Initial Order.

5. ORDERS SOUGHT AND CONCLUSIONS OF THE COURT

5.1 The Bid Extension Application

32 Canada Inc. argues that its tremendous efforts to submit a bid to the Monitor are on the verge of bearing fruit, albeit slightly past the Bid Deadline. Canada Inc. therefore begs the Court to extend the Phase 2 Bid Deadline (which expired on May 11, 2021) for an extra thirty days after the present judgment.

33 The Monitor, BlackRock and Orion and IQ object to such extension.

34 For the reasons below, the Court refused the extension sought.

5.2 The RVO Application

35 The only pending bid therefore is the one made by Orion and IQ, the Stalking Horse Bidders. With the support of BlackRock and of the Monitor, they beg the Court to approve the drafted agreement. [5]

36 The *Intervenors*, who own approximately 50% of the shares of BlackRock, object to the structure of the Proposed Transaction, as it would amount to an illegal appropriation of their shares, without their consent. They also object to the granting of a release to Orion and IQ, as contemplated under the Stalking Horse Agreement.

37 For the reasons below, the Court dismissed the Intervenors' objection and approved the transaction in accordance with the RVO.

ANALYSIS

6. BID EXTENSION APPLICATION

6.1 Facts relevant to the issue

38 As indicated above, Canada Inc.'s LOI [6] is the only Phase 1 Successful Bid. Therefore, only IQ and Orion (Stalking Horse Bidders) and Canada Inc. (Shareholder Bidder) were permitted to proceed to Phase 2 of the SISP.

39 More particularly, on March 8-9, 2022, before the Phase 1 Bid Deadline, Canada Inc. was incorporated and delivered to the Monitor a non-binding LOI, which was confirmed as a Phase 1 Successful Bid. Canada Inc. therefore qualified for Phase 2 of the SISP.

40 To assist in making such a decision, BlackRock and the Monitor requested and received clarifications, particularly with respect to the ability of Canada Inc.'s representatives to fund its bid from their own assets or from third-party financing (*Clarification Letter*) [7] , which will be discussed below. [8]

41 At a later meeting, held on May 9, 2022, Canada Inc. informed the Monitor and BlackRock that despite having initiated, with the help of its own financial advisors, a solicitation process to identify financial partners that would support its bid, it would not be in position to file a qualified bid by the Phase 2 Deadline.

42 Canada Inc. therefore verbally requested that the Phase 2 Bid Deadline be extended for an additional 30 days in order to continue to canvass the market for financing. [9]

43 The Monitor consulted with BlackRock and requested the position of Orion and IQ, as Stalking Horse Bidders, in accordance with paragraph 21 of the approved Bidding Procedures. They expressed serious concerns but were agreeable to considering an extension of the Phase 2 Bid Deadline, subject to several conditions. These conditions included the financing (subordinate to the DIP and to the approximately $100M of secured debt held by the Orion and IQ) of the costs resulting from the extra 30-day extension (estimated at $500K) and the confirmation that no further extension would be sought in the future. [10]

44 Canada Inc. replied that it was prepared to advance a first tranche of $200K of a DIP loan within one week of the acceptance date of their request for a SISP extension, and the balance of $300K as needed. Canada Inc. contemplated that this proposed loan totaling $500K was to be made on the same terms and conditions as the existing DIP loan of the Secured Lenders, and was to rank *pari passu* with them in all respects.

45 The Monitor estimated that it was unlikely that the extension sought would allow Canada Inc. to provide a proper bidding offer at the end of the extension. After further consultation with BlackRock and the Stalking Horse Bidders and with their support, the Monitor denied the extension and informed Canada Inc. accordingly on May 12, 2022.

46 On May 11, 2022, Canada Inc. filed the present Bid Extension Application.

6.2 Opposing arguments of the parties

47 Canada Inc. submits that its LOI conforms with the requirements of the Bidding Procedures in that, without limitation, it meets the "Minimum Purchase Price" requirement of providing at closing net cash proceeds that are not less than the aggregate of (a) the amount of cash payable under the Stalking Horse Agreement together with the amount of obligations being credit bid thereunder, (b) the amount of expense reimbursement payable to the Stalking Horse Bidders, plus (c) a minimum overbid amount of $1M.

48 Canada Inc. also pleads that there is equity for the stakeholders of BlackRock, including the shareholders, based on their knowledge of the company and on recent pre-money valuations performed by third parties which ranged between USD$175M and 350M. In order to assist in designing and financing its final bid, Canada Inc. has retained at its own costs the services of two consultants, FTI Capital Advisors Canada and ERG Securities US.

49 Canada Inc.'s consultants have contacted 156 investors to solicit interest in the opportunity. To date, seven remain highly interested in the opportunity and have executed NDAs and are continuing to perform due diligence on the asset. An additional three have expressed interest and are evaluating the opportunity internally before proceeding to execute an NDA. Investors that have executed NDAs have been added to the VDR and are actively analyzing and reviewing BlackRock's materials. The Consultants have prepared a report on the status of the financing process. [11] For example, Canada Inc. submits a signed non-binding letter of interest signed on May 6, 2022, from a serious investment fund for a USD$65M financing, conditional *inter alia* on a 30-day-due diligence. [12] Canada Inc. further argues that the recent events in Ukraine have improved the outlook of Project Volt and increased the value of its strategic metals.

50 However, according to Canada Inc., based on the feedback provided to its consultants from investors and given the complexity of this transaction, the condensed timeframe of the SISP is a significant hurdle for investors to perform the necessary due diligence in order to provide a commitment to finance the its Phase 2 Qualified Bid. As such, the Consultants believe that additional time will have a material impact on the likelihood of raising the capital required.

51 Canada Inc. argues that although it has made significant progress, it needs more time to pursue these various opportunities and finalize the business and financial terms which will form part of the its Phase 2 Qualified Bid.

52 To that effect, Canada Inc. reminds the Court of its broad discretion under section 11 of the CCAA and points to case law [13] that suggests that the Court would be justified to refuse an asset sale in the presence of impropriety in the sales process.

53 The Monitor, BlackRock, Orion and IQ and BlackRock's First Nation Partners [14] oppose to such extension of the Phase 2 Bid Deadline.

54 BlackRock, the Monitor and Orion and IQ argue that such extension would run contrary to the clear rules of the Bidding Procedures and would break the integrity of the SISP, to the prejudice of all potential bidders who made their decisions based on the rules known to all. Moreover, the extension sought would maintain uncertainty for BlackRock for an additional period, with no realistic chance of obtaining a better offer. Also, the extension would increase the costs and the amounts to be advanced by the Orion and IQ as interim lenders while Canada Inc. is not ready to pay for those expenses for the requested additional period.

6.3 Legal principles

55 The CCAA primarily seeks to refinance and restructure insolvent companies rather than liquidate them. [15] When selling the assets of the company, one of the objectives is thus naturally to achieve the best possible price for the assets. This usually coincides with finding the best outcome for the company's creditors.

56 To achieve this goal, the court benefits from a wide discretionary power pursuant to section 11 of the CCAA:

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

57 The three baseline requirements to meet for an order to be considered "appropriate in the circumstances" are appropriateness, good faith and due diligence.

58 In addition, the order sought must advance the policy and remedial objectives of the CCAA to qualify as "appropriate" within the meaning of section 11. [16] The overarching remedial objectives pursued by the CCAA include: [17]

1. providing for timely, efficient and impartial resolution of a debtor's insolvency;

2. preserving and maximizing the value of a debtor's assets;

3. ensuring fair and equitable treatment of the claims against a debtor;

4. protecting the public interest; and

5. in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

59 Hence, although the objective of any sale process is obviously to obtain the best possible price from prospective purchasers, monetary considerations cannot be the only relevant factor when the Court determines if it is appropriate to deviate from a process that has been duly followed by all parties involved.

60 On the contrary, it is well established that sale processes are important in CCAA proceedings and that modifying same *post facto* every time there is a chance of a better financial outcome could have a negative impact on all the parties involved. Therefore, Courts have often insisted on the importance of preserving the integrity of the sales process. As this court held in *Boutiques San Francisco Inc., Re*:

> [20] Dans le cadre des plans d'arrangement qu'elle autorise, le but de la LACC est, entre autres, de favoriser un processus ordonné et encadré où les paramètres choisis doivent par conséquent avoir un sens. Dans le contexte de cette loi, tout comme par exemple dans celui de la *Loi sur la faillite et l'insolvabilité*, la recherche du meilleur prix possible pour les créanciers ne peut se faire en vase clos, en ignorant la protection nécessaire de l'intégrité et de la crédibilité du processus choisi pour atteindre cet objectif. [18]

61 The Bidding Procedures, which govern the SISP approved by this Court, are fundamentally important for assessing the Proposed Transaction as well as the arguments of the parties. [19]

6.4 Discussion

62 The Monitor also explains that efforts have already been made for some years before the beginning of the CCAA proceedings in order to further finance Project Volt. BlackRock, with the assistance of its financial advisors at the time, have conducted a global search since 2015, but, and despite considerable time and effort, have not been able to secure the required funding.

63 At the inception of the CCAA proceedings, the Court also modified the proposed Bidding Procedures to include a 30 day extension to the "Phase 1 Bid Deadline" based on a request from the Intervenors and their submission that such further time would suffice to ensure a fulsome and fair process. This extension has not led to the desired results.

64 The Monitor then conducted a thorough solicitation process as part of the Phase 1 of the SISP, as mentioned previously, which culminated in a single LOI submitted by Canada Inc.:

> Based on the various discussions with prospective bidders during Phase 1 of the SISP, it was apparent to the Monitor that the BRM project, which had previously been promoted extensively in the market by BRM and its financial advisors for financing purposes, was already very well known by most of the strategic and industry leaders. This situation likely explains why many potentially interested parties declined the opportunity without signing an NDA and without performing due diligence of the VDR. [20]

65 The lack of interest of other bidders in taking part in the Debtor's restructuring has thus been apparent since the very first stages of the SISP process. According to the Monitor, potential players who were contacted either found the opportunity too risky, or not strategic or profitable enough, or did not believe in the feasibility of the technology involved. It remains unlikely that this situation will change in the near future.

66 Moreover, Canada Inc. was unable to secure financing of its own bid during the extended 60 days of Phase 1 of the SISP and waited all the way until that phase's deadline to execute an NDA and to enter into the process.

67 In determining that Canada Inc.'s non-binding LOI constituted a Phase 1 Successful Bid, the Monitor relied on Canada Inc.'s reassurance that it had both the ability and the means required to pay the offered purchase price and to raise or contribute further capital resources to BlackRock's business to continue it as a going concern. The LOI went on to state that the net worth of the Bidder's representatives was, collectively, well above the said amount and that "[b]ased on their extensive experience and engagement in the industry", they were "well placed to obtain both direct and/or third party financing in an aggregate amount

sufficient both to complete the Transaction and thereafter required to proceed with the Business and lead it to profitability as a going concern." [21]

68 Canada Inc., in its Clarification Letter of March 14, 2022, refused to provide more details about its representatives' respective worth. [22] Still, it is not in doubt that they have enough assets to finance its bid if needed.

69 However, Canada Inc. wrote that it was "unable to advise with certainty to what extent [its] three principals [. . .] may contribute to the capital required to fund the transaction contemplated by the non-binding LOI." This issue would "clarify as [its] funding plan finalizes through [its] on-going efforts already well underway." Canada Inc. confirmed that it would "have its financing, to the extent necessary and sufficient for the purpose of the binding LOI, on or before the Phase 2 bid deadline", but added that "some or all" of the funds "may come from external sources", which was subject to further due diligence that could only be performed during Phase 2 of the SISP.

70 These answers are evasive and, in retrospect, proved to include many loopholes. Still, the Clarification letter was considered and the Monitor nonetheless qualified Canada Inc. for Phase 2.

71 The Monitor understood that Canada Inc.'s primary focus during Phase 2 of the SISP was to secure financing, through equity or debt, in order to submit a binding offer prior to the Phase 2 Bid Deadline. Indeed, the due diligence performed during that Phase was limited. Only one meeting occurred, at the request of Canada Inc.'s consultants, with BlackRock and the Monitor, to review the assumptions supporting the financial model of BlackRock. Also, all the groups that were granted access spent a relatively short amount time on the VDR reviewing the information available for this kind of project. [23]

72 At the time of the meeting on May 9, 2022, despite some cursory interest manifested by certain potential capital partners, and except for a non-binding LOI received from a third party for an amount (USD$65M) significantly less than the one required to exceed the Stalking Horse Bid ($100M), Canada Inc. received no other letter of intent or confirmation of interest in writing from a potential capital partner during the SISP.

73 Critically, Canada Inc. also revealed on May 9, 2022 that none of its representatives actually intended to participate in the financing of an eventual Phase 2 Qualified Bid, should there be such a bid.

74 The Monitor testified that had he known in due time that the shareholders had no intention to finance the bid using their own personal assets, Canada Inc. would likely not have qualified for Phase 2 of the SISP. This aspect of the LOI was described as a key consideration in the Monitor's decision at the time.

75 In addition, the failure by Canada Inc. to confirm that it would fund all of the Debtor's costs, including professional costs, during the extended 30-day period, indicates that it is not willing to put "skin in the game" as evidence of its *bona fide* intentions. It appears that Canada Inc. is unwilling to fund the costs of a further delay notwithstanding that any successful bid would necessarily have to cover those costs in order to exceed the value of the Stalking Horse Bid.

76 The above findings remain, in spite of the letter from VanadiumBank Inc., which Canada Inc. filed the day before the hearing. [24] This letter is presented as a new "financing proposal" in favor of Canada Inc. for up to $125M in support of its bid.

77 Actually, it appears that VanadiumBank was incorporated only a few weeks before the hearing. [25] Notwithstanding its name, it is not a bank. Its offer to Canada Inc. is not to lend funds out of its own pocket, but rather to arrange a loan facility after seeking and obtaining the required financing from third parties in the market.

78 In other words, with VanadiumBank's proposal, Canada Inc. is nowhere closer to achieving its financial goals before the proposed extended Phase 2 Bid Deadline. The Court therefore gives no weight to VanadiumBank's letter.

79 It now seems clear that, as it was unable to meet the requirements of the Initial order, Canada Inc. instead decided to launch what could be described as a parallel SISP, which was nowhere authorized and which runs contrary to the letter and spirit of the SISP as ordered by the Court.

80 Although the Court recognizes Canada Inc. and its representatives' efforts in securing third party financing for their bid, and their belief in the potential of BlackRock's projects to attract new interest as the market evolves, it is time for the SISP to come to an end and for the CCAA proceedings to move forward.

81 It is advantageous to the stakeholders generally that BlackRock complete the restructuring process as soon as possible in order to, in particular, end the negative narrative surrounding the company, to limit any further uncertainty and risk and facilitate the completion of the financing necessary for Project Volt, if possible.

82 The SISP provided for a level playing field to all potential bidders. The rules were known to all parties and certain potential bidders might have decided not to participate in the SISP because of its duration (which is often the case in insolvency proceedings). Any modification of the rules after they are set and after all the players have made their choices accordingly should not be taken lightly. In the case at hand, there is no justification whatsoever to such a disruption of the fairness of the process. The overarching remedial objectives of the CCAA are better served by rejecting the Bid Extension Application.

7. RVO APPLICATION

83 The Court's refusal to further extend the Phase 2 Deadline leaves the Stalking Horse Bid from IQ and Orion as the only Phase 2 Qualified Bid. Pursuant to the RVO Application, the Court shall now turn to the question of whether it should approve the Proposed Transaction as per the terms of his bid and, in particular, BlackRock's restructuration through a reverse vesting order (*RVO*).

7.1 Legal Principles

84 In assessing the relevant criteria and determining whether the proposed transaction shall be approved, the Court is mindful not to modify the contractual terms that have been duly negotiated between the parties. [26] In this case, it takes the form of a RVO.

85 RVOs are a fairly new way to achieve the remedial objective of the CCAA: instead of selling the assets of a debtor, a series of transactions will result in i) the purchaser becoming the sole shareholder of a debtor and ii) the unwanted liabilities be vested out to a separate entity, thereby ensuring that the purchaser will not inherit the unwanted liabilities. [27]

86 Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure. [28] In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

87 In addition to section 11, discussed above, section 36 of the CCAA has been interpreted as providing courts with the jurisdiction and the relevant criteria to issue an RVO:

> 36 (1) **[Restriction on disposition of business assets]** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> (2) **[Notice to creditors]** A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) **[Factors to be considered]** In deciding whether to grant the authorization, the court is to consider, among other things,

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

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

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

[. . .]

(6) **[Assets may be disposed of free and clear]** The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[. . .] [Emphasis added]

88 This Court approved an RVO in the face of opposition by a creditor in *Arrangement relatif à Nemaska Lithium inc.*[29]. It was held that section 36 should be interpreted broadly and in accordance with the policy and remedial objectives of the CCAA and the wide discretionary power vested to the supervising judge pursuant to section 11. The Court relied in part on the Supreme Court ruling in *9354-9186 Québec inc. v. Callidus Capital Corp.*[30] It added:

[52] La *LACC* donne donc au juge surveillant la flexibilité nécessaire pour rendre les ordonnances « indiquées » afin de faciliter la restructuration d'une compagnie insolvable.

[53] La nature des problèmes économiques contemporains commande que des solutions innovatrices soient envisagées et, si elles permettent que les objectifs fondamentaux de la *LACC* soient atteints, au bénéfice de tous, alors elles doivent être entérinées.

[. . .]

[71] Le Tribunal est d'avis que les termes « disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires » / « sell or otherwise dispose of assets outside the ordinary course of business »de l'article 36(1) *LACC* permettent un grand éventail d'actes et modes de disposition, incluant, en partie ou en totalité, par voie de « dévolution inversée », une solution innovatrice, à être analysée au cas par cas.

[72] L'article 36(1) *LACC* ne comporte aucune restriction à cet égard.

[73] Sortir des sentiers battus n'est pas contre-indiqué, au contraire, surtout lorsque cela permet de meilleurs résultats.

[74] D'ailleurs, dans l'Affaire *Callidus*, la Cour suprême mentionne ce qui suit quant au pouvoir discrétionnaire général du Tribunal prévu à l'article 11 *LACC* :

> [. . .] le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.
>
> [75] Dans la présente affaire, la solution d'une « dévolution inversée », efficace et rapide, n'affecte pas le résultat final pour les créanciers des Débitrices, au contraire, elle l'améliore.
>
> [76] En effet, le maintien des permis, licences et autorisations existants et des contrats essentiels à l'exploitation des entreprises, et l'utilisation possible des divers attributs fiscaux disponibles, ont facilité l'obtention de concessions de la part des Offrants, et confirmées par le Contrôleur, ce qui devrait permettre qu'une distribution plus importante soit éventuellement effectuée au bénéfice des créanciers des Débitrices.

89 The Court of Appeal refused leave in that case, while noting that some issues raised by the appeal did "appear to qualify as being significant to the practice of insolvency":

> [36] [. . .] This is particularly the case regarding the issue of the scope of authority of the CCAA supervising judge in the context of an order that is not strictly limited to the "sale or disposition of assets" provided for under section 36 (6) CCAA, which, according to the Applicants, results in an outcome that would normally form part of an arrangement subject to prior approval by the creditors. There is also an issue of principle raised regarding the granting of broad third party releases (that are not limited to the transaction itself), outside the confines of an arrangement and without determining their appropriateness and submitting same to the required vote of creditors. [31]

90 In *Quest University Canada*, the Supreme Court of British Columbia cautioned that in the case of an RVO, "the ability of a CCAA court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the CCAA [. . .]." [32] On the other hand, the Court added that "[t]here is no provision in the CCAA that prohibits an RVO structure. As is usually the case in CCAA matters, the court must ensure that any relief is 'appropriate' in the circumstances and that all stakeholders are treated as fairly and reasonably 'as the circumstances permit' [. . .]." [33]

91 Similarly, the Ontario Superior Court of Justice relied on sections 11 and 36 of the CCAA to issue an RVO in *CCAA Plan of Arrangement - Clearbeach and Forbes*. [34]

92 An RVO structure was approved most recently by the same court in *Harte Gold Corp. (Re)*. [35] Although the Court was unconvinced that such an order could rely entirely on section 36 of the *CCAA*, it concluded that its discretion under section 11 was clearly broad enough to encompass it. Furthermore, the criteria set out at paragraph 36(3) provide an analytical framework that could be applied *mutatis mutandis* to an RVO transaction:

> [36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.
>
> [37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction. [36]

93 It is true that a Canadian appeal court has yet to rule definitively on the legality of an RVO under the CCAA. This being said, and although the contexts might differ, the Court sees no compelling reason why it should set aside its reasoning in *Nemaska Lithium*.

94 Even if this type of transaction was not contemplated by section 36 of the CCAA, section 11 could clearly step in as a basis for the Court's jurisdiction. The Supreme Court of Canada recently held that the other provisions of the CCAA, dealing with specific orders which the courts can issue, do not restrict the general language and power of section 11. [37]

95 The Court agrees with the judge in *Harte Gold Corp* that paragraph 36(3), in any event, lays out a useful analytical framework for the issue at bar. These criteria, which are laid out above, should be applied in conjunction with the factors enumerated in *Royal Bank v. Soundair Corp.*: [38]

> 95.1. whether sufficient efforts to get the best price have been made and whether the parties acted providently";
>
> 95.2. the efficacy and integrity of the process followed";
>
> 95.3. the interests of the parties"; and
>
> 95.4. whether any unfairness resulted from the process." [39]

96 The Court also agrees that an RVO structure should remain the exception and not the rule, and should be approved only in the limited circumstances where it constitutes the appropriate remedy.

97 Some authorities indeed call for caution. For instance, Professor Janis Sarra recently stressed the importance for courts to provide detailed reasons when approving RVOs. [40] Among other things, Professor Sarra reminds us that this type of order deviates significantly from the usual CCAA framework, which is meant to provide all creditors with an opportunity to be heard in the process:

> [. . .] [T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both secured and unsecured creditors a meaningful voice/vote in the proceedings, as they are the residual claimants to the value of the debtor's assets during insolvency. [. . .]
>
> [. . .]
>
> The CCAA, particularly in its various amendments over the years, has sought to achieve an appropriate balance between various interests affected by a debtor company's insolvency. Part I sets out the framework of the statute, well-known to practitioners and Canadian courts. It allows for a compromise or arrangement to be proposed between a debtor company and its secured and unsecured creditors, a meeting of the creditors to vote on the plan, and, if a majority in number representing two-thirds in value of the creditors, or the class of creditors, present and voting either in person or by proxy at the meeting, agree to any plan of compromise or arrangement, the plan may be sanctioned by the court and, if so sanctioned, is binding. There are specific provisions addressing Crown claims, employees and pensioners, and treatment of equity claims, all designed to balance multiple interests in complex proceedings.
>
> [. . .]
>
> This statutory framework represents a careful balancing of interests and prejudice, and gives voice and vote to the creditors that are the residual claimants to the value of the debtor company. Many of the provisions are aimed at mitigating the imbalance in power that secured creditors have in insolvency proceedings, at least during the period of negotiations for a plan, with a view to maximizing the value of the assets, preserving going-concern value, and protection of employees and the public interest.

It makes sense, therefore, that in any application to bypass this carefully crafted statutory process, the court consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it. Reasons are important for stakeholders to understand the benefits and prejudice that may accrue to any particular transaction. [41]

98 As the Supreme Court of British Columbia held in *Quest University Canada*:

[171] I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA. [42]

[Emphasis added]

99 In particular, the following comments made in *Harte Gold Corp* are enlightening:

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[Emphasis added]

7.2 Discussion on criteria to approve an RVO

100 The Court will now apply the criteria set out in paragraph 36(3) of the CCAA to the RVO Application, keeping in mind the other relevant factors identified by the case law, and will analyze the appropriateness of the RVO structure in particular.

101 *The process leading to the proposed sale was reasonable in the circumstances (s. 36(3)(a) of the CCAA).* As detailed in the Fifth Report, BlackRock and the Monitor have conducted the SISP in accordance with the Bidding Procedures approved by this Court on January 7, 2022. The market has been adequately canvassed through a fulsome, fair and transparent process.

It should be reiterated that BlackRock had already deployed a global search for financing during the years leading up to the initiation of the CCAA Proceedings, to no avail.

102 In the present circumstances, the Court concludes that sufficient efforts have been made to get the best price for BlackRock's assets and that the parties acted providently. The record also shows the efficacy and integrity of the process followed.

103 *The Monitor approved of the process leading to the proposed sale and filed with the court a report stating that in their opinion the sale would be more beneficial to the creditors than a sale or disposition under a bankruptcy (s. 36(3)(a) and (b) of the CCAA).* The Monitor not only approved the SISP but also participated in the negotiation and development of the Bidding Procedures and had primary carriage of the process throughout. In the course of the SISP, the Monitor consulted with BlackRock.

104 The Fifth Report concludes that the SISP was properly conducted and that the Proposed Transaction is beneficial for all the stakeholders compared to a bankruptcy scenario. The Monitor "is of the view that creditors who will suffer a shortfall following the Purchase Agreement would not obtain any greater recovery in a sale in bankruptcy." "Furthermore, bankruptcy proceedings would: (i) [c]ause additional delays and uncertainty in the sale of [BlackRock]'s assets; (ii) [j]eopardize the going concern operations of [BlackRock]; and, (iii) [l]ikely result in employees to be unemployed." [43]

105 *BlackRock's creditors were duly consulted (s. 36(3)(d) of the CCAA).* The secured creditors of BlackRock are Orion and IQ who are also the Stalking Horse Bidders. Obviously, they have been consulted extensively and they consent to the RVO Application.

106 Importantly, the Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government also expressed support for the Proposed Transaction, as outlined by their counsel in a letter sent to the Monitor on May 19, 2022:

> Our clients consider that the approval of the Stalking Horse Agreement offers the most, and perhaps the only, viable prospect to bring the BlackRock Mining Project into successful commercial operation and hence to secure for the Cree Nation of Eeyou Istchee the critically important benefits of the BallyHusky Agreement. [44]

107 The other creditors are unsecured creditors who have been duly advised of the Initial Application and Order, including the Bidding Procedures. They have decided not to participate in the SISP and nothing indicates that they would oppose to the RVO Application.

108 *The effects of the proposed sale or disposition on the creditors and other interested parties are beneficial overall (s. 36(3)(e) of the CCAA).* The Stalking Horse Bid is the best available alternative for BlackRock's creditors and other interested parties and should allow for BlackRock to emerge as a rehabilitated business in a stronger position to complete the Construction Financing and move forward with Project Volt. This outcome is advantageous to BlackRock and its stakeholders, including their creditors, employees, trading partners and First Nations partners.

109 It is true that the RVO will result in the claim of unsecured creditors being transferred to ResidualCo, an empty shell where all unassumed liabilities will be transferred. This transfer simply reflects the fact that the BlackRock's value, as tested in the market through the SISP and for many years prior to the current restructuring, is not high enough to generate value for these unsecured creditors.

110 As for the other stakeholders, they will benefit on the whole from the approval of the Proposed Transaction, as it will allow the Debtors' business to emerge in a position to move forward as a going concern. This will benefit the employees, trading partners and First Nations partners and it will have indirect socio-economic benefits in the province of Quebec.

111 *The consideration to be received for the assets is reasonable and fair, taking into account their market value (s. 36(3)(f) of the CCAA).* The consideration being paid by Orion and IQ, which is in excess of $100M, is importantly linked to the preservation the Debtor's permits (crucial to the conduct of the contemplated mining activities), certain existing contracts and its tax attributes.

112 The reasonableness of the consideration is well established. Given the amount of the secured debt held by Orion and IQ, the consideration which they will pay exceeds i) what the market would be willing to pay to inherit intangible assets BlackRock has been able to build over time and ii) the capacity to raise on the market the financing required for Project Volt.

113 Nobody submitted a higher bid after extensive attempts to raise financing over many years.

114 *Exceptionally, the RVO structure is appropriate in the circumstances.* In his Fifth Report, the Monitor outlines the reasons why, in his opinion, the reverse vesting order structure that would be implemented would be "more appropriate and beneficial than a traditional vesting order structure and that the reverse vesting order structure is necessary, reasonable and justified in the circumstances": [45]

> (i) Numerous agreements, permits, licenses, authorizations, and related amendments are part of the assets that have to be transferred as per the Purchase Agreements. It could be more complex to transfer the benefits of these assets in a traditional vesting order structure since consents, approvals or authorizations may be required. A reverse vesting order structure minimizes risks, costs or delays of having these assets transferred;
>
> (ii) The proposed reverse vesting order structure results in better economic results for some creditors of BRM who see their pre-filing claim being assumed and retained. Also, the reverse vesting order structure will avoid any delays or costs associated with the assignments of the assumed contracts;
>
> (iii) The contracts or obligations of the creditors and the stakeholders that are considered Excluded Assets and Excluded Obligations according to Schedule B of the Purchase Agreement will not be in a worse position than they would have been with a more traditional vesting of assets to a third party;
>
> (iv) Most assets of BRM are intangibles, such as agreements, permits, licenses, authorizations and related amendments, and their value depend on the capacity of the purchasers to complete the financing and achieve the project. These assets would have no or limited value if some of them were not being preserved. The reverse vesting order structure allows to avoid any potential risks around the transfer to the purchaser.

115 The Court agrees with the Monitor's conclusions. RVO structures have been found by courts to be appropriate in situations such as the present case, where a traditional sale of assets would lead to uncertainty regarding the transfer of numerous agreements, permits, authorizations and other regulatory approvals that are required for the continuation of a company's business. [46]

116 Indeed, BlackRock operates in the highly regulated mining industry. Their business is almost entirely constituted of such intangible assets, which provide a head start of several years to the purchaser. Some of these assets cannot be assigned or are at least difficult to assign. Therefore, the capacity to restructure BlackRock depends heavily on the capacity to keep the existing legal entities in place while restructuring the share-capital of BlackRock. That is exactly what the RVO provides for.

117 If BlackRock was forced to proceed with a traditional asset sale, it could significantly increase the costs, generate uncertainties and reduce the value its assets, to the detriment of all parties involved.

118 Moreover, despite the Intervenors' firm belief, the SISP has unequivocally demonstrated that there is no realizable value in BlackRock's business or assets beyond the secured debt of IQ and Orion, such that there is no equity left for its unsecured creditors, let alone its shareholders.

119 The Court adds that Shareholders have little or no say in CCAA proceedings like the present one, where the debtor company is insolvent and its shares have lost all value. This goes to their legal interest in contesting an arrangement or transaction proposed by the company. [47]

120 In any case, the shareholders and unsecured creditors of BlackRock are not in a worse position with an RVO than they would be under a traditional asset sale. Either way, they would have no economic interest because the purchase price paid would not generate any value for the unsecured creditors (and even less so for the shareholders).

121 This is consistent with the conclusions of the Ontario Superior Court of Justice in *Harte Gold Corp.*:

> [59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.
>
> [60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.
>
> [61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the Bankruptcy and Insolvency Act or an order made under the Companies Creditors Arrangement Act approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.
>
> [62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.
>
> [. . .]
>
> [64] [. . .] In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders [. . .]. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances. [48]

[Emphasis added]

122 In particular, paragraphs 61 and 62 of the above excerpt answer the Intervenors' argument about the jurisdiction of the Court to cancel their shares under *the Canada Business Corporations Act* [49] (*CBCA*). The same logic applies with sections 173 and 191 of that statute. The power to cancel and issue shares in the context of an RVO is captures by the possibility for an court order to "change the designation of all or any of [the corporation's] shares, and add, change or remove any rights, privileges, restrictions and conditions [. . .] in respect of all or any of its shares, whether issued or unissued", pursuant to 191(2) and 173(1)(g) of the CBCA.

123 It should also be noted that the Intervenors' opposition to the RVO structure in particular appears to be new. Canada Inc.'s non-binding LOI had already conceded on March 9, 2022 that its proposed bid could itself "take the form of a reverse vesting order". [50] Ultimately, it seems that the Intervenors are not objecting to the use of an RVO *per se*, but only to the extinguishment of their equity interests, which would occur irrespective of the use of an RVO structure or of a traditional vesting order.

124 Therefore, the fact that the transaction is structured as an RVO only has benefits and does not prejudice any of the stakeholders. The Court finds that in the specific circumstances of the present case, the proposed RVO is an appropriate arrangement.

7.3 Discussion on the releases

125 The Proposed Transaction contemplates releases for various parties, including Orion and IQ, from all claims relating to, in particular, BlackRock, its restructuring or the Proposed Transaction.

126 While the Intervenors do not object to a release being granted to BlackRock directors or to the Monitor, they argue that Orion and IQ's actions constitute an abuse of both their rights as shareholders and of the CCAA process. Thus, the effect of the requested releases in favour of Orion and IQ would be to dismiss the Intervenors' potential claims without the benefit of hearing any evidence allowing for the determination of their potential liability.

127 For the reasons below, the Court holds that the releases in favor of Orion and IQ will form part of the Proposed Transaction.

128 It is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction.[51] In fact, similar releases have been approved by this Court in recent cases involving RVO transactions, including in *Nemaska Lithium*.[52]

129 This being said, the courts should not grant releases blindly and systematically.

130 In *Harte Gold Corp.,* the Court approved releases in favor of various parties that included the purchaser and its directors and officers and considered the criteria ordinarily canvassed with respect to third-party releases provided for under a plan, as articulated in *Lydian International Limited (Re)*[53] and elsewhere[54]. They are the following:

> a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
>
> b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
>
> c) Whether the plan could succeed without the releases;
>
> d) Whether the parties being released were contributing to the plan; and
>
> e) Whether the release benefitted the debtors as well as the creditors generally.[55]

131 In the present file, IQ's and Orion's participation was obviously instrumental to the restructuring of BlackRock's business. Considering the SISP and the opportunity given to BlackRock's stakeholders to participate in the process, it is reasonable for IQ and Orion to now start with a clean slate and not to be under the threat of potential claims as they will be leading BlackRock's efforts with Project Volt. The release will provide more certainty and finality.

132 The release is thus reasonably connected and justified as part of the Proposed Transaction,[56] and it is to the benefit of BlackRock and its stakeholders generally as it will allow BlackRock to emerge as a solvent entity and be in the best possible position to, hopefully, secure financing for Project Volt. They are also fair and reasonable in the present circumstances.

133 The eventual claims for which Orion and IQ should not be released, according to the Intervenors, are based on allegations of abuse related solely to Orion's and IQ's Stalking Horse Bid and their conduct during the SISP.

134 The Court was sensitive to the shareholders' submissions initially and extended the SISP delays to ensure that the process was as fulsome and fair as possible. Still, and in spite of all the efforts made over the years, IQ and Orion remain the only entities who are ready to take over the development of BlackRock and to further invest in same.

135 In the process leading to the Bidding Procedures Order, to the refusal of the Bid Extension Application and to the approval of the Proposed Transaction (Reverse RVO), the Court was able to appreciate the context leading up to the final outcome ordered as per the present judgment and also found the Proposed Transaction, as proposed by Orion and IQ, to be fair and reasonable. The Court sees little to no room for a finding of abuse in the events leading to the CCAA proceedings, to the SISP or to the approved transaction.

136 To the contrary, there is no good reason to leave the door open to the Intervenors' potential claims against Orion and IQ, to BlackRock's detriment.

137 Therefore, the release provided for in the Proposed Transaction will be granted.

FOR THESE REASONS, THE COURT:

138 *DECIDES* in accordance with the attached orders.

Bidder's motion dismissed; debtors' motion granted.

Footnotes

* A corrigendum issued by the Court on July 13, 2022 has been incorporated herein.

1 Reasons in support of orders issued on May 31, 2022 and rectified on June 1, 2022

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

3 Fifth Report, par. 27.

4 Exhibits A-2, R-3.

5 Exhibit R-2.

6 Exhibits A-2, R-3.

7 Exhibit R-5.

8 See par. [68] and following of the present judgment.

9 Exhibit R-6.

10 Exhibit R-7.

11 Exhibit A-3.

12 Exhibit A-4, filed under seal.

13 *Royal Bank v. Soundair Corp.* [1991 CarswellOnt 205 (Ont. C.A.)], 1991 CanLII 2727; *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S. C.A.); *Bank of Montreal v. Maitland Seafoods Ltd.* (1983), 46 C.B.R. (N.S.) 75 (N.S. T.D.).

14 Exhibit R-11.

15 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), par. 14-15.

16 *Canada v. Canada North Group Inc.*, 2021 SCC 30 (S.C.C.), par. 21; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.), par. 48-51.

17 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.), par. 40.

18 *Boutiques San Francisco Inc., Re* [2004 CarswellQue 753 (C.S. Que.)], 2004 CanLII 480, par. 20. See also *Bloom Lake General Partner Ltd., Re*, 2015 QCCS 3064 (Que. Bktcy.) , par. 70 (leave to appeal dismissed, 2015 QCCA 754 (C.A. Que.)).

19 See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 (Que. Bktcy.), par. 14 (leave to appeal dismissed, 2020 QCCA 1488 (C.A. Que.); leave to appeal to SCC dismissed [2021 CarswellQue 4589 (S.C.C.)], 2021 CanLII 34999).

20 Fifth Report, par. 28.

21 Exhibit A-2.

22 Exhibit R-5, par. 3.

23 Fifth Report, par. 38-41.

24 Exhibit A-11.

25 Exhibit R-14.

26 *Mecachrome Canada inc., Re*, 2009 QCCS 6355 (C.S. Que.), par. 28.

27 Exhibit R-2.

28 See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 (Que. Bktcy.), par. 71-79 (leave to appeal dismissed, 2020 QCCA 1488 (C.A. Que.); leave to appeal to SCC dismissed, 2021 CanLII 34999); *Quest University Canada (Re)*, 2020 BCSC 1883 (B.C. S.C.), par. 151-172 (leave to appeal dismissed, 2020 BCCA 364 (B.C. C.A.)); *CCAA Plan of Arrangement - Clearbeach and Forbes*, 2021 ONSC 5564 (Ont. S.C.J. [Commercial List]), par. 24-26; *Harte Gold Corp. (Re)*, 2022 ONSC 653 (Ont. S.C.J. [Commercial List]), par. 36-39, 77.

29 2020 QCCS 3218 (Que. Bktcy.) (leave to appeal dismissed, 2020 QCCA 1488 (C.A. Que.); leave to appeal to SCC dismissed, 2021 CanLII 34999).

30 2020 CSC 10 (S.C.C.).

31 *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488 (C.A. Que.) (leave to appeal to SCC dismissed, 2021 CanLII 34999).

32 *Quest University Canada (Re)*, 2020 BCSC 1883 (B.C. S.C.), par. 154 (leave to appeal dismissed, 2020 BCCA 364 (B.C. C.A.)).

33 *Id.*, par. 157, citing *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) , par. 14-15.

34 2021 ONSC 5564 (Ont. S.C.J. [Commercial List]), par. 24.

35 2022 ONSC 653 (Ont. S.C.J. [Commercial List]).

36 *Harte Gold Corp. (Re)*, 2022 ONSC 653 (Ont. S.C.J. [Commercial List]), par. 36-37.

37 *Canada v. Canada North Group Inc.*, 2021 SCC 30 (S.C.C.), par. 23. See also *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), par. 70.

38 1991 CanLII 2727; *AbitibiBowater inc., Re*, 2010 QCCS 1742 (C.S. Que.), par. 34-35.

39 See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 (Que. Bktcy.), par. 50 (leave to appeal dismissed, 2020 QCCA 1488 (C.A. Que.); leave to appeal to SCC dismissed, 2021 CanLII 34999); *CCAA Plan of Arrangement - Clearbeach and Forbes*, 2021 ONSC 5564 (Ont. S.C.J. [Commercial List]), par. 25.

40 Janis SARRA, "Reverse Vesting Orders - Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431.

41 *Id.*, p. 4, 26. See ss. 4-6 of the CCAA.

42 *Quest University Canada (Re)*, 2020 BCSC 1883 (B.C. S.C.), par. 171 (leave to appeal dismissed, 2020 BCCA 364 (B.C. C.A.)).

43 Fifth Report, par. 57-60.

44 Exhibit R-11.

45 Fifth Report, par. 65-66.

46 See *supra*, note 28.

47 *Peloton Pharmaceutiques inc., Re*, 2017 QCCS 1165 (Que. Bktcy.), par. 65-78; *Raymor Industries inc., Re*, 2010 QCCA 578 (C.A. Que.), par. 4-6; *Stelco Inc., Re* [2006 CarswellOnt 406 (Ont. S.C.J. [Commercial List])], 2006 CanLII 1773, par. 18.

48 *Harte Gold Corp. (Re)*, 2022 ONSC 653 (Ont. S.C.J. [Commercial List]), par. 59-64.

49 R.S.C. 1985, c. C-44.

50 Exhibit A-2.

51 See *Re Green Relief Inc.*, 2020 ONSC 6837 (Ont. S.C.J. [Commercial List]), par. 23-25; *8640025 Canada Inc. (Re)*, 2021 BCSC 1826 (B.C. S.C.), par. 43.

52 *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 (Que. Bktcy.), par. 103-106 (leave to appeal dismissed, 2020 QCCA 1488 (C.A. Que.); leave to appeal to SCC dismissed, 2021 CanLII 34999).

53 2020 ONSC 4006 (Ont. S.C.J. [Commercial List]).

54 *Harte Gold Corp. (Re)*, 2022 ONSC 653 (Ont. S.C.J. [Commercial List]), par. 78-86. See also *Re Green Relief Inc.*, 2020 ONSC 6837 (Ont. S.C.J. [Commercial List]), par. 27-28.

55 *Lydian International Limited (Re)*, 2020 ONSC 4006 (Ont. S.C.J. [Commercial List]), par. 54. See also: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.);

56 See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.), par. 70 (leave to appeal to SCC dismissed [2008 CarswellOnt 5432 (S.C.C.)], 2008 CanLII 46997).

End of Document

TAB C

2020 BCSC 1883
British Columbia Supreme Court

Quest University Canada (Re)

2020 CarswellBC 3091, 2020 BCSC 1883, 326 A.C.W.S. (3d) 192, 85 C.B.R. (6th) 41

In the Matter of the COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

In the Matter of the SEA TO SKY UNIVERSITY ACT, S.B.C. 2002, c. 54

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA (Petitioner)

Fitzpatrick J.

Heard: November 12-13, 16, 2020
Judgment: November 16, 2020
Written reasons: December 2, 2020
Docket: Vancouver S200586

Proceedings: leave to appeal refused *Southern Star Developments Ltd. v. Quest University Canada* (2020), 2020 CarswellBC 3252, 2020 BCCA 364, Harris J.A., In Chambers (B.C. C.A.)

Counsel: J.R. Sandrelli, V. Cross, for Petitioner
V.L. Tickle, for Monitor PricewaterhouseCoopers Inc.
P. Rubin, G. Umbach, for Primacorp Ventures Inc.
K. Jackson, G. Nesbitt, for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.
P. Reardon, K. Strong, for Southern Star Developments Ltd.
C.D. Brousson, for Vanchorverve Foundation
D.V. Bateman, for Dana Hospitality LP
D. Lawrenson, for Halladay Education Group
K. Mak, for Capilano University
J. D. West, for Landrex Ventures Inc.
J. Sanders, S. Rogers, for Quest University Faculty Union
K. Davies, for Bank of Montreal
A. Welch, for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training
K.E. Siddall, for 1114586 B.C. Ltd.
L. Hiebert, for Association for the Advancement of Scholarship

Subject: Insolvency; Public

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Parties were involved in proceedings under Companies' Creditors Arrangement Act — Arrangement plan was approved, while approval of transaction and vesting order was adjourned — Creditor SS Ltd. formalized opposition to vesting order and brought application for order prohibiting debtor disclaiming certain subleases of university residences, which was required for transaction to proceed — Application dismissed; transaction approved — Certain lot on property of debtor was not subject to extant lease, and certain related charges were not intended to be registered until construction began — Jurisdiction existed under s. 11 of Act to approve transaction and to grant order sought by debtor to ensure that SS Ltd. did not assert any rights under lot lease, and authority existed under s. 36(6) of Act that allowed Court to exercise its jurisdiction to vest off other restrictions —

2020 BCSC 1883, 2020 CarswellBC 3091, 326 A.C.W.S. (3d) 192, 85 C.B.R. (6th) 41

Balance of equities regarding creditor C university's charges including mortgage security on certain lots favoured vesting off C university's right of first refusal to allow transaction to proceed — Creditor L Inc. was not entitled to further time to present offer for debtor's assets in competition with transaction — L Inc. had been fully engaged in discussions for some length of time and was given opportunity to participate in sale and partner search process — L had executed purchase and sale agreement when debtor had already signed purchase and sale agreement as part of transaction, but L had not secured rights of exclusivity — Transaction involved significant other benefits to debtor than L Inc.'s offer in terms of debtor's future operations, and was better for shareholders — Any hardship to SS Inc. from disclaiming leases was not shown to be significant, as there was no clear indication how mitigation matters might resolve — Revisions to transaction by parties deleted conditions precedent requiring creditor and court approval of plan, so that only condition precedent that remained before closing was granting of transaction's reverse vesting order — Effect of transaction was to achieve what debtor originally sought by way of restructuring, namely, sale of certain assets to buyer and continuation as going concern as academic institution, in partnership with buyer — Transaction at issue was only transaction that had emerged to resolve financial affairs of debtor and no other options were available — SS Ltd. and other creditors were working actively against goals of Act by their opposition to transaction.

APPLICATION by creditor for order preventing disclamation of leases in proceedings under *Companies' Creditors Arrangement Act*.

***Fitzpatrick J.*:**

INTRODUCTION

1 On November 3, 2020, the petitioner, Quest University Canada ("Quest"), applied for various orders in these *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 ("*CCAA*") proceedings. Orders sought by Quest included approval of a sale transaction with Primacorp Ventures Inc. ("Primacorp") and orders necessary to facilitate that transaction, namely allowing Quest to implement a claims process and calling a meeting to consider its plan of arrangement.

2 On November 3, 2020, I granted the Claims Process Order and a Meeting Order to allow the creditors to consider Quest's plan of arrangement dated November 1, 2020 (the "Plan"). I also approved Quest's agreement to pay Primacorp a Break Up Fee and granted a charge to secure that amount: *Quest University Canada (Re)*, 2020 BCSC 1845 (B.C. S.C.).

3 I adjourned Quest's application for a Transaction Approval and Vesting Order (TAVO) to approve the Primacorp transaction to these hearing dates to allow opposing parties to consider the matter further and prepare necessary materials.

4 Southern Star Developments Ltd. ("Southern Star") has since formalized its opposition to the granting of the TAVO. Indeed, its opposition has since increased in force because Quest and Primacorp have now changed the relief sought to approve the Primacopr transaction within the context of a "reverse vesting order" ("RVO"), as explained below. Southern Star also now applies for an order prohibiting Quest from disclaiming certain subleases, as is required in order for the Primacorp transaction to proceed.

5 In the meantime, other parties have joined in opposing the approval of the Primacorp transaction for a variety of reasons, including those advanced by Southern Star in relation to the RVO.

6 At the conclusion of this hearing, I granted the RVO and dismissed Southern Star's application, with written reasons to follow. These are my reasons for those orders.

BACKGROUND FACTS

7 This *CCAA* proceeding has been underway for almost ten months, after the granting of the Initial Order on January 16, 2020.

8 Since that time, the Court has extended the stay of proceedings a number of times, to allow Quest to undertake efforts to find a restructuring solution to its financial difficulties that would allow it to continue its educational endeavours. Many stakeholders have been actively involved in these proceedings, including secured creditors who, collectively, will be owed approximately $30.7 million by the end of December 2020.

9 I have also approved interim financing to allow Quest to continue its operations while in this proceeding, with that debt now approaching $11 million.

10 Quest's assets include lands in Squamish, BC, being Lot 1, on which the campus is located (the "Campus Lands"), as well as the surrounding 38 acres (the "Development Lands".) Lot 1 is encumbered by various charges, liens, interests, mortgages and assignments of rent, including a mortgage held by Capilano University ("CapU"). In addition, CapU holds various rights of first refusal, including a right of first refusal to purchase, a right of first refusal to lease and rights of first refusal to acquire the charges of Quest's major secured creditor, Vanchorverve Foundation ("VF") (collectively, the "ROFR").

11 Quest is also the registered owner of five real property lots (Lots A-E), four of which are the sites of its university residences (on Lots A-D) (collectively, the "Residences").

12 One of the significant flashpoints in this proceeding has been, and continues to be, in relation to the Residences that Quest leases from Southern Star. After the Residences became vacant in March 2020 following the onset of the COVID-19 pandemic, Quest attempted to defer payment of the substantial lease payments owed to Southern Star. On June 19, 2020, I denied that relief: *Quest University Canada (Re)*, 2020 BCSC 921 (B.C. S.C.) (the "Rent Deferral Reasons").

13 Quest's principal focus in these proceedings has been toward identifying a partner/investor to purchase its land assets and/or identifying an academic partner/investor that would permit Quest to continue as a post-secondary institution.

14 Since January 2020, Quest's Board of Governors and its Restructuring Committee have been working with a private educational consultant, Halladay Education Group Inc. to find a prospective academic partner. In addition, since March 2020, Quest has been working with Colliers Macaulay Nicolls Inc. to find prospective purchasers for Quest's real property assets.

15 There is no dispute that the sale and partner search process (SISP) has been extensive, as confirmed by the Monitor. Quest submits, and I accept that its management, the Restructuring Committee, and the Board analyzed all proposals based on a number of factors, including:

a) Creditor recovery from the purchase price or other consideration under the proposal;

b) That the proposal would result in a completed transaction;

c) That the proposal offered allowed for Quest's long-term continuation as a post-secondary academic institution; and

d) That the proposal would lead to the continuation of a school on Quest's lands that aligned with Quest's current vision and academic quality.

16 The SISP resulted in a number of academic and real estate organizations approaching Quest to express interest in pursuing a transaction. Quest engaged with a number of potential purchasers or partners from Canada, the United States and other countries. Some parties executed Non-Disclosure Agreements (NDAs) and Quest received numerous Letters of Intent (LOIs) and other proposals.

17 On May 28, 2020, this Court granted an extension of the stay of proceedings. At that time, Quest stated that there was a realistic potential of a transaction with the party identified as the "Academic Partner". Unfortunately, that transaction did not proceed.

18 On August 7, 2020, this Court granted a further extension of the stay of proceedings to December 24, 2020 to allow Quest to continue seeking proposals towards a transaction by that deadline and to allow Quest to offer the fall term to its students. Quest was still in discussions with various interested parties at that time. By then, Quest had received LOIs, including one from Primacorp (identified as "Academic Partner #2) as of July 29, 2020.

19 Since August 7, 2020, Quest and Primacorp have worked extensively to negotiate the definitive documents toward completing a transaction. On September 16, 2020, Quest and Primacorp executed a Purchase and Sale Agreement (the "Primacorp PSA").

20 The Primacorp transaction, as originally presented, provided for:

a) Sufficient funds to pay Quest's secured creditors' claims, including claims secured by the *CCAA* charges;

b) Funding for a plan of arrangement to be voted on by Quest's unsecured creditors;

c) Funds for these insolvency proceedings; and

d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

21 The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They were complete by October 28, 2020 and included, as defined in the Monitor's Fourth Report, the Primacorp PSA, the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms included:

a) Primacorp will purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the residence Lands (Lots A-E; four of which involve Southern Star's subleases), chattels and vehicles;

b) Primacorp will lease specific Campus Lands back to Quest under a long-term lease arrangement;

c) Primacorp will provide marketing and recruiting expertise to support Quest as a university;

d) The Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales;

e) Primacorp will fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and $1.35 million under Quest's Plan; and

f) Primacorp will provide Quest with a $20 million secured working capital facility to support its operations.

22 The Primacorp transaction was subject to a number of significant conditions:

a) Quest's disclaimer of the four Southern Star subleases of the Residences or an agreement with Southern Star. On October 23, 2020, Quest disclaimed those subleases;

b) Court approval of the Primacorp transaction including approval of a Break Up Fee and Break Up Fee Charge to secure Primacorp's costs. On November 3, 2020, I approved the Break Up Fee and granted a charge to secure this amount;

c) Creditor approval of Quest's Plan under the *CCAA*. On November 3, 2020, I granted the Meeting Order to allow Quest to present the Plan, after having completed a claims process under the Claims Process Order, also granted on that date; and

d) Court approval of the Plan under the *CCAA*.

23 On November 3, 2020, when Quest sought the TAVO (which was adjourned), Quest asserted that the Primacorp transaction was beneficial in many respects. Quest argued that it maximized the value of Quest's assets, offered the greatest benefit to stakeholders, had a high likelihood of completing, provided a recovery for secured and unsecured creditors, and had the highest likelihood that Quest will continue to operate within its current academic model.

24 The Monitor concurred. In its Fourth Report dated November 2, 2020, the Monitor referred to the fact that there were only two viable proposals, with Primacorp's offer being the superior one. The Monitor's Supplemental and Confidential Report dated November 2, 2020 (the "Confidential Report") is also before the Court, although filed under seal. That Confidential

Report referred to four other proposals received by Quest that were "not currently at a stage such that they are capable of being accepted by Quest".

25 Quest and Primacorp both see the closing of the Primacorp transaction as very time sensitive. Pursuant to agreements with the Interim Lender, Quest was required to enter into a transaction by October 30, 2020 with an anticipated closing of November 30, 2020. The Interim Lender has since agreed to amend that requirement to extend the necessary closing date to December 24, 2020 in accordance with the Primacorp transaction.

26 In addition to satisfying increasing pressure to repay its secured creditors, Quest seeks to exit these *CCAA* proceedings as soon as possible to allow it to recruit and plan for the upcoming 2021/22 academic year. Finally, there are other more financially driven and critical concerns. The Interim Lender has indicated that it will not fund its loan past December 2020. Without funding of some sort, Quest has no liquidity or financial ability after that time to continue operations.

ISSUES

27 The paramount issue for consideration is, of course, whether the Court should approve the Primacorp transaction under s. 36 of the *CCAA*. A number of subsidiary issues also emerged at this hearing, as a result of submissions from various stakeholders:

a) *Lot E*: Southern Star objects to the TAVO (now RVO), as vesting off any interest it may have under an unregistered lease of Lot E;

b) *ROFR*: CapU objects to the sale to Primacorp, asserting that Quest is ignoring its rights under the ROFR that allows CapU to purchase/lease Quest's lands;

c) *Other Offer*: Landrex Ventures Inc. ("Landrex"), together with CapU, assert that they should be given further time to finalize their offer for Quest's assets;

d) *Disclaimers*: Southern Star, supported by its secured creditor, Bank of Montreal (BMO), applies for an order that the subleases of the Residences not be disclaimed by Quest; and

e) *RVO*: Southern Star and another unsecured creditor, Dana Hospitality LP ("Dana"), object to the TAVO (now RVO), as being inappropriate and unfair in the circumstances and contrary to the spirit of the *CCAA*.

28 I will address the subsidiary issues in the first instance, before turning to an overall assessment of the Primacorp transaction and whether the Court should approve that transaction.

Lot E

29 As I described in the Rent Deferral Reasons (at para. 62), Quest, Southern Star and other parties are involved in a complex suite of agreements concerning the Residences that were built some time ago.

30 Quest is the limited partner in a limited partnership agreement with Southern Star, who is the General Partner (GP). They formed the Southern Star Developments Limited Partnership (the "LP") to build the Residences. Quest, as the owner of Lots A-D, leases those lands under Ground Leases to Southern Star (as the GP of the LP). The ground leases are at a nominal rate. In turn, Southern Star (the GP), as landlord, and Quest, as tenant, entered into Subleases for the Residences, once they were built.

31 The initial arrangements between Quest and Southern Star anticipated that a fifth student residence would be built on Lot E, the lot adjacent to Lot D.

32 In September 2017, as part of those arrangements, Quest and Southern Star executed certain Land Title documents (Form C Charges) attaching a Ground Lease and a Sublease with respect to Lot E. When the parties executed the Form C Charges, the Ground Lease was incomplete in many respects; it did not include any legal description because Lot E was created after the execution of the Form C Charges; and, it did not specify the applicable dates of the 99-year term. Finally, the Schedules

to the Ground Lease included various documents between Quest, Southern Star and Southern Star's lender intended to be later executed once the Ground Lease, the Sublease and the mortgage were finalized and registered at the Land Title Office.

33 The parties delivered to Form C Charges to a law firm to be held in escrow pending the commencement of construction of the Lot E residence. Only recently, in response to this application, did a lawyer of the law firm complete the legal description for Lot E. Quest authorized this addition some time ago and I do not consider that matter as determinative of Southern Star's rights, if any, under the Lot E Ground Lease.

34 At present, Quest's title to Lot E remains clear of any registration relating to Southern Star's Ground Lease so there is no need for Quest to obtain a vesting order to remove it from the title. However, Quest and Primacorp seek an order that any claims that arise from the yet incomplete and unregistered Ground Lease on Lot E shall not attach to Quest's assets that are to be vested in Primacorp. They also seek an order permanently enjoining Southern Star from registering the Lot E Ground Lease against title to Lot E.

35 Southern Star objects to the RVO as vesting off any interest it may have in the unregistered Lot E Ground Lease, arguing:

> a) This Court has no jurisdiction to do so under the *CCAA*. Southern Star argues that this is simply a disguised disclaimer of the Ground Lease that the *CCAA* expressly prohibits. Disclaimers are allowed pursuant to s. 32 of the *CCAA*, however, limits are imposed by s. 32(9)(d) which provides that disclaimers can not be made:
>
> > . . . in respect of real property or of an immovable if the company is the lessor.
>
> b) If such jurisdiction exists under the *CCAA*, the relief sought is not fair and equitable in the circumstances.

36 I will begin by discussing the nature of any interest held by Southern Star in relation to the Lot E Ground Lease.

37 In my view, no "lease" *per se* is yet in existence and valid and enforceable between Quest and Southern Star. Although the parties executed the Form C Charges relating to the Lot E Ground Lease, Southern Star's principal, Michael Hutchison, acknowledges that they were not to be registered until construction had commenced. I conclude that the parties did not intend that the Ground Lease would be valid and effective between them until that time, in conjunction with the registration of the Sublease and the execution and registration of Southern Star's mortgage that would allow construction to begin.

38 Southern Star does not argue that it has acquired any legal or beneficial interest in Lot E. At its highest, I conclude that Southern Star's rights to Lot E are purely contractual; Quest agreed that it would grant the Lot E Ground Lease in the future and it would become effective upon certain conditions being satisfied — in essence, an agreement to agree. Those conditions included that Quest would decide to build a residence building on Lot E and that Southern Star would arrange financing to construct the building. In these circumstances, I readily conclude that this condition has not been satisfied and will never be satisfied by Quest given Quest's insolvency.

39 Further, even assuming that this is a "disguised" disclaimer, I conclude that Quest is not a "lessor" as that term is used in s. 32(9)(d) of the *CCAA*. Quest agreed that, if certain conditions were satisfied, it would become a "lessor" under the Ground Lease; however, that has not come to pass.

40 I conclude that I have the jurisdiction under s. 11 of the *CCAA* to grant the order sought by Quest to ensure that Southern Star does not assert any rights under the Lot E Ground Lease at a future date. In addition, I rely on s. 36(6) of the *CCAA* that allows the Court to exercise its jurisdiction to vest off "other restrictions".

41 The exercise of the Court's jurisdiction under s. 11 and 36 of the *CCAA* requires that the relief sought be "appropriate". This is in the sense that it accords with the statutory objectives of the *CCAA*, not only in terms of what the order will achieve, but the means by which it employs to that end: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services] at para. 70.

42 In this respect, the parties have advanced arguments as to equitable considerations in terms of whether such relief is appropriate in the circumstances, while taking into account the respective positions of the parties. While in the receivership context, Quest has referred to various authorities that discuss the balancing of interests in similar situations where leases (in these cases effective and enforceable) were vested off title: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.) at paras. 19-23, citing *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154 (B.C. C.A.); *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648 (Ont. S.C.J.) at para. 66; rev'd other grounds *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817 (Ont. C.A.) at para. 25.

43 Southern Star argues that the equities favour it, not Quest, in these circumstances.

44 Southern Star contends that neither Quest nor Primacorp have made any attempt to negotiate with it concerning its interest in Lot E. I would not accede to this argument. While the negotiations between Quest, Primacorp and Southern Star were not fruitful, it remains the case that Quest has made good faith efforts to address Southern Star's interests, although its ability in that respect were hampered by Primacorp's willingness to accommodate those interests.

45 Southern Star also argues that it will be prejudiced if its contractual right is vested off in that Quest and Primacorp are not offering compensation for the loss of that interest. Southern Star focusses on what it says is the "status *quo*", arguing that it has the "right" to build a residence on Lot E. However, any such "right" is illusory at best, since Quest has no present ability to occupy the Residences, let alone the financial capability to participate in the construction of a fifth one on Lot E. Nor is there any realistic prospect that Quest will be in a position to do so in the future.

46 Southern Star's argument in relation to Lot E is an attempt to gain leverage more than anything else. If Southern Star's argument succeeds and the relief sought is refused, Southern Star would be in the same position — facing a sale of Lot E and a likely order vesting off any rights or interests it may have. It is a condition of the Primacorp transaction that Lot E be transferred to it without any further involvement with Southern Star. Without an order rejecting Southern Star's claim in respect of the escrowed Ground Lease on Lot E, the likely result would be the end of these proceedings and the commencement of realization proceedings by the Interim Lender and other secured creditors.

47 The Ground Lease is not effective and enforceable; the Ground Lease is not registered on title to Lot E. Given the circumstances, Quest has no ability to build a residence on Lot E and there is no reasonable prospect of that happening, given its insolvency and the need to dispose of its assets, including Lot E.

48 While I acknowledge the negative impact on Southern Star arising from this relief, that impact must be balanced in the context of Quest's restructuring efforts in this proceeding. Those efforts are intended to address not only Southern Star's interests, but also the myriad interests held by other stakeholders. The sale of Lot E to Primacorp will allow Quest to realize on its interest in Lot E to the benefit of the stakeholders as a whole.

49 I conclude that the relief sought by Quest in the RVO in relation to Lot E is appropriate and it is granted.

CapU ROFR

50 Lot 1 and Lots A-E are subject to various charges in favour of CapU.

51 In March 2019, Quest granted mortgage security in favour of CapU in connection with a loan made to Quest. As part of these agreements, in April 2019, Quest also granted the ROFR in favour of CapU. CapU registered the ROFR against these lands. Under the Primacorp transaction, Quest is required to obtain title to Lot 1 and Lots A-E without reference to the ROFR.

52 Pursuant to s. 9 of the *Property Law Act*, R.S.B.C. 1996, c. 377, a right of first refusal to land is an equitable interest in land.

53 CapU has referred to two non-*CCAA* cases that discuss ROFRs generally.

54 In *Adesa Auctions of Canada Corp. v. Southern Railway of British Columbia Ltd.*, 2001 BCSC 1421 (B.C. S.C.) at paras. 26-30, the Court found that the contractual terms were to be strictly enforced and that the rights under the ROFR could not be defeated or circumvented by an offer that included other lands not covered by the ROFR. To similar effect, *Alim Holdings Ltd. v. Tom Howe Holdings Ltd.*, 2016 BCCA 84 (B.C. C.A.) at para. 41 states, following *Adesa*, that a ROFR will be triggered by a package sale that includes the subject property, subject to contrary language in the ROFR.

55 It is common ground, however, that different considerations may also apply in the *CCAA* context. Having said that, there is little case authority on the ability of a court in *CCAA* proceedings to vest off a ROFR, whether triggered or not.

56 In "Rights of First Refusal and Options to Purchase in Insolvency Proceedings" (2019) 8 J.I.I.C. 103 (the "ROFR Article"), the authors Virginie Gauthier, David Sieradzki and Hugo Margoc extensively review the issue, including in relation to Options to Purchase (OTPs). At 106, the authors state:

> . . . Section 11 of the *CCAA* grants courts the right to "make any order that it considers appropriate in the circumstances" except as limited by the CCAA. As such, the *CCAA* court is well equipped to approve the sale of an OTP- or ROFR-encumbered asset to a party other than the rights-holder and without having first complied with the restrictive covenants if the transaction is in the best interests of the creditors at large, provided that the interest of the OTP or ROFR-holders is taken into account. The court will consider, *inter alia*, the monitor's views on these issues before making any such approvals.

57 At 118-119, the authors conclude that:

> While jurisprudence on this matter is not conclusive, it appears that a *CCAA* court would likely only vest out a valid and unexpired OTP that runs with the land in exceptional circumstances such as in the context of a going-concern restructuring where obtaining the highest possible price for the encumbered asset is paramount to support the restructuring efforts of the debtor company, and where the OTP rights-holders are also creditors in the proceeding and could seek compensation for any loss incurred due to the removal of the OTP right.
>
> . . .
>
> In summary, common law *CCAA* courts may vest out valid or unexpired ROFRs and OPTs in a case where the equities favour such an order or on consent.

58 Quest has referred to *Bear Hills Pork Producers Ltd., Re*, 2004 SKQB 213 (Sask. Q.B.), additional reasons 2004 SKQB 216 (Sask. Q.B.). In that *CCAA* proceeding, the debtors sought approval of a sale of bundled assets relating to a hog farm, in the face of a ROFR that applied to the land only. Justice Kyle referred to the overall security affecting the assets; the court also commented that a withdrawal of the lands from the sale would not allow the proposed sale to complete, leading possibly to a liquidation (at paras. 4-5).

59 However, in *Bear Hills*, Kyle J. relied on authorities that have since been questioned in *Alim Holdings* (see paras. 38-41). Justice Kyle's conclusion at para. 10 that the ROFR was not triggered runs contrary to the court's conclusion in *Alim Holdings* at para. 41.

60 I have no doubt that courts across Canada have vested off ROFRs in the context of assets sales approved in *CCAA* proceedings. For example, Quest refers to *Arctic Glacier Income Fund, Re*, [2012] M.J. No. 451 (Man. Q.B.) where a ROFR was vested off title, although the circumstances under which that *CCAA* relief was granted is not clear.

61 Similarly, in *Great Slave Helicopters Ltd. v. Gwichin Development Corp.* (November 23, 2018), Doc. CV-18-604434-00CL (Ont. S.C.J.), Justice Hainey's endorsement directed that a purchaser of aggregated assets in a *CCAA* proceeding provide certain information to the holder of the ROFR with respect to the purchase price allocation. The ROFR Article, which discusses the circumstances before the court in *Great Slave Helicopters* at 108-109, indicates that the issue of the exercise of the ROFR was ultimately resolved consensually.

62 Fortunately, in this case, there is no dispute concerning the Court's jurisdiction to address CapU's rights arising under the ROFR. Both Quest and CapU agree that the Court has jurisdiction under the *CCAA* to vest off the ROFR, subject to a consideration of the equities as between the parties.

63 For the following reasons, I conclude that a balancing of the equities favours vesting off CapU's ROFR to allow the Primacorp transaction to proceed:

a) Since January 2020, Quest has been pursuing a going concern restructuring that will permit it to remain as a university and employer in the Squamish area. CapU has been involved in this proceeding from the outset and was well aware of the opportunity to participate in that pursuit;

b) There is a significant issue as to whether the ROFR has even been triggered by delivery of the Primacorp PSA. The definition provided in the ROFR of "Bona Fide Offer to Purchase" means, in part, an offer that is:

> (iii) only for the entirety of the Property [the lands] and all chattels thereto and no other property, rights or assets
>
> [Emphasis added.]

The definition of "Purchased Assets" in the Primacorp PSA is broad and refers not only to lands and chattels, but a variety of other assets (for example, contracts, plans, permits, vehicles and intellectual property). This express language is what the court in *Alim Holdings*, at para. 41, described could indicate an intention that any such aggregated offer would *not* trigger the ROFR;

c) The term of the ROFR expires in March 2024. The ROFR appears to contemplate that, even if CapU does not exercise the ROFR, the purchaser of the lands must still agree to grant CapU a ROFR on the same terms. Similarly, "change of control" provisions are potentially effective that would allow CapU to later acquire control of Quest in place of anyone else. This would frustrate Primacorp's expectation under the Primacorp PSA that it would have the right to nominate the board of governors for Quest after closing;

Primacorp does not agree to assume these restrictions. In addition, every other offer for Quest's assets required that the ROFR be vested off title to the lands. It is difficult to see that any purchaser would agree to take title to purchased assets with such significant restrictions. If the ROFR is effective, this would give rise to a severe "chilling effect" on the market, with potentially disastrous results for Quest's restructuring efforts;

d) The 60-day period within which CapU is entitled to consider any "Bona Fide Offer to Purchase" is simply unworkable in these circumstances. This is not a matter of expediency, without regard to any rights held by CapU. Quest will have no funds to continue its operations past December 2020 and, if realizations by the secured creditors ensue, CapU's ROFR rights will be illusory at best;

e) CapU complains that it received the redacted Primacorp PSA only recently, on October 29, 2020. CapU then requested an unredacted copy, which Quest agreed to do upon CapU executing an NDA. CapU refused to sign the NDA, stating that it would hamper its ability to participate in its own offer. Again, CapU has had months to formulate its own offer;

f) Quest asserts that CapU has no intention to or ability to make its own offer for all of Quest's assets in competition to the Primacorp transaction. CapU has not put forward any evidence at this hearing to confirm such intention or ability. Similarly, there is no evidence that CapU truly wishes to or is able to exercise any rights under the ROFR to purchase Quest's lands and chattels;

g) I consider that the evidence conclusively supports that CapU advances its arguments under the ROFR simply as a tactic to oppose the Primacorp transaction and delay the matter so that it and Landrex can seek to advance their own joint competing offer;

h) As I will discuss below, the terms of the joint Landrex/CapU proposal is only semi-formed at this point and Quest has indicated that some major terms are not acceptable. As such, it is highly questionable that this joint offer is, as CapU asserts, a "better, higher offer";

i) I conclude that Quest has given proper regard to and has not ignored CapU's rights under the ROFR in the context of these proceedings. CapU has had sufficient information even from the redacted Primacorp PSA to discern the substance of the Primacorp transaction in terms of advancing any competing offer or exercising the ROFR;

j) Given the above circumstances, including CapU's involvement in Quest's lengthy efforts to restructure, I cannot conclude that CapU will suffer significant prejudice if the ROFR is vested off. Quest has indicated that CapU will have the opportunity to file a proof of claim in respect of any loss alleged to arise because of the vesting off of the ROFR. Of course, the value of any such claim would be questionable unless CapU can establish that its rights were triggered by the Primacorp transaction and that it had the ability to complete under the ROFR; and

k) The Monitor supports the Primacorp sale, as maximizing the value of Quest's assets for the stakeholders and allowing a successful restructuring of Quest's business.

64 If CapU has rights under the ROFR, allowing CapU to assert those rights would delay the Primacorp sale and potentially negate it, all with potentially devastating effect on the broader stakeholder group. The Primacorp sale is the only sale that is before the Court that would result in a restructuring of Quest for the benefit of the stakeholders. Clearly, within that context, the rights of all affected stakeholders must be balanced in respect of any rights held by CapU.

65 In *Bear Hills*, similar considerations were before the court. The Saskatchewan Court of Queen's Bench approved a bundled sale of assets, without first requiring compliance with a ROFR. In part, the prospective purchaser would only consider purchasing the complete bundle of properties for an aggregate purchase price and did not allocate value on a property-by-property basis.

66 As I have sought to do here, the court in *Bear Hills* (at para. 9) was attuned to the overarching and remedial statutory purpose and objective of the *CCAA* to avoid the "social and economic losses resulting from liquidation of an insolvent company": *Century Services* at para. 70 and *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at paras. 40-41. This objective is not to be achieved simply in the most expedient manner and without due regard to interests of stakeholders that are affected in that process. As the Court further stated in *Century Services* at para. 70, any restructuring is best achieved when "all stakeholders are treated as advantageously and fairly as the circumstances permit".

67 I am satisfied that it is appropriate, in the context of the Primacorp transaction, to vest off the ROFR held by CapU. In that regard, I have also considered the factors set out in s. 36(3) of the *CCAA* in terms of assessing any rights of CapU under the ROFR in that context.

Landrex / CapU Offer

68 Landrex, supported by CapU, opposes approval of the Primacorp transaction. Landrex argues that they should be given further time to present an offer for Quest's assets in competition with the Primacorp transaction.

69 As with CapU, Landrex has been fully engaged in discussions with Quest for some time now, having been alerted to the possibility of a transaction as long ago as fall 2019. Landrex's interest in Quest has always been in conjunction with securing an academic partner, namely, CapU.

70 In June 2020, Landrex and Quest entered into an agreement for a sale; however, the conditions lapsed.

71 On October 8, 2020, Landrex and Quest executed a further purchase and sale agreement (the "Landrex PSA") providing for a purchase price of $51 million for most of Quest's assets (Lot 1 only and excluding Lots A-E: obviating any need for disclaimers of the Southern Star Subleases or vesting off any of Southern Star's rights under the Lot E Ground Lease). The closing date under the Landrex PSA is December 23, 2020.

72 By the start of this hearing, significant conditions precedent in respect of the Landrex PSA were still outstanding. Those included the financing condition in favour of Landrex and the mutual condition by which "another party" (CapU) was to have secured a sublease with Quest after Landrex had granted CapU a lease in the first instance.

73 Landrex suggests that Quest is contractually bound to honour the Landrex PSA by allowing it further time to remove the conditions precedent, citing the good faith organizing principle discussed in *Bhasin v. Hrynew*, 2014 SCC 71 (S.C.C.). Further, Landrex argues that Quest has a duty to take all reasonable steps to satisfy the conditions precedent: *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 (S.C.C.).

74 Further discussions and negotiations continued between Landrex and Quest beyond October 8, 2020; however, matters under the Landrex PSA were not advanced.

75 By late October 2020, Quest was under significant pressure, if not a legal requirement from the Interim Lender, to conclude a transaction. At that time, only two potentially viable proposals were on the table, one being from Primacorp. As above, where the Monitor noted in its Confidential Report that other proposals were "not currently at a stage such that they are capable of being accepted by Quest", those "other proposals" included the Landrex PSA.

76 By the time the Landrex PSA was executed on October 8, 2020, Landrex was not aware that Quest had already signed the Primacorp PSA. However, I agree with Quest's counsel that Landrex had not secured any rights of exclusivity in terms of advancing its offer. The Landrex PSA provided:

> 20.2 Notwithstanding anything else contained herein, Landrex acknowledges and agrees that, following from date of the acceptance of this Offer by the Vendor until the date that the Vendor waives or declares satisfied the Vendor's Condition, the Vendor will be authorized to negotiate with or offer the Property for sale to any third party (including the entering into of any agreement by the Vendor with any third party) . . .

77 Under the Landrex PSA, Quest's Vendor's Condition was approval from its Board of Governors. Quest never obtained that approval because Quest's Board of Governors did not agree to certain deal terms under the Landrex PSA.

78 By October 29, 2020, Landrex would have been fully aware that its offer was not going to be advanced by Quest any further since, by then, Quest had chosen Primacorp.

79 On November 2, 2020, Landrex made a further offer for $53.5 million. The only other significant change to their offer was to describe the requirement for a lease/sublease arrangement between Landrex, "another party" (intended to be CapU) and Quest as Landrex's condition precedent, not a mutual condition precedent. Quest did not accept this offer.

80 In any event, by that time, Landrex's financing condition was far from being satisfied. On November 9, 2020, TD Asset Management ("TD"), Landrex's lender, provided a letter simply stating that it was continuing to work with Landrex and CapU to provide that financing.

81 I acknowledge that, since the initial hearing date of November 3, 2020, Landrex has moved to finalize its offer but it has only done so to some extent.

82 On November 13, 2020, Landrex secured a letter from TD that referred to a term sheet being in place after a final financing structure was negotiated (no documents were disclosed). However, TD's commitment is clearly conditional upon CapU's board approving the lease between Landrex and CapU at a meeting that is not scheduled to take place until November 24, 2020. There is no evidence as to what those lease terms are and whether there is a reasonable likelihood that CapU's board will approve it. Further, this whole arrangement continues to hinge on a negotiated sublease between CapU and Quest, which is not in place.

83 On November 16, 2020, Landrex's counsel advised of yet further developments: (i) removal of its financing condition; (ii) an LOI with Southern Star by which it would take over the Residences but not require disclaimer of the Subleases; and, (iii) agreement with CapU to remove the ROFR.

84 Despite these developments, Quest advised that it was still not agreeable to the terms of the Landrex transaction. In addition, the Monitor continues to support approval of the Primacorp transaction, noting the uncertainty and potential delay of CapU obtaining ministerial approval to allow its participation in the Landrex transaction.

85 The s. 36(3) factors continue to provide a useful structure for consideration of the Landrex transaction, and these late breaking developments.

86 I am satisfied that Landrex was given a reasonable opportunity to participate in the SISP and that it has been aware of this opportunity for many months, even before it officially began. The fact that the cash consideration under the Landrex transaction exceeds that of Primacorp is deserving of consideration. However, other considerations arise, including that the Primacorp transaction involves significant other benefits to Quest in terms of its future operations, including the working capital facility of $20 million.

87 Both Quest and the Monitor continue to be of the view that the Primacorp transaction is more beneficial to the creditors. I agree with this, particularly considering the continuing uncertainty and risk associated with the Landrex/CapU transaction that is yet to be resolved, leaving aside that Quest has unequivocally stated that it has no intention to pursue it. Even if the further negotiations required under the Landrex sale were advanced in an expeditious manner, it seems unlikely to be finalized by the end of the year. To the contrary, the Primacorp transaction has been finalized after weeks of complex negotiations and Quest and Primacorp are ready to close without further delay. I agree that time is of the essence at this stage of the proceedings, for the reasons already noted above.

88 In the overall circumstances here, I see no reason to delay, if not risk, the "bird in hand" transaction that arose through a reasonable sales process, in the hope that a more uncertain transaction may be finalized, such as with Landrex.

Southern Star Disclaimers

89 On October 23, 2020, and with the approval of the Monitor, Quest issued notices of disclaimer (the "Disclaimers") to Southern Star relating to the Subleases on Lots A-D by which Southern Star leases those lands and the Residences to Quest.

90 A condition precedent of the Primacorp transaction is that either Quest will disclaim the Subleases or Primacorp will have entered into an agreement with Southern Star to its satisfaction. The evidence discloses that negotiations did take place between the parties but they did not reach a mutually acceptable agreement.

91 Quest's rent payments to Southern Star under the Subleases for the Residences on Lots A-D total approximately $236,218 per month.

92 Very recently, on November 15, 2020, before the conclusion of this hearing, Quest voluntarily withdrew the Disclaimers with respect to Lots A-B. Accordingly, failing an agreement between Primacorp and Southern Star, it remains a condition of the Primacorp transaction that Quest's Disclaimers of the Subleases in relation to Lots C-D be upheld.

93 The Ground Leases are registered against Lots A-D. BMO's security is registered against Southern Star's interest under the Ground Leases; in addition, Fivestone Capital Corp. ("Fivestone"), a company controlled by Mr. Hutchison, has registered security against the Grounds Leases. Quest does not seek any relief in respect of the Ground Leases; unlike Lot E, those documents are fully effective and enforceable and have been the basis upon which the parties have developed those properties.

94 What remains to be addressed is Southern Star's application pursuant to s. 32(2) of the *CCAA*, supported by BMO, for an order disallowing any disclaimer by Quest of the Subleases of the Residences on Lots C-D. Section 32(4) of the *CCAA* lists various non-exhaustive factors that the court is to consider in relation to disputes over disclaimers:

> In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;

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

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

95 In *League Assets Corp., Re*, 2016 BCSC 2262 (B.C. S.C.), I discussed the significance of disclaimers in *CCAA* proceedings, both from the point of view of the counterparty and that of the entire stakeholder group:

> [49] These *CCAA* provisions are not inconsequential in the face of this type of proceedings. At this point, the matter is no longer between the debtor company and a counterparty. There are other stakeholders involved and the statutory provisions, and the provisions of court orders such as the Initial Order, are meant to protect the stakeholder group as a whole, while also allowing a certain amount of flexibility for the debtor company. A disclaimer of a contract has consequences not only to the debtor company, but the estate generally. Such an action can substantially increase the debt being faced by the estate or divest the debtor of a substantial benefit that might be realized for the benefit of the creditors. It is in that context that the *CCAA* requires that certain procedures be followed by the debtor company, with the necessary oversight by the Court's officer, the Monitor, as to whether any disclaimer will be approved or not.

96 The factor under s. 32(4)(b) of the *CCAA* as to enhancing the prospects of a viable restructuring applies equally in respect of disclaimers in the context of a sales process by which the business is to continue as a going concern: *Timminco Ltd., Re*, 2012 ONSC 4471 (Ont. S.C.J. [Commercial List]) at paras. 51-52 and *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc., Re*, 2012 QCCS 6796 (C.S. Que.) at paras. 48-50. In addition, the disclaimer need not be proven as "essential", only "advantageous and beneficial": *Timminco* at para. 54.

97 Quest asserts that the Disclaimers are necessary to pursue and complete the Primacorp transaction, which it considers the best possible outcome for Quest and its stakeholders, including students, faculty, staff, secured and unsecured creditors, suppliers and vendors. In its letter dated October 28, 2020 to Southern Star, Quest also refers to its liquidity crisis and that amounts owing to its secured creditors became due some time ago.

98 In its Fourth Report dated November 2, 2020, the Monitor confirmed its approval of the Disclaimers, based on:

> 2.8.1 The residences are not currently being used by Quest (other than two units being used by staff members and some limited use by a film crew recently) given on-line learning format being employed as a result of COVID 19;
>
> 2.8.2 It is a term of the Primacorp Agreement that the subleases be disclaimed; and,
>
> 2.8.3 The Monitor noted that the two most promising alternative parties in discussions with Quest also required the Southern Star subleases to be disclaimed.

99 Southern Star advances a number of arguments in relation to the Disclaimers.

100 Firstly, it argues that the Disclaimers will not result in a viable compromise or arrangement. Southern Star argues that there is no indication that Quest and Primacorp do not wish to continue to have the Residences as part of the student experience for those attending Quest.

101 I agree that, in the Rent Deferral Reasons, many of my comments (at paras. 23-26, 90) were confirmatory of the importance of the Residences to Quest in respect of its future operations. However, that was then and this is now. The pandemic continues in full force and Quest is necessarily required to make decisions in the face of current circumstances. I agree that it is likely that Quest will seek to continue the student residence experience once the pandemic has receded, however, when that might happen is anyone's guess.

102 In the meantime, Quest, under the Primacorp transaction, must make decisions as to its financial capabilities going forward. Maintaining two empty Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances. It was Primacorp, an arms length purchaser, who has imposed this condition.

103 Further, the Monitor agrees with Quest that the Disclaimers are necessary to enhance the prospects of Quest making a viable compromise or arrangement in these proceedings. There is no reason to question the Monitor's view as it is apparent that the Monitor has considered all relevant matters.

104 I agree that the Disclaimers will enhance the prospects of Quest making a viable compromise or arrangement. The Monitor overwhelmingly agrees after a consideration of all the circumstances including those particularly faced by Southern Star as a result.

105 Secondly, Southern Star argues that Quest delivered the Disclaimers simply to secure a bargaining advantage for Quest and Primacorp toward a re-visitation of the rent deferral issue or to attempt to reduce the rent. I agree that there is some indication that Quest and Primacorp had that in mind; however, that is often the reality that arises after a debtor concludes that it is no longer viable to abide by those contractual commitments and that a disclaimer is appropriate. If it were possible to come to an amicable resolution with Southern Star in the context of the Primacorp transaction, I expect Quest would have done so.

106 Southern Star refers to the statements in *Allarco Entertainment Inc., Re*, 2009 ABQB 503 (Alta. Q.B.) at para. 59, where Justice Veit considered whether certain contracts should be terminated. She was attuned to whether the termination was fair, appropriate and reasonable and whether it arose after good faith negotiations. In this case, there is no evidence to suggest that the parties did not approach the negotiations in good faith. Clearly, it is not my role on this application to assess the reasonableness of the respective positions of Quest, Primacorp and Southern Star in those negotiations. It does appear, however, that Quest and Primacorp have moved toward a middle ground by the withdrawal of the Disclaimers in relation to Lots A-B.

107 Thirdly, Southern Star places great emphasis on what it says will be the significant hardship it will suffer if the Disclaimers are upheld. Southern Star says that it has spent approximately $41.7 million to construct the Residences.

108 The monthly mortgage payments to BMO and Fivestone are approximately $220,000. The outstanding balance of the BMO loan facility is $34.4 million. Mr. Hutchison indicates that, without payment of rent by Quest, Southern Star will not be able to make its mortgage payments to BMO. In that event, BMO will be in a position to foreclose on the Ground Leases. Mr. Hutchison has guaranteed the BMO debt, as has another of Mr. Hutchison's companies.

109 As noted by Quest, any financial consequences to Southern Star will largely depend on what mitigating measures are undertaken. Those could include a re-letting of the Residences or a sale of its interests under the Ground Leases. At present, with no clear indication as to how those matters might evolve, I am unable to conclude with certainty that any hardship suffered by Southern Star would be "significant".

110 Regardless of any hardship faced by Southern Star, the reality is that Quest has only one viable means by which to advance the restructuring at this time — the Primacorp transaction. Within the confines of that transaction, Primacorp sees no merit in maintaining the Subleases on these two Residences. Apparently, no other interested party expressed an interest in maintaining the Subleases besides Landrex. In light of Landrex's submissions at the conclusion of this hearing on November 16, 2020, I have considered that the Landrex/CapU transaction may have presented a more palatable resolution of the Subleases given the recent LOI between Landrex and Southern Star. However, I conclude that delaying the Primacorp sale, on the prospect that the Landrex/CapU transaction will come about, is not a viable option for the reasons discussed above.

111 I agree that this decision will visit hardship, even arguably significant hardship, upon Southern Star. However, it is difficult to see that preventing delivery of the Disclaimers would avoid that result in any event. If the Primacorp transaction does not proceed, there is no transaction and Quest has no financial means to continue past December 2020. The Interim Lender has indicated that it will not advance funds to Quest beyond that date, and specifically, that it has no interest in funding continued rent payments to Southern Star.

112 In that event, Southern Star will be in the same position post December 2020, with Quest unable to pay the rent for the Residences at that time: see *Target Canada Co., Re*, 2015 ONSC 1028 (Ont. S.C.J.) at paras. 27-28.

113 As the court noted in *Target Canada* at paras. 24-25, the court must give due consideration to the stakeholder group as a whole in assessing whether the Disclaimers are fair and reasonable: *Doman Industries Ltd., Re*, 2004 BCSC 733 (B.C. S.C.) at para. 33. The price of setting aside the Disclaimers is that the Primacorp transaction will not proceed and a receivership at the behest of the Interim Lender will likely follow. In my view, this is not in the best interests of that larger stakeholder group which, in my view, has primacy here even in the face of the hardship and prejudice caused to Southern Star.

114 I dismiss Southern Star's application for order that the Subleases of the Residences on Lots C-D not be disclaimed by Quest.

RVO

115 At the November 3, 2020 hearing, when Quest originally sought the TAVO, Quest was seeking to uphold the Disclaimers of the Subleases. At that time, Southern Star's evidence and submissions were to the effect that, if the Court upheld the Disclaimers, it would have a substantial unsecured claim against the estate. As indicated above, the amount of any claim that Southern Star might advance in the estate is far from clear, given possible mitigation, although there is potential for a significant claim.

116 This position did not come as a surprise to Quest; however, it appears that Quest did not appreciate the potential magnitude of Southern Star's claim. More importantly, Quest has not fully appreciated that a very unhappy claimant — Southern Star under the Disclaimers — was not likely to vote in favour of the Plan and that the value of its claim could swamp the class votes to prevent any approval by the creditors. Again, creditor approval of the Plan is a requirement of the Primacorp Transaction.

117 In early November 2020, known unsecured creditor's claims were estimated at approximately $2.3 million. "Restructuring Claims" (which will include any claim of Southern Star under the Disclaimers) were yet unknown.

118 Initially, Primacorp agreed to fund Quest's Plan in the amount of the lesser of 50% of the claims or $1.35 million. The Monitor now states that there is a "high probability" that Southern Star's claim will be large enough such that Southern Star will control the value of the votes at the creditors meeting. Other major unsecured creditor claims have also since emerged, being that of Dana (estimated $1 million) and the Association for the Advancement of Scholarship (estimated $5 million).

119 As the Monitor notes, any of these claims could effectively veto the Plan.

120 Quest and Primacorp were then facing a dilemma. They determined that, while they might succeed on the Disclaimer issue, they could not likely obtain approval of the Plan, a further requirement of the Primacorp PSA, if Southern Star carried through with its suggested negative vote. While Quest could raise arguments in relation to the value of any claim advanced by Southern Star, uncertain and lengthy litigation would likely result; even if Quest was successful, it would be too late to factor into this restructuring.

121 Quest, with Primacorp's approval, solved this dilemma by revising the TAVO to an RVO. In addition, the Primacorp PSA was amended to delete the conditions precedent requiring creditor and court approval of the Plan. Accordingly, the only condition precedent that remains before closing of the Primacorp transaction is the granting of the RVO.

122 The Monitor supports this change as necessary in the circumstances in order to allow Quest to complete the Primacorp transaction. The Monitor supports the granting of the RVO.

123 In its Fifth Report dated November 10, 2020, the Monitor describes the characteristics of the new structure and steps under the RVO, which involves Quest's subsidiary, Guardian Properties Ltd. ("Guardian"):

> RVO Structure & Impact

2.6 The RVO provides for the following to occur in sequential order on the closing of the Primacorp Transaction:

2.6.1 A wholly owned subsidiary of Quest, Quest Guardian Properties Ltd. ("Guardian") shall be added as a Petitioner in these CCAA proceedings. Guardian was incorporated on January 25, 2018 and has never carried on any business and has never held any assets or liabilities;

2.6.2 All of Quest's right, title and interest in and to the Excluded Assets (as defined in the Primacorp PSA and the RVO) shall be transferred to and vested in Guardian;

2.6.3 All Contracts (other than Approved Contracts), Claims and Liabilities of Quest shall be transferred to Guardian and Quest shall be released from and in respect of all obligations in respect of such Contracts, Claims and Liabilities;

2.6.4 Primacorp will pay the Purchase Price to the Monitor to the extent of the Secured Charges and all the Secured Claims and the Secured Charges shall be extinguished and cancelled. The Purchase Price will stand in the place of the Purchased Assets;

2.6.5 All of Quests right, title and interest in the Purchased Assets shall vest in Primacorp free and clear of any security interests, Claims and Liabilities; and,

2.6.6 Quest will cease to be a Petitioner in these CCAA proceedings leaving Guardian as the sole Petitioner.

2.7 The RVO contains release provisions similar to those contained in the Plan. Quest, its employees, legal advisors and other representatives, Quest's Governors and Officers, and the Monitor and its legal counsel shall be released from any and all demands and claims relating to, arising out of, or in connection with these CCAA Proceedings. The releases do not apply in the case of wilful misconduct or fraud.

2.8 As a result of the amendments to the Primacorp Transaction and the RVO, if the RVO is granted:

2.8.1 There will be no uncertainty as to whether the Primacorp Transaction can close and the condition precedent for the approval of the Plan is no longer applicable. As a result, there will be certainty for the go-forward operations of Quest, thereby creating security for the Quest students, faculty and staff leading into the critical enrolment period for the winter term;

2.8.2 Guardian will become responsible for the obligations under the Southern Star subleases should they not be disclaimed. As Guardian will not have the financial resources to meet those obligations, it is expected that Guardian would default on the Southern Star subleases in January 2021; and

2.8.3 The Plan, which will now compromise the debts of Guardian, will be funded through the Primacorp Transaction and therefore this aspect of the Primacorp Transaction and the Plan has not changed.

124 As I will discuss below, the effect and substance of the RVO is to achieve what Quest has originally sought by way of a restructuring in these proceedings; namely, a sale of certain assets to Primacorp and, importantly, Quest continuing as a going concern as an academic institution, in partnership with Primacorp. The only aspect now missing is that, under the RVO, Quest will avoid having to obtain creditor or Court approval of the Plan.

125 The intention is that the amounts that Primacorp was to fund under the Plan will now be transferred to Guardian to be distributed under Guardian's plan in relation to the Quest's liabilities that are to be transferred to Guardian. Effectively, Guardian will be funded just as it was originally intended that Quest's Plan was to have been funded to resolve those claims.

126 Southern Star and Dana, as unsecured creditors of Quest, object to the granting of an RVO, contending that it effectively and unfairly negates their right to vote on Quest's Plan under s. 6 of the *CCAA*. They object to the transfer of their claims to

Guardian. They say that, although they will have the ability to vote on Guardian's plan, it will effectively mean that they cannot vote to block Quest's restructuring to enable it to continue as a going concern within the context of the Primacorp transaction.

RVO Jurisdiction and Authorities

127 There is no dispute between the parties that this Court has authority to grant the RVO under its general statutory jurisdiction found in s. 11 of the *CCAA*.

128 Quest has referred me to a number of decisions across Canada where courts have exercised that jurisdiction to grant an RVO in the context of sale approvals considered under s. 36 of the *CCAA*. I will review those decisions in some detail below to highlight the relevant circumstances.

129 In *T. Eaton Co., Re*, 2000 CarswellOnt 4502, 26 C.C.P.B. 295 (Ont. S.C.J. [Commercial List]), the Ontario court granted such an order under its *CCAA* proceedings. There are no written reasons discussing the circumstances in that case. The only brief reference to that structure is found in Claims Officer Houlden's decision in *Eaton's* that addressed an unrelated issue. The agreed statement of facts before the Claims Officer provided:

> 5. The *CCAA* Plan contemplated that all of the assets of Eaton's which were not being retained by Eaton's under the Sears Agreement would be transferred to a new corporation, Distributionco Inc. ("Distributionco"). These assets would then be liquidated by Richter & Partners Inc. ("Richter") in its capacity as court-appointed liquidator of the estate and effects of Distributionco. Richter would then distribute the assets of Distributionco to unsecured creditors and others in accordance with priorities set out in the *CCAA* Plan.
>
> 6. Under the *CCAA* Plan, unsecured creditor claims against Eaton's are converted into a right to participate in distributions in the liquidation of Distributionco based on the amount of the creditor's claim against Eaton's. Accordingly, a critical initial step in the liquidation of Distributionco is the determination of the validity and amount of claims asserted against Eaton's. For this purpose the *CCAA* Plan establishes a Claims Procedure for the resolution of such claims, of which the parties to this matter are aware.

130 It is unclear as to the basis upon which the court approved this structure in *Eaton's* although, as Southern Star notes, it was a transaction approved within the context of a *CCAA* Plan.

131 More recently, this structure was approved in *Plasco Energy, Re* (July 17, 2015), Doc. Toronto CV-15-10869-00C (Ont. S.C.J. [Commercial List]). In those *CCAA* proceedings, an agreement was approved that "effectively" transferred current tax losses and intellectual property to a purchaser. Justice Wilton-Siegel's endorsement stated:

> The Global Settlement contemplates implementation of a corporate reorganization by which the shares of Plasco will be transferred to an acquisition corporation owned by NSPG and CWP and the remaining assets of the applicants will be held by a new corporation, referred to as "New Plasco", which will assume all of the liabilities and obligations of Plasco. I am satisfied that the Court has authority under section 11 of the *CCAA* to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the *CCAA* insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise. For this purpose, I consider that the Global Settlement is analogous to such a plan in the context of these particular proceedings. . . .

132 Justice Gouin granted an RVO in the *CCAA* proceedings of *Stornoway Diamond Corp., Re* (October 7, 2019), Doc. Montreal 500-11-057094-191 (C.S. Que.). There are no written reasons from the court; however, the motion materials disclose that, under the transaction, the purchasers acquired substantially all the debtor's assets by purchasing 100% of the shares of one debtor company (SDCI, which held the acquired assets). In consideration, the purchaser released certain liabilities owed by the debtors and agreed to assume others.

133 In *Stornoway Diamond*, to ensure the purchaser acquired the assets free and clear of all encumbrances, the debtors incorporated a new subsidiary (Newco), added Newco as an applicant in the *CCAA* proceedings, and transferred all liabilities,

obligations, and unacquired assets of SDCI to Newco. The debtor's motion referred to this transaction as the only viable alternative to preserve the going concern value of the debtor. The debtor noted that the equity and "non-operational related unsecured claims" had no value. As in the RVO sought here, the court's order included familiar aspects found in sanction orders, including releases.

134 An RVO was also approved in the *CCAA* proceedings of *Wayland Group Corp., Re* (April 21, 2020), Doc. Toronto CV-19-00632079-00CL (Ont. Gen. Div. [Commercial List]). Approval was sought in the context of preserving valuable cannabis licenses. Justice Hainey's brief endorsement indicates that the relief was unopposed. The court approved a sale of substantially all of the debtor's assets to the successful bidder under a share purchase agreement after a sales and investment solicitation process.

135 Other information before me regarding the *Wayland Group* transaction is found in the applicant's factum. The factum refers to both *Plasco Energy* and *Stornoway Diamond*, while also referring to ss. 11 and 36(3) of the *CCAA* as the jurisdictional basis for the relief. The applicants argued that transferring certain assets and liabilities of the debtors into a "newco" would ensure that the purchaser acquired the underlying assets of the target company free and clear of all claims and encumbrances and allow the business to continue as a going-concern. They asserted that this was the "only way" to complete the sale to realize the value in the assets; it was also argued that this transaction was in the best interests of stakeholders and did not prejudice major creditors. In *Wayland Group*, the transaction value was only sufficient to repay the interim lender and perhaps some amount for the first secured creditor.

136 The Ontario court again approved a similar RVO transaction in the *CCAA* proceedings of *Comark Holdings Inc., Re* (July 13, 2020), Doc. Toronto CV-20-00642013-00CL (Ont. Gen. Div. [Commercial List]). Justice Hainey granted the RVO while again indicating in a brief endorsement that the relief was unopposed. The share sale preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business. The purchaser was a related party who was making a credit bid for the assets.

137 In *Comark Holdings*, the purchaser acquired all the issued and outstanding shares of the primary *CCAA* debtor and agreed to pay out all the secured debt and priority claims. The excluded assets, agreements, liabilities and encumbrances were transferred to another entity that became a debtor in the *CCAA* proceedings, with the result that the *CCAA* debtor held its assets free and clear of all claims and encumbrances and was then removed from the *CCAA* proceedings. The purchaser and the primary *CCAA* debtor then amalgamated. The new *CCAA* debtor (Newco) was authorized to make an assignment into bankruptcy. The monitor, along with the principal secured creditors, including the interim lender, supported the transactions. As in *Plasco Energy*, *Stornoway Diamond* and *Wayland Group*, the debtors in *Comark Holdings* argued that this was the "only option" to preserve the business, that the value in that business would be lost in a liquidation and that the transaction was in the best interests of the stakeholders generally.

138 Justice Conway granted an RVO in the *CCAA* proceedings of *Beleave Inc., Re* (Sep 18, 2020), Doc. Toronto CV-20-00642097-00CL (Ont. Gen. Div. [Commercial List]). As in *Wayland Group*, the preservation of valuable cannabis licenses were at stake. The motion was supported by the monitor and unopposed. Justice Conway stated in her brief endorsement:

> The Applicants seek approval of the transaction whereby . . . (the Purchaser) will acquire the operating business of the Applicants. The structure of the transaction is partly by share sale and partly by asset sale. The reason for the structure is to accommodate the licensing requirements of Health Canada. The order is structured as a reverse vesting order, in which excluded liabilities and assets will be transferred to "Residualco", which will then become one of the Applicants in the *CCAA* proceedings. Reverse vesting orders have been approved by the courts in other cases: see *Re Stornoway Diamond Corporation* . . . and *Re Wayland Group Corp* . . .
>
> The transaction is the culmination of a stalking horse sales process approved by the court. The motion is unopposed. The Monitor recommends and supports the transaction in its Fourth Report. In particular, the Monitor states that the proposed transaction is economically superior to the estimated liquidation value of the Beleave Group's assets and operations, will allow the Purchaser to maintain operations and use of the Cannabis licenses and will provide for continued employment

> for a majority of the existing employees. In my view, the transaction satisfies s. 36(3) of the *CCAA* and the *Soundair* test and should be approved.

139 In *Beleave Inc.*, the RVO included releases of claims similar to that granted in other RVO decisions. These provisions were also consistent generally with sanction orders and are similar to the relief sought by Quest here.

140 Even more recently, the Alberta court approved an RVO structure in the *CCAA* proceedings of *JMB Crushing Systems Inc., Re* (October 16, 2020), Doc. Calgary 2001-05482 (Alta. Q.B.). Justice Eidsvik approved the RVO structure as part of a sale approval. No written reasons of the court are available, however, the monitor's bench brief discloses the relevant facts.

141 As in the above cases, the transaction addressed in *JMB Crushing* arose from a sale and investment solicitation process that yielded only one offer, with the RVO described as a critical component. The underlying intention was to preserve the value of the paid up capital and regulatory permits in the *CCAA* debtor.

142 In *JMB Crushing*, the monitor relied on the orders granted in *Plasco Energy*, *Stornoway Diamond*, *Wayland Group* and *Beleave Inc.*, arguing that the RVO structure was justified in those circumstances:

> 24. In recent *CCAA* proceedings, where it was not practical to compromise amounts owed to creditors through a traditional plan of compromise and arrangement, but it was critical to the viability of a transaction to "cleanse" the debtor company, such that a prospective purchaser may: (i) utilize non-transferrable regulatory licenses (by way of amalgamation or the purchase of the shares of the debtor company); or, (ii) make use of tax attributes of the debtor company, such as [paid up capital], Courts have recently approved and utilized reverse vesting orders to achieve such objectives.
>
> 25. The purpose of a reverse vesting order is to transfer and vest all of the assets and liabilities of a debtor company, which are not subject to a sale, to another company within the same *CCAA* proceedings. The cleansed debtor company is then able to: (i) be utilized by a purchaser as a go-forward vehicle, without any concern regarding creditors and obligations that may otherwise be "laying in the weeds"; and, (ii) allow the purchaser to make use of the debtor company's tax attributes and non-transferrable regulatory licenses. This approach is necessary in situations where the parties would otherwise be unable to preserve the value of significant assets that are subject to restraints on alienation and to provide a corresponding realizable benefit for creditors and stakeholders.

143 In *JMB Crushing*, the monitor further justified the RVO structure in asserting that the debtor's secured creditors would suffer a shortfall even with such measures. The monitor stated that the unsecured creditors had no economic interest in the transaction and there was no reasonable prospect of any recovery to them. The debtor did not intend to undertake a claims process or present a plan to its unsecured creditors.

144 By pure coincidence, another and perhaps more compelling authority came to the attention of the parties during this hearing.

145 On November 11, 2020, the Québec Court of Appeal dismissed an application for leave to appeal the granting of an RVO by Gouin J. of the Québec Superior Court on October 15, 2020: *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 (Que. Bktcy.); leave to appeal denied *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488 (C.A. Que.). The Court of Appeal's decision is in English; Gouin J.'s decision is in French and no English translation was available. As such, all references to *Nemaska Lithium* will be to the QCCA.

146 All counsel agree that Gouin J.'s decision in *Nemaska Lithium* is the first time a Canadian court has granted an RVO in contested *CCAA* proceedings.

147 In *Nemaska Lithium* (at para. 5), the court stated that the RVO allowed the purchaser to carry on the operations of the Nemaska Lithium entitles (mining in James Bay) by maintaining existing permits, licenses and authorizations. This goal was accomplished via a credit bid for the shares in Nemaska Lithium in return for assumption of the secured debt. At para. 22, the

court refers to the intention of the "residual companies" to later present a plan of arrangement to the "remaining creditors", but the details are not disclosed.

148 In denying leave to appeal in *Nemaska Lithium*, the court stated that an appeal would hinder the progress of the proceedings. More relevant to this application were the court's comments on the legitimacy of the position of the only objecting creditor, Cantore, and the court's rejection that it was appropriate to allow Cantore to exercise a veto in the restructuring:

> [38] As it turns out, the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at $8,160 million out of a total value of provable claims of $200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors" claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?
>
> [39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in the first instance.

149 Similar to Cantore's position in the *Nemaska Lithium* restructuring, Southern Star and Dana's objections to the RVO are grounded in the assertion it will negate their effective veto on the Plan (and hence the Primacorp transaction) by which they seek to leverage further concessions. For obvious reasons, those concessions can only come about at a cost to other stakeholders, whose interests remain to be addressed.

Discussion

150 Quest, with the support of the Monitor, submits that the Primacorp transaction satisfies s. 36 of the *CCAA* and that the Court should grant the RVO pursuant to ss. 11 and 36 of the *CCAA*.

151 As with the structures approved in the above *CCAA* proceedings, the RVO has certain aspects that Southern Star says are objectionable. Those include primarily: (i) the addition of Guardian as a petitioner in the *CCAA* proceeding; (ii) the vesting of the Excluded Liabilities and Excluded Contracts in Guardian; (iii) Quest's exit from this *CCAA* proceeding; and (iv) the release of Quest in respect of the Excluded Liabilities and Excluded Contracts.

152 Essentially, unsecured claims against Quest and minor assets are transferred to Guardian and Quest continues as a going concern after having transferred the bulk of its assets to Primacorp free and clear of any encumbrances (save for certain Retained Liabilities). Quest no longer requires approval of the Plan by the creditors and the Court to complete the Primacorp transaction.

153 At para. 19, the QCCA in *Nemaska Lithium* referred to Gouin J.'s comment that s. 36 of the *CCAA* allows the court a broad discretion to consider and, if appropriate, grant relief that represents an innovative solution to any challenges in a proceeding. Justice Gouin considered that approving an RVO structure was such an innovative solution. Indeed, this is the history of *CCAA* jurisprudence under the court's broad statutory discretion and court approval of innovative solutions continues to this time.

154 That said, the ability of a *CCAA* court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the *CCAA*: *Century Services*.

155 I find further support for Quest's position in the recent comments of the Court in *Callidus*. The Court was there addressing a different issue — whether a *CCAA* judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is "acting for an improper purpose" — but the Court's comments on the exercise of jurisdiction under the *CCAA* ring true in relation to the RVO structure:

> [49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant

bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> Good faith
>
> 18.6(1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> Good faith — powers of court
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

. . .

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

. . .

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68) . . .

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

. . .

[70] . . . The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

. . .

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the

> Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:
>
> > The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . *If the CCAA is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute*.
> >
> > ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))
>
> In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.
>
> [76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.
>
> [Underline emphasis added; italic emphasis in original.]

156 Quest is not seeking to bar Southern Star or Dana from voting on the Plan. It is seeking approval of a structure that would result in Guardian submitting its own plan to the unsecured creditors, which would include Southern Star and Dana, at which time they are generally free to vote their "self-interest" subject to any relevant constraint (for example, if the court finds that they are voting for an improper purpose): *Callidus* at para. 24 and 56.

157 There is no provision in the *CCAA* that prohibits an RVO structure. As is usually the case in *CCAA* matters, the court must ensure that any relief is "appropriate" in the circumstances and that all stakeholders are treated as fairly and reasonably "as the circumstances permit": *Century Services* at para. 70.

158 As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the *only* transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. As was noted by Gouin J. in *Nemaska Lithium* (at para. 12), it is not up to the Court to dictate the terms and conditions that are included in an offer. Primacorp has presumably made the best offer that it is prepared to make in the circumstances — that is the offer the Court must consider.

159 I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is receivership, liquidation and bankruptcy, a future that looms in early 2021 if the transaction is not approved.

160 Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable "assets" that could be not transferred.

161 Akin to the tax losses, permits and licences that could not be transferred in those RVO cases, is Quest's ability to confer degrees under its statutory authority under s. 4(2) of the *Sea to Sky Act*, S.B.C. 2002, c. 54 (the "*Sea to Sky Act*"). Quest cannot sell its ability to grant degrees under s. 4(2) of the *Sea to Sky Act*. Nor can any purchaser acquire the right to grant degrees indirectly through a purchase of the shares in Quest. Pursuant to s. 2 of the *Sea to Sky Act*, Quest is a corporation "composed of the members of the board" and no shareholders exist. Pursuant to s. 1 of the *Sea to Sky Act*, the "board" means the board of governors of the university.

162 It is a critical requirement under the Primacorp transaction that Quest remain a viable entity to continue its operations and, in particular, continue to grant degrees. That is a significant component of the Primacorp transaction and the value that Primacorp is prepared to pay under the transaction reflects that component. In other words, the stakeholders are receiving a benefit from this transaction by which Primacorp ensures that Quest continues after exiting these *CCAA* proceedings.

163 At para. 38, the court in *Nemaska Lithium* asked:

> . . . whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

164 I acknowledge the negative consequences that arise particularly for Southern Star if the Primacorp transaction is approved, although there is significant uncertainty about the extent of any loss that may be suffered. Dana's unsecured claim has little, if any value, outside of the benefits of the Primacorp transaction.

165 In that light, I would ask Southern Star and Dana a similar question to that of the QCCA — to what end is your veto if Quest's Plan is put presented for creditor approval?

166 Both creditors potentially hold the sword of Damocles over the head of the significant broad stakeholder group who stand to benefit from the Primacorp transaction. Recently, Southern Star has secured further benefits by the withdrawal of two of the Disclaimers. Both objecting creditors have nothing to lose at this point in this dangerous game of chicken with Primacorp, with only the oversight of this Court to oversee this strategy. By any stretch, no one is blinking at this point, while significant other interests hang in the balance.

167 The Monitor's comments in its Fifth Report as to the jeopardy to those other interests are apt:

> 2.15 The Monitor has considered the competing interests of Southern Star and the interests of Quest's other stakeholders. In the Monitor's view, the Primacorp Transaction should not be jeopardized by the lack of agreement between Southern Star and Primacorp. Southern Star can mitigate its financial hardship by entering into an agreement with Primacorp for use of some or all of the residences. By contrast, Quest's other stakeholders have no ability to mitigate their potential losses in the event that the Primacorp Transaction does not close. They are reliant on the completion of the Primacorp Transaction or face significant losses themselves should it not complete.

168 In my view, in the vein of the Court's discussion in *Callidus*, these are unique and exceptional circumstances where the Court may grant the relief by allowing Quest to employ the RVO structure within the context of this sale transaction.

169 Southern Star and Dana seek to effectively block the only reasonable outcome here by insisting that they must approve of Quest's Plan in conjunction with the sale. However, creditor approval of a sale is not required under s. 36 of the *CCAA*.

170 The granting of the RVO in these circumstances is in accordance with the remedial purposes of the *CCAA*. To use the words of Dr. Sarra, quoted above in *Callidus*, I conclude that Southern Star and Dana are working actively against the goals of the *CCAA* by their opposition to the RVO.

171 I do not consider that an RVO structure would be generally employed or approved in a *CCAA* restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the *CCAA*.

172 Here, in these complex and unique circumstances, I conclude that it is appropriate to exercise my discretion to allow the RVO structure. Quest seeks this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. I have considered the balance between the competing interests at play. This transaction is unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group, a group that includes Southern Star and Dana.

173 The structure also allows Quest to continue its operations in partnership with Primacorp, a result that will avoid the devastating social and economic consequences that will be visited upon the stakeholders if this transaction is not approved. Ironically, the continuation of Quest's operations will also benefit Southern Star in the future through the continued payment of rent for two of the Residences. Other potential benefits may also arise if Southern Star and Quest are later able to come to terms once the pandemic has receded and students return to campus.

THE PRIMACORP TRANSACTION

174 Quest applies for the granting of the RVO in favour of Primacorp pursuant to s. 36(1) of the *CCAA*.

175 Section 36(1) of the CCAA allows the court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) of the *CCAA* lists the relevant non-exhaustive factors to be considered:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

176 The well-known considerations identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6 are consistent with and overlap many of the s. 36(3) factors: see *Veris Gold Corp., Re*, 2015 BCSC 1204 (B.C. S.C.) at para. 25, referring to various authorities such as *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]) at para. *13*. Those considerations include: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and, (iv) whether there has been any unfairness in the sales process.

177 More generally, in analyzing whether a transaction should be approved, taking into consideration the s. 36(3) and *Soundair* factors, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable: *Veris Gold* at para. 23.

178 I conclude that the s. 36(3) and *Soundair* factors all favour approving the Primacorp transaction and granting the RVO. Specifically:

> a) The process leading to the Primacorp transaction has been lengthy and exhaustive. The Monitor has overseen that entire process;
>
> b) Quest 's Restructuring committee and its Board of Governors have sought and obtained professional advice throughout the *CCAA* process toward finding a suitable academic partner and/or a purchaser/developer for Quest's lands;
>
> c) No stakeholder objects to the proposition that the sales process was conducted in an appropriate, fair and reasonable manner;
>
> d) The Primacorp transaction will see the repayment of Quest's secured creditors, now totalling approximately $42.2 million in what has been an increasingly pressurized environment to do so after long standing defaults;

e) Since August 7, 2020, the Interim Lender and VF, Quest's major secured creditors, have been kept apprised of developments. They both support the Primacorp transaction. In addition, other secured creditors have been involved throughout these proceedings and support the transaction;

f) There has been significant community and stakeholder involvement throughout the sales process;

g) The Primacorp transaction will ensure that Quest continues as a going concern, by continuing operations as a post-secondary institution in Squamish. This will result in continuing benefits to the broad stakeholder group. This includes faculty, staff, students, secured and unsecured creditors, suppliers, landlords and the community generally;

h) The broader stakeholder interests must be balanced against those who will be negatively affected by the transaction, such as Southern Star under the Disclaimers, although no viable offer has emerged that does not include the Disclaimers;

i) Quest's Board of Governors have exercised their business judgment and determined that the Primacorp transaction is the best option to fulfil the goals of Quest's restructuring;

j) The Primacorp transaction will fund a Plan for unsecured creditors;

k) The Primacorp transaction provides Quest with significant benefits in terms of its future operations. These include the $20 million working capital facility and Primacorp support for Quest's marketing, recruiting and operations to allow it to continue as a post-secondary institution into the future;

l) No other or better offer or proposal has emerged that can be considered superior to the Primacorp transaction;

m) The Monitor is satisfied that the consideration to be received from Primacorp is reasonable and fair, taking into account the market value of the assets and the other unique factors of these proceedings;

n) The Monitor is of the view that this transaction will yield a greater benefit to the stakeholders than might be achieved in a liquidation or bankruptcy;

o) Any delay of approval is likely to lead to ruinous consequences after December 2020, when Quest will be out of funds and the Interim Lender will be in a position to commence a receivership and liquidation of Quest's assets; and

p) Simply, Quest has run out of time to find a restructuring solution and the Primacorp transaction presently stands as the *only* viable option to avoid the devastating social and economic consequences to its stakeholders if a liquidation results.

CONCLUSIONS

179 I grant the RVO as sought by Quest, and as supported by the Monitor.

180 The Primacorp transaction is the best option available that maximizes recovery for Quest's creditors and preserves Quest's university operations. Allowing Quest to continue as a university will benefit all stakeholders, including Quest's current and former employees, current and future students of Quest and the community generally. The RVO structure is an appropriate means to accomplish this result in these unique and exceptional circumstances.

Application dismissed.

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
18-Dec-20
Vancouver
REGISTRY

NO. S-200586
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE *SEA TO SKY UNIVERSITY ACT*, S.B.C. 2002, C. 54

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA AND QUEST GUARDIAN PROPERTIES LTD.

PETITIONERS

ORDER MADE AFTER APPLICATION

[EXPANSION OF MONITOR'S POWERS AND STAY EXTENSION]

	) THE HONOURABLE)		
BEFORE	)	)	17 / DEC / 2020
	) MADAM JUSTICE FITZPATRICK)		

ON THE APPLICATION of the Quest Guardian Properties Ltd. ("**Guardian**") coming on for hearing at Vancouver, British Columbia on the 17th day of December, 2020, and on hearing Tevia Jeffries and Valerie Cross, counsel for Guardian, and those other counsel set forth on **Schedule "A"** hereto; *counsel appeared by MS Teams;*

AND UPON READING the material filed herein including the notice of application dated December 14, 2020 (the "**Notice of Application**"); and the Sixth Report of PricewaterhouseCoopers Inc. in its capacity as the Monitor of Guardian (in such capacity, the "**Monitor**") to be filed (the "**Sixth Report**"); AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "**CCAA**"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS AND DECLARES that:

DEFINITIONS

1. Any capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Amended and Restated Initial Order made January 27, 2020 (the "**ARIO**").

EXTENSION OF STAY OF PROCEEDINGS

2. The Stay Period set out in paragraph 15 of the ARIO and other relief provided for in the ARIO, as extended by Court order dated August 7, 2020, are hereby further extended to 11:59 p.m. Pacific Time on January 29, 2021.

EXPANSION OF MONITOR'S POWERS

3. The powers and duties of PricewaterhouseCoopers Inc., in its capacity as the court-appointed monitor of Guardian and not in its personal capacity (in such capacity, the "**Monitor**"), are hereby modified and expanded such that the Monitor, in addition to its powers set forth in the ARIO, is hereby expressly empowered and authorized, when the Monitor considers it necessary or desirable, to file a voluntary assignment in bankruptcy on behalf of Guardian pursuant to section 49 on the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("**BIA**").

4. Guardian shall be deemed the former employer of any former employees of Quest University Canada ("**Quest**") whose claims against Quest were transferred to Guardian pursuant to this Court's Order dated November 16, 2020.

GENERAL PROVISIONS

5. Endorsement of this Order by Vivian Krause and counsel appearing on this application other than counsel for Guardian is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Tevia Jeffries
Lawyer for Quest Guardian Properties Ltd.

By the Court. Digitally signed by Naidu, Sanjeev

Registrar

SCHEDULE "A"

List of Counsel

Counsel Name	Party Represented
Vicki Tickle	The Monitor, PricewaterhouseCoopers Inc.
Peter Reardon Kayla Strong	Southern Star Developments Ltd.
Aaron Welch	Her Majesty the Queen in right of the Province of British Columbia and the Ministry of Advanced Education Skills and Training
N/A	Vivian Krause

NO. S-200586
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

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PETITIONERS

ORDER MADE AFTER APPLICATION

[EXPANSION OF MONITOR'S POWERS AND STAY EXTENSION ORDER]

DENTONS CANADA LLP
BARRISTERS & SOLICITORS
20th Floor, 250 Howe Street
Vancouver, British Columbia
V6C 3R8
Attn: Tevia Jeffries

TAB D

2022 ONSC 653
Ontario Superior Court of Justice [Commercial List]

Harte Gold Corp. (Re)

2022 CarswellOnt 1698, 2022 ONSC 653, 343 A.C.W.S. (3d) 284, 97 C.B.R. (6th) 202

THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (Applicant) and A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP. (Applicant)

Penny J.

Heard: January 28, 2022
Judgment: February 4, 2022
Docket: CV-21-00673304-00CL

Counsel: Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais, for Applicant
Joseph Pasquariello, Chris Armstrong, Andrew Harmes, for Court appointed Monitor
Leanne M. Williams, for Board of Directors of the Applicant
Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji, for 1000025833 Ontario Inc.
Stuart Brotman, Daniel Richer, for BNP Paribas
Sean Collins, Walker W. MacLeod, Natasha Rambaran, for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited
David Bish, for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates
Orlando M. Rosa, Gordon P. Acton, for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)
Timothy Jones, for Attorney General of Ontario

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Company operated gold mine — Company encountered growing liquidity problem — Company developed plan to attract new capital through potential sale — No binding offers were received — Further sale and investment solicitation process led to two competing proposals from its primary secured creditors — One of creditors had winning bid and proposed purchase was structured as reverse vesting order — Company brought motion for orders approving creditor transaction, including reverse vesting order structure, extending stay and expanding monitor's powers — Motion granted — Section 11 of Companies Creditors Arrangement Act clearly provided court with jurisdiction to issue reverse vesting order, provided discretion available under s. 11 of Act was exercised in accordance with objects and purposes of Act — Reverse vesting order should continue to be regarded as unusual or extraordinary measure and approval of such structure should involve close scrutiny — Reverse vesting order sought in instant case was in creditors' and stakeholders' interests — Order was appropriate as it would provide for timely, efficient and impartial resolution of company's insolvency; preserve and maximize value of company's assets; ensure fair and equitable treatment of claims against company; protect public interest; and balance costs and benefits of company's restructuring or liquidation.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Company operated gold mine — Company encountered growing liquidity problem — Company developed plan to attract new capital through potential sale — No binding offers were received — Further sale and investment solicitation process led to two competing proposals from its primary secured creditors — One of creditors had winning bid and proposed purchase was structured as reverse vesting order — Company brought motion for orders approving creditor transaction, including reverse vesting order structure, extending stay and expanding monitor's powers — Motion granted — Company was seeking to extend

stay period to allow it to proceed with closing transaction, while at same time preserving status quo and preventing creditors and others from taking steps to try and better their positions — No creditors were expected to suffer material prejudice as result of extension of stay of proceedings.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor

Company operated gold mine — Company encountered growing liquidity problem — Company developed plan to attract new capital through potential sale — No binding offers were received — Further sale and investment solicitation process led to two competing proposals from its primary secured creditors — One of creditors had winning bid and proposed purchase was structured as reverse vesting order — Company brought motion for orders approving creditor transaction, including reverse vesting order structure, extending stay and expanding monitor's powers — Motion granted — Order for monitor's expanded powers was intended to provide monitor with power to administer affairs of new companies, established to complete transaction, along with powers necessary to wind down proceedings and put new companies into bankruptcy following close of transaction.

MOTION by company for approval of sale of company's mining enterprise to strategic purchaser, including reverse vesting order structure of transaction, and for order extending stay and expanding monitor's powers.

***Penny J.*:**

1 This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

2 Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

Background

3 Harte Gold is a public company incorporated under the Business Corporations Act (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.

4 Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.

5 It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.

6 Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated $7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

7 At the time of its initial application to the court, Harte Gold's assets were valued at $163.8 million. Its liabilities were valued at $166.1 million. On a balance sheet basis, therefore, Heart Gold was insolvent.

8 Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.

9 This prefiling strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.

10 In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.

11 In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.

12 The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.

13 Only one competing bid was received — a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.

14 This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that the $10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the prefiling cure costs; and, (c) the undertaking to pay an additional cash deposit of US$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

15 In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

- the cancellation of all Harte Gold shares and the issue of new shares to the purchaser
- payment by the purchaser of all secured debt
- payment by the purchaser of virtually all prefiling trade amounts (estimated at $7.5 million but with a $10 million cap) and postfiling trade amounts
- certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contacts and liabilities include a number of agreements involving ongoing or future services in

respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction The emplyment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority

• retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and

• releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

16 I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and postfiling trade amounts, interim financing and the like, totals well over $160 million.

Issues

17 There are three principal issues:

(1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;

(2) Whether the stay should be extended; and,

(3) Whether the Monitor's mandate should be extended to included additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

18 Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".

19 Section 36(1) of the CCAA provides:

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

20 Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

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

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

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

(d) the extent to which the creditors were consulted;

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

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

21 The s. 36(3) criteria largely correspond to the principles articulated in Royal Bank v. Soundair Corp1991 CanLII 2727(ONCA) for the approval of the sale of assets in an insolvency scenario:

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

(b) the interests of all parties;

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

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

see Target Canada Co. (Re),2015 ONSC 1487, at paras. 14-17.

22 The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

23 In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:

(a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,

(b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

24 The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re)*, (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found "the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise."

25 A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.

26 More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.

27 In *Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218*, at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc,*, 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc,*, 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently

- The efficacy and integrity of the process followed
- The interests of the parties, and
- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

28 In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that "the terms 'sell or otherwise dispose of assets outside the ordinary course of business' under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*": *Nemaska* QCCA at para 19.

29 Similarly, in *Quest University Canada (Re),*, 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court's authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on CCAA jurisdiction in *9354-9186 Québec Inc. v. Callidus Capital Corp.,*, 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.

30 In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.

31 Fitzpatrick J. relied on *Callidus* to the effect that:

- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence". On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances"
- the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company"
- Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context
- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence
- Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. The supervising judge is best positioned to undertake this inquiry.

32 The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

33 Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.

34 The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not "meritorious", also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. "reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings": *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

35 It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

36 The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

37 I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

38 Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

39 With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

40 Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

41 Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

42 Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

43 The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

44 I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

45 Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

Comparison with Sale in Bankruptcy

46 The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.

47 The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.

48 In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.

49 Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

Consultation with Creditors

50 Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately $28 million in respect of its hedge agreements. Silver Lake has claims of approximately $95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.

51 BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.

52 While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

53 The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.

54 I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

55 The proposed transaction affords the following benefits to the creditors and to stakeholders generally:

(a) the retention and payment in full of the claims of almost all creditors of Harte Gold;

(b) continued employment for all except four of the Harte Gold's employees;

(c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and

(d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.

56 The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.

57 Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional

"compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.

58 The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).

59 Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

60 The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

61 Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

62 Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

63 Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.

64 Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: Stelco Inc. (Re), 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.

65 Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

Fairness of Consideration

66 Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to

be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable. [1]

67 A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational — both payments being made to bring about the acquisition of the Mine as a going concern.

68 It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the prefiling strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

69 The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

70 As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

71 The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

72 It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

73 The position of the purchaser is, not unreasonably, that it will not *both continue* to fund ongoing operations and the CCAA process *and* undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

74 The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

75 In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

76 For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

77 In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

78 Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

79 CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

80 I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from Lydian International Limited (Re), 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

81 *Whether the claims to be released are rationally connected to the purpose of the restructuring*: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

82 *Whether the releasees contributed to the restructuring:* The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

83 *Whether the Release is fair, reasonable and not overly broad*: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

84 *Whether the restructuring could succeed without the Release*: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

85 *Whether the Release benefits Harte Gold as well as the creditors generally*: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

86 *Creditors' knowledge of the nature and effect of the Release*: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

87 The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

88 Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

89 No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

90 For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

91 The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

92 The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete

the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

93 I approve the grant of the requested powers to the Monitor.

Conclusion

94 For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Motion granted.

Footnotes

1 The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

TAB E

Court File No. CV-15-10869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	**FRIDAY, THE 17TH**
	)	
JUSTICE SPENCE	)	**DAY OF JULY, 2015**

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 PLASCO ENERGY GROUP INC., PLASCO TRAIL ROAD INC. AND PLASCO OTTAWA INC.

SETTLEMENT APPROVAL ORDER

THIS MOTION made by Plasco Energy Group Inc. (**"Plasco"**), Plasco Trail Road Inc. (**"PTR"**) and Plasco Ottawa Inc. (**"Plasco Ottawa"** and, together with Plasco and PTR, the **"Applicants"**) pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the **"CCAA"**) for an Order substantially in the form attached at Tab 2 of the Motion Record was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, filed, the Affidavit of Randall Benson sworn July 14, 2015 (the **"Benson Affidavit"**), filed, the Affidavit of Ryan Baulke sworn July 31, 2015, filed, and the third report of Ernst & Young Inc., in its capacity as CCAA Monitor of the Applicants (the **"Monitor"**), filed, and on hearing the submissions of counsel for each of the Applicants, the Monitor, North Shore Power Group Inc. (**"NSPG"**), Canadian Water Projects Inc. (**"CWP"**), Her Majesty the Queen in Right of the Province of Ontario as represented by the Minister of Research and Innovation (**"MRI"**), the Ministry of the Environment and Climate Change, the City of Ottawa (the **"City"**), Representative Counsel for certain former and current employees of the Applicants, and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service, filed.

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record in respect of this Motion be and is hereby abridged so that the Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that, unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meanings given to them in the Global Settlement Agreement.

APPROVAL OF THE GLOBAL SETTLEMENT AGREEMENT

3. **THIS COURT ORDERS** that the agreement among the Applicants, Plasco Newco Inc. ("**Plasco Newco**"), NSPG and CWP in substantially the form attached as Schedule "A" to this Order, as such agreement may be amended prior to the execution thereof with the consent of the Monitor (the "**Global Settlement Agreement**") is hereby approved. The performance by the Applicants of their obligations under the Global Settlement Agreement is hereby authorized and approved.

4. **THIS COURT ORDERS** that the Applicants are hereby authorized and directed to take such additional actions and to execute such additional documents (including, without limitation, any amendments to the Global Settlement Agreement) as may be necessary or desirable for the completion of the settlements, transactions and other agreements contemplated in the Global Settlement Agreement.

5. **THIS COURT ORDERS** that that the Applicants are authorized to undertake and complete the corporate steps and arrangements necessary to implement the Global Settlement Agreement and, without limiting the generality of the foregoing, the following actions and arrangements are authorized and approved in accordance with the timing, sequence, terms and conditions set forth in the Global Settlement Agreement:

(a) the issuance of the New Plasco Shares by Plasco;

(b) the amendment of the articles of Plasco to consolidate the issued and outstanding Plasco Common Shares on the basis of the Consolidation Ratio;

(c) the amendment of the articles of Plasco to provide that any fractional Plasco Common Shares held by any holder of Plasco Common Shares immediately following the Plasco Common Share Consolidation shall be cancelled without any liability, payment or other compensation in respect thereof;

(d) the amendment of the articles of Plasco to prohibit the issuance of any fractional Plasco Common Shares; and

(e) each Existing Shareholder shall be deemed to receive its Existing Shareholder's Pro Rata Share of 100 percent of the issued and outstanding common shares of Plasco Newco and thereafter each Existing Shareholder shall have no equity interest in any member of the Plasco Group.

6. **THIS COURT ORDERS** that, on the Effective Date, Plasco is hereby permitted to execute and file articles of amendment or reorganization or such other documents or instruments as may be required to permit or enable and effect the issuance of the New Plasco Shares, the Plasco Common Share Consolidation, the Fractional Interest Cancellation and the prohibition of the issuance of fractional Plasco Common Shares post Effective Date and such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective notwithstanding any requirement under federal or provincial law to obtain director or shareholder approval with respect to such actions, and upon the delivery of a Monitor's certificate to the Parties substantially in the form attached as Schedule B hereto (the "**Monitor's Certificate**"), all options, warrants, and other rights and entitlements to common shares of Plasco existing prior to the Effective Time shall be deemed cancelled and extinguished.

7. **THIS COURT ORDERS** that the release of each Released Party pursuant to the terms of the Global Settlement Agreement is hereby authorized and approved.

8. **THIS COURT ORDERS AND DECLARES** that the transactions pursuant to the Global Settlement Agreement are exempt from the application of the *Bulk Sales Act* (Ontario).

CCAA APPLICANTS

9. **THIS COURT ORDERS** that, from and after the Effective Date of the Global Settlement Agreement:

(a) Plasco Newco is a company to which the CCAA applies;

(b) Plasco Newco shall be added as an Applicant in these CCAA proceedings and any reference in any Order of this Court in respect of these CCAA proceedings to an "Applicant" or the "Applicants" shall refer to Plasco Newco, *mutatis mutandis*, and, for greater certainty, each of the Charges (as such term is defined in the Initial Order) shall constitute a charge on the Charged Property (as such term is defined in the Initial Order) of Plasco Newco; and

(c) Plasco, PTR and Plasco Ottawa shall cease to be Applicants in these CCAA proceedings, and each such entity shall be released from the purview of any Order of this Court granted in respect of these CCAA Proceedings.

10. **THIS COURT ORDERS** that Plasco Newco shall be authorized to take all actions necessary to change its corporate name in connection with, or to implement the terms of, the Global Settlement Agreement.

11. **THIS COURT ORDERS THAT** on the Effective Date, upon the delivery of the Monitor's Certificate to the Parties and in accordance with the terms of the Global Settlement Agreement:

(a) all Transferred Assets shall vest absolutely in Plasco Newco;

(b) all debts, obligations, liabilities, indebtedness, contracts, leases, agreements and undertakings of any kind or nature whatsoever of Plasco, PTR and Plasco Ottawa including, without limitation, obligations and liabilities relating to the environmental condition of any of the Property of such entities and obligations and liabilities relating to the Promissory Notes, including the obligation to convert the Promissory Notes to common shares (collectively, "**Obligations**") other than Obligations which pursuant to the terms of the Global Settlement Agreement shall

be retained by Plasco, PTR or Plasco Ottawa (all such Obligations that are not retained by such entities being the "**Transferred Obligations**") shall be assumed by and shall vest absolutely in Plasco Newco such that, from and after the Effective Date, the Transferred Obligations shall be obligations of Plasco Newco and not obligations of Plasco, PTR or Plasco Ottawa, as applicable and Plasco, PTR and Plasco Ottawa shall be forever released and discharged from such Transferred Obligations;

(c) the commencement or prosecution, whether directly, indirectly, derivatively or otherwise of any demands, claims, actions, counterclaims, suits, judgements, or other remedy or recovery with respect to any indebtedness, liability, obligation or cause of action against Plasco, PTR and/or Plasco Ottawa in respect of the Transferred Obligations shall be permanently enjoined;

(d) all holders of Promissory Notes with rights and entitlements to convert such Promissory Notes or any part thereof into Plasco Common Shares shall no longer have such rights and or entitlements against Plasco but will have equivalent rights and entitlements against Plasco Newco to convert to common shares of Plasco Newco in its place and stead;

(e) the nature of the Obligations retained by Plasco, PTR or Plasco Ottawa, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Global Settlement Agreement or the steps and actions taken in accordance with the Global Settlement Agreement;

(f) the nature of the Transferred Obligations, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to Plasco Newco;

(g) any person that prior to the Effective Date had a valid right or claim against Plasco, PTR or Plasco Ottawa in respect of the Transferred Obligations (each a "**Claim**") shall no longer have such right or claim against Plasco, PTR or Plasco Ottawa but will have an equivalent Claim against Plasco Newco in respect of the

Transferred Obligations from and after the Effective Date in its place and stead, and, except with respect to the treatment of the NSPG Claim and the CWP Claim in accordance with the terms of the Global Settlement Agreement, nothing in this Order limits, lessens or extinguishes the Transferred Obligations or the Claim of any person as against Plasco Newco; and

(h) the Claim of any person against Plasco Newco and the Transferred Assets following the Effective Date shall have the same rights, priority and entitlement as such Claim had against Plasco, PTR or Plasco Ottawa, as applicable, and the Transferred Assets prior to the Effective Date.

APPROVAL OF THE MRI SETTLEMENT AGREEMENT

12. **THIS COURT ORDERS** that the Settlement and Release Agreement dated July 7, 2015 among Plasco, PTR and MRI (the "**MRI Settlement Agreement**") and the performance by the Applicants of their obligations thereunder are hereby authorized and approved.

13. **THIS COURT ORDERS** that the Applicants are hereby authorized and directed to take such additional steps and execute such additional documents (including, without limitation, any amendments to the MRI Settlement Agreement) as may be necessary or desirable for the completion of the settlements, transactions and other agreements contemplated in the MRI Settlement Agreement.

14. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") in respect of the Applicants or Plasco Newco and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Applicants or Plasco Newco,

the entering into of the Global Settlement Agreement and the MRI Settlement Agreement and the vesting of the Transferred Assets and the Transferred Obligations in Plasco Newco and the issuance of the New Plasco Common Shares to Acquisition Holdco pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Applicants or Plasco Newco and shall not be void or voidable by creditors of the Applicants or Plasco Newco, as applicable, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

CONTINGENCY RESERVE

15. **THIS COURT ORDERS** that the Applicants shall be authorized to transfer $800,000 from the Contingency Reserve (as defined in the Order of this Court dated February 10, 2015 (the "**Initial Order**")) into unrestricted cash (the "**Unrestricted Funds**") to be used in the general operation of the Business in accordance with the terms of the Initial Order. For greater certainty, the Applicants shall be permitted, but not required, to use the Unrestricted Funds to make any payment permitted under subparagraph 6(c) of the Initial Order.

DECOMMISSIONING AND REMEDIATION ACTIVITIES

16. **THIS COURT ORDERS** that any of the Applicants or Plasco Newco shall forthwith pay any and all premiums invoiced and required to render policy number BC 99000551 of the Berkley Insurance Company (the "**Berkley Policy**") effective as of July 31, 2015 for the full term of the policy period being until July 31, 2022.

17. **THIS COURT ORDERS** that, notwithstanding any previous Order of this Court to the contrary, the Applicants and/or their agents, designees or service providers, including, without limitation, Maynards Industries Ltd. ("**Maynards**"), shall be authorized from and after the earlier of (a) the date on which title to the NSPG Equipment and the CWP Equipment transfers pursuant to the Global Settlement Agreement as executed by the parties thereto, (b) the receipt by the Applicants of written consent from NSPG and CWP, or (c) further Order of this Court, to commence and undertake demolition, dismantlement, decommissioning and remediation

activities in respect of or related to the Property or the Business (as such terms are defined in the Initial Order), the Demonstration Facility, the Site (as defined in the Benson Affidavit), the NSPG Equipment and the CWP Equipment and any other related assets or property, provided that such demolition, dismantlement, decommissioning and remediation activities shall commence only after environmental impairment insurance described in the Berkley Policy is in place and the City has been provided with evidence that Maynards has obtained general liability insurance and automobile insurance showing the City as an additional insured. For clarity, (a) the authorization contained in this paragraph 16 shall not be construed to amend or in any way alter the obligation of the Applicants prior to the Effective Date and Plasco Newco after the Effective Date (i) to decommission and remediate the Site in accordance with the Demonstration Site Lease (as defined in the Benson Affidavit), or (ii) in respect of the provisions of the Decommissioning Security and Escrow Security Agreement among and between PTR, Plasco, the City and The Bank of Nova Scotia dated as of April 24, 2015; and (b) Plasco, PTR and Plasco Ottawa shall be released and forever discharged of all obligations referenced in subparagraph (a) above as provided in paragraph 11 of this Order after the Effective Date.

EXTENSION OF THE STAY OF PROCEEDINGS

18. **THIS COURT ORDERS** that the Stay Period, as such term is defined in and used throughout the Initial Order, be and is hereby extended to and including 11:59 p.m. on September 25, 2015, and that all other terms of the Initial Order shall remain in full force and effect, unamended, except as may be required to give effect to this paragraph or as otherwise provided in this Order.

MISCELLANEOUS

19. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or any other foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any

foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

SUPERIOR COURT OF JUSTICE
ENTERED

JUL 31 2015

COUR SUPÉRIEURE DE JUSTICE
ENTRÉ

TAB F

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-11-057094-191

DATE: October 7, 2019

PRESIDING: THE HONOURABLE LOUIS J. GOUIN, J.S.C.

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

STORNOWAY DIAMOND CORPORATION

-&-

STORNOWAY DIAMONDS (CANADA) INC.

-&-

ASHTON MINING OF CANADA INC.

-&-

FCDC SALES AND MARKETING INC.

Petitioners

-&-

COMPUTERSHARE TRUST COMPANY OF CANADA

-&-

DIAQUEM INC.

-&-

INVESTISSEMENT QUÉBEC

-&-

FONDS DE SOLIDARITÉ DES TRAVAILLEURS DU QUÉBEC

-&-

FONDS RÉGIONAL DE SOLIDARITÉ F.T.Q. NORD-DU-QUÉBEC, SOCIÉTÉ EN COMMANDITE

-&-

NATION CRIE DE MISTISSINI

-&-

GRAND CONSEIL DES CRIS (EEYOU ISTCHEE)

-&-

ADMINISTRATION RÉGIONALE CRIE

-&-

CATERPILLAR FINANCIAL SERVICES LIMITED

-&-

CHUBB LIFE INSURANCE COMPANY OF CANADA

-&-

BANK OF NOVA SCOTIA

-&-

XEROX CANADA LTD.

-&-

ATLAS COPCO CANADA INC.

-&-

CWB NATIONAL LEASING INC.

-&-

OSISKO GOLD ROYALTIES LTD

-&-

CDPQ RESOURCES INC.

-&-

TF R&S CANADA LTD.

-&-

ALBION EXPLORATION FUND LLC

-&-

WASHINGTON STATE INVESTMENT BOARD

-&-

TSX INC.

-&-

ATTORNEY GENERAL OF CANADA

-&-

QUEBEC REVENUE AGENCY

-&-

THE DIRECTOR APPOINTED PURSUANT TO THE CANADA BUSINESS CORPORATIONS ACT

-&-

THE REGISTRAR OF THE REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS OF QUEBEC, represented by the **QUEBEC MINISTRY OF JUSTICE**

-&-

11641603 CANADA INC.

-&-

11641638 CANADA INC.

-&-

11641735 CANADA INC.

-&-

11272420 CANADA INC.

-&-

THE MINISTER OF ECONOMY, SCIENCE AND INNOVATION OF QUEBEC

-&-

THE MINISTER OF FINANCE AND ECONOMY OF QUÉBEC

-&-

THE LAND REGISTRAR FOR THE REGISTRY OFFICE FOR THE REGISTRATION

DIVISION OF SEPT-ILES

-&-

THE REGISTRAR OF PUBLIC REGISTER OF REAL AND IMMOVABLE MINING RIGHTS KEPT BY THE MINISTÈRE DE L'ÉNERGIE ET DES RESSOURCES NATURELLES (QUÉBEC)

Mis-en-cause

-&-

DELOITTE RESTRUCTURING INC.

Monitor

APPROVAL AND VESTING ORDER

[1] **ON READING** the Petitioners' *Motion Seeking (i) Extension of the Stay of Proceedings, (ii) Amendment and Restatement of the Initial Order; and (iii) Leave to Enter Into the Participating Streamers/Diaquem Transaction with Issuance of an Approval and Vesting Order and Ancillary Relief* (the "**Motion**"), the affidavit and the exhibits in support thereof, as well as the Report of the Monitor dated October 2, 2019 (the "**Report**");

[2] **SEEING** the service of the Motion;

[3] **SEEING** the submissions of Petitioners' attorneys;

[4] **SEEING** that it is appropriate to issue an order approving: the purchase and sale and other transactions (the "**Purchase and Sale Transactions**") contemplated in the agreement entitled Share Purchase Agreement dated October 6, 2019 (the "**Purchase Agreement**") by and between the Petitioners, as vendor, and *11272420 Canada Inc.* (the "**Purchaser**"), as purchaser, copy of which is attached as **Schedule "A"** to this Order, forming part hereof, including the pre-closing reorganization transactions contemplated in Exhibit A thereto (the "**Pre-Closing Reorganization**" and, collectively with the other transactions contemplated in the Purchase Agreement, the "**Transactions**");

WHEREFORE, THE COURT:

[5] **GRANTS** the Motion.

[6] **ORDERS** that, unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meanings given to them in the Purchase Agreement and/or in the Initial Order and/or Initial Motion, as extended, amended and restated from time to time.

PURCHASE AGREEMENT:

[7] **AUTHORIZES** and **APPROVES** the execution by the Petitioners of the Purchase Agreement and the completion of the Transactions, with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

PRE-CLOSING REORGANIZATION

[8] **AUTHORIZES** the Petitioners (including Mises en cause 11641603 Canada Inc., 11641638 Canada Inc. and 11641735 Canada Inc. as the case may be) to implement and complete the Pre-Closing Reorganization contemplated in Exhibit A to the Purchase Agreement, in the sequence provided for therein.

[9] **AUTHORIZES** the Petitioners (including Mises en cause 11641603 Canada Inc., 11641638 Canada Inc. and 11641735 Canada Inc. as the case may be), in completing the transactions contemplated in the Pre-Closing Reorganization:

a) to execute and deliver any documents and assurances governing or giving effect to the Pre-Closing Reorganization as the Petitioners, in their discretion, may deem to be reasonably necessary or advisable to conclude the Pre-Closing Reorganization, including the execution of such deeds, contracts or documents, as may be contemplated in the Purchase Agreement and all such deeds, contracts or documents are hereby ratified, approved and confirmed; and

b) to take such steps as are, in the opinion of the Petitioners, necessary or incidental to the implementation of the Pre-Closing Reorganization.

[10] **ORDERS AND DECLARES** that the Petitioners (including Mises en cause 11641603 Canada Inc., 11641638 Canada Inc. and 11641735 Canada Inc. as the case may be) are hereby permitted to execute and file articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Pre-Closing Reorganization and that such articles, documents or other instruments shall be

deemed to be duly authorized, valid and effective notwithstanding any requirement under federal or provincial law to obtain director or shareholder approval with respect to such actions or to deliver any statutory declarations that may otherwise be required under corporate law to effect the Pre-Closing Reorganization.

[11] **ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the CCAA Parties to proceed with the Pre-Closing Reorganization and that no director, shareholder or regulatory approval shall be required in connection with any of the steps contemplated pursuant to the Pre-Closing Reorganization save for those contemplated in the Purchase Agreement.

[12] **ORDERS** the Director appointed pursuant to Section 260 of the CBCA to accept and receive any articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Pre-Closing Reorganization contemplated in the Purchase Agreement, filed by either the CCAA Parties, as the case may be;

SALE APPROVAL

[13] **AUTHORIZES** the Petitioners (including Mises en cause 11641603 Canada Inc., 11641638 Canada Inc. and 11641735 Canada Inc. as the case may be), the Vendor, the Monitor, as the case may be, and the Purchaser to perform all acts, sign all documents and take any necessary action to execute any agreement, contract, deed, provision, transaction or undertaking stipulated in the Purchase Agreement and any other ancillary document which could be required or useful to give full and complete effect thereto.

[14] **ORDERS** and **DECLARES** that this Order shall constitute the only authorization required by the Petitioners and the Vendor, as the case may be, to proceed with the Pre-Closing Reorganization, the Purchase and Sale Transactions, the other Transactions and that no shareholder or regulatory approval, if applicable, shall be required in connection therewith.

[15] **ORDERS** and **DECLARES** that the Vendor, in consummating the transactions contemplated by the Purchase Agreement, which is a "related party transaction" for purposes of Multilateral Instrument 61-101 - *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**") and subject to a court order under applicable bankruptcy or insolvency laws, is not required to comply with both the formal valuation and minority approval requirements under Sections 5.4 and 5.6, respectively, of MI 61-101.

[16] **ORDERS** and **DECLARES** that upon the issuance of a Monitor's certificate substantially in the form appended as **Schedule "B"** hereto (the "**Certificate**"),

all right, title and interest in and to the Purchased Shares, the COA and the MSA shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, Liabilities (direct, indirect, absolute or contingent), obligations, taxes, prior claims, right of retention, liens, security interests, charges, hypothecs, trusts, deemed trusts (statutory or otherwise), judgments, writs of seizure or execution, notices of sale, contractual rights (including purchase options, rights of first refusal, rights of first offer or any other pre-emptive contractual rights), encumbrances, whether or not they have been registered, published or filed and whether secured, unsecured or otherwise (collectively, the "**Encumbrances**"[1]), including without limiting the generality of the foregoing all Encumbrances created by order of this Court and all charges, or security evidenced by registration, publication or filing pursuant to the *Civil Code of Québec* in movable / immovable property, excluding however, the permitted encumbrances listed on **Schedule "C"** hereto (the "**Permitted Encumbrances**") and, for greater certainty, **ORDERS** that all of the Encumbrances affecting or relating to the Purchased Shares, other than the Permitted Encumbrances, be cancelled and discharged as against the Purchased Shares, in each case effective as of the applicable time and date of the Certificate.

[17] **ORDER** and **DECLARES** that upon the issuance of the Certificate, any agreement, contract, plan, indenture, deed, certificate, subscription right, conversion rights, pre-emption rights or other document or instrument governing and/or having been created, granted in connection with the Purchased Shares and/or the share capital of SDCI, Ashton and FCDC shall be deemed terminated and cancelled.

[18] **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Sept-Iles and the Registrar of the Public Register of Real and Immovable Mining Rights (known as GESTIM Plus), upon presentation of the Certificate and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and cancel the Encumbrances listed in **Schedule "D"** on the immovable properties identified therein.

[19] **ORDERS** the Quebec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Order and the Certificate, to strike the registration listed in **Schedule "D"**.

[20] **ORDERS** and **DECLARES** that upon the issuance of the Certificate, Purchaser and AmalCo (including any predecessor corporations) shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or

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obligations with respect to any taxes (including penalties and interest thereon) of, or that relate to, the Vendor, including without limiting the generality of the foregoing all taxes that could be assessed against Purchaser and Amalco (including any predecessor corporations) pursuant to section 160 of the *Income Tax Act* (Canada), or any provincial equivalent, in connection with the Vendor.

[21] **ORDERS** that upon issuance of the Certificate, all Persons shall be deemed to have waived any and all defaults of the CCAA Parties then existing or previously committed by the CCAA Parties or caused by the CCAA Parties, directly or indirectly, or non-compliance with any covenant, positive or negative pledge, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the CCAA Parties arising from the filing by the CCAA Parties under the CCAA or the completion of the Transactions, and any and all notices of default and demands for payment under any instrument, including any guarantee arising from such default, shall be deemed to have been rescinded.

[22] **ORDERS** that the implementation of the Transactions shall be deemed not to constitute a change in ownership or change in control under any financial instrument, loan or financing agreement, executory contract or unexpired lease or contract, lease or agreement in existence on the Effective Date and to which the CCAA Parties are a party.

[23] **ORDERS and DIRECTS** the Monitor to file with the Court a copy of the Certificate, no later than one business day after the issuance thereof.

[24] **DECLARES** that upon the filing of the Certificate, the Purchase and Sale Transactions shall be deemed to constitute and shall have the same effect as a sale under judicial authority as per the provisions of the *Code of Civil Procedure* and a forced sale as per the provisions of the *Civil Code of Quebec*.

CCAA PETITIONERS

[25] **ORDERS** that upon filing of the Monitor's Certificate:

a) 11641638 Canada Inc. and 11641735 Canada Inc. are companies to which the CCAA applies;

b) 11641638 Canada Inc. and 11641735 Canada Inc. shall be added as Petitioners in these CCAA proceedings and any reference in any Order of this Court in respect of these CCAA proceedings to a "Petitioner", the "Petitioners" or "CCAA Parties" shall refer to 11641638 Canada Inc. and

11641735 Canada Inc., *mutadis mutandis*, and, for greater certainty, each of the Charges (as such term is defined in the Initial Order) shall constitute a charge on the property of 11641638 Canada Inc. and 11641735 Canada Inc.; and

c) SDCI, Ashton, FCDC and 11641603 Canada Inc., as amalgamated shall each be deemed to cease to be Petitioners in these CCAA proceedings, and each such entity shall be deemed to be released from the purview of any Order of this Court granted in respect of these CCAA Proceedings, save and except for the present Order the terms of which (as they related to any such entity) shall continue to apply in all respects.

[26] **ORDERS** that upon the issuance of the Certificate and in accordance with the terms of the Purchase Agreement:

a) all Excluded Assets shall vest absolutely and exclusively in 11641638 Canada Inc. and all Encumbrances shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer;

b) all debts, liabilities, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) of Amalco, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise (collectively, "**Obligations**") other than the Assumed Liabilities (all such Obligations that are not expressly identified in the Purchase Agreement as being Assumed Liabilities being referred to as the "**Excluded Liabilities**") shall be transferred to, assumed by and vest absolutely and exclusively in, 11641735 Canada Inc. such that, at the time provided for in the Pre-Closing Reorganization and before the Closing Date, the Excluded Liabilities shall be novated and become obligations of 11641735 Canada Inc. and not obligations of AmalCo, and AmalCo shall be forever released and discharged from such Excluded Liabilities, and all Encumbrances securing Excluded Liabilities shall be forever released and discharged, it being understood that nothing in the present Order shall be deemed to cancel any of the Permitted Encumbrances, as applicable to AmalCo (including any predecessor corporations);

c) the commencement or prosecution, whether directly, indirectly, derivatively or otherwise of any demands, claims, actions, counterclaims, suits, judgements, or other remedy or recovery with respect to any indebtedness, liability, obligation or cause of action against Amalco in respect of the Excluded Liabilities shall be permanently enjoined;

d) the nature of the Obligations retained by Amalco including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Purchase Agreement or the steps and actions taken in accordance with the terms thereof;

e) the nature and priority of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to and assumption by 11641638 Canada Inc. and/or 11641735 Canada Inc.; and

f) any person that, prior to the Closing Date, had a valid right or claim against AmalCo in respect of the Excluded Liabilities (each a "**Claim**") shall no longer have such Claim against AmalCo, but will have an equivalent Claim against 11641638 Canada Inc. and/or 11641735 Canada Inc. in respect of the Excluded Liabilities from and after the Closing Date in its place and stead, and, nothing in this Order limits, lessens or extinguishes the Excluded Liabilities or the Claim of any person as against 11641638 Canada Inc. and/or 11641735 Canada Inc.

RELEASES

[27] **ORDERS** that effective upon the filing of the Certificate, (i) the present and former directors, officers, employees, legal counsel and advisors of the Petitioners (including for purpose of clarity 11641638 Canada Inc., 11641735 Canada Inc. and AmalCo), (ii) the Monitor and its legal counsel, and (iii) the Streamers under the Stream Agreement, Diaquem Inc. and Investissement Québec, including in each case their respective directors, officers, employees, legal counsel and advisors (the persons listed in (i), (ii) and (iii) being collectively the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims (including, without limitations, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole

or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the issuance of the Certificate or completed pursuant to the terms of this Order and/or in connection with the Transactions, in respect of the Petitioners or their assets, business or affairs wherever or however conducted or governed, the administration and/or management of the Petitioners, the Stream Agreement, the Diaquem Loan Agreement, the Diaquem Royalty Agreement and these proceedings (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim against the Directors and Officers of the Petitioners that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[28] **ORDERS** that, notwithstanding:

a) the pendency of these proceedings;

b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") in respect of the Petitioners, 11641638 Canada Inc., 11641735 Canada Inc. or Amalco and any bankruptcy order issued pursuant to any such applications; and

c) any assignment in bankruptcy made in respect of the Petitioners, 11641638 Canada Inc., 11641735 Canada Inc. or Amalco,

the implementation of the Pre-Closing Reorganization (including the transfer of the Excluded Assets to 11641638 Canada Inc. and the transfer of the Excluded Liabilities to 11641638 Canada Inc. and/or to 11641735 Canada Inc.) and the implementation of the Purchase and Sale Transactions under and pursuant to the Purchase Agreement (i) shall be binding on any trustee in bankruptcy that may be appointed in respect of the Petitioners, 11641638 Canada Inc., 11641735 Canada Inc. or Amalco and shall not be void or voidable by creditors of the Petitioners, 11641638 Canada Inc. or 11641735 Canada Inc., as applicable, (ii) shall not constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, and (iii) shall not constitute nor be deemed to be oppressive or unfairly prejudicial conduct by the Petitioners or the Released Parties pursuant to any applicable federal or provincial legislation.

THE MONITOR

[29] **PRAYS ACT** of the Monitor's Second Report.

[30] **ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is authorized, entitled and empowered to assign or cause to be assigned, at any time after the Closing Date, Stornoway Diamond Corporation, 11641638 Canada Inc. and 11641735 Canada Inc. into bankruptcy and the Monitor shall be entitled but not obligated to act as trustee in bankruptcy thereof.

[31] **DECLARES** that, subject to other orders of this Court, nothing herein contained shall require the Monitor to occupy or to take control, or to otherwise manage all or any part of the assets of the Petitioners. The Monitor shall not, as a result of this Order, be deemed to be in possession of any assets of the Petitioners within the meaning of environmental legislation, the whole pursuant to the terms of the CCAA.

[32] **DECLARES** that the Monitor shall incur no liability as a result of acting in accordance with this Order, other than any liability arising out of or in connection with the gross negligence or wilful misconduct of the Monitor.

[33] **DECLARES** that no action lies against the Monitor by reason of this Order or the performance of any act authorized by this Order, except by leave of the Court. The entities related to the Monitor or belonging to the same group as the Monitor shall benefit from the protection arising under the present paragraph.

GENERAL

[34] **ORDERS** that the Purchaser shall be authorized to take all steps as may be necessary to effect the discharge of the Encumbrances as against the assets of AmalCo.

[35] **DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

[36] **DECLARES** that the Monitor shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement the Order and, without limitation to the foregoing, an order under Chapter 15 of the U.S. Bankruptcy Code, for which the Monitor shall be the foreign representative of the Debtor. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to Monitor as may be deemed necessary or appropriate for that purpose.

[37] **REQUESTS** the aid and recognition of any court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America

and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order.

[38] **ORDERS** the provisional execution of the present Order notwithstanding any appeal and without the requirement to provide any security or provision for costs whatsoever.

THE WHOLE WITHOUT COSTS.

Louis J. Gouin J.S.C.

The Honourable Louis J. Gouin, J.S.C.

Date of hearing: October 7, 2019

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TAB G

Court File No. CV-19-00632079-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 21ST
	)	
JUSTICE HAINEY	)	DAY OF APRIL, 2020

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 WAYLAND GROUP CORP., MARICANN INC. AND NANOLEAF TECHNOLOGIES INC.

(collectively, the "**Applicants**" and each an "**Applicant**")

APPROVAL AND VESTING ORDER

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order, *inter alia*, (i) approving the Share Purchase Agreement (the "**Sale Agreement**") among Wayland Group Corp. ("**Wayland**"), Maricann Inc. ("**Maricann**"), and Canadelaar B.V. (the "**Purchaser**") dated April 15, 2020 and attached as Exhibit "A" to the affidavit of Matthew McLeod sworn April 15, 2020 (the "**Seventh McLeod Affidavit**") and the transactions contemplated thereby (the "**Transactions**"), (ii) adding 2751609 Ontario Inc. ("**Residual Co**") as an Applicant to these CCAA proceedings, (iii) vesting all of Maricann's right, title and interest in and to the Excluded Assets (as defined in the Sale Agreement) in Residual Co, (iv) transferring and vesting all of the Excluded Contracts and Excluded Liabilities in Residual Co, (v) vesting all of Wayland's right, title and interest in and to the Transferred Assets (as defined in the Sale Agreement) in Maricann, (vi) vesting all of the right, title and interest in and to the Maricann Shares (as defined in the Sale

Agreement) in the Purchaser, (vii) granting the Payables Charge (as defined below), and (viii) granting certain related relief, was heard this day in writing at Toronto, Ontario.

ON READING the Notice of Motion of the Applicants, the Seventh McLeod Affidavit, the sixth report of PricewaterhouseCoopers Inc., in its capacity as monitor of the Applicants (the "**Monitor**"), dated April 16, 2020, and on hearing the submissions of counsel for the Applicants, the Monitor, the Purchaser, the DIP Lender and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Karin Sachar sworn April 16, 2020:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein have the meaning ascribed to them in the Seventh McLeod Affidavit and/or the Sale Agreement and/or the Second Amended and Restated Initial Order of this Court in the within proceedings dated December 2, 2019 (as amended and restated on December 16, 2019 and otherwise modified, the "**Initial Order**"), as applicable.

APPROVAL AND VESTING

3. **THIS COURT ORDERS AND DECLARES** that the Sale Agreement and the Transactions are hereby approved and the execution of the Sale Agreement by Wayland and Maricann is hereby authorized and approved, with such minor amendments as the parties thereto may deem necessary, with the approval of the Monitor and the DIP Lender. The Applicants are hereby authorized and directed to perform their obligations under the Sale Agreement and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions and for the conveyance of the Maricann Shares to the Purchaser.

4. **THIS COURT ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Applicants to proceed with the Transactions (including, for certainty, the Pre-Closing Reorganization) and that no shareholder or other approval shall be required in connection therewith.

5. **THIS COURT ORDERS AND DECLARES** that, upon the delivery of the Monitor's certificate (the "**Monitor's Certificate**") to the Purchaser (the "**Effective Time**"), substantially in the form attached as Schedule "A" hereto , the following shall occur and shall be deemed to have occurred at the Effective Time in the following sequence:

(a) first, all of Maricann's right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in Residual Co, and all Claims and Encumbrances (each as defined below) shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer;

(b) second, (i) all of Wayland's right, title and interest in and to the Transferred Assets shall vest absolutely and exclusively in Maricann free and clear of and from any and all Claims and Encumbrances (each as defined below); and (ii) all Assumed Liabilities which are to be assigned by Wayland to, and assumed by Maricann pursuant to the Sale Agreement shall be and are hereby assigned to, assumed by and shall vest absolutely and exclusively in Maricann; and for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Transferred Assets are hereby expunged and discharged as against the Transferred Assets;

(c) third, all Excluded Contracts and Excluded Liabilities (which, for certainty includes all debts, liabilities, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) of Maricann other than the Assumed Liabilities) shall be transferred to, assumed by and vest absolutely and exclusively in, Residual Co such that the Excluded Contracts and Excluded Liabilities shall become obligations of Residual Co and shall no longer be

obligations of Maricann, and Maricann and all of its assets, licenses, undertakings and properties of every nature and kind whatsoever and wherever situate (including, for certainty, the Transferred Assets and the Retained Assets, the "**Maricann Property**") shall be and are hereby forever released and discharged from such Excluded Contracts and Excluded Liabilities and all related Claims (as defined below), and all Encumbrances (as defined below) affecting or relating to the Maricann Property are hereby expunged and discharged as against the Maricann Property;

(d) fourth, all options, conversion privileges, equity-based awards, warrants, securities, debentures, loans, notes or other rights, agreements or commitments of any character whatsoever that are held by any Person (as defined below) and are convertible or exchangeable for any securities of Maricann or which require the issuance, sale or transfer by Maricann, of any shares or other securities of Maricann, or otherwise evidencing a right to acquire the Maricann Shares and/or the share capital of Maricann, or otherwise relating thereto, shall be deemed terminated and cancelled; and

(e) fifth, all of the right, title and interest in and to the Maricann Shares shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order, the KERP & SISP Approval Order of this Court dated January 13, 2020, or any other Order of the Court; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule "B" hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "C" hereto) and, for

greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Maricann Shares are hereby expunged and discharged as against the Maricann Shares, and

(f) sixth, Maricann shall and shall be deemed to cease to be an Applicant in these CCAA proceedings, and Maricann shall be deemed to be released from the purview of the Initial Order and all other Orders of this Court granted in respect of these CCAA proceedings, save and except for this Order the provisions of which (as they relate to Maricann) shall continue to apply in all respects.

6. **THIS COURT ORDERS** that upon the registration in the Land Registry Office #37 for the Land Titles Division of Norfolk (Simcoe) of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and/or the *Land Registration Reform Act* (Ontario), the Land Registrar is hereby directed to vacate and expunge from title to the subject real property identified in Schedule "D" hereto (the "**Real Property**") all of the Claims listed in Schedule "B" hereto.

7. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof in connection with the Transactions.

8. **THIS COURT ORDERS** that the Monitor may rely on written notice from Wayland and the Purchaser regarding the fulfillment of conditions to closing under the Sale Agreement and shall have no liability with respect to delivery of the Monitor's Certificate.

9. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Maricann Shares (including, for greater certainty, the net proceeds realized from the Cash Payment and any Conditional Payments) (the "**Proceeds**") shall stand in the place and stead of the Maricann Shares, and that from and after the delivery of the Monitor's Certificate and the payment of the Priority Payments pursuant to paragraph 27 hereof, all Claims and Encumbrances shall attach to the remaining Proceeds, if any, following the payment of the Priority Payments with the same priority as they had with respect to the Maricann Shares immediately prior to the sale, as if the Maricann Shares had not been sold and remained in the possession or control of the Person having that possession or control immediately prior to the sale.

10. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Applicants or the Monitor, as the case may be, is authorized, permitted and directed to, at the Effective Time, disclose to the Purchaser all human resources and payroll information in Maricann's records pertaining to past and current employees of Maricann. The Purchaser shall maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by Maricann.

11. **THIS COURT ORDERS AND DECLARES** that, at the Effective Time and without limiting the provisions of paragraph 5 hereof, the Purchaser and Maricann shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any Taxes (including penalties and interest thereon) of, or that relate to, the Applicants (provided, as it relates to Maricann, such release shall not apply to Taxes in respect of the business and operations conducted by Maricann after the Effective Time), including without limiting the generality of the foregoing all taxes that could be assessed against the Purchaser or Maricann (including its affiliates and any predecessor corporations) pursuant to section 160 of the *Income Tax Act* (Canada), or any provincial equivalent, in connection with the Applicants.

12. **THIS COURT ORDERS** that except to the extent expressly contemplated by the Sale Agreement, all Contracts to which Maricann is a party upon delivery of the Monitor's Certificate (including, for certainty, those Contracts constituting Transferred Assets) will be and remain in full force and effect upon and following delivery of the Monitor's Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:

(a) any event that occurred on or prior to the delivery of the Monitor's Certificate and is not continuing that would have entitled such Person to enforce those rights or

remedies (including defaults or events of default arising as a result of the insolvency of any Applicant);

(b) the insolvency of any Applicant or the fact that the Applicants sought or obtained relief under the CCAA;

(c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Sale Agreement, the Transactions or the provisions of this Order, or any other Order of the Court in these proceedings; or

(d) any transfer or assignment, or any change of control of Maricann arising from the implementation of the Sale Agreement, the Transactions or the provisions of this Order.

13. **THIS COURT ORDERS**, for greater certainty, that (a) nothing in paragraph 12 hereof shall waive, compromise or discharge any obligations of Maricann in respect of any Assumed Liabilities, and (b) the designation of any Claim as an Assumed Liability is without prejudice to Maricann's right to dispute the existence, validity or quantum of any such Assumed Liability, and (c) nothing in this Order or the Sale Agreement shall affect or waive Maricann's rights and defences, both legal and equitable, with respect to any Assumed Liability, including, but not limited to, all rights with respect to entitlements to set-offs or recoupments against such Assumed Liability.

14. **THIS COURT ORDERS** that from and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of any Applicant then existing or previously committed by any Applicant, or caused by any Applicant, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any Contract, existing between such Person and Maricann (including, for certainty, those Contracts constituting Transferred Assets) arising directly or indirectly from the filing by the Applicants under the CCAA and the implementation of the Transactions, including without limitation any of the matters or events listed in paragraph 12 hereof and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under a

Contract shall be deemed to have been rescinded and of no further force or effect, provided that nothing herein shall be deemed to excuse Maricann or Wayland from performing their obligations under the Sale Agreement or be a waiver of defaults by Maricann or Wayland under the Sale Agreement and the related documents.

15. **THIS COURT ORDERS** that from and after the Effective Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessment, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against Maricann or the Maricann Property relating in any way to or in respect of any Excluded Assets or Excluded Liabilities and any other claims, Obligations and other matters which are waived, released, expunged or discharged pursuant to this Order.

16. **THIS COURT ORDERS** that, from and after the Effective Time:

(a) the nature of the Assumed Liabilities retained by Maricann, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Transactions or this Order;

(b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to Residual Co;

(c) any Person that prior to the Effective Time had a valid right or claim against Maricann under or in respect of any Excluded Contract or Excluded Liability (each an "**Excluded Liability Claim**") shall no longer have such right or claim against Maricann but will have an equivalent Excluded Liability Claim against Residual Co in respect of the Excluded Contract and Excluded Liability from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against Residual Co; and

(d) the Excluded Liability Claim of any Person against Residual Co following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against Marcann prior to the Effective Time.

17. **THIS COURT ORDERS AND DECLARES** that, as of the Effective Time:

(a) Residual Co shall be a company to which the CCAA applies; and

(b) Residual Co shall be added as an Applicant in these CCAA proceedings and all references in any Order of this Court in respect of these CCAA proceedings to (i) an "Applicant" or the "Applicants" shall refer to and include Residual Co, *mutatis mutandis*, and (ii) "Property" shall include the current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, of Residual Co. (the "**Residual Co. Property**"), and, for greater certainty, each of the Charges (as defined in the Initial Order and including for greater certainty the Payables Charge (as defined below)), shall constitute a charge on the Residual Co. Property.

CLOSING FUNDING AND CHARGE

18. **THIS COURT ORDERS** that the Closing Funding is hereby approved, and Wayland is hereby authorized and empowered to obtain and borrow the Closing Funding from the Purchaser (or one of its Affiliates) (the "**Closing Funding Lender**") in accordance with the terms of the Sale Agreement, provided that such Closing Funding shall not exceed the aggregate principal amount of $1,000,000 and that the Closing Funding shall be on the terms and subject to the conditions set forth in the Sale Agreement and, without limitation, shall be used solely for the purposes set out in the Sale Agreement.

19. **THIS COURT ORDERS** that the Closing Funding Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Payables Charge**") on the Property of the Applicants (including the entitlement of any Applicant to receive the Conditional Payments), which Payables Charge shall not secure an obligation that exists before this Order is made. The Closing Funding Charge shall have the priority set out in paragraph 22 hereof.

20. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the Purchaser may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Payables Charge; and

(b) upon the failure of the Applicants to comply with their obligations under the Sale Agreement as they relate to the Closing Funding (including the use and repayment thereof), the Purchaser, upon seven (7) days' notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Sale Agreement and the Payables Charge, including to apply for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants.

21. **THIS COURT ORDERS AND DECLARES** that the Purchaser shall be treated as unaffected in any plan of arrangement or compromise filed by any Applicant under the CCAA, or any proposal filed by any Applicant under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), with respect to any advances of Closing Funding made under the Sale Agreement.

22. **THIS COURT ORDERS** that the Payables Charge shall rank in priority to all Encumbrances (as defined in the Initial Order) other than the Administration Charge, the Directors' Priority Charge, the KERP Charge, and the DIP Lender's Charge, and the priority as among the Charges shall be as follows:

First – Administration Charge (to the maximum amount of $1,000,000);

Second – Directors' Priority Charge (to the maximum amount of $200,000);

Third – KERP Charge (to the maximum amount of $500,000);

Fourth – DIP Lender's Charge;

Fifth – Payables Charge (to the maximum amount of $1,000,000); and

Sixth – Directors' Subordinate Charge (to the maximum amount of $250,000).

23. **THIS COURT ORDERS** that the filing, registration or perfection of the Payables Charge shall not be required, and that the Payables Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected

subsequent to the Payables Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

24. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances (as defined in the Initial Order) over any of their Property that rank in priority to, or *pari passu* with, the Payables Charge unless the Applicants also obtain the prior written consent of the Closing Funding Lender and the beneficiaries of the Directors' Subordinate Charge.

25. **THIS COURT ORDERS** that the Sale Agreement (as it pertains to the Closing Funding) and the Payables Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Purchaser thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances (as defined in the Initial Order), contained in any Agreement which binds any of the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Payables Charge nor the execution, delivery, perfection, registration or performance of the Sale Agreement shall create or be deemed to constitute a breach by any Applicant of any Agreement to which it is a party; and

(b) the Purchaser and the Closing Funding Lender shall have no liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from Wayland and Maricann entering into the Sale Agreement or the creation of the Payables Charge.

26. **THIS COURT ORDERS** that the Payables Charge over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

PRIORITY PAYMENTS

27. **THIS COURT ORDERS AND DIRECTS** that the Proceeds shall be distributed by the Monitor as soon as is practicable following the Effective Time through the following payments in the following order (collectively, the "**Priority Payments**"):

(a) First, an amount equal to $100,000 to the Monitor to establish the Post-Closing Reserve (as defined below);

(b) Second, to the beneficiaries of the Administration Charge, on a *pro rata* basis, in satisfaction of the Applicants' obligations secured thereby up to the maximum amount secured by such charge and set out in Paragraph 22 hereof;

(c) Third, to the beneficiaries of the Directors' Priority Charge, on a *pro rata* basis, in satisfaction of the Applicants' obligations secured thereby (if any) up to the maximum amount secured by such charge and set out in Paragraph 22 hereof;

(d) Fourth, to the beneficiaries of the KERP Charge, on a *pro rata* basis, in satisfaction of the Applicants' obligations secured thereby (if any) up to the maximum amount secured by such charge and set out in Paragraph 22 hereof;

(e) Fifth, to the DIP Lender in satisfaction of the DIP Obligations (as defined in the Initial Order) secured by the DIP Lender's Charge;

(f) Sixth, to the Closing Funding Lender in satisfaction of the Applicants' obligations secured by the Payables Charge; and

(g) Seventh, to the beneficiaries of the Directors' Subordinate Charge, on a *pro rata* basis, in satisfaction of the Applicants' obligations secured thereby (if any) up to the maximum amount secured by such charge.

28. **THIS COURT ORDERS** that any remainder of the Proceeds following the payment in full of the Priority Payments shall be held by the Monitor pending further order of the Court, subject to paragraphs 29 and 30 of this Order.

POST-CLOSING RESERVE

29. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed to establish a cash reserve (the "**Post-Closing Reserve**") from the Proceeds, which shall be held in a segregated account and shall be used to pay costs and fees incurred by the Monitor or the Applicants following the Effective Time in connection with completing these CCAA proceedings, including for greater certainty, (i) the fees and disbursements of the Applicants' counsel, the Monitor, counsel to the Monitor, and other professionals engaged by the Applicants or the Monitor incurred following the Effective Time, including in the exercise of the Applicants' and Monitor's powers and duties pursuant to the CCAA, the Initial Order, this Order, and any other Order granted in these proceedings, and (ii) any fees, expenses, or disbursements incurred in relation to any proceeding under the BIA in respect of any of the Applicants (collectively, the "**Post-Closing Costs**").

30. **THIS COURT ORDERS** that the Monitor is hereby authorized to pay any Post-Closing Costs in its own name or in the name of and on behalf of the Applicants, as it deems necessary, appropriate, or desirable, in its discretion.

RELEASES

31. **THIS COURT ORDERS** that effective upon the filing of the Monitor's Certificate, (i) the current directors, officers, employees, legal counsel and advisors of the Applicants (including, for certainty, Maricann), and (ii) the Monitor and its legal counsel (collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims (including, without limitations, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the filing of the Monitor's Certificate (a) undertaken or completed pursuant to the terms of this Order, or (b) arising in connection with or relating to the SPA or the completion of the Transaction (collectively, the "**Released Claims**"), which

Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA or that arose in or relates to the period prior to the granting of the Initial Order. For greater certainty, nothing in this paragraph 31: (i) affects any claims against the directors and officers of any of the Applicants for breach of trust arising from acts or omissions occurring before the date of the Initial Order; or (ii) releases, fetters or prejudices: (a) the right of any person or entity to commence a claim against Wayland Group Corp. or any directors and officers of Wayland Group Corp. with respect to the class action or the issues giving rise to the class action against Wayland Group Corp., including without limitation for contribution and indemnity, or contractual indemnity (in each case subject to the stay of proceedings); and (b) the availability of any applicable insurance to satisfy such class action claims (including any future cross and third party claims).

32. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of the Applicants and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Applicants;

the Sale Agreement, the implementation of the Transactions (including without limitation the transfer and vesting of the Excluded Assets, Excluded Contract and Excluded Liabilities in and to Residual Co, the transfer and vesting of the Transferred Assets in and to Maricann, and the transfer and vesting of the Maricann Shares in and to the Purchaser), the payment of the Priority Payments, the granting of the Payables Charge, and any payments by or to the Purchaser, the Closing Funding Lender, the Applicants or the Monitor authorized herein shall be binding on any trustee in bankruptcy that may be appointed in respect of the Applicants and/or Residual Co and shall not be void or voidable by creditors of the Applicants or Residual Co, as applicable, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the CCAA, the BIA or

any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

GENERAL

33. **THIS COURT ORDERS** that, following the Effective Time, the Purchaser shall be authorized to take all steps as may be necessary to effect the discharge of the Claims and Encumbrances as against the Maricann Shares and the Maricann Property.

34. **THIS COURT ORDERS** that, following the Effective Time, the title of these proceedings is hereby changed to:

> 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 WAYLAND GROUP CORP., 2751609 ONTARIO INC. AND NANOLEAF TECHNOLOGIES INC

35. **THIS COURT DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

36. **THIS COURT DECLARES** that the Applicants shall be authorized to apply as they may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and, without limitation to the foregoing, an order under Chapter 15 of the U.S. Bankruptcy Code, for which the Monitor shall be the foreign representative of the Applicants. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

37. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the

Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order.

38. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Prevailing Eastern Time on the date hereof.

Hainey J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

APR 2 1 2020

PER / PAR:

Schedule "A" – Form of Monitor's Certificate

Court File No. CV-19-00632079-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WAYLAND GROUP CORP., MARICANN INC. AND NANOLEAF TECHNOLOGIES INC.

(collectively, the "**Applicants**" and each an "**Applicant**")

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to the Initial Order of the Honourable Justice Hainey of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated December 2, 2019, the Applicants were granted protection from their creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and PricewaterhouseCoopers Inc. was appointed as the monitor (the "**Monitor**") of the Applicants.

B. Pursuant to an Approval and Vesting Order of the Court dated April 21, 2020 (the "**Order**"), the Court approved the transactions (the "**Transactions**") contemplated by the Share Purchase Agreement (the "**Sale Agreement**") among Wayland Group Corp. ("**Wayland**"), Maricann Inc. ("**Maricann**"), and Canadelaar B.V. (the "**Purchaser**") dated April 15, 2020, and ordered, *inter alia*, that (i) all of Maricann's right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in Residual Co, (ii) all of Wayland's right, title and interest in and to the Transferred Assets shall vest absolutely and exclusively in Maricann, (iii) all of the Excluded Contracts and Excluded Liabilities shall be transferred to, assumed by and vest

absolutely and exclusively in, Residual Co, and (iv) all of the right, title and interest in and to the Maricann Shares shall vest absolutely and exclusively in the Purchaser, which vesting is, in each case, to be effective upon the delivery by the Monitor to the Purchaser of a certificate confirming that the Monitor has received written confirmation in the form and substance satisfactory to the Monitor from the Purchaser and Wayland that all conditions to closing have been satisfied or waived by the parties to the Sale Agreement.

C. Capitalized terms used but not defined herein have the meanings ascribed to them in the Order.

THE MONITOR CERTIFIES the following:

1. The Monitor has received written confirmation from the Purchaser and Wayland, in form and substance satisfactory to the Monitor, that all conditions to closing have been satisfied or waived by the parties to the Sale Agreement.

2. This Monitor's Certificate was delivered by the Monitor at _____ on _____, 2020.

PricewaterhouseCoopers Inc., in its capacity as Monitor of the Applicants, and not in its personal capacity

Per: _____

Name:

Title:

Schedule B – Claims to be deleted and expunged from title to Real Property

Mortgages:

1. Instrument No. NK104626 is a Charge registered October 27, 2017 in favour of TSX Trust Company for $31,000,000

2. Instrument No. NK122473 is a Charge registered August 12, 2019 in favour of Cryptologic Corp. for $5,000,000

   - Instrument No. NK123545 is an Amending Agreement registered September 17, 2019 amending the terms of Charge registered as Instrument No. NK122473 to increase the amount of the loan to $50,000,000

Construction Liens (with no corresponding Certificates of Action):

1. Instrument No. NK124619 is a Construction Lien registered October 17, 2019 in favour of Newfab Ltd. for $1,758,481

Construction Liens (with corresponding Certificates of Action):

1. (a) Instrument No. NK124416 is a Construction Lien registered October 10, 2019 in favour of North Shore Electric Inc. for $96,050

   (b) Instrument No. NK124417 is a Construction Lien registered October 10, 2019 in favour of North Shore Electric Inc. for $1,152,542

   (c) Instrument No. NK125666 is a Construction Lien registered November 19, 2019 in favour of North Shore Electric Inc. for $64,191

   - Certificate of Action registered November 21, 2019 as Instrument No. NK125761

2. (a) Instrument No. NK124494 is a Construction Lien registered October 15, 2019 in favour of 2296642 Ontario Inc. for $18,080

   (b) Instrument No. NK124495 is a Construction Lien registered October 15, 2019 in favour of 2296642 Ontario Inc. for $111,915

   - Certificate of Action registered November 21, 2019 as Instrument No. NK125762

3. Instrument No. NK124806 is a Construction Lien registered October 24, 2019 in favour of MG Miscellaneous Metals Inc. for $173,865

   - Certificate of Action registered November 21, 2019 as Instrument No. NK125758

4. Instrument No. NK124828 is a Construction Lien registered October 24, 2019 in favour of Vive Mechanical Inc. for $352,226

   - Certificate of Action registered January 20, 2020 as Instrument No. NK127377

5. Instrument No. NK125256 is a Construction Lien registered November 5, 2019 in favour of 1573082 Ontario Inc. for $45,858

- Certificate of Action registered November 21, 2019 as Instrument No. NK125757

6. Instrument No. NK125322 is a Construction Lien registered November 7, 2019 in favour of Decloet Greenhouse Manufacturing Ltd. for $581,897

   - Certificate of Action registered January 31, 2020 as Instrument No. NK127745

7. Instrument No. NK125432 is a Construction Lien registered November 12, 2019 in favour of Mat 4 Site Engineers Ltd. for $72,932

   - Certificate of Action registered December 23, 2019 as Instrument No. NK126777

8. Instrument No. NK125433 is a Construction Lien registered November 12, 2019 in favour of Rassaun Services Inc. for $320,151

   - Certificate of Action registered January 24, 2020 as Instrument No. NK127504

9. Instrument No NK125500 is a Construction Lien registered November 14, 2019 in favour of Zimcon Inc. for $246,282

   - Certificate of Action registered December 17, 2019 as Instrument No. NK126533

10. Instrument No. NK125507 is a Construction Lien registered November 14, 2019 in favour of Gerrie Electric Wholesale Limited for $2,010,872

    - Certificate of Action registered January 31, 2020 as Instrument No. NK127743

11. Instrument No. NK125598 is a Construction Lien registered November 15, 2019 in favour of Gerrie Electric Wholesale Limited for $177,995

    - Certificate of Action registered January 31, 2020 as Instrument No. NK127744

12. (a) Instrument No. NK125625 registered November 18, 2019 is a Construction Lien registered November 18, 2019 in favour of 2256544 Ontario Inc. for $115,944

    (b) Instrument No. NK125627 is a Construction Lien registered November 18, 2019 in favour of 2256544 Ontario Inc. for $276,585

    (c) Instrument No. NK125628 is a Construction Lien registered November 18, 2019 in favour of 2256544 Ontario Inc. for $817,534

    - Certificate of Action registered November 21, 2019 as Instrument No. NK125760

13. Instrument No. NK125834 is a Construction Lien registered November 22, 2019 in favour of Stinson Security Services Limited for $105,033

    - Certificate of Action registered December 13, 2019 as Instrument No. NK126494

14. Instrument No. NK126155 is a Construction Lien registered December 3, 2019 in favour of Trane Canada, ULC for $283,828

    - Certificate of Action registered January 24, 2020 as Instrument No. NK127527

15. Instrument No. NK127222 is a Construction Lien registered January 15, 2020 in favour of Havecon Projects BV and Havecon North America Inc. for $899,027

- Certificate of Action registered January 21, 2020 by Instrument No. NK127395

- Instrument No. NK125624 is a Construction Lien registered November 18, 2019 in favour of 1820819 Ontario Inc. for $95,578

- Certificate of Action registered March 16, 2020 by Instrument No. NK128831

Schedule C – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property

(unaffected by the Vesting Order)

Leases

1. Instrument No. NR587644 is a Lease registered February 22, 2005 between Lucien Phillips Jr. also known as Lucien Albert Phillips Jr., Mariette Denise Phillips and Metalore Resources Limited

   - Instrument No. NR591536 is an Assignment of Lease registered as Instrument No. NR587644 registered July 12, 2005 from Metalore Resources Limited to Leader Energy Corp.
   - Instrument No. NK72540 is an Application to Change Name - Instrument registered August 11, 2014 regarding Instrument Nos. NR587644, NR591536 to change the name from Leader Energy Corp. to Leader Capital Corp.
   - Instrument No. NK73385 is an Application (General) re: Assignment of Lease registered as Instrument No. NR587644 registered September 11, 2014 from Leader Capital Corp. to Magnum Gas Corp.
   - Instrument No. NK73740 is an Application (General) re: Assignment of Lease registered as Instrument No. NR587644 registered September 24, 2014 from Magnum Gas Corp. to Tribute Resources Inc.
   - Instrument No. NK107595 is an Application (General) re: Assignment of Leases registered as Instrument Nos. NR587644, NR591536, NK72540, NK73385, NK73740 registered February 1, 2018 from Tribute Resources Inc. to On-Energy Corp.
   - Instrument No. NK109419 is a Notice (Fixed and Floating Charge Demand Debenture) registered April 19, 2018 regarding Instrument Nos. NR587644, NR591536, NK72540, NK73385, NK73740, NK587644 between On-Energy Corp. and Pace Savings & Credit Union Limited for $2,800,000.00
   - Instrument No. NK126996 is an Application to Change Name - Instrument registered January 6, 2020 regarding NK107595 to change the name from On-Energy Corp. to Clearbeach Resources Inc.

General Encumbrances with respect to the Property

1. The reservations, limitations, exceptions, provisos and conditions, if any, expressed in any original grants from the Crown including, without limitation, the reservation of any mines and minerals in the Crown or in any other person.
2. Encumbrances respecting minor encroachments by the Property over abutting lands and minor encroachments over any portion of the Property by improvements of abutting land owners.
3. Any unregistered easements, rights-of-way or other unregistered interests or claims not disclosed by registered title.

Schedule "D" - Legal Description of the Real Property

PROPERTY DESCRIPTION:	PT LT 2 CON 7 NORTH WALSINGHAM AS IN NR306706 SAVE & EXCEPT PT 1 ON 37R10232; NORFOLK COUNTY
	PIN 50127-0217 (LT)

TAB H

Court File No.CV-20-00642097-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MADAM	)	FRIDAY, THE 18th
	)	
JUSTICE CONWAY	)	DAY OF SEPTEMBER, 2020

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

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF BELEAVE INC., BELEAVE KANNABIS CORP., SEVEN OAKS INC., 9334416 CANADA INC. O/A MEDI-GREEN AND MY-GROW, BELEAVE KANNABIS ABBOTSFORD INC. AND BELEAVE KANNABIS CHILLIWACK INC.

(collectively, the "**Applicants**" and each an "**Applicant**")

APPROVAL AND VESTING ORDER
(Motion returnable September 18, 2020)

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**"), for an order, among other things: (i) approving the Amended and Restated Purchase Agreement, dated September 8, 2020 (the "**APA**"), between Beleave and Wayne Patrick Consumer Products Ltd. (the "**Purchaser**"), for the purchase and sale of all of the issued and outstanding shares of Beleave Kannabis Corp. ("**BKC Shares**") and 9334416 Canada Inc. (the "**933 Shares**" together with the BKC Shares, the "**Subsidiary Shares**") and those assets of Beleave Inc. ("**Beleave**") identified in the APA (the "**Transferred Assets**"); (ii) adding 2775965 Ontario Inc., a subsidiary of Beleave ("**ResidualCo**"), as an applicant in the within proceedings in order to carry out the transaction contemplated by the APA (the "**Transaction**"); (iii) transferring the Excluded Liabilities, Excluded Assets, and Excluded Contracts (all as defined in the Share Purchase Agreement, dated September 8, 2020 among Beleave, BKC and the Purchaser) to, and vesting

the same in ResidualCo; (iv) vesting all of Beleave Parent's right, title and interest in and to the Subsidiary Shares and the Transferred Assets in the Purchaser; (v) authorizing Grant Thornton Limited, in its capacity as court-appointed monitor of the Applicants (the "**Monitor**") to act as trustee in bankruptcy of the Applicants, including ResidualCo (in such capacities, the "**Trustee**"); and (vi) extending the stay of proceedings in respect of the Applicants to November 30, 2020 (the "**Stay Period**") was heard this day by videoconference due to the COVID-19 pandemic.

ON READING the Applicants' Notice of Motion, the affidavit of Bill Panagiotakopoulos, sworn September 9, 2020, and the Fourth Report of the Monitor dated September 17, 2020 (the "**Fourth Report**") and on hearing the submissions of counsel for the Applicants and counsel for the Monitor and counsel for those other parties appearing as indicated by the counsel slip, no one appearing for any other party although duly served as appears from the affidavit of service, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. **THIS COURT ORDERS** that capitalized terms not otherwise defined herein shall have meaning ascribed to them in the APA.

APPROVAL AND VESTING

3. **THIS COURT ORDERS AND DECLARES** that the APA, including the BKC SPA and the 933 SPA, and the Transaction be and are hereby approved and that the execution of the APA by Beleave is hereby authorized, ratified and approved, with such minor amendments as the parties thereto may deem necessary, with the approval of the Monitor. Beleave is hereby authorized and directed to perform its obligations under the APA and to take such additional

steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Subsidiary Shares and the Transferred Assets to the Purchaser.

4. **THIS COURT ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Applicants to proceed with the Transaction and that no shareholder or other approval shall be required in connection therewith.

5. **THIS COURT ORDERS AND DECLARES** that upon the delivery of the Monitor's certificate (the "**Monitor's Certificate**") to the Purchaser (the "**Effective Time**"), substantially in the form attached as Schedule "A" hereto, the following shall occur and shall be deemed to have occurred at the Effective Time in the following sequence:

(a) all of the right, title and interest in and to the Excluded Assets of BKC shall vest absolutely and exclusively in ResidualCo, and all Claims and Encumbrances (both defined below) shall continue to attach to the Excluded Assets and to the Proceeds (defined below) in accordance with paragraph 8 of this Order, in either case with the same nature and priority as they had immediately prior to the transfer;

(b) all of Beleave's right, title and interest in and to the Transferred Assets shall vest absolutely and exclusively in the Purchaser free and clear of and from any and all Claims and Encumbrances;

(c) all Excluded Contracts and Excluded Liabilities (which for certainty includes all debts, liabilities, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) of BKC) shall be transferred to, assumed

by and vest absolutely and exclusively in ResidualCo such that the Excluded Contracts and Excluded Liabilities shall become obligations of ResidualCo and shall no longer be obligations of BKC;

(d) all options, conversion privileges, equity-based awards, warrants, securities, debentures, loans, notes or other rights, agreements or commitments of any character whatsoever that are held by any Person (as defined below) and are convertible or exchangeable for any securities of BKC or 933 (the "**Share Companies**") or which require the issuance, sale or transfer by the Share Companies of any shares or other securities of the Share Companies and/or the share capital of the Share Companies, or otherwise relating thereto, shall be deemed terminated and cancelled; and

(e) all of the right, title and interest in and to the Subsidiary Shares shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypotecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order or any other orders in these CCAA proceedings; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry systems; and (iii) those Claims listed on Schedule "B" hereto (all of which are collectively referred to as the "**Encumbrances**") and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Subsidiary Shares are hereby expunged and discharged as against the Subsidiary Shares; and

(f) the Share Companies shall be deemed to cease being Applicants in these CCAA proceedings, and the Share Companies shall be deemed to be released from the purview of the Initial Order and all other orders of this Court granted in respect of these CCAA proceedings, save and except for this Order, the provisions of which (as they relate to the Share Companies) shall continue to apply in all respects.

6. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof in connection with the Transaction.

7. **THIS COURT ORDERS** that the Monitor may rely on written notice from the Beleave Group and the Purchaser regarding the fulfilment of conditions to closing under the APA and shall have no liability with respect to delivery of the Monitor's Certificate.

8. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims:

(a) the net proceeds from the sale of the Transferred Assets and the 933 Shares, as allocated by Beleave and the Purchaser in consultation with the Monitor (the "**Asset Proceeds**"), shall stand in the place and stead of the Transferred Assets and 933 Shares and that from and after the delivery of the Monitor's Certificate all Claims and Encumbrances relating to the Transferred Assets and 933 Shares shall attach to the Asset Proceeds with the same priority as they had with respect to the Transferred Assets and 933 Shares, respectively, immediately prior to the sale, as if the Transferred Assets and 933 Shares had not been sold and remain in the possession or control of the Person having that possession or control immediately prior to the sale; and

(b) the net proceeds from the sale of the BKC Shares, as allocated by Beleave and the Purchaser in consultation with the Monitor (the "**BKC Proceeds**" together with the

Asset Proceeds, the "**Proceeds**") shall stand in the place and stead of the assets conveyed by BKC through the sale of the BKC Shares and that from and after the delivery of the Monitor's Certificate all Claims and Encumbrances against BKC shall attach to the BKC Proceeds with the same priority as they had with respect to BKC immediately prior to the sale, as if the BKC assets conveyed by BKC through the sale of the BKC Shares had not been sold and remain in the possession or control of the Person having that possession or control immediately prior to the sale.

9. **THIS COURT ORDERS** that pursuant to section 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Applicants or the Monitor, as the case may be, is authorized, permitted and directed to, at the Effective Time, disclose to the Purchaser all human resources and payroll information in the Share Companies' records pertaining to past and current employees of the Share Companies. The Purchaser shall maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner that is in all material respects identical to the prior use of such information by the Share Companies.

10. **THIS COURT ORDERS AND DECLARES** that, at the Effective Time and without limiting the provisions of paragraph 5 hereof, the Purchaser and BKC shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any taxes (including penalties and interest thereon) of, or that relate to, the Applicants (provided as it relates to BKC, such release shall not apply to taxes in respect of the business and operations conducted by BKC after the Effective Time), including, without limiting the generality of the foregoing, all taxes that could be assessed against the Purchaser or BKC (including any predecessor corporations) pursuant to section 160 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), or any provincial equivalent, in connection with the Applicants.

11. **THIS COURT ORDERS** that except to the extent expressly contemplated by the APA, all contracts to which the Share Companies and Beleave are parties upon delivery of the Monitor's Certificate will be and remain in full force and effect upon and following delivery of the Monitor's Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:

(a) any event that occurred on or prior to the delivery of the Monitor's Certificate and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of any Applicant);

(b) the insolvency of any Applicant or the fact that the Applicants sought or obtained relief under the CCAA;

(c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the APA, the Transaction or the provisions of this Order, or any other Order of the Court in these proceedings; or

(d) any transfer or assignment, or any change of control of the Share Companies or Beleave arising from the implementation of the APA, the Transaction or the provisions of this Order.

12. **THIS COURT ORDERS** that from and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of any Applicant then existing or previously committed by any Applicant, or caused by any Applicant, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative

pledge, term, provision, condition or obligation, expressed or implied, in any Contract existing between such Person and BKC arising directly or indirectly from the filing of the Applicants under the CCAA and the implementation of the Transaction, including without limitation any of the matters or events listed in paragraph 11 hereof and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under a contract shall be deemed to have been rescinded and of no further force or effect, provided that nothing herein shall be deemed to excuse BKC from performing its obligations under the APA or be a waiver of defaults by BKC under the APA and the related documents.

13. **THIS COURT ORDERS** that from and after the Effective Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against BKC relating in any way to or in respect of any Excluded Assets, Excluded Liabilities or Excluded Contracts and any other claims, obligations and other matters that are waived, released, expunged or discharged pursuant to this Order.

14. **THIS COURT ORDERS** that from and after the Effective Time:

(a) the nature of the Assumed Liabilities retained by 933, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Transaction or this Order;

(b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to ResidualCo;

(c) any Person that prior to the Effective Time had a valid right or claim against BKC under or in respect of any Excluded Contract or Excluded Liability (each an

"**Excluded Liability Claim**") shall no longer have such right or claim against BKC but will have an equivalent Excluded Liability Claim against ResidualCo in respect of the Excluded Contract or Excluded Liability from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against ResidualCo; and

(d) the Excluded Liability Claim of any Person against ResidualCo following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against BKC prior to the Effective Time.

15. **THIS COURT ORDERS AND DECLARES** that, as of the Effective Time:

(a) ResidualCo shall be a company to which the CCAA applies; and

(b) ResidualCo shall be added as an Applicant in these CCAA proceedings and all references in any Order of this Court in respect of these CCAA proceedings to (i) an "Applicant" or the "Applicants" shall refer to and include ResidualCo, and (ii) "Property" shall include the current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, of ResidualCo (the "**ResidualCo Property**"), and, for greater certainty, each of the Charges (as defined in the Amended and Restated Initial Order, dated June 15, 2020), shall constitute a charge on the ResidualCo Property.

RELEASES

16. **THIS COURT ORDERS** that effective upon the filing of the Monitor's Certificate, (i) the current directors, officers, employees, legal counsel and advisors of the Applicants (including, for certainty, the Share Companies) and (ii) the Monitor and its legal counsel (collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims (including without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts,

liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the filing of the Monitor's Certificate (a) undertaken or completed pursuant to the terms of this Order, (b) arising in connection with or relating to the APA or the completion of the Transaction, (c) arising in connection with or relating to the within CCAA proceedings, or (d) related to the management, operations or administration of the Applicants (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

17. **THIS COURT ORDERS** that the relief sought by the Applicants against 1178647 B.C. Ltd. ("**117**") in paragraph 1(e) of the Applicants' notice of motion dated August 13, 2020 filed in the within CCAA proceedings (the "**Notice of Motion**"), and the grounds for such relief described in paragraphs 29-35 thereof, be and are hereby withdrawn by the Applicants on a with prejudice and without costs basis, and that 117 (including its current directors, officers, employees, legal counsel and advisors) (collectively, the "**117 Parties**"), on the one hand, and the Applicants and the Released Parties, on the other hand, shall be deemed to forever and irrevocably release and discharge each other from any and all present and future claims (including without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured

or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the date of this Order (collectively, the "**Second Released Claims**"), which Second Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the 117 Parties, the Applicants and the Released Parties, respectively, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

18. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C 195, c. B-3, as amended (the "**BIA**"), in respect of the Applicants and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Applicants;

the APA, the implementation of the Transaction (including without limitation the transfer and vesting of the Excluded Assets, Excluded Contracts and Excluded Liabilities in and to ResidualCo, the transfer and vesting of the Transferred Assets and the Subsidiary Shares in and to the Purchaser) the Payments and any payments by or to the Purchaser, the Applicants or the Monitor authorized herein shall be binding on any trustee in bankruptcy that may be appointed in respect of the Applicants and/or ResidualCo and shall not be void or voidable by creditors of the Applicants or ResidualCo, as applicable, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the CCAA, the BIA or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

GENERAL

19. **THIS COURT ORDERS** that, following the Effective Time, the Purchaser shall be authorized to take all steps as may be necessary to effect the discharge of the Claims and Encumbrances as against the Subsidiary Shares and the Transferred Assets.

20. **THIS COURT ORDERS** that, following the Effective Time, the title of these proceedings is hereby changed to:

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

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF BELEAVE INC., SEVEN OAKS INC., 2775965 ONTARIO INC., BELEAVE KANNABIS ABBOTSFORD INC. AND BELEAVE KANNABIS CHILLIWACK INC.

21. **THIS COURT ORDERS** that Grant Thornton Limited is authorized, but not required, to act as trustee in bankruptcy of Beleave Inc., Seven Oaks Inc., 2775965 Ontario Inc., Beleave Kannabis Abbotsford Inc. and Beleave Kannabis Chilliwack Inc.

STAY PERIOD

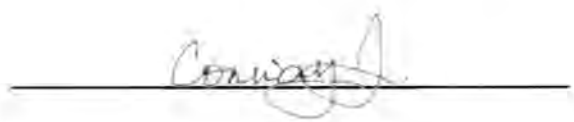
22. **THIS COURT ORDERS** that the Stay Period referred to in the Amended and Restated Initial Order, dated June 15, 2020, be and is hereby extended to November 30, 2020.

OTHER

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding,

or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

24. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.



SCHEDULE "A" – FORM OF MONITOR'S CERTIFICATE

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

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF BELEAVE INC., BELEAVE KANNABIS CORP., SEVEN OAKS INC., 9334416 CANADA INC. O/A MEDI-GREEN AND MY-GROW, BELEAVE KANNABIS ABBOTSFORD INC. AND BELEAVE KANNABIS CHILLIWACK INC.

(collectively, the "**Applicants**" and each an "**Applicant**")

RECITALS

A. Pursuant to the Initial Order of the Honourable Madam Justice Conway of the Ontario Superior Court of Justice (Commercial List), dated June 5, 2020, the Applicants were granted protection from their creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and Grant Thornton Limited was appointed as the monitor ("**Monitor**") of the Applicants.

B. Pursuant to the Approval and Vesting Order of the Court, dated September 18, 2020 (the "**Order**"), the court approved the transaction (the "**Transaction**") contemplated by the Amended and Restated Purchase Agreement (the "**APA**") dated September 8, 2020, between Beleave Inc. ("**Beleave**") and Wayne Patrick Consumer Products Ltd., (the "**Purchaser**"), and ordered, *inter alia*, that (i) all of Beleave's right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in ResidualCo.; (ii) all of Beleave Parent's right, title and interest to the Transferred Assets shall vest absolutely and exclusively in the Purchaser; (iii) all of the Excluded Contracts and Excluded Liabilities shall be transferred to, assumed by and vest in ResidualCo; and (iv) all of the right, title and interest in and to the Subsidiary Shares shall vest absolutely and exclusively in the Purchaser, which vesting is, in each case, to be effective upon the delivery by the Monitor to the Purchaser of a certificate confirming that the Monitor has received written confirmation in the form and substance satisfactory to the Monitor from the Purchaser and Beleave that all conditions to closing have been satisfied or waived by the parties to the APA.

C. Capitalized terms not defined herein shall have the meaning given to them in the Order.

THE MONITOR CERTIFIES the following:

1. The Monitor has received written confirmation from the Purchaser and from Beleave, in form and substance satisfactory to the Monitor, that all conditions to closing have been satisfied or waived by the parties to the APA.

2. This Monitor's certificate was delivered by the Monitor at _____ on _____, 2020.

GRANT THORNTON LIMITED, in its capacity as Monitor of the Applicants, and not in its personal capacity.

Per: _____
Name:
Title:

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

Court File No.: CV-20-00642097-00CL

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF **BELEAVE INC., BELEAVE KANNABIS CORP., SEVEN OAKS INC., 9334416 CANADA INC. O/A MEDI-GREEN AND MY-GROW, BELEAVE KANNABIS ABBOTSFORD INC. AND BELEAVE KANNABIS CHILLIWACK INC.**

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at TORONTO

APPROVAL AND VESTING ORDER
(MOTION RETURNABLE SEPTEMBER 18, 2020)

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Lawyers for the Applicants

TAB I

COURT FILE NUMBER	2001-05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. AND 2161889 ALBERTA LTD. AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and MANTLE MATERIALS GROUP, LTD. UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended, and the *BUSINESS CORPORATIONS ACT*, SBC 2002, c 57, as amended
APPLICANTS	JMB CRUSHING SYSTEMS INC., 2161889 ALBERTA LTD., MANTLE MATERIALS GROUP, LTD. and 2324159 ALBERTA INC.
DOCUMENT	**AMENDED REVERSE VESTING ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Gowling WLG (Canada) LLP 1600, 421 – 7th Avenue SW Calgary, Alberta T2P 4K9 Attn: Tom Cumming / Caireen E. Hanert / Stephen Kroeger Tel: 403.298.1938 / 403.298.1992 / 403.298.1018 Fax: 403.298.9193 Email: tom.cumming@gowlingwlg.com / caireen.hanert@gowlingwlg.com / stephen.kroeger@gowlingwlg.com

DATE ON WHICH ORDER WAS PRONOUNCED:	**March 31, 2021**
LOCATION AT WHICH ORDER WAS MADE:	**Calgary Court House**
NAME OF JUSTICE WHO MADE THIS ORDER:	**Honourable Justice K.M. Eidsvik**

UPON THE APPLICATION (the "**Application**") of JMB Crushing Systems Inc. ("**JMB**"), 2161889 Alberta Ltd. ("**216**", and with JMB, the "**CCAA Applicants**"), Mantle Materials Group, Ltd. ("**Mantle**", and collectively with JMB and 216, the "**Plan Parties**", and individually, a "**Plan Party**") and

2324159 Alberta Inc. ("**ResidualCo**") for an Order amending and restating the reverse vesting Order pronounced on October 16, 2020, as amended by an Order pronounced on December 7, 2020 (the reverse vesting Order, as amended, the "**Original RVO**"), which is being applied for pursuant to the amended and restated purchase agreement dated March 3, 2021 (the "**Amended Purchase Agreement**") between JMB, 216 and Mantle, attached as Exhibit "A" to the Confidential Affidavit of Aaron Patsch sworn March 30, 2021 (the "**Confidential Affidavit**");

AND UPON HAVING READ (a) the Application, filed; (b) the Affidavits of Byron Levkulich sworn on March 4 and March 23, 2021, both filed; (c) the Affidavit of Tyler Pell sworn on March 22, 2021; (d) the Affidavits of Blake M. Elyea sworn on March 24 and March 30, 2021, both filed; (e) the Confidential Affidavit of Blake M. Elyea sworn March 24, 2021; (f) the Affidavit of Aaron Patsch sworn March 30, 2021, filed; (g) the Confidential Affidavit; (h) the fourteenth report of FTI Consulting Canada Inc. in its capacity as Court-appointed monitor of JMB and 216 (the "**Monitor**") dated March 4, 2021, the fifteenth report dated March 26, 2021 of the Monitor, and the sixteenth report dated March 30, 2021, all filed; (i) the pleadings and proceedings in this Action, including: (i) the initial Order pronounced on May 1, 2020 and the Order pronounced on May 11, 2020 amending and restating the initial Order (the initial Order as amended and restated, the "**Initial Order**"), filed; (ii) the Order (amended and restated Mantle sale approval Order) pronounced on October 16, 2020 (the "**Original SAVO**") approving the original amended and restated asset purchase agreement dated September 28, 2020 between the CCAA Applicants and Mantle, which agreement was amended and restated by the Amended Purchase Agreement, filed; (iii) the Original RVO, filed; (iv) the assignment order pronounced on October 16, 2020 (the "**Original Assignment Order**"), filed; and (v) the plan sanction Order pronounced on October 16, 2020 (the "**Original Sanction Order**"), sanctioning the joint plan of arrangement of Mantle and the CCAA Applicants under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**"), and the *Business Corporations Act*, SBC 2002, c 57, as amended (the "**BCA**", and such plan of arrangement, the "**Original Plan**"), filed; and (f) the Affidavit of Service of Sandra Morrie sworn March 5, 2021 and the Affidavit of Service of Ingrid Fitzner sworn March 29, 2021 (collectively, the "**Service Affidavits**");

AND UPON HAVING READ the following Orders applied for contemporaneously in this Application: (a) an Order amending and restating the Original SAVO and approving the Amended Purchase Agreement and the transactions contemplated thereby (the "**Acquisition and Reorganization Transactions**"), and vesting certain assets in Mantle (the "**Amended SAVO**"), (b) an Order amending and restating the Original Assignment Order, filed; and (c) an Order amending and restating the Original Sanction Order (the "**Amended Sanction Order**") and sanctioning an amended and restated plan of arrangement (the "**Amended Plan**") of the Plan Parties under the CCAA and BCA, which amends and

restates the Original Plan;

AND UPON HEARING the submissions of counsel for JMB, 216, the Monitor, Mantle, and any other parties who may be present: **IT IS HEREBY ORDERED AND DECLARED THAT:**

Service of Application

1. The time for service of the Application is abridged, the Application is properly returnable today, service of the Application on the service list, in the manner described in the Service Affidavits, is good and sufficient, and no other Persons, other than those listed on the service list (the "**Service List**") attached as an exhibit to the Service Affidavits, are entitled to service of the Application.

Defined Terms

2. The capitalized terms "**Accounts Receivable**", "**Aggregate Pit**", "**Applicable Law**", "**Assumed Liabilities**", "**Bonnyville Lands**", "**Contract**", "**Edmonton Lease**", "**Employees**", "**Governmental Authorities**", "**Information**", "**Inventory**", "**Kalinko Operating Agreement**", "**Lands**", "**Permitted Encumbrances**", "**Security Interest**", "**Shankowski Royalty Agreement**" and "**Transferred Employees**" have the meanings given to them in the Amended Purchase Agreement. Other capitalized terms used in this Order and not otherwise defined shall have the meanings referred to or given to them below:

   (a) "**216 Disposition Lands**" means the lands subject to one or more 216 Dispositions;

   (b) "**216 Dispositions**" means the Dispositions listed on **Schedule "A"** to this Order under the heading "**216 Dispositions**";

   (c) "**216 Retained Assets**" means, collectively:

      (i) the 216 Dispositions and the interest of 216 in the 216 Disposition Lands, if any, granted under the 216 Dispositions; and

      (ii) the "**216 Reserves**", the "**216 Permits**", the "**216 Inventory**" and the "**216 Miscellaneous Operational Contracts**", as such terms in quotation marks having the meanings given to them in the Amended Purchase Agreement;

   (d) "**AEP**" means Alberta Environment and Parks;

   (e) "**AEP Payment Arrears**" means any rent, royalties, dues, fees, rates, charges or other money which accrued under the 216 Dispositions and JMB Dispositions prior to the Filing

Date, together with any interest or penalties thereon, but specifically excludes Reclamation Security and the Reclamation Obligations;

(f) "**Aggregate**" is defined in the Amended Purchase Agreement;

(g) "**ATB**" means ATB Financial;

(h) "**CCAA Proceedings**" means the proceedings commenced on application by the Applicants under the CCAA pursuant to the Initial Order;

(i) "**Claim**" means a claim to which JMB or 216 which under section 19(1) of the CCAA may be dealt with by a compromise or arrangement thereunder and to which JMB or 216 either as of the Filing Date or before Plan Implementation;

(j) "**Compliance Issues**" means failures to comply with the terms or provisions of Dispositions, the EPEA Registrations or the Regulatory Legislation;

(k) "**Disposition**" has the meaning given to that term in the PLA;

(l) "**Eastside**" means Eastside Rock Products, Inc.;

(m) "**Effective Time**" means the effective time at which Plan Implementation occurs on the Plan Implementation Date, or such other time on such date as JMB, 216, Mantle and the Monitor agree;

(n) "**EO**" means an Enforcement Order issued under the Regulatory Legislation;

(o) "**EPEA**" means the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, as amended, the *Conservation and Reclamation Regulation*, AR 115/93, as amended, together with regulations thereunder relevant to the extraction, processing and transportation of Aggregate, including the *Code of Practice for Pits* thereunder;

(p) "**EPEA Registrations**" means the registrations held by JMB under the EPEA in respect of the JMB Active Royalty Lands and the JMB Inactive Royalty Lands, and "**EPEA Registration**" means any one of them;

(q) "**EPO**" means an Environmental Protection Order issued under the Regulatory Legislation;

(r) "**Excluded Books and Records**" means all Information maintained relating to or in connection with the Excluded ResidualCo Assets or Excluded Liabilities together with personal information relating to Employees who are not Transferred Employees;

(s) "**Excluded Inventory**" means (i) approximately 10,201.82 tonnes of Aggregate consisting of raw pit run gravel located on the Bonnyville Lands which according to the records of JMB was transferred from another property, and approximately 7,000 tonnes of customer rejected clay contaminated ACP L1 (½") asphalt material; (ii) approximately 7,900 tonnes of Aggregate consisting of pea gravel located on the Lands subject to the Shankowski Royalty Agreement; (iii) Aggregate consisting of approximately 8,265 tonnes of Des 2 Class 20, approximately 5,000 tonnes of Des 6 Class 80 and approximately 9,569 tonnes of Des 2 Class 40 stored on lands subject to a Disposition held by Stony Valley Contracting Ltd. and located at NE 2-82-7 W4M pursuant to a license agreement dated December 14, 2018 between Stony Valley Contracting Ltd. and JMB; (iv) Aggregate on the lands subject to the Kalinko Operating Agreement; and (v) approximately 6,458 tonnes of Aggregate consisting of 10 mm gravel and sand located on the Lands subject to the Havener Royalty Agreement;

(t) "**Excluded Liabilities**" means all Liabilities of JMB and 216 other than the Assumed Liabilities;

(u) "**Excluded ResidualCo Assets**" means, collectively:

(i) the JMB Inactive Royalty Agreements and the interest of JMB in the JMB Inactive Royalty Lands granted thereunder;

(ii) the Excluded Books and Records;

(iii) the Excluded Inventory; and

(iv) the "**PMSI Property**", the "**Accounts Receivable**" and any "**Rejected Contract**" which has not been disclaimed under section 32 of the CCAA, as such terms in quotation marks having the meanings given to them in the Amended Purchase Agreement;

(v) "**Fiera**" means Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc. ("**Fund VI**") and Fiera Private Debt Fund V LP, by its general partner Fiera

Private Debt Fund GP Inc., acting in its capacity as collateral agent for and on behalf of and for the benefit of Fund VI;

(w) "**Fiera Disposed Equipment**" means any personal property in which a company has or had an interest against which the Security Interest in favour of Fiera ranked in priority to any Security Interest in favour of any other Person that was sold or subject to an agreement to sell, to a Person other than Mantle prior to closing pursuant to the SISP or otherwise, including the equipment listed in **Schedule "B"** to this Order;

(x) "**Fiera Eastside Equipment**" means the equipment in which JMB has an interest which is located on property that Eastside had access to in the State of Washington, including the equipment listed on **Schedule "C"** to this Order;

(y) "**Filing Date**" means May 1, 2020;

(z) "**JMB Active Royalty Agreements**" means the Royalty Agreements listed on **Schedule "A"** to this Order under the heading "JMB Active Royalty Agreements";

(aa) "**JMB Active Royalty Lands**" means the lands subject to one or more JMB Active Royalty Agreements;

(bb) "**JMB Disposition Lands**" means the lands subject to one or more JMB Dispositions;

(cc) "**JMB Dispositions**" means the Dispositions listed on **Schedule "A"** under the heading "JMB Dispositions", and "**JMB Disposition**" means any one of the JMB Dispositions;

(dd) "**JMB Inactive Royalty Agreements**" means the Royalty Agreements listed on **Schedule "A"** to this Order under the heading "JMB Inactive Royalty Agreements";

(ee) "**JMB Inactive Royalty Lands**" means the lands subject to one or more JMB Inactive Royalty Agreements;

(ff) "**JMB Retained Assets**" means, collectively:

(i) the "**JMB Equipment**", the "**JMB Real Property**", the "**JMB Reserves**", the "**JMB Inventory**", the "**Bonnyville Supply Contract**", as such terms in quotation marks having the meanings given to them in the Amended Purchase Agreement;

(ii) the Contracts consisting of (A) the Cenovus Energy master service and supply agreement 700322 effective as of March 13, 2020 between Cenovus Energy Inc. and JMB, (B) the Bonnyville Lease, and (C) the "**JMB Miscellaneous Operational Contracts**", as the latter term is defined in the Amended Purchase Agreement;

(iii) Inventory that is owned by JMB or in which JMB has an interest not located on JMB Real Property, Bonnyville Lands, JMB Disposition Lands, JMB Active Royalty Lands or JMB Inactive Royalty Lands, but excluding for certainty the Excluded Inventory;

(iv) the JMB Dispositions and the interest of JMB in the JMB Disposition Lands, if any, granted under the JMB Dispositions;

(v) the JMB Active Royalty Agreements and the interest of JMB in the JMB Active Royalty Lands thereunder; and

(vi) the EPEA Registrations and other JMB Permits;

(gg) "**Landowner**" means any Person that owns or leases the surface title to JMB Inactive Royalty Lands;

(hh) "**Lands**" means any one of the JMB Active Royalty Lands, the JMB Inactive Royalty Lands, the JMB Disposition Lands or the 216 Disposition Lands;

(ii) "**Liabilities**" means debts, liabilities and obligations, whether accrued or fixed, liquidated or unliquidated, absolute or contingent, matured or unmatured or determined or undeterminable, under any Applicable Law, Contract or otherwise, and includes any amounts owing to a Regulatory Body as a creditor and which is a claim for the purposes of section 19(1) of the CCAA, and "**Liability**" means any one of the Liabilities;

(jj) "**Permit**" means any permit, license, approval, consent, authorization, registration, or certificate issued by and conservation and reclamation business plans approved by a Governmental Authority including registrations issued under the Regulatory Legislation;

(kk) "**Person**" will be broadly interpreted and includes: (i) a natural person, whether acting in his or her own capacity, or in his or her capacity as executor, administrator, estate trustee,

trustee or personal or legal representative, and the heirs, executors, administrators, estate trustees, trustees or other personal or legal representatives of a natural person; (ii) a corporation or a company of any kind, a partnership of any kind, a sole proprietorship, a trust, a joint venture, an association, an unincorporated association, an unincorporated syndicate, an unincorporated organization or any other association, organization or entity of any kind; and (iv) a Regulatory Body or other Governmental Authority;

(ll) "**PLA**" means the *Public Lands Act*, RSA 2000, c P-40, as amended, the *Public Lands Administration Regulation*, AR 187/2011, as amended, and any regulations thereunder relevant to the extraction, processing and transportation of Aggregate;

(mm) "**Plan Implementation**" means the fulfillment, satisfaction or waiver of the conditions set out in section 7.1 of the Amended Plan and the occurrence or effecting of the sequential steps set out in section 5.1 of the Amended Plan;

(nn) "Plan Implementation Date" means the date on which Plan Implementation occurs;

(oo) "**PMSI Holder**" means a Person other than ATB or Fiera that holds a Security Interest attaching to PMSI Property which ranks in priority to any other Security Interest attaching to such PMSI Property;

(pp) "**PMSI Property**" means the personal property listed on **Schedule "D"** to this Order;

(qq) "**Reclamation Obligations**" means the abandonment, reclamation and remediation obligations under the Regulatory Legislation in respect of the 216 Disposition Lands, the JMB Disposition Lands, the JMB Active Royalty Lands and the JMB Inactive Royalty Lands, including under any EPOs, EOs or other regulatory orders issued under the Regulatory Legislation by the AEP;

(rr) "**Reclamation Security**" means any security for Reclamation Obligations required under the Regulatory Legislation;

(ss) "**Regulatory Body**" has the meaning given to that term in section 11.1(1) of the CCAA and for greater certainty includes the AEP or any other Governmental Authority under the Regulatory Legislation;

(tt) "**Regulatory Legislation**" means the EPEA, the PLA and the *Water Act*, RSA 2000, c W-3, as amended, and any regulations thereunder;

(uu) "**Released Parties**" means, collectively, JMB, 216, Mantle, Byron Levkulich, Aaron Patsch, the Monitor, the Chief Restructuring Advisor, and legal counsel of such Persons, and "**Released Party**" means any one of them;

(vv) "**Remaining ATB Debt**" is defined in the Amended Purchase Agreement;

(ww) "**Remaining Fiera Debt**" is defined in the Amended Purchase Agreement;

(xx) "**Royalty Agreement**" is defined in the Amended Purchase Agreement.

Amended and Restated Order

3. The within Order amends and restates the Original RVO.

Retention in JMB and 216 and Reverse Vesting in ResidualCo

4. Upon delivery of a Monitor's certificate to Mantle and the CCAA Applicants, substantially in the form attached as Schedule "A" to the Amended SAVO (the "**Monitor's Certificate**"), the following shall occur and shall be deemed to have occurred at the Effective Time in accordance with Section 5.1 of the Amended Plan:

(a) JMB shall retain all of its right, title and interest in and to the JMB Retained Assets, free and clear of any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgements, executions, levies, taxes, writs of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing:

(i) any encumbrances or charges created by the Initial Order;

(ii) all charges, security interests or claims evidenced by registrations pursuant to: (i) the *Personal Property Security Act*, RSA 2000, c P-7 or any other real or personal property registry system (the "**Property Security Legislation**"); and (ii) the *Land Titles Act*, RSA 2000, c L-7 (the "**LTA**"); and

(iii) any liens or claims of lien under the *Builders' Lien Act*, RSA 2000, c B-7 (the "**BLA**");

(collectively, the "**Encumbrances**", and individually, an "**Encumbrance**"), but excluding Permitted Encumbrances;

(b) 216 shall retain all of its right, title and interest in and to the 216 Retained Assets, free and clear of all Encumbrances, including without limiting the generality of the foregoing any Encumbrances created by the Initial Order, all Encumbrances evidenced by registrations pursuant to the Property Security Legislation and the LTA and any liens or claims of lien under the BLA, but excluding Permitted Encumbrances;

(c) All of the right, title and interest of JMB and 216 in and to the Excluded ResidualCo Assets shall vest absolutely in the name of ResidualCo, but shall remain subject to any and all Encumbrances, including, without limiting the generality of the foregoing any Encumbrances created by the Initial Order, all Encumbrances evidenced by registrations pursuant to the Property Security Legislation and the LTA, and any liens or claims of lien under the BLA (all of which are collectively referred to as the "**Excluded Encumbrances**"), and ResidualCo shall be deemed to have assumed the Excluded Encumbrances and the Excluded Encumbrances shall continue to attach to the Excluded ResidualCo Assets and to any and all proceeds of the Excluded ResidualCo Assets (any such proceeds being the "**Excluded Proceeds**") and to secure the payment and performance of any Excluded Liabilities secured thereby, with such Excluded Encumbrances and Excluded Liabilities having the same nature and priority as against the Excluded ResidualCo Assets and their Excluded Proceeds as they had immediately prior to the transfer and vesting in ResidualCo;

(d) The Excluded ResidualCo Assets and their Excluded Proceeds shall be held in trust by ResidualCo for and on behalf of Persons to whom the Excluded Liabilities are owed and the Persons holding any Excluded Encumbrances securing the payment and performance thereof (such Persons being collectively referred to as the "**Excluded Creditors**" and individually referred to as an "**Excluded Creditor**");

(e) Any and all Excluded Liabilities (including, for greater certainty, the Remaining ATB Debt and Remaining Fiera Debt) shall be transferred to and vest absolutely in ResidualCo and ResidualCo shall be deemed to have assumed and become liable for such Excluded

Liabilities up to and solely to the extent of the Excluded ResidualCo Assets and the Excluded Proceeds, as set out in paragraph 9 of this Order, and subject to the Initial Order and any other applicable Order in these proceedings, the Excluded Creditors (including, for greater certainty, ATB and Fiera) will have all of the rights, remedies, recourses, benefits and interests against ResidualCo up to and solely to the extent of the Excluded ResidualCo Assets, which immediately prior to the Effective Time, they had against JMB and/or 216, and the nature of the Excluded Liabilities, including, without limitation, their amount, priority, and secured or unsecured status, shall not be affected or altered as a result of their transfer to and vesting in ResidualCo;

(f) Subject to subparagraph 4(g) of this Order:

(i) the Excluded Creditors shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with pursuant to the Excluded Liabilities or the Excluded Encumbrances against JMB, 216 or any assets held by JMB or 216 subsequent to the Effective Time, but subject to the Initial Order, ResidualCo shall be subject to all such steps or proceedings in place of JMB and/or 216;

(ii) any Excluded Creditor that prior to the Effective Time had a valid right or claim against JMB and/or 216 under or pursuant to any Excluded Liability shall no longer have such right or claim against JMB and/or 216, but shall have an equivalent Excluded Liability claim against ResidualCo to the extent of ResidualCo's interests in the Excluded ResidualCo Assets and the Excluded Proceeds, as set out in paragraph 9 of this Order, from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens, extinguishes, or alters the Excluded Liability claimed by any such Excluded Creditor as against ResidualCo to the extent of its interest in the Excluded ResidualCo Assets and the Excluded Proceeds; and

(iii) JMB and 216 shall be deemed released from any and all Excluded Liabilities such that no Excluded Encumbrance securing any Excluded Liabilities shall attach to,

encumber or otherwise remain as a claim against or interest in any property or assets of JMB or 216, and no Excluded Creditor shall have any claim therefor against JMB or 216 in respect thereof; and

(g) Notwithstanding anything in subparagraph 4(f) of this Order, JMB and 216 shall continue to be liable to ATB for the Remaining ATB Debt and to Fiera for the Remaining Fiera Debt, and the Excluded Encumbrances granted by JMB and 216 to ATB and Fiera shall continue to attach to any property and assets of JMB and 216, subject to the terms and provisions of the Amended Plan.

5. Upon delivery of the Monitor's Certificate, and upon filing of a certified copy of this Order, together with any applicable registration fees, all Governmental Authorities are hereby authorized, requested and directed to accept delivery of such Monitor's Certificate and certified copy of this Order as though they were originals and to register such transfers or conveyances as may be required to convey to ResidualCo title to the Excluded ResidualCo Assets.

6. In order to effect the transfers described in paragraph 5 above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order. Presentment of this Order and the Monitor's Certificate shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest to or in any of the Excluded ResidualCo Assets.

7. No authorization, approval or other action by and no notice to or filing with any Governmental Authority or Regulatory Body exercising jurisdiction over the Excluded ResidualCo Assets is required for the due vesting and transfers provided for in paragraph 4 of this Order.

8. From and after the Effective Time:

(a) where any Person was liable to JMB for any existing or potential Liability that is included in the Excluded ResidualCo Assets (any such Liability being a "**JMB Claim**"), such JMB Claim shall not be affected by, and such Person shall have no defence, claim, set-off or other rights as a result of, the transfer and vesting of the Excluded ResidualCo Assets and Excluded Liabilities in ResidualCo;

(b) where any Person was liable to 216 for any existing or potential Liability that is included in the Excluded ResidualCo Assets (any such Liability being a "**216 Claim**"), such 216 Claim shall not be affected by, and such Person shall have no defence, claim, set-off or

other rights as a result of, the transfer and vesting of the Excluded ResidualCo Assets and Excluded Liabilities in ResidualCo;

(c) ResidualCo may, and is hereby authorized to, commence, continue and prosecute proceedings in respect of the JMB Claims in JMB's name, and in respect of 216 Claims in 216's name, and all benefits to be derived from the proceedings taken by ResidualCo in respect of the JMB Claims or 216 Claims, as authorized by this Order, together with the costs of same, shall belong exclusively to ResidualCo and not JMB or 216, as applicable, and shall form part of the Excluded ResidualCo Assets to be held in trust by ResidualCo for and on behalf of the Excluded Creditors in accordance with this Order;

(d) in the event that paragraph 8(a) is or becomes for any reason ineffective, then with the consent of the Monitor, ATB, and Fiera, JMB shall act as agent for and on behalf of ResidualCo in taking any steps or commencing any action or proceeding to enforce the JMB Claim for and on behalf of ResidualCo;

(e) in the event that paragraph 8(b) is or becomes for any reason ineffective, then with the consent of the Monitor, ATB, and Fiera, 216 shall act as agent for and on behalf of ResidualCo in taking any steps or commencing any action or proceeding to enforce the 216 Claim for and on behalf of ResidualCo.

9. Subject to paragraph 10 of this Order, from and after the Effective Time, ResidualCo shall hold the Excluded ResidualCo Assets in trust for and on behalf of any Excluded Creditors, provided that to the extent that the vesting and transfer to ResidualCo of the Excluded ResidualCo Assets from JMB and 216 and the assumption by ResidualCo of the Excluded Liabilities from JMB and 216 pursuant to paragraph 4 of this Order would result in and preserve the *pro rata* rights of any of the Excluded Creditors in respect of the Excluded Liabilities so that:

(a) ResidualCo shall hold the Excluded ResidualCo Assets vested and conveyed from JMB and the Excluded Proceeds thereof in trust for the Excluded Creditors with Excluded Liabilities and Excluded Encumbrances vested and assumed from JMB in trust for such Excluded Creditors; and

(b) ResidualCo shall hold the Excluded ResidualCo Assets vested and conveyed from 216 and the Excluded Proceeds thereof in trust for the Excluded Creditors with Excluded Liabilities

and Excluded Encumbrances vested and assumed from 216 in trust for such Excluded Creditors.

10. ResidualCo shall be deemed to have granted access to and in favour of JMB to the JMB Inactive Royalty Lands to permit JMB to perform Reclamation Obligations on the JMB Inactive Royalty Lands subject to any EPOs and sell any Aggregate that has been extracted and stored on the JMB Inactive Royalty Lands, and upon the sale thereof, title to the proceeds of sale thereof shall vest in JMB free and clear of all other interests other than any Security Interest in ATB, and any royalty in favour of the Person who owns the applicable JMB Inactive Royalty Lands arising from such sale. As security for the obligation of ResidualCo to provide such access to JMB, JMB shall be entitled to the benefits of and is hereby granted a charge on the JMB Inactive Royalty Lands (the "**Access Charge**"), which Access Charge shall rank behind the charges granted pursuant to the Initial Order, but in priority to any other Encumbrances in favour of any Person, and shall not otherwise be limited or impaired by:

(a) the pendency of these proceedings and the declarations of insolvency made in the CCAA Proceedings or otherwise;

(b) any application for bankruptcy order issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or

(d) the provisions of any federal or provincial statutes.

11. ResidualCo shall be entitled to enter into and upon, hold and enjoy the Excluded ResidualCo Assets for its use and benefit in accordance with the Initial Order, this Amended Reverse Vesting Order, and any other Order made in the CCAA Proceedings.

Vesting in Eastside

12. Effective on the date that the Original RVO was pronounced, all of JMB's right, title and interest in and to the Fiera Eastside Equipment is hereby vested in and transferred to Eastside, but subject to any and all Excluded Encumbrances which specifically affect and attach to the Fiera Eastside Equipment, all of which shall continue to attach to the Fiera Eastside Equipment and to any and all

proceeds of the Fiera Eastside Equipment (any such proceeds being the "**Eastside Proceeds**") and to secure the payment and performance of any Excluded Liabilities secured thereby, with such Excluded Encumbrances and Excluded Liabilities having the same nature and priority as against the Fiera Eastside Equipment and the Eastside Proceeds as they had immediately prior to the transfer and vesting.

PMSI Holders

13. Effective on the date the Original RVO was pronounced, and on a without prejudice basis with respect to any of the parties' potential cost allocation positions, each PMSI Holder is hereby authorized and directed to do the following:

    (a) to take possession or control of the PMSI Property within a reasonable period of time after the later of: (i) this Order; or (ii) the Monitor advising such PMSI Holder that the Monitor is satisfied with their Security Interest(s) in favour of such PMSI Holder, as and against their respective PMSI Property;

    (b) to dispose of such PMSI Property, in accordance with Applicable Law, including the PPSA; and

    (c) to account to the Monitor, ResidualCo and Fiera in respect of the proceeds of sale of such PMSI Property in accordance with Applicable Law, including the Personal Property Legislation.

Regulatory Bodies

14. This Court hereby declares that:

    (a) the AEP Payment Arrears are Claims for the purposes of section 19(1) of the CCAA and that the Regulatory Bodies are creditors with respect to the AEP Payment Arrears; and

    (b) the AEP Payment Arrears are Excluded Liabilities and from and after the Effective Time:

        (i) the AEP Payment Arrears shall be debts and liabilities of ResidualCo to the applicable Regulatory Body and shall cease to be debts or liabilities of 216 or JMB to such Regulatory Body; and

        (ii) the Regulatory Bodies are, for the purposes of any AEP Payment Arrears owed to them, Excluded Creditors.

15. Notwithstanding the right under section 11.1(2) of a Regulatory Body to carry out any investigation in respect of JMB or 216, or to take an action, suit or proceeding in respect of JMB or 216, from and after the Effective Time, except with the leave of this Court on notice to JMB, 216 and Mantle, all powers, rights and remedies of a Regulatory Body, whether judicial, extra-judicial, administrative, statutory or non-statutory, against, in respect of or affecting in any way any Plan Party, 216 Disposition, JMB Disposition, EPEA Registration or Permit, or any Disposition, EPEA Registration or Permit issued, transferred or assigned to a Plan Party hereafter, to enforce the payment of the AEP Payment Arrears, or arising from the non-payment thereof by 216, or JMB or ResidualCo, are hereby permanently stayed and suspended and no Regulatory Body shall commence, proceed with or continue any such the exercise of any such power, right or remedy.

16. Nothing in this Order shall:

(a) affect the respective obligations of JMB, 216, or any director of JMB or 216, at all times, including following the Effective Time:

(i) to resolve Compliance Issues;

(ii) to perform Reclamation Obligations on the Lands in accordance with the Regulatory Legislation; or

(iii) to comply with their respective obligations under the 216 Dispositions, the JMB Dispositions, the EPEA Registrations and the Regulatory Legislation;

(b) affect any liabilities of any director of JMB or 216 that may arise from any failure of JMB or 216 to comply with their respective obligations under the 216 Dispositions, the JMB Dispositions, the EPEA Registrations and the Regulatory Legislation at all times, including after the Effective Time; or

(c) limit the exercise of any power, right or remedy by a Regulatory Body against JMB, 216 of any director to enforce the obligations and liabilities referred to in paragraphs 16(a) and 16(b).

17. Notwithstanding the right under section 11.1(2) of a Regulatory Body to carry out any investigation in respect of JMB or 216, or to take an action, suit or proceeding in respect of JMB or 216, and having regard to paragraph 16 above, from and after the Effective Time, except with the leave of this Court on notice to JMB, 216 and Mantle, no Regulatory Body shall exercise any power, right

or remedy against JMB, 216, Bryon Levkulich or Aaron Patsch as a result of (i) any failure to comply with the Regulatory Legislation, perform Reclamation Obligations or rectify any Compliance Issues prior to the Effective Time which failure cannot be rectified after the Effective Time due to the passage of time (for example a permit not being applied for on a date prior to the Effective Time which was required to be applied for prior to the Effective Time); (ii) JMB and 216 having sought or obtained relief under these CCAA Proceedings; (iii) the financial condition or insolvency of JMB or 216 prior to the Effective Time (which, for greater certainty, does not relate to rents, charges, and royalties accruing under 216 Dispositions subsequent to the Filing Date); or (iv) the vesting in and assumption by ResidualCo of the AEP Payment Arrears, whether such powers are judicial, extra-judicial, administrative, statutory or non-statutory, and any exercise of such power, right or remedy is hereby stayed and suspended.

18. Notwithstanding paragraph 15 of this Order, nothing in this Order shall:

(a) empower a Plan Party to carry on any business that the Plan Party is not lawfully entitled to carry on; or

(b) affect any investigations, actions, suits or proceedings by the AEP in respect of any failure by a Plan Party to comply with its Reclamation Obligations, other than relating to the matters described in paragraph 15 of this Order.

Releases

19. Subject to paragraph 18, effective from and after the Effective Time, the Released Parties shall be released and discharged from any and all actions, causes of action, counterclaims or suits in respect of any Claims or Encumbrances securing Claims of whatever nature which any Person may be entitled to assert, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, and all Claims be forever waived and released, all to the full extent permitted by Applicable Law. For clarity, the ability of any Person to proceed against any Released Party in respect of any Claims released and discharged hereby shall be forever discharged, barred and restrained, and all proceedings with respect to, in connection with, or relating to any such matter is enjoined and permanently stayed.

20. Nothing in paragraph 17 shall release or discharge:

(a) a Released Party from:

(i) any obligation created by or existing under the Amended Plan or any related document;

(ii) any Claim against a Released Party that is determined by a Final Order of a Court of competent jurisdiction to arise from criminal acts, fraud or wilful misconduct of such Released Party; or

(iii) any Claim against a Released Party that is not permitted to be released pursuant to section 5.1(2) or 19(2) of the CCAA, as determined by a Final Order of a Court of competent jurisdiction; or

(b) JMB, 216, Byron Levkulich or Aaron Patsch from their Reclamation Obligations, Compliance Issues or any other obligations under the Regulatory Legislation that do not constitute Claims.

21. From and after the Effective Time, a Person may only commence an action against a Released Party contemplated by paragraph 18 if such Person has first obtained leave of this Court on notice to the applicable Released Party, the Plan Parties and the Monitor (unless previously discharged); provided that no Person shall be prevented from commencing such an action against a Released Party where such an action must be taken in order to comply with statutory time limitations in order to preserve such Person's rights at law, provided further that no further steps shall be taken by such Person except in accordance with the provisions of the within Order (including the requirement herein to obtain the leave of the Court at the first available opportunity), and notice in writing of such action be given to the applicable Released Party, the Plan Parties and the Monitor (unless previously discharged) at the first available opportunity.

Authorization of Monitor

22. The Monitor is authorized and directed to undertake and perform such activities and obligations as are contemplated to be undertaken or performed by the Monitor pursuant to this Order, the SISP, the Amended Purchase Agreement, the Amended SAVO, the Amended Sanction Order, the Amended Assignment Order, or any ancillary document related thereto, and shall incur no liability, whatsoever, in connection therewith, save and except for any liability arising due to gross negligence or wilful misconduct on its part.

Effective Time

23. This Order shall become effective in the order set out in the Amended Sanction Order, which Amended Sanction Order is granted contemporaneously with the within Order.

Pendency of Bankruptcy Proceedings

24. Notwithstanding:

(a) the pendency of these proceedings and any declaration of insolvency made in the CCAA Proceedings;

(b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the BIA, in respect of ResidualCo, and any bankruptcy order issued pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of ResidualCo; and

(d) the provisions of any federal or provincial statute,

the vesting and transfers pursuant to paragraph 4 of this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of ResidualCo and shall not be void or voidable by creditors of ResidualCo, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

Addition of ResidualCo as an Applicant

25. ResidualCo is hereby added as an Applicant in these CCAA Proceedings and, for greater certainty, FTI Consulting Canada Inc. shall be the Monitor of ResidualCo.

26. Following the Effective Time, the style of cause of these CCAA Proceedings is hereby amended to be:

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

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF 2324159 ALBERTA INC.

Advice and Directions, and Reservation of Court's Authority

27. Notwithstanding that the Effective Date and Plan Implementation have occurred, or the CCAA Proceedings have been terminated:

(a) the Plan Parties, the Monitor and any other interested party shall be at liberty to apply to this Court for further advice, assistance and direction as may be necessary in order to:

(i) give full force and effect to the terms of this Order;

(ii) assist and aid the Plan Parties and the Monitor in closing the Acquisition and Reorganization Transactions; and

(iii) in the event that a Landowner does not allow reasonable access to JMB Inactive Royalty Lands in order to permit JMB or its representatives or contractors to perform Reclamation Obligations or take possession of and dispose of Aggregate Inventory to which JMB is entitled; and

(b) this Honourable Court hereby reserves its discretion to hear any application by a Plan Party under section 11.1(3) of the CCAA to stay the exercise of powers, rights and remedies of a Regulatory Body, provided that, for greater certainty, this paragraph 25(b) shall be without prejudice to the ability of any party to object to the jurisdiction of this Court to hear the application based on characterization of the dispute or to object to an order under such section on the basis that the test has not been satisfied.

Aid and Recognition

28. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

Service

29. Service of this Order shall be deemed good and sufficient by:

(a) Serving the same on:

(i) the Persons listed on the service list created in these proceedings;

(ii) any other Person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and

(iv) the Monitor or its solicitors; and

(b) Posting a copy of this Order on the Monitor's website at:

http://cfcanada.fticonsulting.com/jmb/default.htm,

and service on any other Person is hereby dispensed with.

30. Service of this Order shall be deemed good and sufficient by serving the same in accordance with the procedures in the CaseLines Service Order granted on May 29, 2020.

Justice of the Court of Queen's Bench of Alberta

Schedule "A"
216 Dispositions, JMB Dispositions, JMB Active Royalty Agreements, JMB Inactive Royalty Agreements and other Permits

1. **216 Dispositions**

(a) Surface Material Lease No. 080085 in favour of 216 dated April 26, 2012 in respect of Aggregate Pit JLG 3 located within NW-12-63-19 W4M and SW-13-63-19 W4M;

(b) Surface Material Lease No. 100085 in favour of 216 dated June 24, 2016 in respect of Aggregate Pit JLG 4 located within NE-12-63-19 W4M and NW-12-63-19 W4M;

(c) Surface Material Lease No. 110025 in favour of 216 dated February 11, 2014 in respect of Aggregate Pit JLG 5 located within NE-11-61-18 W4M;

(d) Surface Material Lease No. 110026 in favour of 216 dated April 11, 2012 in respect of Aggregate Pit JLG 6 located within SE-11-61-18 W4M;

(e) Surface Material Lease No. 110045 in favour of 216 dated March 18, 2015 in respect of Aggregate Pit JLG 7 located within SE-15-61-18 W4M and NE-15-61-18 W4M;

(f) Surface Material Lease No. 110046 in favour of 216 dated March 18, 2015 in respect of Aggregate Pit JLG 8 located within NE-15-61-18 W4M and NW-15-61-18 W4M;

(g) Surface Material Lease No. 120006 in favour of 216 dated October 5, 2017 in respect of Aggregate Pit JLG 11 located within NW-14-61-18 W4M;

(h) Surface Material Lease No. 120100 in favour of 216 dated October 5, 2017 in respect of Aggregate Pit JLG 12 located within SE-21-61-18 W4M;

(i) Surface Material Lease No. 110047 in favour of 216 located within SE-15-61-18 W4M, SW-15-61-18 W4M, and NW-15-61-18 W4M;

(j) Surface Material Lease No. 120005 in favour of 216 located within SW-14-61-18 W4M and NW-14-61-18 W4M;

(k) Surface Material Lease No. 060060 in favour of 216 located within SW-13-65-18-W4M;

(l) Department Licence of Occupation 170011 in favour of 216 located within SE-13-65-18-W4M and SW-13-65-18-W4M;

(m) Department Licence of Occupation No. 200059 in favour of 216;

(n) Department Miscellaneous Lease 200017 in favour of 216;

(o) Temporary Field Authorization 201094 in favour of 216;

(p) Temporary Field Authorization 201290 in favour of 216;

2. **JMB Dispositions**

(a) Surface Material Lease No. 120027 in favour of JMB located within SW-30-63-08-W4M;

(b) Surface Material Lease No. 930040 in favour of JMB located within SE-23-61-07-W4M;

(c) Surface Material Lease 980116 in favour of JMB located within SW-21-63-12-W4M;

(d) Department Miscellaneous Lease 120032 in favour of JMB located within NW-20-74-8-W4M;

(e) Surface Materials Exploration 150106 in favour of JMB located within SW-26-75-11-W4M, SE-34-75-11-W4M, NW-23-75-11-W4M, NE-27-75-11-W4M, SW-35-75-11-W4M, and NW-26-75-11-W4M;

(f) Surface Materials Exploration 200009 in favour of JMB located within NE-30-81-6-W4M, NE-31-81-6-W4M, SE-31-81-6-W4M, and SW-31-81-6-W4M;

(g) Department Miscellaneous Lease 120032 in favour of JMB;

(h) Temporary Field Authorization 194837 in favour of JMB in respect of the lands identified as Mer 4, Rge 07, Twp 062, Sec 18 NW and Mer 4, Rge 08, Twp 062, Sec 13 NE.

3. **JMB Active Royalty Agreements**

(a) Royalty Agreement made as of June 28, 2019 between JMB and Lafarge Canada Inc. ("**Lafarge**") in respect of the Aggregate Pit referred to as Moose River for which Lafarge has a surface material lease identified as SML 100043 located at SW-35-61-7-W4M and having 18.46 acres;

(b) Royalty Agreement made as of June 28, 2019 between JMB and Lafarge in respect of the Aggregate Pit referred to as Oberg for which Lafarge has EPEA Registration 15215-01-01 located on lands described as SE-5-62-7-W4 and having 159.88 acres;

(c) Royalty Agreement made as of October 29, 2018 between JMB and Jerry Shankowski (945441 Alberta Ltd.) in respect of an Aggregate Pit located at SW 21-56-7-W4, which Aggregate Pit is registered under the EPEA Registration 308161-00-00;

(d) Royalty Agreement made as of November 8, 2018 between Helen Havener, Gail Havener and JMB in respect of the Aggregate Pit located at NW 16-56-7-W4M, which Aggregate Pit is registered under the EPEA Registration 17395-01-00;

(e) Royalty Agreement made as of February 26, 2020 between Darren Andrychuk and Daphne Andrychuk and JMB in respect of the Aggregate Pit located at SW 15-57-14-W4.

4. **JMB Inactive Royalty Agreements**

(a) Royalty Agreement made as of December 31, 2018 between JMB and 302016 Alberta Limited, care of Rose Short, in respect of the Aggregate Pit located at NE-24-56-7-W4, in respect of which JMB holds EPEA Registration 15048-03-02;

(b) Royalty Agreement made as of January 7, 2020 between Ron and Rita Kucy, Ron and Vonda Hoye, and JMB in respect of an Aggregate Pit located at LSD 1-19-63-9-W4, in respect of which JMB holds EPEA Registration 306490-00-00;

(c) Royalty Agreement made as of October 27, 2019 between Allan K MacDonald and JMB in respect of an Aggregate Pit located at SE 34-56-7-W4, in respect of which JMB holds EPEA Registration 293051-00-00;

(d) Royalty Agreement made as of September 30, 2018 between Doug Megley and JMB in respect of an Aggregate Pit located at SW-36-58-16-W4, in respect of which JMB holds EPEA Registration 149949-00-00;

(e) Royalty Agreement made as of April 30, 2018 between Colleen Penner/Estate of Ed O'Kane and JMB in respect of an Aggregate Pit located at NE 10-57-6-W4, in respect of which JMB holds EPEA Registration 263318-00-00.

Schedule "B"
Fiera Disposed Equipment

Year	Manufacturer	Model	Size / Capacity / Asset Type	Serial # / VIN
2004	Elrus	H4800	Portable Cone Crusher	M3314ER04CC
2008	Kolberg-Pioneer	33-36150 SuperStacker	36" x 150' Portable Telescopic Radial Stacking Belt Conveyor	409329
2014	Global	6GSTAP	6" Trash Pump	1496808
1998	Caterpillar	D8R	Crawler Dozer	7XM02813
2008	Kolberg-Pioneer	33-36150 SuperStacker	36"x150' Portable Radial Stacking Telescopic Belt Conveyor	409329
2010	Kolberg-Pioneer	47-3670S	36"x70' Portable Belt Conveyor	410244
2010	Kolberg-Pioneer		36"x70' Portable Belt Conveyor	410245
2010	Kolberg-Pioneer		36"x70' Portable Stacking Belt Conveyor	410246
2009	Wabash		Tri-Axle Control Van Trailer	1JJV533W99L314662
2013	MTU Onsite Energy	DP550D65-AH1484	550-kW Diesel Generator	366258101013
	Global	6GSTAP	6" Trash Pump - Diesel	S/N:1496808 VIN: 1G9BT1314ED419162
			Initial Supplies to build splitter bin	
1999	Red Deer Industries		Dozer Trap Feeder	RDIBF099000010
2001	Svedala	H-6000 Hydrocone	M2808 Portable Cone Crusher, S/N:SW5873, mounted on Elrus Mode CH660-E00002029 Tri-Axle Carrier	M2765ER01CC
2007	Western Star		Winch tractor and deck 4900SA, Tri-Drive	5KKXAM0067PX64941
2014	Tyalta		60' Transfer belt conveyor	144260350
2011	Clemro		Portable screen plant 7X20-3D	1681-4600
2006	Fabtec		Portable screen plant 6x20	P620332506
2013	Peterbilt		Winch tractor 367, Tandem	1XPTD40X6DD197601
2008	Kenworth	T800	Tandem dump truck (not running)	1NKDL40X88J936319
2007	International Mechanic		truck 4200 SBA	1HTMPAFM67H406957
2008	Kenworth	T800	Tandem dump truck	1NKDL40X68J936318
2015	Ames		End Dump Trailer	2A9073738FA00359
2001	Svedala	H-6000 Hydrocone	M2808 Portable Cone Crusher, S/N:SW5873, mounted on Elrus Mode CH660-E00002029 Tri-Axle Carrier	M2765ER01CC
2007	Western Star		Winch tractor and deck 4900SA, Tri-Drive	
2014	Tyalta		60' Transfer belt conveyor	
2011	Clemro		Portable screen plant	7X20-3D
2006	Fabtec		Portable screen plant 6x20	
2013	Peterbilt		Winch tractor 367, Tandem	
2008	Kenworth	T800	Tandem dump truck (not running)	
2007	International Mechanic		truck 4200 SBA	
2008	Kenworth	T800	Tandem dump truck	
2008	Caterpillar		Generator APS800	
2015	Ames		End Dump Trailer	2A9073738FA00359

Schedule "C"
Fiera Eastside Equipment

Year	Manufacturer	Model	Size / Capacity / Asset Type	Serial # / VIN
2010	John Deere	844K	Articulated Wheel Loader	1DW844KX627428
2013	Volvo	L180G	Articulated Wheel Loader	VCEL180GC00022042
2006	Volvo	EC330B LC	Crawler Excavator	EC330V10699
2012	Caterpillar	345D	Crawler Excavator	CAT0345DJRAJ00435
	Precision	10'x80' Survivor Truck Scale	100 ton Scale Indicator	Scale s/n 3842 Indicator s/n 1479500073
2005	Fintec	542 5x12	Tracked Feeder Screen Plant	2005542575
	Bobcat	225	Engine Driven Welder	
2008	Caterpillar		Generator APS800	5EF2GC3008B772456

Schedule "D"
PMSI Property

Priority Secure Creditor	Year	Manufacturer	Model	Size / Capacity / Asset Type	Serial # / VIN
Ford Credit Canada Company	2015	Ford	F150	Supercrew Pickup Truck	1FTFW1EF3FFC07984
	2015	Ford	F150	Supercrew Pickup Truck	1FTFW1EF7FFC07986
	2015	Ford	F150	Supercrew Pickup Truck	1FTFW1EF0FFC07988
	2015	Ford	F150	Supercrew Pickup Truck	1FTFW1EF9FFC07990
	2015	Ford	F150	Supercrew Pickup Truck	1FTFW1EF0FFC07991
Ford Credit Canada Leasing, Division of Canadian Road Leasing Company	2016	Ford	F250	Crew Cab Pickup Truck	1FT7W2B66GEB46457
	2018	Ford	F150		1FTEW1EG7JFC34831
	2019	Ford	F150		1FTFW1E53KFA45940
Ford Credit Canada Limited	2016	Ford	F150	Super Crew Pickup Truck	1FTFW1EFXGFC63082
Proven Financial Group and Canadian Western Bank Leasing Inc. – Broker Buying Centre	2012	Smith - Co	Super B	Tri-Axle Lead Side Dump Trailer	1S9SS3735CL476517
	2012	Smith - Co	Super B	Tandem Axle Pup Side Dump Trailer	1S9SS2929CL476518
	2018	Elrus		6" x 20"Deck Screen	M7102ERC18SC
	2012	Elrus	HD2054	Portable Jaw Crusher	M6028ERC12CJS
	2002	Elrus	M2943 2236	Portable Jaw Crusher	M7102ERC18SC
Caterpillar Financial Services Limited	2015	Caterpillar	972MXE	Articulated Wheel Loader	CAT0972MKEDW00340
	2016	Caterpillar	980M	Wheel Loader	CAT0980MCKRS01308
	2012	Caterpillar	D8T	Crawler Dozer	CAT00D8TEMLN01555
	2014	Caterpillar	246D	Skid Steer Loader	CAT0246DLBYF00587
	2016	Caterpillar	246D	Skid Steer Loader	CAT0246DTBYF02460
VFS Canada Inc.	2017	Volvo	L220H	Wheel Loader	VCEL220HL00002736
TD Equipment Finance, A Division of the Toronto Dominion Bank and Toronto Dominion Bank	2015	Superior		36" x 50' Stackable Belt Conveyor with Legs	817775
	2015	Superior		36" x 50' Stackable Belt Conveyor with Legs	847651
	2015	Superior		36" x 50' Stackable Belt Conveyor with Legs	847652
	2015	Superior		36" x 50' Stackable Belt Conveyor with Legs	847655
	2015	Superior		36" x 50' Stackable Belt Conveyor with Legs	847656
	2015	Superior		36" x 50' Stackable Belt Conveyor with Legs	847657
	2015	Superior		36" x 50' Stackable Belt Conveyor with Legs	847658
	2015	Terex Cedarapids	6203	6' x 20' Portable Screening Plant	TRX620HSCOKFK0807
	2014	AMI	Thunderbird II 3054JVE	Electric Portable Jaw Plant with Switchgear	2807-14

Priority Secure Creditor	Year	Manufacturer	Model	Size / Capacity / Asset Type	Serial # / VIN
	2014	CR		30" x 54"Jaw Crusher	TRXJ3054COKEE0657
	2014	AMI	C04521	50" x 20" VGF	2806-14
Komatsu International (Canada) Inc. and SMS Equipment Inc.	2014	Komatsu	WA470-7	Articulated Wheel Loader	10123
	2019	Komatsu	WA500-8	Wheel Loader	A96809
	2019	Komatsu	PC490LC-11	Crawler Excavator	A42247
		Hensley		7.5 CY Spade Nose Bucket	85680
				Wheel Loader C/W 5.5 CYD GP Bucket	
Bank of Montreal	2015	AMI	380C6203CC-D06319	Portable Cone Crusher	2836-15
	2015	AMI	CRC380X	CC Plant	
			MVP380X	Terex Rollercone Crusher	TRXRX380EOKEL0708
			LJ-TSV6203-32	Terex Screen	TRXV6203TDUEG1886
	2018	Midland	TW3000	TR045 - Side Dump Trailer	2MFB2R5D9JR008909
	2016	Midland	TW2500	TR046 - Side Dump Trailer	2MFB2R5C0GR008281
	2018	Midland	TW2500	TR047 - Side Dump Trailer	2MFB2R5C0JR008840
	2019	Midland	TW3000	TR048 - Side Dump Trailer	
	2019	Midland	TW2500	TR049 - Side Dump Trailer	
	2019	Midland	TW3000	TR050 - Side Dump Trailer	
	2019	Midland	TW2500	TR051 - Side Dump Trailer	
	2019	Midland	TW3000	TR052 - Side Dump Trailer	
	2019	Midland	TW2500	TR053 - Side Dump Trailer	
	2019	Midland	TW3000	TR054 - Side Dump Trailer	
	2019	Arnes	Quad Wagon	TR055 - Trailer	
	2019	Arnes	Quad Wagon	TR056 - Trailer	
	2019	Arnes	Quad Wagon	TR057 - Trailer	
	2019	Arnes	Quad Wagon	TR058 - Trailer	
	2019	Arnes	Quad Wagon	TR059 - Trailer	
	2019	Peterbilt	567 Tandem	TT027 - Truck tractor	
	2019	Peterbilt	567 Tandem	TT028 - Truck tractor	
	2019	Peterbilt	567 Tandem	TT029 - Truck tractor	
	2019	Peterbilt	567 Tandem	TT030 - Truck tractor	
	2019	Peterbilt	567 Tandem	TT031 - Truck tractor	
	2019	Peterbilt	567 Tri-Drive/Box	TT032 - Truck tractor	
	2019	Peterbilt	567 Tri-Drive/Box	TT033 - Truck tractor	
	2019	Peterbilt	567 Tri-Drive/Box	TT034 - Truck tractor	
	2019	Peterbilt	567 Tri-Drive/Box	TT035 - Truck tractor	
	2019	Peterbilt	567 Tri-Drive/Box	TT036 - Truck tractor	
	2015	AMI	LJ-TSV 6203-32	Trailer	TRXV6203TDUEG1886

TAB J

THE DIRECTOR APPOINTED PURSUANT TO THE *CANADA BUSINESS CORPORATIONS ACT*

-&-

THE ENTERPRISE REGISTRAR UNDER THE *BUSINESS CORPORATIONS ACT* (QUÉBEC)

-&-

THE REGISTRAR OF THE REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS OF QUÉBEC, represented by the **QUÉBEC MINISTRY OF JUSTICE**

-&-

THE LAND REGISTRAR FOR THE REGISTRY OFFICE FOR THE REGISTRATION DIVISION OF LAC-SAINT-JEAN-OUEST

-&-

THE LAND REGISTRAR FOR THE REGISTRY OFFICE FOR THE REGISTRATION DIVISION OF SHAWINIGAN

-&-

THE REGISTRAR OF PUBLIC REGISTER OF REAL AND IMMOVABLE MINING RIGHTS KEPT BY THE MINISTÈRE DE L'ÉNERGIE ET DES RESSOURCES NATURELLES (QUÉBEC)

-&-

STEIN MONAST L.L.P.

-&-

ROBERT CASSIUS DE LINVAL

Mis-en-cause

-&-

PRICEWATERHOUSECOOPERS INC.

Monitor

APPROVAL AND VESTING ORDER

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[1] **ON READING** the Debtors' *Application Seeking Leave to Enter Into the Orion / IQ / Pallinghurst Transaction with Issuance of an Approval and Vesting Order and Ancillary*

Relief (the "**Application**"), the affidavit and the exhibits in support thereof, as well as the report of the Monitor dated September 9, 2020 (the "**Report**");

[2] **SEEING** the service of the Application;

[3] **SEEING** the submissions of Debtors' attorneys and **GIVEN** the concurrent judgment rendered by the Court on the Application on October 15, 2020;

[4] **SEEING** that it is appropriate to issue an order approving:

a) the purchase and sale and other transactions (the "**Purchase and Sale Transactions**") contemplated in the share purchase agreement (the "**Purchase Agreement**") to be entered into by and between (i) Investissement Québec, or an entity designated by it (collectively, "**IQ**") and Quebec Lithium Partners (UK) Limited ("**QLP**"), as purchasers (collectively, the "**Purchaser**"), and (ii) the Debtors, and pursuant to which an entity to be incorporated pursuant to the Reorganization (as defined below), to become the parent company of the Debtors, acts as vendor ("**New ParentCo**" or the "**Vendor**"), a copy of said Purchase Agreement being attached as **Schedule "A"** to this Order, forming part hereof; and

b) all such other reorganization transactions contemplated in Exhibit A (the "**Steps Memo**") to the Purchase Agreement and forming part of this Order (such transactions contemplated in the Steps Memo being collectively referred to as the "**Reorganization**");

(the Purchase and Sale Transactions together with the Reorganization are collectively referred to as the "**Transactions**").

WHEREFORE, THE COURT:

[5] **GRANTS** the Application.

[6] **ORDERS** that, unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meanings given to them in the Purchase Agreement, as such agreement may be amended and restated from time to time.

PURCHASE AGREEMENT

[7] **AUTHORIZES** and **APPROVES** the Transactions and the entering into and execution by the Debtors (including New ParentCo and ResidualCo) of the Purchase Agreement and the completion of all the Transactions, with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

REORGANIZATION

[8] **AUTHORIZES** and **ORDERS** the Debtors and their successors (including New ParentCo and an entity to be incorporated pursuant to the Reorganization and defined in the Steps Memo as "**ResidualCo**") to implement and complete the Reorganization contemplated in the Steps Memo, including notably:

a) on the date that is four business days before the Closing Date, all of the issued shares of NMX shall be exchanged (the "**Exchange**") for common shares of New ParentCo on a one-for-one basis, such that, as a consequence, New ParentCo will thereafter hold all of the then issued and outstanding shares in the capital of NMX. At the same time, (i) all issued and outstanding options, warrants and other securities of NMX (including securities convertible, exchangeable or exercisable for shares of NMX) shall be canceled for no consideration and (ii) all the shares of New ParentCo then held by NMX are canceled for no consideration;

b) following the Exchange, each share certificate (or other evidence of ownership of shares of NMX) representing shares of NMX shall be deemed to represent for all purposes the same number of common shares of New ParentCo, and that, with the consent of the Monitor, the Debtors and their successors (including New ParentCo and ResidualCo) are authorized to take, proceed with or implement any and all other steps, notifications, filings and delivery of any documents or instruments as may be deemed advisable or necessary by them to practically effect and implement the Exchange; and

c) the execution of the share purchase agreement contemplated between Nemaska Shawinigan, as purchaser, and OMF (Cayman) Co. VII Ltd. ("**OMF Cayman**"), as vendor, pursuant to which Nemaska Shawinigan will purchase all of the issued and outstanding shares in the capital of OMF Fund II (K) Ltd. and OMF Fund II (N) Ltd. from OMF Cayman, in the sequence provided for in the Steps Memo, with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

[9] **AUTHORIZES** the Debtors and their successors (including New ParentCo and ResidualCo, as the case may be) to:

a) execute and deliver any documents and assurances governing or giving effect to the Reorganization as the Debtors, in their discretion, may deem to be reasonably necessary or advisable to conclude the Reorganization, including the execution of such deeds, contracts or documents, as may be contemplated in the Steps Memo and all such deeds, contracts or documents are hereby ratified, approved and confirmed; and

b) take such steps as are deemed necessary or incidental to the implementation of the Reorganization.

[10] **ORDERS** and **DECLARES** that the Debtors and their successors (including New ParentCo and ResidualCo, as the case may be) are hereby permitted to execute and file articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Reorganization and that such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective notwithstanding any requirement under federal, provincial or territorial law to obtain director or shareholder approval with respect to such actions or to deliver any statutory declarations that may otherwise be required under corporate law to effect the Reorganization.

[11] **ORDERS** and **DECLARES** that for the purposes of permitting, enabling and effecting the Reorganization and in order to implement the Transactions, each of the Debtors and their

successors (including New ParentCo and ResidualCo, as the case may be) are deemed to comply with the requirements of section 185(2) of the *Canada Business Corporations Act* ("**CBCA**"), and that the Debtors and their successors (including New ParentCo and ResidualCo, as the case may be) are hereby permitted to execute and file a declaration under section 185 CBCA stating that (i) each amalgamating corporation is, and each amalgamated corporation will be, able to pay its liabilities as they become due, (ii) the realizable value of each of such amalgamated corporation's assets will not be less than the aggregate of its liabilities and stated capital of all classes; and (iii) no creditor will be prejudiced by each amalgamation contemplated.

[12] **ORDERS** and **DECLARES** that this Order shall constitute the only authorization required by the Debtors and their successors, and the Vendor to proceed with the Reorganization and that no director, shareholder, contractual or regulatory approval shall be required in connection with any of the steps contemplated pursuant to the Reorganization.

[13] **ORDERS** the Director appointed pursuant to section 260 CBCA to accept and receive any articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Reorganization, filed by any of the Debtors or their successors pursuant to the Reorganization, as the case may be.

[14] **ORDERS** the Enterprise Registrar under the Business Corporations Act (Québec) ("**QBCA**") to accept and receive any articles of constitution, articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Reorganization, filed by any of the Debtors or their successors pursuant to the Reorganization, as the case may be.

SALE APPROVAL

[15] **AUTHORIZES** and **ORDERS** the Debtors (including ResidualCo), the Vendor, the Monitor, as the case may be, and the Purchaser to perform all acts, sign all documents and take any necessary action to execute any agreement, contract, deed, provision, transaction or undertaking stipulated in the Purchase Agreement with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor and any other ancillary document which could be required or useful to give full and complete effect thereto and to implement the Transactions.

[16] **ORDERS** and **DECLARES** that this Order shall constitute the only authorization required by the Debtors and the Vendor, as the case may be, to proceed with the Purchase and Sale Transactions and any other transactions or steps forming part of the Transactions, and that no shareholder or regulatory approval, if applicable, shall be required in connection therewith.

[17] **ORDERS** and **DECLARES** that, subject to paragraphs [36] and [37] of this Order, upon the issuance of a Monitor's certificate substantially in the form appended as **Schedule "B"** hereto (the "**Certificate**"), all right, title and interest in and to the Purchased Shares shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, Liabilities (direct, indirect, absolute or contingent), obligations, taxes, prior claims, right of retention, liens, royalties or any similar claim based on the extraction of minerals, security interests, charges, hypothecs, trusts, deemed trusts (statutory or otherwise), judgments, writs of seizure or execution, notices of sale, contractual rights

(including purchase options, rights of first refusal, rights of first offer or any other pre-emptive contractual rights), encumbrances, whether or not they have been registered, published or filed and whether secured, unsecured or otherwise (collectively, the "**Encumbrances**"), including without limiting the generality of the foregoing, all Encumbrances created by order of this Court and all charges or security evidenced by registration, publication or filing pursuant to the *Civil Code of Québec* in movable / immovable property, and for greater certainty **ORDERS** that all of the Encumbrances affecting or relating to the Purchased Shares be cancelled and discharged as against the Purchased Shares, in each case effective as of the applicable time and date of the Certificate.

[18] **ORDERS** and **DECLARES** that upon the issuance of the Certificate, any agreement, contract, plan, indenture, deed, certificate, subscription rights, conversion rights, pre-emptive rights, options (including stock option or share purchase or equivalent plans), or other documents or instruments governing and/or having been created or granted in connection with the Purchased Shares and/or the share capital of NMX, Nemaska P1P, Nemaska Shawinigan, Nemaska Whabouchi and Nemaska Innovation (collectively, the "**Nemaska Entities**"), that were existing prior to the Reorganization, if any, shall be deemed terminated and cancelled.

[19] **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Lac-Saint-Jean-Ouest, for the Registration Division of Shawinigan, and the Registrar of the Public Register of Real and Immovable Mining Rights (known as GESTIM Plus), upon presentation of the Certificate and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and cancel the Encumbrances listed in **Schedule "C"** hereto on the immovable properties identified therein.

[20] **ORDERS** the Québec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Order and the Certificate, to strike the registrations listed in **Schedule "C"** hereto.

[21] **DECLARES** and **ORDERS** that upon the issuance of the Certificate, the hypothecs granted to OMF Cayman over the assets of AmalCo2 in the manner set forth in the Reorganization shall charge the universality of the property and assets of AmalCo2 with a charge and security ranking prior to any other hypothecs, including the existing hypothec granted pursuant to the following security document:

- Deed of Collateral Hypothec executed before Mtre. Lyes Arfa, Notary on April 30, 2020 under his minute number 97 and registered at the Public Register of Real and Immovable Mining Rights (known as GESTIM Plus, a Mining Title Management System) under number **57 681** and at the Land Register for the Registration Division of Lac-Saint-Jean-Ouest under number **25 348 653** against the First Land File (being the BM 1022), under the terms of which Nemaska Lithium Whabouchi Mine Inc. hypothecated in favour of the CREE NATION OF NEMASKA, the GRAND COUNCIL OF THE CREES (EEYOU ISTCHEE) and the CREE NATION GOVERNMENT, for an amount of $15,083,159.51, bearing interest at the rate of 25% per annum, affecting the mining lease BM 1022.

[22] **DECLARES** and **ORDERS** that upon the issuance of the Certificate, the hypothecs granted pursuant to the following security document (the "**JM Hypothecs**" and the "**JM Deed of Hypothec**"):

- Deed of hypothec executed before Mtre. Charlotte Dangoisse, Notary, on May 10, 2016 under her minute number 4, registered by notarized summary at the Land Register for the Registration Division of Shawinigan under number 22 298 741, and registered at the Register of Personal and Movable Real Rights under number 16-0432329-0002, under the terms of which 9671714 Canada Inc. (now Nemaska Lithium P1P Inc.) hypothecated the Charged Property (as defined in the JM Deed of Hypothec) in favour of JOHNSON MATTHEY BATTERY MATERIALS LTD. for an amount of $15,000,000.00;

shall only charge, with a rank prior to any other hypothecs, the universality of movable and immovable assets of AmalCo2 that were assets owned by Nemaska Lithium P1P Inc. ("**P1P**") immediately prior to the implementation of the Reorganization (the "**P1P Assets**"), to the exclusion of any other movable or immovable asset of AmalCo2 that were not P1P Assets immediately prior to the Reorganization, or that are not assets that were acquired in replacement of such P1P Assets, and for greater certainty, the JM Hypothecs shall not charge the Property (as defined in the JM Deed of Hypothec) nor the Premises (as defined in the JM Deed of Hypothec) as a result of the Transactions, but shall charge the Improvements (as defined in the JM Deed of Hypothec), as well as everything artificially united thereto.

[23] **ORDERS** the Québec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Order and the Certificate, to reduce the scope of the registration number **16-0432329-0002**, in order for the scope of the JM Hypothecs with respect to movable assets to be limited to the universality of movable assets of AmalCo2 that were movable assets owned by P1P immediately prior to the implementation of the Reorganization, to the exclusion of any other asset of AmalCo2, including future assets, that were not already assets owned by P1P immediately prior to the Reorganization, or that are not assets that were acquired in replacement of such P1P Assets.

[24] **ORDERS** and **DECLARES** that any distributions, disbursements or payments made under this Order, including, for greater certainty, pursuant to the Transactions, shall not constitute a "distribution" by any Person for the purposes of section 107 of the *Corporations Tax Act* (Ontario), section 22 of the *Retail Sales Tax Act* (Ontario), section 117 of the *Taxation Act*, 2007 (Ontario), section 34 of the *Income Tax Act* (British Columbia), section 104 of the *Social Service Tax Act* (British Columbia), section 49 of the *Alberta Corporate Tax Act*, section 22 of the *Income Tax Act* (Manitoba), section 73 of *The Tax Administration and Miscellaneous Taxes Act* (Manitoba), section 14 of the *Tax Administration Act* (Québec), section 85 of *The Income Tax Act*, 2000 (Saskatchewan), section 48 of *The Revenue and Financial Services Act* (Saskatchewan), section 56 of the *Income Tax Act* (Nova Scotia), section 159 of the *Income Tax Act* (Canada), section 270 of Part IX of the *Excise Tax Act* (Canada), section 46 of the *Employment Insurance Act* (Canada), or any other applicable similar federal, provincial, and/or territorial tax legislation (collectively, the "**Tax Statutes**"), and the Vendor, the Nemaska Entities and AmalCo2 in making any such distributions, disbursements or payments, as applicable, is merely a disbursing agent under this Order, including, for greater certainty, pursuant to the Transactions, and is not exercising any discretion in making such payments and no Person is "distributing" such funds for the purpose of the Tax Statutes, and the Vendor,

the Nemaska Entities and AmalCo2 and any other Person shall not incur any liability under the Tax Statutes in respect of distributions, disbursements or payments made by it and the Vendor, the Nemaska Entities and AmalCo2 and any other Person is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of or as a result of distributions, disbursements or payments made by it in accordance with this Order, including, for greater certainty, pursuant to the Transactions, and any claims of this nature are hereby forever barred.

[25] **ORDERS** and **DECLARES** that upon the issuance of the Certificate, the Purchaser and AmalCo2 shall be deemed released from any and all claims, Liabilities (direct, indirect, absolute or contingent) or obligations with respect to any taxes (including penalties and interest thereon) of, or that relate to, the Vendor or the Nemaska Entities, including, without limiting the generality of the foregoing all taxes that could be assessed against the Purchaser and AmalCo2 (including any predecessor corporations) pursuant to section 160 of the *Income Tax Act* (Canada), section 325 of Part IX of the *Excise Tax Act* (Canada), section 14.4 of the *Tax Administration Act* (Québec), and/or any similar applicable provisions of the other Tax Statutes in connection with the Vendor.

[26] **ORDERS** and **DECLARES** that upon issuance of the Certificate, all Persons shall be deemed to have waived any and all defaults of the Nemaska Entities then existing or previously committed by the Debtors or caused by the Debtors, directly or indirectly, or non-compliance with any covenant, positive or negative pledge, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Debtors, or their successors, arising from the insolvency of the Debtors, the filing by the Debtors under the CCAA or the completion of the Transactions, and any and all notices of default and demands for payment under any instrument, including any guarantee arising from such default, shall be deemed to have been rescinded.

[27] **ORDERS,** upon issuance of the Certificate, Stein Monast L.L.P., as escrow agent under the Escrow Agreement entered into on May 10, 2019, by Nemaska Shawinigan and Stein Monast L.L.P., to remit the funds held pursuant to the aforementioned agreement (the "**Escrow Funds**") as follows:

a) USD 13,000,000 to AmalCo3 (as defined in the Steps Memo), in accordance with the instructions to be provided in writing by Davies Ward Phillips & Vineberg LLP to Stein Monast L.L.P., including the wire transfer coordinates of the bank account(s) to which the said amount shall be deposited; and

b) the balance, including any interest accrued on the Escrow Funds, to the Vendor, in accordance with the instructions to be provided in writing by McCarthy Tétrault LLP to Stein Monast L.L.P., including the wire transfer coordinates of the bank account(s) to which the said amount shall be deposited.

[28] **ORDERS** and **DECLARES** that upon issuance of the Certificate section 6.02 in each of the D&O Trust, the Nemaska Retention Programs Trust Agreement entered into between NMX and Robert Cassius de Linval, as trustee, dated July 18, 2019 and the Nemaska Restructuring Trust Agreement entered into between NMX and Robert Cassius de Linval,

as trustee, dated February 28, 2020 shall be amended by replacing the word "Nemaska" with "NMX Residual Liabilities Inc.".

[29] **ORDERS** and **DECLARES** that the implementation of the Transactions shall be deemed not to constitute a change in ownership or change in control under any agreement, including without limiting the foregoing, any financial instrument, loan or financing agreement, executory contract or unexpired lease or contract (including, for certainty, the Chinuchi Agreement), lease, permits and licences in existence on the Closing Date and to which any of the Nemaska Entities are a party.

[30] **ORDERS** and **DIRECTS** the Monitor to issue the Certificate as soon as practicable upon the occurrence of the closing of the Transactions.

[31] **ORDERS** and **DIRECTS** the Monitor to file with the Court a copy of the Certificate, no later than one business day after the issuance thereof.

[32] **DECLARES** that, subject to paragraphs [36] and [37] of this Order, upon the issuance of the Certificate, the Purchase and Sale Transactions shall be deemed to constitute and shall have the same effect as a sale under judicial authority as per the provisions of the Code of Civil Procedure and a forced sale as per the provisions of the *Civil Code of Québec*.

CCAA DEBTORS

[33] **ORDERS** that:

a) ResidualCo and New ParentCo are companies to which the CCAA applies; and

b) ResidualCo and New ParentCo shall be added as Debtors in these CCAA proceedings and any reference in any Order of this Court in respect of these CCAA proceedings to a "Debtor" or the "Debtors" shall also refer to ResidualCo and New ParentCo, *mutadis mutandis*, and, for greater certainty, each of the CCAA Charges (as such term is defined in the initial order issued by this Court in the present matter on December 23, 2019, as extended, amended and restated since (the "**Initial Order**")) shall also constitute a charge on the property of ResidualCo and New ParentCo.

[34] **ORDERS** that upon the issuance of the Certificate:

a) the Debtors, as amalgamated, and for greater certainty not including ResidualCo and New ParentCo, shall each be deemed to cease to be Debtors in these CCAA proceedings, and each such entity shall be deemed to be released from the purview of any Order of this Court granted in respect of these CCAA proceedings, save and except for the present Order the terms of which (as they related to any such entity) shall continue to apply in all respects.

[35] **ORDERS** and **DECLARES** that upon the issuance of the Certificate and subject to paragraphs [36] and [37] of this Order:

a) all Excluded Assets shall vest absolutely and exclusively, at the times provided for in the Reorganization and before the Closing Date, in ResidualCo and all

Encumbrances, except the Permitted Encumbrances, shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer in each case;

b) all Excluded Cash shall (i) vest absolutely and exclusively (other than the Cantore Litigation Fund, as defined below, which shall be dealt with as set out below), at the times provided for in the Reorganization and before the Closing Date, in New ParentCo, and (ii) be remitted to New ParentCo, with the exception of an amount of $6,000,000, which shall be remitted in trust with the Monitor and be distributed in accordance with the terms of the Purchase Agreement and the Steps Memo, including without limitation for the payment of the Purchaser's professional fees and expenses and/or the funding of any settlement payment in relation to the determination or settlement, as applicable, of Mr Cantore's rights as described in paragraphs [36] and [37] herein (the "**Cantore Litigation Fund**");

c) all Encumbrances, except the Permitted Encumbrances, shall attach to the Excluded Cash with the same priority as they had with respect to the assets and properties of the Nemaska Entities immediately prior to their transfer in each case, it being understood that such Encumbrances shall not attach to the Cantore Litigation Fund unless and until it is released from escrow by the Monitor and remitted by the Monitor to New ParentCo in accordance with the terms of the Purchase Agreement and the Steps Memo;

d) AmalCo2 shall own and hold, to the exclusion of all other Persons, free and clear of and from any Encumbrances, except the permitted encumbrances listed on **Schedule "D"** hereto (the "**Permitted Encumbrances**"), all right, title and interest in and to all assets and properties of the Nemaska Entities other than the Excluded Assets and Excluded Cash;

e) all debts, liabilities, taxes, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) of AmalCo2 and its predecessors, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise (collectively, "**Obligations**") other than the AmalCo2 Assumed Liabilities (all such Obligations that are not expressly identified in the Purchase Agreement as being AmalCo2 Assumed Liabilities being referred to as the "**Excluded Liabilities**") shall be transferred to, assumed by and vest absolutely and exclusively in, New ParentCo with the same attributes and rights resulting from existing defaults of AmalCo2 and its predecessors, such that, at the times provided for in the Reorganization and before the Closing Date, the Excluded Liabilities shall be novated in each case and become obligations of New ParentCo and not obligations of AmalCo2, and AmalCo2 shall be forever released and discharged from such Excluded Liabilities, and all Encumbrances securing Excluded Liabilities shall be forever released and discharged, it being understood that nothing in the present Order shall be deemed to cancel any of the Permitted Encumbrances, as applicable to AmalCo2 (including any predecessor corporations);

f) the commencement or prosecution, whether directly, indirectly, derivatively or otherwise of any demands, claims, actions, counterclaims, suits, judgements, or other remedy or recovery with respect to any indebtedness, liability, obligation or cause of action against AmalCo2 (including any successor corporation) in respect of the Excluded Liabilities shall be permanently enjoined and barred;

g) the AmalCo2 Assumed Liabilities including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Purchase Agreement or the steps and actions taken in accordance with the terms thereof;

h) the nature and attributes (including rights resulting from existing defaults of AmalCo2 and its predecessors) of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to and assumption by New ParentCo; and

i) any Person that, prior to the Closing Date, had a valid right or claim against AmalCo2 (including any predecessor corporation) in respect of the Excluded Liabilities (each a "**Claim**") shall no longer have such Claim against AmalCo2 (including any successor corporation), but will have an equivalent Claim against New ParentCo in respect of the Excluded Liabilities from and after the Closing Date in its place and stead, with the same attributes and rights resulting from existing defaults of AmalCo2 and its predecessors and, nothing in this Order limits, lessens, modify (other than by change of debtor) or extinguishes the Excluded Liabilities or the Claim of any Person as against New ParentCo which shall be the sole and exclusive debtor of the Claim.

VICTOR CANTORE REAL RIGHT, AS THE CASE MAY BE

[36] **ORDERS** and **DECLARES**, notwithstanding anything to the contrary contained in this Order, that any *sui generis* real right or royalty right held by Mr. Victor Cantore in and to the assets and properties of the Nemaska Entities, as the case may be, as finally determined by the adjudication of the *Real Right Application* of Mr. Cantore dated September 3, 2020 in the present matter (the "**Cantore Alleged Rights**" and the "**Cantore Application**"), shall not be affected by this Order, it being understood that the Cantore Alleged Rights are contested by the Vendor, the Monitor and the Purchaser and this Court shall retain the right to determine whether it can purge and discharge the Cantore Alleged Rights, and if the Court determines in the affirmative, this Order shall be deemed to have purged and discharged the Cantore Alleged Rights as of the date of this Order.

[37] **ORDERS** and **DIRECTS** that:

a) If this Court finds, subsequently to the issuance of the Certificate, that Mr. Cantore did not hold prior to the issuance of this Order any *sui generis* real right or royalty right in and to the assets and properties of the Nemaska Entities, or that the Cantore Alleged Rights should be purged and discharged, then **(i)** AmalCo2 and its successors, shall own and hold all right, title and interest in and to all assets and properties of the Nemaska Entities, other than the Excluded Assets and Excluded Cash, to the exclusion of Mr. Victor Cantore, free and clear of and from the Cantore Alleged Rights as of the date of this Order, without prejudice however to any proof of claim already filed by Mr. Cantore as an unsecured creditor

pursuant to the Claims Procedure Order, and **(II)** the Cantore Litigation Funds, net of all deductions as provided for in the Purchase Agreement, shall be remitted to New ParentCo;

b) If either (i) this Court finds, subsequently to the issuance of the Certificate, that Mr. Cantore held with respect to the Cantore Alleged Rights, prior to the issuance of this Order, a *sui generis* real right or royalty right in and to the assets and properties of the Nemaska Entities and that the Cantore Alleged Rights should not or cannot be purged and discharged, or (ii) as a result of any settlement agreement reached by the Purchaser (in consultation with the Monitor) with Mr. Cantore that results in the withdrawal of any claims relating to the Cantore Alleged Rights, then the Cantore Litigation Funds required to effect such settlement shall vest with and be remitted to AmalCo3 (as defined in the Steps Memo).

AMENDMENT AND RESTATEMENT OF THE INITIAL ORDER

[38] **ORDERS** and **DECLARES** that the Initial Order shall be amended by:

a) adding ResidualCo and New ParentCo as Debtors in the heading;

b) adding, after subparagraph 46(l), the following subparagraph:

(l.1) may act on behalf and in the name of any of ResidualCo and New ParentCo;

[39] **ORDERS** and **DECLARES** that upon the issuance of the Certificate the Initial Order shall be amended by:

a) deleting "Nemaska Lithium Inc.", "Nemaska Lithium Shawinigan Transformation Inc.", "Nemaska Lithium P1P Inc.", "Nemaska Lithium Whabouchi Mine Inc." and "Nemaska Lithium Innovation Inc." from the heading;

b) deleting the residual clause of paragraph [46];

[40] **ORDERS** that forthwith upon the issuance of the Certificate the Initial Order shall be restated to reflect the amendments made by paragraphs [38] and [39] hereof.

RELEASES

[41] **ORDERS** that effective upon the issuance of the Certificate, (i) the present and former directors, officers, employees, legal counsel and advisors of the Debtors (including for purpose of clarity New ParentCo, ResidualCo and AmalCo2), (ii) the Monitor and its legal counsel, and (iii) OMF Cayman, OMF Fund II (K) Ltd., OMF Fund II (N) Ltd., QLP, Pallinghurst GP Limited, the Pallinghurst Group (and any affiliate and investor thereof) and IQ, including in each case their respective directors, officers, employees, legal counsel and advisors (the Persons listed in (i), (ii) and (iii) being collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims whatsoever (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind

whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, offer, investment proposal, dealing, statutory declaration under the QBCA or CBCA as permitted pursuant to the terms of this Order, or other occurrence existing or taking place prior to the issuance of the Certificate or completed pursuant to the terms of this Order and/or in connection with the Transactions, in respect of the Debtors or their assets, business or affairs, or prior dealings with Debtors, wherever or however conducted or governed, the administration and/or management of the Debtors and these proceedings or the CBCA proceedings (500-11-056859-198) (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, and are not vested nor transferred to ResidualCo or to any other entity and are extinguished, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim against the Directors (as this term is defined in the Initial Order) of the Debtors that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[42] **ORDERS** that, notwithstanding:

a) the pendency of these proceedings;

b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") in respect of the Debtors, New ParentCo, ResidualCo or AmalCo2 and any bankruptcy order issued pursuant to any such applications; and

c) any assignment in bankruptcy made in respect of the Debtors, New ParentCo, ResidualCo or AmalCo2,

the implementation of the Transactions, including the transfer of the Excluded Assets to ResidualCo and the transfer of the Excluded Liabilities and Excluded Cash to New ParentCo and the implementation of the Purchase and Sale Transactions under and pursuant to the Purchase Agreement, (i) shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtors, New ParentCo, ResidualCo or AmalCo2 and shall not be void or voidable by creditors of the Debtors, New ParentCo, ResidualCo or AmalCo2, as applicable, (ii) shall not constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA or any other applicable federal, provincial or territorial legislation, and (iii) shall not constitute nor be deemed to be oppressive or unfairly prejudicial conduct by the Debtors, New ParentCo, ResidualCo or the Released Parties pursuant to any applicable federal, provincial or territorial legislation.

THE MONITOR

[43] **PRAYS ACT** of the Monitor's Report.

[44] **DECLARES** that, subject to other orders of this Court, nothing herein contained shall require the Monitor to occupy or to take control, or to otherwise manage all or any part of the assets of the Debtors. The Monitor shall not, as a result of this Order, be deemed to

be in possession of any assets of the Debtors within the meaning of environmental legislation, the whole pursuant to the terms of the CCAA.

[45] **DECLARES** that the Monitor, its employees and representatives shall not be deemed directors of ResidualCo or New ParentCo, *de facto* or otherwise, and shall incur no liability as a result of acting in accordance with this Order, other than any liability arising out of or in connection with the gross negligence or wilful misconduct of the Monitor.

[46] **DECLARES** that no action lies against the Monitor by reason of this Order or the performance of any act authorized by this Order, except by leave of the Court. The entities related to the Monitor or belonging to the same group as the Monitor shall benefit from the protection arising under the present paragraph.

EXEMPTIONS FROM MINORITY APPROVAL REQUIREMENT

[47] **DECLARES** that this Order is a court order effected under insolvency law as contemplated by clauses 5.5(f)(i)(A) and 5.7(1)(d) of *Regulation 61-101 respecting Protection of Minority Security Holders in Special Transactions* ("**Regulation 61-101**") pursuant to the *Securities Act*, c V-1.1, r 33 (Québec) (corresponding to Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* in the other provinces and territories of Canada).

[48] **DECLARES** that the Debtor NMX has duly and adequately advised this Court (i) that the transactions contemplated by the Purchase Agreement collectively constitute a "related party transaction" within the meaning of Regulation 61-101, and (ii) of the formal valuation requirement applicable to related party transactions set forth in section 5.4 and the minority approval requirement applicable to related party transactions set forth in section 5.6 of Regulation 61-101.

[49] **ORDERS** and **DECLARES** that, with respect to the consummation by the Debtors of the related party transaction(s) contemplated by the Purchase Agreement, this Court does not require compliance with either the formal valuation requirement applicable to related party transactions set forth in section 5.4 or the minority approval requirement applicable to related party transactions set forth in section 5.6 of Regulation 61-101.

GENERAL

[50] **ORDERS** that the Purchaser shall be authorized to take all steps as may be necessary to effect the discharge of the Encumbrances as against the assets of AmalCo2.

[51] **DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

[52] **DECLARES** that the Monitor shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement the Order and, without limitation to the foregoing, an order under Chapter 15 of the U.S. Bankruptcy Code, for which the Monitor shall be the foreign representative of the Debtors. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to Monitor as may be deemed necessary or appropriate for that purpose.

[53] **REQUESTS** the aid and recognition of any court or administrative body in any province or territory of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order.

[54] **ORDERS** the provisional execution of the present Order notwithstanding any appeal and without the requirement to provide any security or provision for costs whatsoever.

THE WHOLE WITHOUT COSTS.

Louis J. Gouin, J.S.C.

The Honourable Louis J. Gouin, JSC

Dates of hearing: September 21, 24, 25 and 28, October 1st, 2nd, 6, 7 and 8, 2020

TAB K

2022 ONSC 6354
Ontario Superior Court of Justice

Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.

2022 CarswellOnt 16700, 2022 ONSC 6354, 2022 A.C.W.S. 5355

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT. (Applicants) and MORGAN STANLEY CAPITAL GROUP INC. (Respondents)

McEwen J.

Heard: November 2, 2022
Judgment: November 14, 2022
Docket: CV-21-00658423-00CL

Counsel: Jeremy Dacks, Marc Wasserman, for Just Energy Group
Tim Pinos, Ryan Jacobs, Alan Merskey, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
David H. Botter, Sarah Link Schultz, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
Heather L. Meredith, James D. Gage, for Agent and the Credit Facility Lenders
Howard A. Gorman, Ryan E. Manns, for Shell Energy North American (Canada) Inc. and Shell Energy North America (U.S.)
Danielle Glatt, for U.S. Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in Donin et al. v. Just Energy Group Inc. et al. and Counsel to U.S. Counsel for Trevor Jordet, in his capacity as proposed class representative in Jordet v. Just Energy Solutions Inc.
David Rosenfeld, James Harnum, for Haidar Omarali in his capacity as Representative Plaintiff in Omarali v. Just Energy
Robert Kennedy, for BP Energy Company and certain of its affiliates
Jessica MacKinnon, for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
Bevan Brooksbank, for Chubb Insurance Co. of Canada

Alexandra McCawley, for Counsel to Fortis BC Energy Inc.
Robert I. Thornton, Rebecca Kennedy, Rachel B. Nicholson, Puya Fesharaki, for FTI Consulting Canada Inc., as Monitor
John F. Higgins, for FTI Consulting Canada Inc., as Monitor
Ganesh Yadav, for himself
Mohammad Jaafari, for himself

Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.ii Discretion of court

Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Discretion of court
Applicants were group of energy companies, who were forced to file for protection under Companies' Creditors Arrangement Act — Applicants reached agreement for transaction — Applicants provided court with reverse vesting order and monitor's order in support of transaction — Applicants applied for approval of transaction — Application granted — Monitor's actions were necessary to implement required steps and provisions of vesting order — Stay extension was also necessary, so that needed steps could be undertaken — Monitor's fees were fair and reasonable — Reverse vesting order was necessary, so that necessary licenses and authorizations for ongoing business operations of applicants could be preserved — Relief was time-sensitive so that vesting order was to be granted immediately — Transaction was fair and reasonable, with proper process being followed — Transaction was more beneficial to creditors, than sale or disposition in bankruptcy would have been — Criteria for transaction had been met, including effort to obtain best price and interests of parties being considered.

Table of Authorities

Cases considered by *McEwen J.*:

Arrangement relatif à Blackrock Metals Inc. (2022), 2022 QCCS 2828, 2022 CarswellQue 10503, 2 C.B.R. (7th) 214 (C.S. Que.) — considered

Arrangement relatif à Blackrock Metals Inc. (2022), 2022 QCCA 1073, 2022 CarswellQue 11443 (C.A. Que.) — considered

Canwest Global Communications Corp., Re (2010), 2010 ONSC 4209, 2010 CarswellOnt 5510, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Harte Gold Corp. (Re) (2022), 2022 ONSC 653, 2022 CarswellOnt 1698, 97 C.B.R. (6th) 202 (Ont. S.C.J. [Commercial List]) — considered

Quest University Canada (Re) (2020), 2020 BCSC 1883, 2020 CarswellBC 3091, 85 C.B.R. (6th) 41 (B.C. S.C.) — 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.) — referred to

Sherman Estate v. Donovan (2021), 2021 SCC 25, 2021 CSC 25, 2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 458 D.L.R. (4th) 361, 72 C.R. (7th) 223 (S.C.C.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — referred to

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

s. 173 — referred to

s. 176(1)(b) — referred to

s. 191(1) "reorganization" — referred to

s. 191(1) "reorganization" (c) — referred to

s. 191(2) — referred to

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

Generally — considered

s. 11 — referred to

s. 36 — referred to

s. 36(3) — referred to

s. 36(4) — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

***McEwen J.*:**

1 The Applicants (collectively the "Just Energy Entities") bring a motion seeking approval of a going-concern sale transaction (the "Transaction") for their business. They seek to implement the Transaction through a proposed draft reverse vesting order (the "RVO") and other related relief.

2 The Just Energy Entities provided the court with two draft orders in furtherance of their position. The first is the RVO for the Transaction. The second is an order (the "Monitor's Order") giving FTI Consulting Canada Inc. (the "Monitor") enhanced powers to implement the RVO and other related relief, including a stay extension, approval of the Monitor's reports and fees and a sealing order.

3 I granted the two orders with reasons to follow. I am now providing those reasons.

BACKGROUND

4 Just Energy Group Inc. ("Just Energy") and its subsidiaries collectively form the Just Energy Entities. Just Energy is primarily a holding company that operates subsidiaries in Canada and the U.S.

5 Just Energy is incorporated under the*Canada* Business Corporations Act, R.S.C. 1985, c. C–44 (“CBCA”) . It maintains dual headquarters in Ontario and Texas. Just Energy's shares are listed on the Toronto Stock Exchange and the New York Stock Exchange.

6 The Just Energy Entities are a retail energy provider. Their principal line of business consists of purchasing retail energy and natural gas commodities from large energy suppliers and reselling them to residential and commercial customers. The Just Energy Entities service over 950,000 residential and commercial customers across Canada and the U.S. and employ over 1,000 employees.

7 The Just Energy Entities' business is highly regulated. This is because of its nature. The business depends on many licenses, authorizations and permits across multiple jurisdictions in both Canada and the U.S. Without these approvals the Just Energy Entities cannot market or sell energy to its customers.

8 On March 9, 2022, the Just Energy Entities obtained protection under the Companies' Creditors Arrangement Act,R.S.C. 1985, c.C–36 (the "*CCAA*") pursuant to anInitial Order under the *CCAA*.

9 The Just Energy Entities were forced to file for protection under the *CCAA* after an extreme winter storm in Texas. The February 2021 storm, together with Texas regulators' response to the storm, posed a significant liquidity challenge that precipitated the filing. In or about the time of the filing, the Just Energy Entities held an aggregate book value of approximately CDN $1.069 billion, with an aggregate book value of liabilities around CDN $1.28 billion.

10 There is a complicated array of secured creditors. Insofar as the Transaction is concerned, the Pacific Investment Management Company LLC ("PIMCO") manages a number of funds which comprise a portion of the secured creditors and/or the DIP Lenders. These entities constitute the purchaser in the Transaction (the "Purchaser").

11 There are also several other secured creditors, including the Credit Facility Lenders and secured suppliers. They have reached an agreement with the Just Energy Entities and the Purchaser with respect to the Transaction.

12 In September 2021, this court granted aClaims Process Order to establish a process to determine the nature, quantum and validity of the claims against the Just Energy Entities.

13 In May 2022, the Just Energy Entities brought a motion (the "Meetings Order Motion") seeking, amongst other things, authorization to hold a creditors' meeting to vote on their proposed Plan of Compromise and Arrangement.

14 Some unsecured litigation claimants opposed the Meetings Order Motion: primarily, two uncertified U.S. class actions (together the "U.S. Class Actions"), a certified Ontario class action (the "Omarali Class Action") and plaintiffs in four actions brought in Texas by approximately 250 claimants (the "Mass Tort Claims").

15 Following my June 10, 2022 Endorsement, the Plan Sponsor — that consisted of the DIP Lenders, one of their affiliates and other stakeholders — withdrew their support for the proposed Plan of Compromise and Arrangement.

16 Thereafter, the Just Energy Entities, the Plan Sponsor and other supporting stakeholders pivoted to implementing a sales and investment solicitation process (the "SISP") in accordance with the new Support Agreement dated August 4, 2022 (the "SISP Support Agreement"). The SISP included a stalking-horse bid by the Purchaser.

17 On August 18, 2022, I granted an order (the "SISP Approval Order") that, amongst other things, approved the SISP and SISP Support Agreement with modest modifications.

18 The SISP was conducted over a 10-week period. It was conducted in accordance with the SISP Approval Order and was well-publicized. The Just Energy Entities negotiated non-disclosure agreements with potential bidders, facilitated access to the data room for those parties, responded to numerous due diligence requests and offered management presentation meetings. Four written notices of intention to bid ("NOIs") were received. Ultimately, however, no bids were received; therefore, the Transaction was declared the successful bid, subject to court approval.

19 It bears noting that, in addition to the SISP, the business of the Just Energy Entities was broadly and extensively marketed over the past approximately three years. No meaningful proposals were ever received.

20 Also, at the time of the SISP ApprovalOrder, the Just Energy Entities had been negotiating with their key stakeholders for roughly 1.5 years.

21 Further, U.S. Class Actions were involved in the SISP but ultimately did not file a NOI or engage in further discussions with the Just Energy Entities in the SISP.

22 The value that the Purchaser is paying for the Just Energy Entities is approximately U.S. $444 million plus the assumption of several liabilities, all of which provides recovery for the approximately CDN $1 billion in secured claims.

23 Last, all equity interests of Just Energy and Just Energy (U.S.) Corp. ("JEUS") that exist prior to the proposed implementation of the RVO will be deemed to be terminated, cancelled or redeemed following the closing. The Purchaser will own all the issued and outstanding shares of JEUS. In turn, JEUS will own all of the issued and outstanding shares of Just Energy and the other acquired entities. The Just Energy Entities will continue to control their own assets, other than the excluded assets, and will remain liable for their respective assumed liabilities.

THE ISSUES

24 There are two issues on this motion:

- whether the Transaction should be approved, including the RVO and related relief; and
- whether the Monitor should receive the enhanced powers requested in the Monitor's Order with respect to the implementation of the RVO and the related relief, including the stay extension, approval of the Monitor's reports and fees and a sealing order.

25 The secured creditors consent to the relief sought. Neither the U.S. Class Actions, the Omarali Class Action nor the Mass Tort Claims opposed the relief sought. The only opposition comes from Mr. Ganesh Yadav, a shareholder, and Mr. Mohammad Jaafari, a former employee of Just Energy who is pursuing a claim in the Tokyo District Court of Japan alleging wrongful termination.

26 I will first deal with the issues surrounding the RVO and the Monitor's Order. Thereafter I will outline the two specific claims of Mr. Yadav and Mr. Jaafari and explain why I do not believe their claims affect the relief sought by the Just Energy Entities.

REVERSE VESTING ORDERS

27 A reverse vesting order generally involves a series of steps, whereby:

(a) the purchaser becomes the sole shareholder of the debtor company;

(b) the debtor company retains its assets, including key contracts and permits; and

(c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity or entities. [1]

The assets and liabilities are vested out in the separate entity or entities (which are referred to in the RVO as "Residual Cos.") which may then be addressed through a bankruptcy or similar process. The reverse vesting order is therefore contrasted with a traditional vesting order in which the assets of a debtor company that the purchaser acquires are vested in the purchaser free and clear of any encumbrances or claims, other than those assumed by the purchaser, as contemplated by s. 36(4) of the CCAA. The purchase price stands in place of the assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.

The Law relating to Reverse Vesting Orders

28 I begin my analysis with a general review of the law.

29 The jurisdiction to approve a transaction through a reverse vesting order is found in s. 11 of the CCAA. Section 11 gives this court broad powers to make orders that it sees fit, subject to the restrictions set out in the statute. There is no provision in the *CCAA* that prohibits a reverse vesting order structure: see QuestUniversity (Re), 2020 BCSC 1883, at para. 157.

30 Some courts have also held that s. 36*o*f the CCAA confers jurisdiction. Section 36 contemplates court approval for the sale of a debtor company's assets out of the ordinary course of business: see *Black Rock Metals Inc.*; *Quest University (Re)*, at para. 40.

31 In any event, it is settled law that courts have jurisdiction to approve a transaction involving a reverse vesting order. Moreover, courts agree that the factors set out in s. 36(3) of the CCAA should also be considered on a motion to approve a sale, including one involving a reverse vesting order. Section 36(3) stipulates that the court is to consider, among other things,

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than 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.

32 In *Harte Gold Corp. (Re)*, 2022 ONSC 653, Penny J. held that the s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank of Canada v. Soundair Corp*, (1991), 4 O.R. (3d) 1 (C.A) for the approval of the sale of assets in an insolvency. They are as follows:

> • whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> • the interests of all parties;
>
> • the efficacy and integrity of the process by which offers have been obtained; and
>
> • whether there has been unfairness in the working out of the process.

33 Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the "norm" and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances: see *Harte Gold Corp. (Re)* , at para. 38; *Black Rock Metals Inc.*, at para. 99. That said, reverse vesting orders have been deemed appropriate in a number of cases: see *Quest University (Re)* , at para. 168, *Harte Gold Corp. (Re)* , at para. 77 and *Black Rock Metals Inc.*, at para. 114.

34 The aforementioned cases approved reverse vesting orders in circumstances where:

> • The debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser.
>
> • The debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser.
>
> • Where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

35 Given the supporting jurisprudence, I will now discuss why the RVO should be granted and why the Transaction should be approved.

The RVO should be granted

36 The Just Energy Entities' business, as noted, is highly regulated and depends almost entirely on a substantial number of licenses, authorizations and permits in multiple jurisdictions in Canada and the U.S.

37 As set out in the affidavit of Mr. Michael Carter, the Chief Financial Officer to the Just Energy Entities (at para. 57), the value of the Just Energy Entities' business arises predominantly from the gross margin in their customer contracts. The business is wholly dependent on the Just Energy Entities holding several non-transferable licenses and authorizations that permit their operation in Canada and the U.S. and in their agreements with over 100 public utilities, which allow the Just Energy Entities to provide natural gas and electricity in certain markets to their customers.

38 Currently the Just Energy Entities hold at least:

- Seventeen separate licenses and authorizations in five provinces in Canada which allows them to market natural gas and electricity in the applicable provincial markets, eight of which are non-transferrable and non-assignable, with the remaining nine only assignable with leave of the regulator.

- Five separate import and export orders issued by the Canadian Energy Regulator ("CER"), all of which are non-transferrable and non-assignable.

- Three separate registrations with the Alberta Electricity System Operator (the "AESO") in Alberta and with the Independent Electricity System Operator ("IESO") in Ontario, all of which are either non-transferrable or only assignable with leave.

- Six licenses in Nevada and New Jersey to allow them to market natural gas and/or electricity in the applicable states, all of which are non-transferrable.

- Twenty-five licenses in Connecticut, Delaware, Maine, Maryland, Ohio, Pennsylvania and Virginia to allow them to market natural gas and/or electricity in the applicable states, all of which may only be transferred with the prior authorization of the applicable regulator in each jurisdiction.

- Eighteen electricity and/or natural gas provider licenses or authorizations in California, Illinois, Massachusetts, Michigan, and New York, where no process for transferring the licenses or authorizations is prescribed in the applicable statutes.

- Five retail electricity provider certifications in Texas which may only be transferred with the authorization of the Public Utility Commission of Texas ("PUCT").

- Three separate export authorizations issued by the Department of Energy ("DOE") in the U.S., all of which may only be transferred with the prior authorization of the DOE's assistant secretary.

- Seven separate market-based authorizations issued by the Federal Energy Regulatory Commission ("FERC") in the U.S. which may only be transferred with the prior authorization of FERC.

39 As further deposed by Mr. Carter, all the provincial, state, market participation, export and import orders, licenses and authorizations held by the Just Energy Entities are either non-transferrable, capable of transfer only with the approval of the applicable regulator, or provide for no clear regulatory process for the transfer of such authorizations.

40 On Mr. Carter's analysis, the RVO would not hamper the existing licenses, authorizations, orders and agreements. As such, he deposes that the RVO structure is the only feasible structure for the Transaction (at para. 59). Any other structure would risk exposing most of the 89 licenses upon which the Just Energy Entities' business is founded. Mr. Carter also deposes (at para. 75) that if a traditional vesting order was granted, the Purchaser would be required to participate in a separate regulatory process in five Canadian provinces, 15 U.S. states and with federal agencies in both Canada and the U.S. to try and obtain transfers of the 89 licenses, authorizations and certifications or the issuance of new licenses, authorizations and certifications. This risk and

uncertainty would affect the value of a sale to any other purchaser. For this reason, the benefit of the RVO is clear: it preserves the necessary approvals to conduct business.

41 Additionally, Mr. Carter (at para. 60) deposes that the Just Energy Entities are party to a myriad of hedging transactions. This includes hedge transactions with commodity suppliers to minimize commodity and volume risk, foreign exchange hedge transactions and hedges for renewal energy credits, many of which are fundamental to the Just Energy Entities' ability to effectively operate their business and non-transferrable. Moreover, any U.S. tax attributes resident in the Just Energy Entities would generally be unable to be utilized in the go-forward business where the Transaction structure has a traditional asset sale vesting order.

42 No stakeholder disputes Mr. Carter's evidence. More specifically, no stakeholder disputes the importance of maintaining the 89 current licenses, authorizations and certifications listed above. And, no stakeholder disputes the fact that under a traditional asset sale and approval and vesting order structure, a purchaser would have to apply to the various agencies and regulators for transfers of the aforementioned licenses, etc.

43 I agree with the Just Energy Entities, who are supported by the Monitor. Given the above, the RVO sought is the only way to achieve the preservation of the licenses, authorizations and certifications necessary for the ongoing business operations of the Just Energy Entities. This includes transferring the excluded assets into the two Residual Cos., one in Canada and one in the U.S. as is typically the case in reverse vesting orders.

44 The fact that the Just Energy Entities has been operating for approximately 19 months since the *CCAA* filing is critical. As noted by Penny J. in *Harte Gold Corp. (Re)* , at para. 72, time is not on the side of a debtor company facing financial challenges. I agree.

45 For all the reasons above, I am satisfied that the RVO is appropriate.

46 I now turn to the s. 36(3) factors.

The Transaction is fair and reasonable

The process leading to the proposed sale was reasonable

47 The Transaction was developed by the Just Energy Entities in consultation with the Monitor and its financial advisor, Mr. Mark Caiger, the Managing Director, Mergers & Acquisitions at BMO Nesbitt Burns Inc., as well as the Purchaser and other secured lenders. As noted, the SISP was approved by this court and thereafter conducted as per the provisions of the SISP Approval Order. As set out in Mr. Carter's affidavit, the SISP was undertaken in accordance with the SISP Approval Order in two stages.

48 The overview of the SISP structure is well described in Mr. Caiger's October 19, 2022 affidavit. Amongst other things, in the first stage, the Just Energy Entities and Mr. Caiger prepared a list of potential bidders, established a data room and published a press release announcing the SISP. Mr. Caiger contacted 41 potential bidders, non-disclosure agreements were negotiated and four NOIs were received.

49 The process then moved into the second stage. The Just Energy Entities prepared a form of transaction agreement that included a form of approval and RVO for completion by bidders as part of receiving submissions of a qualified bid. Three of the four second stage participants eventually indicated that they were not going to proceed. The remaining party did not submit a bid. It advised the Monitor that it saw no value beyond the stalking-horse bid.

50 The Transaction before this court is therefore the only going-concern Transaction available to the Just Energy Entities. I am satisfied in the circumstances that the market was thoroughly canvassed and, as noted, in addition to the SISP, the business of the Just Energy Entities has been marketed broadly and extensively for approximately three years. The U.S. Class Actions previously indicated that they may advance their own restructuring plan for consideration and voting by the Just Energy Entities

creditors. During this process, they were allowed full participation but ultimately did not file a NOI or further engage in the SISP process.

The Monitor has approved the process

51 As noted, the Monitor approved the process that lead to the Transaction. The Monitor concluded that the RVO is the only efficient means to ensure that all the licenses, authorizations and agreements remain in place. The Monitor is also of the view that any potential prejudice to the individual creditors is far outweighed by the overall benefit of the Transaction. Importantly, the Monitor also believes that the RVO represents the only viable alternative to implement the Transaction for the benefit of the Just Energy Entities' stakeholders.

The Transaction is more beneficial to the creditors than a sale or disposition in bankruptcy

52 The Monitor assisted the Just Energy Entities in preparing a liquidation analysis when the Just Energy Entities were pursuing approval of the Plan of Compromise and Arrangement. The analysis has been updated. The Monitor and the Just Energy Entities concluded, on the basis of the updated liquidation analysis, that not only would a liquidation produce no recovery for unsecured creditors, but it would result in a shortfall to secured creditors. This, of course, would be less beneficial than closing the Transaction.

The creditors were consulted

53 As noted in this endorsement, extensive consultation was undertaken both with the secured creditors, the U.S. Class Actions, the Omarali Class Action and the Mass Tort Claims. There is no suggestion in the record that any creditors were ignored or overlooked.

The effect of the Transaction on creditors and other interested parties

54 I am of the belief that the RVO is the only viable option for a going-concern exit from the *CCAA* proceedings.

55 No other offers have been obtained, not only during the SISP but also in the past three years when the Just Energy Entities' business was being broadly and extensively marketed. No other plan or proposal has been put forward.

56 The Transaction, in my view, provides a number of positive benefits, including:

- preserving the going-concern value of the business for the benefit of stakeholders;
- maintaining the Just Energy Entities' relationships with the majority of its commodity suppliers, vendors, trade creditors and other counter-parties;
- providing for the continued operation of the Just Energy Entities across Canada and the U.S.;
- continuing to supply uninterrupted energy to the Just Energies Entities approximately 950,000 customers;
- preserving the ongoing employment of most of the more than 1,000 employees of the Just Energy Entities;
- maintaining the aforementioned regulatory and licensing relationships across Canada and the U.S.;
- satisfying or assuming in full all secured claims and priority payables;
- preserving U.S. tax attributes and tax pools; and
- permitting the Just Energy Entities to exit these proceedings with a significantly deleveraged balance sheet and a U.S. $250 million new credit facility bringing an end to the *CCAA* proceedings aside from the limited matters related to the Residual Cos.

57 As discussed, the Transaction does not provide any recovery for unsecured creditors or shareholders. I accept the submissions of the Just Energy Entities, however, that this is not a result of the RVO structure. Rather, this reflects the fact that the Just Energy Entities' value, as tested through the market through the SISP and through previous marketing attempts over three years, is not high enough to generate value for the unsecured creditors and shareholders. This was also the situation in *Black Rock Metals Inc.* (see paras. 109, 120). I agree with the comments in *Black Rock Metals Inc.* wherein Chief Justice Paquette stated that the unsecured creditors and shareholders are therefore not in a worse position with the reverse vesting order than they would have been under a traditional asset sale. Either way, they have no economic interest because the purchase price would not generate any value for the unsecured creditors and shareholders.

58 There is no other viable option being presented to this court. Further, it bears noting that the shareholders' interests amount to claims in equity. As noted in *Harte Gold Corp. (Re)* , at para. 64, shareholders have no economic interest in an insolvent enterprise and therefore they are not entitled to a vote in any plan. The portion of the order requested relating to the cancellation of the existing shares is, therefore, justified in the circumstances.

59 The consideration to be received for the assets is fair and reasonable. The Just Energy Entities' business was extensively marketed both prior to and during the *CCAA*. There have been no offers, except that put forth by the Purchaser. Therefore, I accept that the consideration is fair and reasonable.

60 While it is unfortunate that there is no recovery for unsecured creditors or shareholders, this is a function of the market. In this regard, it is noteworthy that PIMCO holds over U.S. $250 million in unsecured debt that it will not recover.

61 There is also evidence above that the purchaser is paying more than the Just Energy Entities would be worth in a bankruptcy. Furthermore, the Monitor is satisfied that the consideration is fair in the circumstances.

Other considerations

62 Based on the foregoing analysis of the s. 36(3) provisions, I am also satisfied that the criteria set out above in *Soundair* have been met: there has been a sufficient effort to obtain the best price; the debtor has not acted improvidently; the interests of the parties have been properly considered; the process has been carried out with efficacy and integrity; and there is no unfairness in the circumstances.

63 The Transaction will provide for a fair and reasonable resolution of the Just Energy Entities' insolvency and obtain the best value for its assets. In sum, employment is preserved for most employees and energy will continued to be provided for approximately 950,000 customers.

Related relief

64 With respect to the shareholdings in the Just Energy Entities, it is reasonable to cancel the existing shares and issue new common shares to the Purchaser via JEUS. Similar approaches have been used in other reverse vesting order transactions: see *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)* , at paras. 59-64. Since the existing shareholders have no economic interest in the company, there is no entitlement to recovery unless all creditors are paid in full: *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209, 70 C.B.R. (5th) 1.

65 The *CBCA* provides that the share conditions of a *CBCA* corporation under *CCAA* protection can be changed by articles of reorganization. Section 191(1) of the CBCA recognizes that a "reorganization" includes a court order made under any Act of Parliament that affects the rights among the corporation, its shareholders and other creditors (see s. 191(1)(c)). This includes the *CCAA*: see *Canwest*, at para. 34; *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)* , at para. 61 (dealing with the equivalent provision of Ontario's Business Corporations Act, R.S.O. 1990, c.B.16. (*OBCA*)).

66 Pursuant to ss. 173, 176(1)(b) and191(2) of the *CBCA* , courts have accepted that, under a *CCAA* proceeding, they can approve the cancellation of outstanding shares as part of a corporate reorganization that gives effect to a *CCAA* restructuring

transaction and that the shareholders are not entitled to vote: see *Harte Gold Corp. (Re)*, at para. 62; *Black Rock Metals Inc.*, at para. 122; *Canwest*, at para. 34.

67 There are also a number of other orders requested in the RVO that I have approved. I will briefly deal with the noteworthy ones below, as follows:

• It is appropriate that the RVO provides that all former employees of the Just Energy Entities be transferred to the Canadian Residual Cos. This will assist these former employees in relation to their entitlements under the Wage Earner Protection Program Act,S.C. 2005, c.47, s.1. Similar relief was granted in *Quest University (Re)*, which also involved a reverse vesting order.

• The releases sought are proportional in scope and consistent with releases granted in other similar *CCAA* proceedings. I have analyzed the factors set out by Penny J. in *Harte Gold Corp. (Re)* , at paras. 81-86. As in that case, the releases are rationally connected to the purposes of the restructuring; the releasees contributed to the restructuring; the releases are not overly broad; the releases will enhance the certainty and finality of the Transaction; the releases benefit the Just Energy Entities, its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification; and all creditors on the service list were made aware of the releases sought and the nature and effect of the release.

• The specific relief in the RVO concerning the ongoing litigation with the Electric Reliability Council of Texas Inc. ("ERCOT") is fair and reasonable. The wording was negotiated with ERCOT and preserves the Just Energy Entities' and ERCOT's rights in the ongoing litigation between them as set out para. 11.

• Similarly, the paragraphs of the RVO concerning the Omarali Class Action are fair and reasonable and have been negotiated with the Omarali Class Action solicitors and are not prejudicial to the insurers noted therein.

• All remaining ancillary relief is fair and reasonable. I have simply touched upon the most significant ancillary relief above.

THE MONITOR'S ORDER

68 As outlined, I granted the Monitor'sOrder.

69 First, it is necessary that the Monitor carry on in order to implement the steps required with respect to the Residual Cos. in Canada and the U.S. and to implement the provisions of the RVO.

70 Second, the stay extension to January 31, 2023 is also necessary given the steps that must be undertaken.

71 I have reviewed the activities of the Monitor's reports and fees and they are fair and reasonable.

72 Last, I agree that a sealing order should be issued with respect to confidential Exhibit "F" of Mr. Caiger's affidavit. Exhibit "F" is comprised of the four NOIs received by the Just Energy Entities. The NOIs contain confidential, commercially sensitive information regarding the identities of the four participants and their respective corporate, operational and financial information disclosed in support of the requirement of each NOI. Additionally, the NOIs contain confidential and commercially sensitive information regarding the scope and subject matter of each proposed bid. Dissemination of this information at this time, would pose a legitimate risk to the commercial interests of the SISP participants and the Just Energy Entities and their stakeholders should the Transaction fail to close. Thus, the public's interest in maintaining the confidentiality of this commercially sensitive information creates an important commercial interest. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as recast in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38, has been met. The sealing order is being made on an interim basis pending further order of the court.

CLAIMS OF BP ENERGY COMPANY

73 At the request of the Just Energy Entities and the BP Energy Company, I will now turn to agreed-upon terms as between the Just Energy Entities and the BP Energy Company.

74 The Just Energy Entities and BP Energy Company and certain of its affiliates (collectively "BP") and the Just Energy Entities have reached an agreement, which is not opposed by any other stakeholders, that BP, being beneficiaries of the Priority Commodity/ISO Charge in these proceedings, are not opposing this motion on the basis that the New Intercreditor Agreement will be on terms consistent with those set forth in the term sheet included in Exhibit "I" to the Affidavit of Mr. Carter sworn August 4, 2022 (the "ICA Term Sheet").

75 To the extent that the terms of the New Intercreditor Agreement are inconsistent with the ICA Term Sheet or contain material changes to the current Intercreditor Agreement that are not specifically set forth in the ICA Term Sheet, BP is reserving its rights to return to this Court to (a) oppose the future release of the Priority Commodity/ISO Charge contemplated by the Reverse Vesting Order and (b) take such action as it reasonably deems necessary to assure its future extensions and credit and accommodations are terminated.

76 I have reviewed this agreement with counsel and find it to be fair and reasonable in the circumstances of the Transaction.

THE OPPOSING STAKEHOLDERS

77 As noted, two stakeholders raised objections to the orders sought by the Just Energy Entities. I will deal with each in turn.

Ganesh Yadav

78 Mr. Yadav is a shareholder.

79 Mr. Yadav did not file any affidavit evidence or any other evidence in a proper form. Rather, he filed what he described as a "motion record" in which he attached various documents relating to the Just Energy Entities' financial performances and outlined his objections.

80 Essentially, he submits that the Just Energy Entities have significant liquidity, far in excess of the stalking-horse bid and the calculations performed by the Just Energy Entities and the Monitor. He primarily submits that the Just Energy Entities have significant future equity in its hedges, that energy prices are increasing and that the hedges are placed at very attractive prices. To support this argument, he relies upon the Just Energy Entities' 2022 annual report describing the derivative instruments. Mr. Yadav stresses that there are significant cash flows and that the future value of the Just Energy Entities is very promising.

81 The difficulty with Mr. Yadav's submissions, however, is the fact that there is no evidentiary basis for these submissions other than a loose connection of documents that, in and of themselves, do not support his argument.

82 More importantly, the Just Energy Entities' business was marketed for over three years and was widely canvassed during the SISP. During this entire time period there has not been a single offer in excess of the stalking-horse offer. Further, Mr. Yadav's submissions concerning value run contrary to the Just Energy Entities and the Monitor's valuation of the company and are unsupported by any other stakeholder.

83 Based on the foregoing, there is no cogent evidence in the record to support Mr. Yadav's submissions, nor has he adduced proper evidence to this court by way of affidavit or expert's report.

84 As a shareholder, he has an equity claim for which there is no recovery in the Transaction.

Mohammad Jaafari

85 Mr. Jaafari also did not file any affidavit evidence at this motion. He, too, simply provided a number of documents. [2]

86 Mr. Jaafari is a former Director and Representative Director of Just Energy Japan Kabushiki Kaisha ("JEJKK"), a former subsidiary of Just Energy. JEJKK operated the Just Energy Entities' businesses in Japan.

87 Mr. Jaafari was terminated from his position in August 2018, allegedly for cause.

88 In November 2018, he commenced litigation in the Tokyo District Court against Just Energy and JEJKK.

89 In April 2020, the Just Energy Entities sold their Japanese business. Mr. Jaafari submitted a Proof of Claim in the *CCAA* proceeding that was disallowed by the Monitor.

90 Mr. Jaafari apparently has continued his litigation in Tokyo. As noted above, although there is no affidavit evidence, the documentation that he has filed with this court includes apparent endorsements by the Tokyo District Court which, if accurate, accept that Mr. Jaafari was an employee of Just Energy.

91 Mr. Jaafari submits that as part of the RVO, I should order that money be paid in trust until the litigation in Tokyo is resolved. As I understand it, he is seeking a payment of approximately CDN $2 million.

92 The Just Energy Entities submit that Mr. Jaafari's ongoing litigation is in violation of the Initial Order and that he was never an employee of Just Energy. Counsel also advises that they recently heard from their former Japanese counsel (although there is no evidence to support this) that Mr. Jaafari's action against Just Energy was dismissed.

93 In any event, the Just Energy Entities submit that, at best, Mr. Jaafari has an unsecured claim that is incapable of recovery since unsecured creditors are receiving no money as a result of the Transaction. Therefore, even if he is successful, there is no recovery.

94 The Monitor, in support of the Just Energy Entities' submissions, confirms that there is no recovery for Mr. Jaafari even if he is successful. The Monitor further submits that a payment into court or into some sort of trust would constitute a preference, which is inappropriate where other unsecured creditors are not receiving any money as a result of the Transaction.

95 Based on the incomplete record in front of me, there is no meaningful way to determine the status and legitimacy of Mr. Jaafari's claim for wrongful dismissal.

96 In any event, I accept the submissions of the Just Energy Entities, supported by the Monitor, that Mr. Jaafari's claim constitutes an unsecured claim for which there will be no recovery in the circumstances of this case.

97 As the Monitor points out, Just Energy no longer has any assets or operations in Japan and no longer owns JEJKK. The stay of proceedings does not extend to JEJKK, which is now owned by another corporation. The Monitor submits that Mr. Jaafari is free to pursue such claims in Japan without the involvement of the Just Energy Entities. To allow Mr. Jaafari's claim to continue against the Just Energy Entities in Japan would require the Just Energy Entities to incur expenses, perhaps make a payment into court or into trust and would deplete the Just Energy Entities' estate to the detriment of the other stakeholders with no foreseeable benefits to Mr. Jaafari.

98 I therefore accept the Monitor's submission that this court order that Mr. Jaafari's claim can be addressed by the Just Energy Entities, in consultation with the Monitor, in accordance with the terms of the Claims Procedure Order. I am specifically not making an order that any money be paid into court or into a trust account.

CONCLUSION

99 For the reasons above, the RVO and theMonitor's Order should be approved. A reverse vesting order is permitted pursuant to the above provisions of the *CCAA*. Given the nature of the Just Energy Entities' business, the RVO structure is necessary and appropriate to preserve the going-concern value of the business. The Transaction is the only viable transaction that has emerged in the 19 months since the *CCAA* filing. It is currently the only option for a going-concern exit from the *CCAA* proceedings.

The Transaction is the product of months of negotiations between the Just Energy Entities' key stakeholders as well as a robust court-approved SISP.

100 Overall, the Transaction provides tangible benefits to the Just Energy Entities and their stakeholders. The fact that the Transaction provides no recovery for the general unsecured creditors or shareholders is a function of the market, not the RVO structure.

DISPOSITION

101 For the reasons above, I grant both the RVO and the Monitor's Order.

Application granted.

Footnotes

1 Arrangement relatif à BlackRock Metals Inc., 2022 QCCS 2828, at para. 85, leave to appeal to QCCA refused, 2022 QCCA 1073.

2 Mr. Jaafari continued to improperly send documents directly to me, after I signed the two orders, which I have not considered in preparing these reasons.

TAB L

Clerk's Stamp

COURT FILE NUMBER	1501-05908
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH, in its capacity as Administrative Agent under that certain First Lien Term Loan Credit Agreement dated March 31, 2014
DEFENDANTS	SOUTHERN PACIFIC RESOURCE CORP., SOUTHERN PACIFIC ENERGY LTD., 1614789 ALBERTA LTD., 1717712 ALBERTA LTD. AND SOUTHERN PACIFIC RESOURCE PARTNERSHIP
DOCUMENT	**APPROVAL AND REVERSE VESTING ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCARTHY TÉTRAULT LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Walker W. MacLeod Tel: 403-260-3701 Fax: 403-260-3501 Email: wmacleod@mccarthy.ca

DATE ON WHICH ORDER WAS PRONOUNCED:	**May 13, 2022**
LOCATION OF HEARING OR TRIAL:	**Calgary, Alberta**
NAME OF MASTER/JUDGE WHO MADE THIS ORDER:	**Justice B.E.C. Romaine**

UPON the application (the "**Application**") of 2276736 Alberta Ltd. ("**227 AB**"), in respect of Southern Pacific Resource Corp. (the "**Borrower**"), Southern Pacific Energy Ltd. ("**Energy**"), 1614789 Alberta Ltd. ("**161 AB**"), 1717712 Alberta Ltd. ("**171 AB**"), and Southern Pacific Resource Partnership ("**Partnership**", Partnership, 171 AB, 161 AB, and Energy are collectively referred to as, the "**Guarantors**" the Guarantors and the Borrower are collectively referred to as, the "**Debtors**") for an order approving the sale transaction (the "**Transaction**") contemplated by a subscription agreement attached hereto (the "**Agreement**") between the Debtors, Spark Capital Corporation, Sandy Edmonstone, Nicholas Lau, Bradley G. Squibb Professional Corporation, and Torey Celinskis (collectively, the "**Purchasers**"), and 2436544 Alberta Ltd. (the "**ResidualCo**"), and attached as Schedule "**B**" hereto, including the reorganization transactions contemplated in Schedule "B" to the Agreement (the "**Reorganization**");

AND UPON HAVING READ the Receivership Order dated May 13, 2022 (the "**Receivership Order**"), the Pre-Filing Report of PricewaterhouseCoopers Inc., LIT (the

"**Receiver**"), in its capacity as the court-appointed receiver and manager of the undertakings, property and assets of the Debtors in the within proceedings (the "**Receivership Proceedings**"), dated May 6, 2022 (the "**Pre-Filing Report**"), the Affidavit of Torey Celinskis, sworn on May 4, 2022 (the "**Celinskis Affidavit**"), and the Affidavit of Service of Katie Doran, sworn on May 5, 2022 and the Supplemental Affidavit of Service of Katie Doran, sworn on May 11, 2022 (collectively, the "**Service Affidavits**"), each filed; **AND UPON** hearing counsel for 227 AB, counsel for the Receiver, and for any other parties who may be present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the Application, the Pre-Filing Report, and the Celinskis Affidavit is abridged, if necessary, the Application is properly returnable today, service of the Application, the Pre-Filing Report, and the Celinskis Affidavit on the service list (the "**Service List**") attached as Exhibit "A" to the Service Affidavits, in the manner described in the Service Affidavits, is good and sufficient, and no other persons other than those listed on the Service List, are entitled to service of the Application, the Pre-Filing Report, or the Celinskis Affidavit.

CAPITALIZED TERMS

2. Capitalized terms used herein but not otherwise defined in this Order shall have the meaning given to such terms in the Agreement.

APPROVAL OF THE TRANSACTION

3. The Agreement and the Transaction (including the Reorganization) are hereby approved, and the execution of the Agreement by the Receiver, for and on behalf of the Debtors, is hereby authorized and approved, with such amendments to the Agreement as the Debtors, the Purchasers and the ResidualCo may agree to with the consent of the Receiver. The performance by the Debtors of its obligations under the Agreement is hereby authorized and approved and the Receiver and the Debtors are hereby authorized to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction, including, without limitation, the Reorganization.

REORGANIZATION

4. The Debtors and ResidualCo are authorized to undertake and complete the Reorganization contemplated in Schedule "B" to the Agreement and, without limiting the generality of the foregoing, subject to the terms of the Agreement, upon the delivery of a Receiver's certificate substantially in the form attached as Schedule "**A**" hereto (the "**Receiver's Certificate**") to the Borrower and the Purchasers, the following shall be deemed to occur in accordance with the timing, sequence, terms and conditions set forth in the Agreement:

   (a) All of the Debtors right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in the name of ResidualCo and all Claims and Encumbrances attached to the Excluded Assets shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer;

   (b) Concurrently with step (a) above, all Excluded Liabilities shall be transferred to, assumed by and vest absolutely and exclusively in the name of ResidualCo, and the Excluded Liabilities shall be novated and become obligations of ResidualCo and not obligations of the Debtors;

   (c) Concurrently with steps (a) and (b) above, the Debtors shall be forever released and discharged from such all Excluded Liabilities, and all Encumbrances securing Excluded Liabilities shall be forever released and discharged in respect of the Debtors and the Retained Assets;

   (d) The Borrower shall: (i) create the Class A Common Shares, (ii) add a right to each of the issued and outstanding Common Shares that allows for such shares to be redeemed by the Borrower for the Common Share Redemption Amount, and (iii) issue the Purchased Shares to the Purchasers in accordance with Section 2.1 and Schedule "C" of the Agreement, free and clear of any Claims or Encumbrances, in consideration of the receipt of the ResidualCo Cash and the Subscription Cash from the Purchasers;

   (e) Immediately after step (d) above, the Borrower shall thereafter exercise, and be deemed to exercise, such right of redemption such that each of the Common

Shares shall be have been fully, completely and irrevocably redeemed by the Borrower for the Common Share Redemption Amount; and

(f) Immediately after step (e) above, any classes or series of shares in the Borrower that have no shares issued or outstanding in that particular class or series shall be cancelled;

5. Following the completion of the above steps the ResidualCo Cash shall be released by the Receiver for the benefit of ResidualCo, the Purchasers shall deliver the Subscription Cash to the Borrower and the Purchasers shall be the sole legal and beneficial shareholders of the Borrower.

6. The Receiver, the Borrower and ResidualCo, in completing the transactions contemplated in the Reorganization, are authorized:

(a) to execute and deliver any documents and assurances governing or giving effect to the Reorganization as the Receiver, the Borrower and/or ResidualCo, in their discretion, may deem to be reasonably necessary or advisable to conclude the Reorganization, including the execution of all such ancillary documents as may be contemplated in the Agreement or necessary or desirable for the completion and implementation of the Reorganization, and all such ancillary documents are hereby ratified, approved and confirmed; and

(b) to take such steps as are, in the opinion of the Receiver, the Borrower and/or ResidualCo, necessary or incidental to the implementation of the Reorganization.

7. The Receiver, the Borrower and ResidualCo are hereby permitted to execute and file articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Reorganization, including, without limitation, the issuance of the Purchased Shares, and such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective notwithstanding any requirement under federal or provincial law to obtain director or shareholder approval with respect to such actions or to deliver any statutory declarations that may otherwise be required under corporate law to effect the Reorganization.

8. This Order shall constitute the only authorization required by the Receiver, the Borrower or ResidualCo to proceed with the Transaction, including, without limitation, the Reorganization and, except as specifically provided in the Agreement, no director or shareholder approval shall be required and no authorization, approval or other action by or notice to or filing with any governmental authority or regulatory body exercising jurisdiction in respect of the Borrower is required for the due execution, delivery and performance by the Receiver, the Borrower and by ResidualCo of the Agreement and the completion of the Transaction.

VESTING OF ASSETS AND LIABILITIES

9. Subject to the terms of the Agreement, upon the delivery of the Receiver's Certificate to the Borrower and the Purchasers, the following shall be deemed to occur in accordance with the timing, sequence, terms and conditions set forth in the Agreement:

   (a) all of the Debtors' right, title and interest in and to the Excluded Assets (including, for certainty, the right to receive the ResidualCo Cash) shall vest absolutely and exclusively in the name of ResidualCo and all Claims and Encumbrances attached to the Excluded Assets shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer;

   (b) all Excluded Liabilities shall be transferred to, assumed by and vest absolutely and exclusively in the name of ResidualCo, and the Excluded Liabilities shall be novated and become obligations of ResidualCo and not obligations of the Debtors, and the Debtors shall be forever released and discharged from such Excluded Liabilities, and all Encumbrances securing the Excluded Liabilities shall be forever released and discharged in respect of the Debtors, provided that nothing in this Order shall be deemed to cancel any Encumbrances expressly permitted by the Agreement as against the Debtors;

   (c) the commencement or prosecution, whether directly, indirectly, derivatively or otherwise of any demands, claims, actions, counterclaims, suits, judgements, or other remedy or recovery with respect to any indebtedness, liability, obligation or cause of action against the Debtors in respect of the Excluded Liabilities shall be permanently enjoined;

(d) the nature of the Retained Liabilities retained by the Debtors, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Agreement or the steps and actions taken in accordance with the terms thereof;

(e) the nature and priority of the Excluded Liabilities assumed by ResidualCo, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to and assumption by ResidualCo; and

(f) any Person that, prior to the Closing Date, had a valid Claim against the Debtors in respect of the Excluded Liabilities shall no longer have such Claim against the Debtors, but will have an equivalent Claim against ResidualCo (including, without limitation, in respect of the net proceeds of the Transaction received by ResidualCo pursuant to the Agreement) in respect of the Excluded Liabilities from and after the Closing Date in its place and stead, and, nothing in this Order limits, lessens or extinguishes the Excluded Liabilities or the Claim of any person as against ResidualCo.

10. Upon delivery of the Receiver's Certificate to the Borrower and the Purchasers, and upon filing of a certified copy of this Order, together with any applicable registration fees, all governmental authorities (collectively, "**Governmental Authorities**") are hereby authorized, requested and directed to accept delivery of such Receiver's Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required in order to give effect to the terms of this Order and the Agreement.

11. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order and the Agreement. Presentment of this Order and the Receiver's Certificate shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations such that the Retained Assets of the Debtors shall be free from all Encumbrances.

12. The Purchasers shall be authorized to take all steps as may be necessary to effect the discharge of the Encumbrances as against the Retained Assets of the Debtors.

COURT PROCEEDINGS

13. Upon the filing of the Receiver's Certificate:

(a) ResidualCo shall be added as a debtor in these Receivership Proceedings and any reference in any Order of this Court in respect of these Receivership Proceedings to a "Debtor" shall refer to ResidualCo, *mutatis mutandis*;

(b) The Debtors shall be deemed to cease to be Debtors in these Receivership Proceedings and the proceedings occurring under the *Companies' Creditors Arrangement Act* (Canada), Court File No. 1501-00580 (the "**CCAA Proceedings**"), and shall be deemed to be released from the purview of any Order of this Court granted in respect of these Receivership Proceedings or the CCAA Proceedings, save an except for this Order, the terms of which as they relate to the Debtors shall continue to apply in all respects to the Debtors; and

(c) the title of these Receivership Proceedings is hereby, and shall be deemed to be, amended as follows:

DEFENDANT 2436544 ALBERTA LTD.

and any document filed thereafter in these Receivership Proceedings (other than the Receiver's Certificate) shall be filed using such revised title of proceedings.

THE RECEIVER

14. Without in any way limiting the Receiver's powers set out in the Receivership Order or any other Order of this Court in these Receivership Proceedings or applicable law, the Receiver is hereby authorized to undertake and perform such activities and obligations as are contemplated to be undertaken or performed by the Receiver pursuant to this Order and the Agreement or any ancillary document related thereto, and shall incur no liability in connection therewith, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall affect, vary, derogate from, limit or otherwise amend any of the protections in favour of the Receiver at law, the Receivership Order or any other Order granted in these Receivership Proceedings.

15. The Receiver is directed to file with the Court a copy of the Receiver's Certificate forthwith after delivery thereof to the Debtors and the Purchasers.

16. The Receiver may rely on written notice from the Debtors and the Purchasers or their respective counsel regarding the satisfaction of the Purchase Price and the fulfillment of the conditions to closing under the Agreement and shall incur no liability with respect to the delivery of the Receiver's Certificate.

17. The Receiver, in addition to its prescribed rights and obligations under the Receivership Order, is authorized, entitled and empowered to assign or cause to be assigned, at any time after the Closing Date, ResidualCo into bankruptcy and the Receiver shall be entitled but not obligated to act as trustee in bankruptcy thereof.

MISCELLANEOUS

18. The Debtors shall not be obligated to make any payments or other distributions to Existing Holders in respect of the redemption of the Common Shares in circumstances where the total amount payable to any Existing Holder is equal to or less than the sum of two ($2.00) dollars.

19. Notwithstanding:

(a) the pendency of these Receivership Proceedings and any declaration of insolvency made herein;

(b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), in respect of ResidualCo, and any bankruptcy order issued pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of ResidualCo; and

(d) the provisions of any federal or provincial statute,

the execution of the Agreement, the implementation of the Reorganization (including the transfer of the Excluded Assets and the Excluded Liabilities to ResidualCo and the issuance of the Purchased Shares to the Purchasers) and the implementation of the Transaction shall be binding on any trustee in bankruptcy that may be appointed in respect of ResidualCo, and shall not be void or voidable by creditors of ResidualCo, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent

preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

20. The Receiver, the Debtors, ResidualCo and the Purchasers shall each be at liberty to apply for further advice, assistance and direction as may be necessary or desirable in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.

21. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

22. Service of this Order shall be deemed good and sufficient by:

(a) serving the same on:

(i) the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and,

(b) posting a copy of this Order on the Receiver's website at https://www.pwc.com/ca/en/services/insolvency-assignments/stp.html,

and service on any other person is hereby dispensed with.

23. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Justice of the Court of Queen's Bench of Alberta

Clerk's Stamp

SCHEDULE "A"
RECEIVER'S CERTIFICATE

COURT FILE NUMBER	1501-05908
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH, in its capacity as Administrative Agent under that certain First Lien Term Loan Credit Agreement dated March 31, 2014
DEFENDANTS	SOUTHERN PACIFIC RESOURCE CORP., SOUTHERN PACIFIC ENERGY LTD., 1614789 ALBERTA LTD., 1717712 ALBERTA LTD. AND SOUTHERN PACIFIC RESOURCE PARTNERSHIP
DOCUMENT	**RECEIVER'S CERTIFICATE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCARTHY TÉTRAULT LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Walker W. MacLeod Tel: 403-260-3701 Fax: 403-260-3501 Email: wmacleod@mccarthy.ca

RECITALS

A. Pursuant to an Order of the Honourable Justice B.E.C. Romaine of the Court of Queen's Bench of Alberta, Judicial District of Calgary (the "**Court**") dated May 13, 2022, PricewaterhouseCoopers Inc., LIT, was appointed as the receiver and manager (the "**Receiver**") of all undertakings, property, and assets of Southern Pacific Resource Corp., Southern Pacific Energy Ltd., 1614789 Alberta Ltd., 1717712 Alberta Ltd. and Southern Pacific Resource Partnership (the "**Debtors**") in these proceedings.

B. Pursuant to an Order of the Court dated May 13, 2022, the Court, *inter alia*, approved the agreement (the "**Agreement**") among the Debtors, Spark Capital Corporation, Sandy Edmonstone, Nicholas Lau, Bradley G. Squibb Professional Corporation, and Torey Celinskis (collectively, the "**Purchasers**"), and 2436544 Alberta Ltd. (the "**ResidualCo**") and the transactions contemplated thereby.

C. Unless otherwise indicated herein, capitalized terms have the meanings set out in the Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchasers have satisfied the Purchase Price in accordance with the Agreement;

2. The conditions to Closing as set out in the Agreement have been satisfied or waived by the Debtors and the Purchasers;

3. The Transaction has been completed to the satisfaction of the Receiver; and

4. This Certificate was delivered by the Receiver at _____ **[a.m./p.m.]** on _____, 2022.

PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as Receiver of SOUTHERN PACIFIC RESOURCE CORP., SOUTHERN PACIFIC ENERGY LTD., 1614789 ALBERTA LTD., 1717712 ALBERTA LTD. AND SOUTHERN PACIFIC RESOURCE PARTNERSHIP and not in its personal capacity

Per: _____
Name:
Title:

SCHEDULE "B"
THE AGREEMENT

[see attached]

SUBSCRIPTION AGREEMENT

AMONG

SOUTHERN PACIFIC RESOURCE CORP.

– and –

SPARK CAPITAL CORPORATION

– and –

SANDY EDMONSTONE

– and –

NICHOLAS LAU

– and –

BRADLEY G. SQUIBB PROFESSIONAL CORPORATION

– and –

TOREY CELINSKIS

– and –

2436544 ALBERTA LTD.

MADE AS OF MAY 13, 2022

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(continued)

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THIS SUBSCRIPTION AGREEMENT is made as of May 13, 2022,

BETWEEN:

SOUTHERN PACIFIC RESOURCE CORP., a corporation governed by the laws of the Province of Alberta

("**Southern Pacific**")

- and -

SPARK CAPITAL CORPORATION, a corporation governed by the laws of Alberta, and
SANDY EDMONSTONE, an individual resident in Calgary, Alberta, and
NICHOLAS LAU, an individual resident in Calgary, Alberta, and
BRADLEY G. SQUIBB PROFESSIONAL CORPORATION, a corporation governed by the laws of Alberta, and
TOREY CELINSKIS , an individual resident in Calgary, Alberta,

(collectively, the "**Purchasers**" and each a "**Purchaser**")

- and –

2436544 ALBERTA LTD., a corporation governed by the laws of the Province of Alberta

("**ResidualCo**")

RECITALS:

A. On May 13, 2022, PricewaterhouseCoopers Inc. (the "**Receiver**") was appointed as receiver and manager of Southern Pacific, Southern Pacific Energy Ltd., 1614789 Alberta Ltd., 1717712 Alberta Ltd. and Southern Pacific Resource Partnership (collectively, the "**Debtors**"), by way of an order (the "**Receivership Order**") granted by the Court of the Queen's Bench of Alberta (the "**Court**").

B. In order to complete the transactions hereunder, Receiver has, pursuant to the terms of the Receivership Order, incorporated ResidualCo for the purposes of acting as the residual entity under the Approval and Vesting Order (as defined herein).

C. Pursuant to an order for reorganization to be completed in accordance with section 192 of the *Business Corporations Act* (Alberta) Southern Pacific has agreed to issue to the Purchasers, and the Purchasers have agreed to subscribe for and purchase from Southern Pacific, the Purchased Shares, upon the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the covenants and agreements herein contained and for other good and valuable consideration, the receipt and sufficiency or which are hereby acknowledged, the Parties (as defined below) agree as follows:

ARTICLE 1
DEFINITIONS AND PRINCIPLES OF INTERPRETATION

1.1 Definitions

Whenever used in this Subscription Agreement the following words and terms shall have the meanings set out below:

"**2011 Convertible Debentures**" means the subordinate unsecured convertible debentures issued on January 7, 2011, with a face value of $172,500,000.00;

"**2020 Promissory Note**" means the Promissory Note dated June 18, 2020 between Viceroy Canadian Resources Corp. as the borrower and the Debtor as the holder for the principal amount of CAD $1,326,000.00;

"**Accounts Receivable**" means accounts receivable, bills receivable, trade accounts, holdbacks, retention, book debts, insurance claims and other amounts due or accruing to Southern Pacific that arose or relate to the period prior to the Closing Time and includes, for greater certainty, any and all Tax Refunds, and together with any unpaid interest accrued on such items and any security or collateral for such items, including recoverable deposits;

"**AER**" means the Alberta Energy Regulator;

"**AER Licenses**" means any licenses, permits, certificates or other authorizations or directions issued by the AER to the Debtors;

"**Affiliate**" has the meaning given in the *Canada Business Corporations Act*;

"**Agreement Date**" means the date of this Subscription Agreement as set forth on the first page of this Subscription Agreement;

"**Approval and Vesting Order**" means an Order of the Court, in substantially the form attached as Schedule "A" hereto, or in such other form as may be agreed to by the Parties in writing, that, among other things, approves this Subscription Agreement and the Transactions contemplated by this Subscription Agreement (including the Reorganization) and, upon the delivery of a copy of the Receiver's Certificate to each of Southern Pacific and the Purchasers, among other things, (a) transfers all of the Debtors' right, title and interest in and to the Excluded Assets to ResidualCo; (b) transfers and novates all Excluded Liabilities to ResidualCo; (c) releases and discharges the Debtors from all Excluded Liabilities; and (d) releases the Debtors from the purview of the Receivership Proceedings and adds ResidualCo as the new and sole debtor in the Receivership Proceedings;

"**Books and Records**" means all books and records of the Debtors, including minute books, annual returns filed with corporate registry, books of account, ledgers, general, financial and accounting records, Tax Returns and other records in the possession and control of the Debtors as of the Agreement Date, but in each case excludes all books and records in respect of the Excluded Assets and excludes any e-mail correspondence of

Southern Pacific (including any of its present and former, directors, officers, employees, contractors and other representatives) prior to the Closing Time;

"**Books and Records Instrument Appointment**" means the instrument appointment of the Receiver by 2276736 Alberta Ltd., in its capacity as successor to the rights, powers, and duties of Credit Suisse AG, Cayman Islands Branch under the First Lien Term Loan Credit Agreement dated as of March 31, 2014, of all of the books and records of Southern Pacific;

"**Business**" means the business carried on by the Debtors of exploration, development and production of hydrocarbons in Western Canada;

"**Business Day**" means any day, other than a Saturday or Sunday or any day on which banks are generally not open for business in the City of Calgary, Alberta;

"**Cash**" means all cash, bank balances, funds, deposits or monies owned or held by the Debtors or any other Person (including any bank, depository or the Receiver) on behalf of the Debtors at the Closing Time (including the Promissory Note Administration Amount) and all cash equivalents, securities and investments of the Debtors at the Closing Time, but excluding the Process Costs Cash and any amounts received by the Receiver as such;

"**CCAA Proceedings**" means the proceedings commenced on January 21, 2015 by the Debtors pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**") with an Alberta Court of Queen's Bench file number of 1501-00570;

"**Claims**" means all indebtedness, liabilities and, obligations, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise;

"**Class A Common Shares**" has the meaning set out in Section 2.1;

"**Closing**" means the completion of the Transactions pursuant to this Subscription Agreement;

"**Closing Date**" means the date on which the Closing occurs, which date shall be no later than two (2) Business Days from the date on which all conditions set out in Article 5 (other than those conditions that by their nature can only be satisfied on the Closing Date) have been satisfied or waived or such other date as may be agreed to in writing by the Parties;

"**Closing Time**" means 9:00 a.m. Calgary time on the Closing Date or such other time on such date as the Parties may agree in writing;

"**Common Shares**" means the common shares in the capital of Southern Pacific issued and outstanding at the applicable time;

"**Common Share Redemption Amount**" means $0.0000000001 per Common Share;

"**Court**" has the meaning set out in Recital A;

"**Discharge Order**" means an Order of the Court, in substantially the form attached as Schedule "E" hereto;

"**Encumbrances**" means all security interests (whether contractual, statutory, or otherwise), hypothecs, pledges, mortgages, liens, trusts or deemed trusts (whether contractual, statutory or otherwise), reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgements, executions, levies, taxes, writs of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by any Order of this Court or any other Order of this Court, including the Receiver's Charge; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* or the *Land Titles Act* of Alberta or any other real or personal property registry system in any other Canadian or foreign jurisdiction;

"**Equity Interest**" includes (i) any shares, interests, participations or other equivalents (however designated) of capital stock or share capital ; (ii) any phantom stock, phantom stock rights, stock appreciation rights or stock-based performance securities ; (iii) any warrants, options, convertible, exchangeable or exercisable securities, subscriptions, rights (including any pre-emptive or similar rights), calls or other rights to purchase or acquire any of the foregoing; and (iv) any interest that constitutes an "equity interest" as such term is defined in the *Bankruptcy and Insolvency Act* (Canada");

"**Excluded Assets**" means the ResidualCo Cash and the interest of the Debtors in any assets that are added to the Excluded Assets pursuant to Section 2.4, but does not include the Retained Assets;

"**Excluded Liabilities**" means all Liabilities of the Debtors other than the Retained Liabilities and, for the avoidance of doubt, includes the following Liabilities:

(a) Liabilities owing to employees or former employees;

(b) Liabilities for the Senior Secured Second Lien Notes;

(c) Liabilities for the 2011 Convertible Debentures;

(d) Liabilities in relation to or arising from any secured or unsecured trade payables;

(e) Liabilities arising pursuant to any order granted by the Court in the Receivership Proceedings or the CCAA Proceedings;

(f) Liabilities in relation to the environment whether arising under contract, applicable Laws or otherwise; and

(g) Liabilities for any equity claims;

"**Existing Holders**" means the holders of Equity Interests in Southern Pacific immediately prior to the Closing Time;

"**First Lien Agent**" means 2276736 Alberta Ltd., in its capacity as successor to the rights, powers, and duties of Credit Suisse AG, Cayman Islands Branch under the First Lien Term Loan Credit Agreement dated as of March 31, 2014;

"**Goodwill**" means the goodwill of the Debtors relating to the Business, and information and documents relevant thereto, including telephone and facsimile numbers, email addresses, internet addresses and domain names used in connection with the Business, to the extent such Goodwill is in the possession or under the control of the Debtors, and subject to any cure costs that may be payable in order to reactivate such goodwill;

"**Governmental Authority**" means any government, regulatory authority, governmental department, agency, agent, commission, bureau, official, minister, Crown corporation, court, body, board, tribunal or dispute settlement panel or other law or regulation-making organization or entity: (a) having or purporting to have jurisdiction on behalf of any nation, province, territory or state or any other geographic or political subdivision of any of them; or (b) exercising, or entitled to or purporting to exercise, any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power;

"**Information Technology**" means the computer hard drives, and any other computer and information technology equipment and systems owned, used or held by the Debtors, to the extent such items are in the possession or under the control of the Debtors;

"**Intellectual Property**" means all of the Debtors' right, title and interest (through ownership, licensing or otherwise) in and to (a) trademarks, trade names, business names, brand names, services marks, copyrights, trade secrets, patents, formulas, processes, know-how, technology, and any other intellectual property and related proprietary rights, interests and protections, and related goodwill, and (b) any applications or registrations of the foregoing or analogous rights therefor, in each case whether registered or not;

"**Laws**" means, with respect to any Person, property, transaction, event or other matter; all laws, statutes, by-laws, rules, regulations, treaties, Orders, ordinances or judgments, guidelines, directives or other requirements having the force of law, whether federal, provincial, state or municipal, relating or applicable to that Person, property, transaction, event or other matter;

"**Liabilities**" means any and all present and future Claims including, without limitation, Claims for contribution or indemnity, environmental liabilities, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, contract, agreement, dealing, undertaking or otherwise;

"**Non-Capital Losses**" means the aggregate non-capital losses for the purposes of paragraph 111(1)(a) of the Tax Act of Southern Pacific which arose from carrying on the Business prior to the Closing Time;

"**Notice**" has the meaning set out in Section 7.3;

"**Orders**" means orders, injunctions, judgments, administrative complaints, decrees, rulings, awards, assessments, directions, instructions, penalties or sanctions issued, filed or imposed by any Governmental Authority or arbitrator and includes the Receivership Order and any other orders granted in the Receivership Proceedings;

"**Outside Date**" has the meaning set out in Section 5.3(e);

"**Parties**" means, collectively, Southern Pacific, ResidualCo and the Purchasers, and "**Party**" means any one of them;

"**Person**" means any individual, sole proprietorship, partnership, firm, entity, unincorporated association, unincorporated syndicate, unincorporated organization, trust, body corporate, corporation, Governmental Authority, and where the context requires, any of the foregoing when they are acting as trustee, executor, administrator or other legal representative;

"**Purchase Price**" has the meaning set out in Section 2.2;

"**Purchased Shares**" has the meaning set out in Section 2.1;

"**Purchaser**" and "**Purchasers**" have the meaning set out in preamble to this Subscription Agreement;

"**Process Costs Cash**" means all amounts paid to the Receiver pursuant to the Books and Records Instrument appointment and utilized to fund the reasonable and documented professional fees and expenses of the Receiver and its counsel (and other professionals that may be required by the Receiver and its counsel) in analyzing, negotiating and seeking Court approval of the proposed Reorganization, administering the estate of ResidualCo and obtaining the Receiver's discharge in respect of ResidualCo;

"**Promissory Note Administration Amount**" means the amount held by the Receiver for professional fees or disbursements incurred by the Receiver for the purpose of administering the 2020 Promissory Note, in the amount of approximately $42,000;

"**Receiver**" has the meaning set out in Recital A;

"**Receiver's Certificate**" has the meaning set out in Section 4.3;

"**Receiver's Charge**" means any priority charges granted by the Court in the Receivership Proceedings, that will rank in priority to the Senior Lender to secure the professional fees and expenses associated of the Receiver and counsel to the Receiver to a maximum amount of $10,000;

"**Receivership Proceedings**" means the proceedings commenced by the First Lien Agent pursuant to section 13(2) of the *Judicature Act*, RSA 2000, c J-2, section 99(a) of the *Business Corporations Act*, R.S.A. 2000, c. B-9, and section 65(7) of the *Personal Property Security Act*, R.S.A. 2000, c. P-7;

"**Receivership Order**" means an Order of the Court, in substantially the form attached as Schedule "D" hereto, granted in the Receivership Proceedings appointing PricewaterhouseCoopers Inc. as the receiver of the Debtor and the Subsidiaries;

"**ResidualCo**" has the meaning set out in preamble to this Subscription Agreement;

"**ResidualCo Cash**" means the sum of ten ($10) dollars;

"**Reorganization**" means the reorganization transactions contemplated in Schedule "B" hereto;

"**Retained Assets**" means all of the assets, properties, undertakings and rights of the Debtors other than the Excluded Assets and, for the avoidance of doubt, includes the following assets, properties, undertakings and rights of the Debtors:

(a) the 2020 Promissory Note;

(b) the Books and Records;

(c) the Cash, subject to a set-off for the fees or disbursements charged by the Receiver and its legal counsel in an amount equal to the amount of the Receiver's Charge

(d) the Accounts Receivable;

(e) all insurance policies;

(f) the Goodwill;

(g) the Tradename;

(h) the Intellectual Property;

(i) the Information Technology;

(j) the Tax Returns;

(k) the Non-Capital Losses;

(l) the Subscription Cash, without any deduction, set-off or netting on account of fees or disbursements charged by the Receiver or its legal counsel;

(m) the Tax Attributes;

(n) the AER Licenses;

(o) Southern Pacific's direct and indirect equity and partnership interest in the Subsidiaries; and

(p) all indebtedness, liabilities and obligations owing by any Person to the Debtors;

"**Retained Liabilities**" means:

(a) all Liabilities owing by the Debtors pursuant to the $136,200,000 First Lien Term Loan Credit Agreement among Southern Pacific, as borrower, the several lenders from time to time party thereto, as lenders, Credit Suisse Securities (USA) LLC as lead arranger and lead bookrunner and Credit Suisse AG, Cayman Islands Branch, as Administrative Agent, dated as of March 31, 2014, as subsequently amended, modified, supplemented or restated from time to time; and

(b) all Liabilities owing by the Debtors to the AER that relate to the AER Licenses;

"**Senior Secured Second Lien Notes**" means the notes issued by the Debtor on January 25th, 2013, in the amount of $260,000,000.00;

"**Subscription Agreement**" means this Subscription Agreement, including all schedules, and all amendments or restatements, as permitted pursuant to the terms hereof, and references to "**Article**" or "**Section**" mean the specified Article or Section of this Subscription Agreement;

"**Subscription Cash**" has the meaning set out in Section 2.1;

"**Subsidiaries**" means Southern Pacific Energy Ltd., 1614789 Alberta Ltd., 1717712 Alberta Ltd. and Southern Pacific Resource Partnership;

"**Tax Act**" means the *Income Tax Act* (Canada), as amended from time to time;

"**Tax Attributes**" means the cumulative Canadian exploration expense, cumulative Canadian development expense, cumulative Canadian oil and gas property expense and cumulative foreign resource expense of the Debtors;

"**Tax Refunds**" means all payments, credits or refunds (including payments and refunds in respect of Taxes) to which is the Debtors are entitled that arose or relate to the period prior to the Closing Time, including (i) any refund of goods and services taxes or harmonized sales taxes, (ii) any refund of federal or provincial income taxes, and (iii) any refund of premiums or payments relating to a workers' compensation fund or program of any province, but for greater certainty shall not include any payment or refund received by the Debtors following the Closing Time arising from the use or deduction of the Non-Capital Losses or Tax Attributes;

"**Tax Returns**" means all returns, reports, declarations, elections, notices, filings, forms, statements and other documents in respect of Taxes (whether in tangible, electronic or other form) and including any amendments, schedules, attachments, supplements, appendices and exhibits thereto, made, prepared or filed by the Debtors;

"**Taxes**" means taxes, duties, fees, premiums, assessments, imposts, levies and other similar charges imposed by any Governmental Authority under Law, including all interest, penalties, fines, additions to tax or other additional amounts imposed by any Governmental Authority in respect thereof, and including those levied on, or measured by, or referred to as, income, gross receipts, profits, capital, transfer, land transfer, sales, goods and services, harmonized sales, use, value-added, excise, stamp, withholding, business, franchising, property, development, occupancy, employer health, payroll, employment, health, social services, education and social security taxes, all surtaxes, all customs duties and import and export taxes, countervail and anti-dumping, and all employment insurance, health insurance and governmental pension plan premiums or contributions;

"**Tradename**" means the Debtors' rights to use the name "Southern Pacific Resource Corp." and any variations thereof;

"**Transactions**" means the issuance by Southern Pacific, and the subscription for and purchase by the Purchasers of, the Purchased Shares and all matters related or ancillary thereto contemplated by or in the manner provided for in this Subscription Agreement or the Approval and Vesting Order, including the Reorganization.

1.2 Certain Rules of Interpretation

In this Subscription Agreement:

(a) **Currency** – Unless otherwise specified, all references to monetary amounts are to lawful currency of Canada.

(b) **Headings** – Headings of Articles and Sections are inserted for convenience of reference only and do not affect the construction or interpretation of this Subscription Agreement.

(c) **Including** – Where the word "including" or "includes" is used in this Subscription Agreement, it means "including (or includes) without limitation".

(d) **No Strict Construction** – The language used in this Subscription Agreement is the language chosen by the Parties to express their mutual intent, and no rule of strict construction shall be applied against any Party.

(e) **Number and Gender** – Unless the context otherwise requires, words importing the singular include the plural and vice versa and words importing gender include all genders.

(f) **Statutory references** – A reference to a statute includes all regulations and rules made pursuant to such statute and, unless otherwise specified, the provisions of any statute or regulation which amends, supplements or supersedes any such statute or any such regulation.

(g) **Time** – Time is of the essence in the performance of the Parties' respective obligations.

(h) **Time Periods** – Unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next Business Day following if the last day of the period is not a Business Day.

1.3 Entire Agreement

This Subscription Agreement and the agreements and other documents required to be delivered pursuant to this Subscription Agreement, constitute the entire agreement between the Parties and set out all the covenants, promises, warranties, representations, conditions and agreements between the Parties in connection with the subject matter of this Subscription Agreement and supersede all prior agreements, understandings, negotiations and discussions, whether oral or written, pre-contractual or otherwise with respect to the subject matter of this Subscription Agreement. There are no covenants, promises, warranties, representations, conditions, understandings or other agreements, whether oral or written, pre-contractual or otherwise, express, implied or collateral, whether statutory or otherwise, between the Parties in connection with the subject matter of this Subscription Agreement except as specifically set forth in this Subscription Agreement and any document required to be delivered pursuant to this Subscription Agreement, and the Purchasers shall acquire the Purchased Shares (and the underlying Retained Assets) as is and where is subject to the benefit of the representations and warranties in this Subscription Agreement. This Subscription Agreement constitutes the complete and exclusive statement of its terms and no extrinsic evidence whatsoever may be introduced in any proceedings involving this Subscription Agreement. Any estimates, projections, quantifications or other predictions contained or referred to with respect to Southern Pacific, the Purchased Shares or the Retained Assets, or otherwise in any other material or information that has been provided to the Purchasers or any of their respective Affiliates, agents or representatives (including any due diligence presentations, documents or materials) are not and shall not be deemed to be representations or warranties of any of Southern Pacific, ResidualCo, the Receiver, any of their respective Affiliates or any partner, employee, officer, director, accountant, agent, financial, legal or other representative of any of Southern Pacific, ResidualCo, the Receiver or any of their respective Affiliates.

1.4 Schedules

The schedules to this Subscription Agreement, listed below, are an integral part of this Subscription Agreement:

Schedule	Description
Schedule A	Form of Approval and Vesting Order
Schedule B	Reorganization
Schedule C	Allocation of Purchased Shares
Schedule D	Form of Receivership Order
Schedule E	Form of Discharge Order

ARTICLE 2
SUBSCRIPTION FOR PURCHASED SHARES

2.1 Subscription for Purchased Shares

Subject to the provisions of this Subscription Agreement and the Approval and Vesting Order, on the Closing Date, at the time and in the sequence set forth in Schedule "B", Southern Pacific shall create a new class of common shares (the "**Class A Common Shares**"), the Purchasers shall subscribe for and purchase from Southern Pacific, and Southern Pacific shall issue to the Purchasers, such number of Class A Common Shares as are set forth in Schedule "C" hereto (collectively, the "**Purchased Shares**"), free and clear of all Claims and Encumbrances.

2.2 Purchase Price

The aggregate consideration payable by the Purchasers for the Purchased Shares shall be equal to: (i) the amount of $700,000 (the "**Subscription Cash**"); plus (ii) the ResidualCo Cash; plus (iii) the Purchaser causing Southern Pacific to pay and perform the Retained Liabilities (collectively, the "**Purchase Price**"). Each Purchaser shall pay, in cash and in immediately available funds, its pro rata share of the ResidualCo Cash based on the number of Purchased Shares set forth next to such Purchaser's name in Schedule "C" hereto, to the Receiver, in trust, upon the execution of this Subscription Agreement. At Closing, each Purchaser's pro rata share of the Purchase Price shall be satisfied each such Purchaser paying its pro rata share of the Subscription Cash based on the number of Purchased Shares set forth next to such Purchaser' name in Schedule "C" hereto, directly to Southern Pacific and by the release of such Purchaser's pro rata share of the ResidualCo Cash amount to the Receiver on behalf of ResidualCo, to be held by the Receiver on behalf of an for the benefit of ResidualCo. In the event Closing does not occur pursuant to the conditions outlined in Article 5 hereof, each Purchaser's pro rata share of the ResidualCo Cash shall be returned to such Purchaser and no Purchaser shall have any obligation to pay the Subscription Cash, or any portion thereof, to Southern Pacific.

2.3 Retained Assets and Retained Liabilities; Transfer of Excluded Assets and Excluded Liabilities to ResidualCo

Pursuant to and without limiting the Approval and Vesting Order, on the Closing Date:

(a) the Debtors shall retain all of the Retained Assets and the obligation to pay and perform all of the Retained Liabilities;

(b) all Excluded Assets shall be transferred to and vested in ResidualCo, and all Excluded Liabilities shall be transferred and novated to ResidualCo;

(c) all Claims and Encumbrances shall be expunged, discharged and released as against the Debtors and the Retained Assets.

2.4 Right to Modify Designations with Consent of the Receiver

At any time on or prior to the day that is one (1) day prior to the Closing Date, the Purchasers may, with the consent of Southern Pacific and the Receiver, elect to exclude any assets, properties or

undertakings of Southern Pacific from the Retained Assets, and add such assets, properties or undertakings to the Excluded Assets, provided that no changes to the Retained Assets or Excluded Assets pursuant to this Section 2.4 shall modify the Purchase Price.

ARTICLE 3
REPRESENTATIONS AND WARRANTIES

3.1 Representations and Warranties of Southern Pacific

Southern Pacific represents and warrants as of the Agreement Date the following to the Purchasers and acknowledges that the Purchasers are relying upon the representations and warranties in connection with the Transactions:

(a) subject to the granting and terms of the Approval and Vesting Order, this Subscription Agreement is a legal, valid and binding obligation of Southern Pacific, enforceable against it in accordance with its terms; and

(b) Southern Pacific is not a non-resident of Canada within the meaning of the Tax Act.

3.2 Representations and Warranties of the Purchasers

Each Purchaser represents and warrants, each severally and not jointly or jointly and severally, as of the Agreement Date the following to Southern Pacific and ResidualCo and acknowledges that each of Southern Pacific and ResidualCo is relying upon the representations and warranties in connection with the Transactions:

(a) if the Purchaser is a corporation, such Purchaser is a corporation incorporated and existing under the Laws of its jurisdiction of incorporation and it has the corporate power to enter into and perform its obligations under this Subscription Agreement;

(b) if the Purchaser is a corporation, the execution and delivery of and performance by such Purchaser of this Subscription Agreement have been authorized by all necessary corporate action on the part of such Purchaser;

(c) if the Purchaser is an individual, the Purchaser is of the full age of majority in the jurisdiction in which this Agreement is executed and is legally competent to execute this Subscription Agreement and take all action pursuant hereto and thereto;

(d) the execution and delivery of and performance by such Purchaser of this Subscription Agreement:

(i) if the Purchaser is a corporation, does not constitute or result in a violation or breach of, or conflict with, or allow any Person to exercise any rights under, any of the terms or provisions of its constating documents or bylaws;

(ii) does not constitute or result in a breach or violation of, or conflict with or allow any Person to exercise any rights under, any contract, license, lease or instruction to which it is a party; and

(iii) does not result in the violation of any Laws;

(e) no filing with, notice to or authorization of, any Governmental Authority is required on the part of such Purchaser as a condition to the lawful completion of the Transactions;

(f) this Subscription Agreement has been duly executed and delivered by such Purchaser and constitutes a legal, valid and binding agreement of such Purchaser, enforceable against it in accordance with its terms, subject only to any limitation under applicable Laws relating to (i) bankruptcy, winding-up, insolvency, arrangement, fraudulent preference and conveyance, assignment and preference and other similar Laws of general application affecting creditors' rights, and (ii) the discretion that a court may exercise in the granting of equitable remedies including specific performance and injunction;

(g) the Purchaser acknowledges that it has been encouraged to and should obtain independent legal, tax and investment advice with respect to its subscription for the Purchased Shares, including, but not limited to, the applicable resale and transfer restrictions, and accordingly, has been independently advised, or has waived such independent advice, as to the meanings of all terms contained herein relevant to the Purchaser for purposes of giving representations, warranties and covenants under this Subscription Agreement;

(h) such Purchaser is an informed and sophisticated buyer, it has engaged expert advisors and is experienced in the evaluation and purchase of property and assets and assumption of liabilities such as the Purchased Shares and the Retained Assets as contemplated hereunder, and has undertaken such investigations and has been provided with and has evaluated such documents and information as it has deemed necessary to enable it to make an informed and intelligent decision with respect to the execution, delivery and performance of this Subscription Agreement;

(i) such Purchaser acknowledges that investment in the Purchased Shares involves risk, and represents that it is able, without materially impairing its financial condition, to hold the Purchased Shares for an indefinite period of time and to suffer a complete loss of its investment;

(j) such Purchaser understands that the Purchased Shares are being issued to it upon an exemption from the registration and prospectus requirements applicable under Canadian securities Laws and that there are restrictions imposed on such Purchaser and the Purchased Shares which limit such Purchaser's ability to resell the Purchased Shares in Canada. Such Purchaser further acknowledges that if an exemption from qualification is available, it may be conditioned on various requirements including the time and manner of sale, the holding period for the Purchased Shares, and on requirements relating to Southern Pacific which are outside of such Purchaser's control, and which Southern Pacific is under no obligation and may not be able to satisfy;

(k) it is an "accredited investor", as such term is defined in *National Instrument* 45-106; and

(l) such Purchaser understands that the investment in, or holding, acquisition or disposition of, the Purchased Shares may have material tax consequences under applicable Laws, and that it is the sole responsibility of such Purchaser to determine and assess such tax consequences as may apply to its particular circumstances.

3.3 As is, where is

Notwithstanding any other provision of this Subscription Agreement but without limiting Section 1.3, each Purchaser acknowledges, agrees and confirms that:

(a) except for the representations and warranties of Southern Pacific set forth in Section 3.1, it is entering into this Subscription Agreement and acquiring its Purchased Shares (and the underlying Retained Assets and Retained Liabilities) on an "as is, where is" basis as they exist as of the Closing Time;

(b) it has conducted to its satisfaction and has relied on such independent searches, investigations, reviews and inspections of Southern Pacific, the Purchased Shares, and the Retained Assets as it deemed appropriate, and based thereon, has determined to proceed with the Transactions;

(c) it is aware that the Common Shares were delisted from the Toronto Stock Exchange and that the Alberta Securities Commission has issued a cease trade order under the securities legislation of Alberta and Ontario in respect of Southern Pacific dated February 20, 2015;

(d) except as expressly stated in Section 3.1, none of Southern Pacific, ResidualCo or the Receiver is making, and the Purchaser is not relying on, any written or oral representations, warranties, statements, information, promises or guarantees, express or implied, statutory or otherwise, concerning the Transactions, Southern Pacific, the Business, the Purchased Shares, the Retained Assets (including the Non-Capital Losses and the Tax Attributes), the Excluded Assets and the Excluded Liabilities, including the right, title or interest of Southern Pacific in and to any of the foregoing, and any and all conditions, warranties or representations expressed or implied pursuant to any applicable Law in any jurisdiction, which the Purchaser confirms do not apply to this Subscription Agreement, are hereby waived in their entirety by the Purchaser;

(e) none of Southern Pacific, ResidualCo or the Receiver has made any representation or warranty as to any regulatory approvals, permits, licences, consents, registrations, filings or authorizations that may be needed to complete the Transactions or to obtain the benefit of the Retained Assets or any portion thereof, and the Purchaser is relying entirely on its own investigation, due diligence and inquiries in connection with such matters;

(f) the obligations of the Purchaser under this Subscription Agreement are not conditional upon any additional due diligence;

(g) except for the representations and warranties of Southern Pacific set forth in Section 3.1, any information regarding or describing the Purchased Shares, the Retained Assets, or in any other agreement or instrument contemplated hereby, is for identification purposes only, is not relied upon by the Purchaser, and no representation, warranty or condition, express or implied, has or will be given by Southern Pacific, ResidualCo or the Receiver concerning the completeness or accuracy of such information or descriptions;

(h) except as otherwise expressly provided in this Subscription Agreement, and except for fraud on the part of Southern Pacific, the Purchaser hereby unconditionally and irrevocably waives any and all actual or potential rights or claims the Purchaser might have against Southern Pacific, ResidualCo or the Receiver pursuant to any warranty, express or implied, legal or conventional, of any kind or type, other than those representations and warranties of Southern Pacific expressly set forth in Section 3.1. Except as set out above in this subsection (h), such waiver is absolute, unlimited, and includes, but is not limited to, waiver of express warranties, completeness of warranties, implied warranties, warranties of fitness for a particular use, warranties of merchantability, warranties of occupancy, strict liability and claims of every kind and type, including claims regarding defects, whether or not discoverable or latent, and all other claims that may be later created or conceived in strict liability or as strict liability type claims and rights; and

(i) the provisions of Section 3.3 shall survive and not merge on Closing.

ARTICLE 4
CLOSING

4.1 Date, Time and Place of Closing

The Closing shall take place at the offices of McCarthy Tétrault LLP at the Closing Time, or at such other place (including electronically), on such other date and at such other time as the Parties may agree in writing.

4.2 Reorganization

Subject to the other terms of this Subscription Agreement and the Approval and Vesting Order, Southern Pacific and ResidualCo, as applicable, shall effect the Reorganization, in the sequence and at the times specified in Schedule "B" hereto, as such steps, transactions, sequence and/or times may be amended by written agreement of the Parties.

4.3 Delivery of the Receiver's Certificate

Upon the satisfaction or waiver, as applicable, of the conditions set out in Article 5 hereof pursuant to this Subscription Agreement, Southern Pacific and each of the Purchasers shall deliver to the Receiver written confirmation that such conditions have been satisfied and/or waived, as

applicable. Upon receipt of such written confirmation from Southern Pacific and each of the Purchasers and the Purchase Price from the Purchasers, the Receiver shall issue and deliver a duly executed certificate in the form contemplated by the Approval and Vesting Order (the "**Receiver's Certificate**") to Southern Pacific and each of the Purchasers confirming that the Receiver has received the Purchase Price payable to it and Southern Pacific has received the portion of the Purchase Price payable to it and that conditions to Closing set out in this Subscription Agreement have been satisfied or waived by Southern Pacific and the Purchasers, as applicable.

4.4 Southern Pacific's Closing Deliveries

On the Closing Date, Southern Pacific shall deliver or cause to be delivered to the Purchasers, or the Purchasers' solicitors, the following in form and substance satisfactory to the Purchaser, acting reasonably:

(a) the certificate referred to in 5.2(a);

(b) an entered copy of the Approval and Vesting Order;

(c) to each Purchaser, a share certificate duly executed by Southern Pacific, or other satisfactory evidence such as a notice of uncertified securities, representing the number of Purchased Shares such Purchaser has subscribed for and acquired pursuant to this Subscription Agreement, as set forth in Schedule "C" hereto, registered in the name of the Purchaser (or as otherwise directed by such Purchaser); and

(d) all such other assurances, consents, agreements, documents and instruments as may be reasonably required by the Purchasers to complete the Transactions.

4.5 Purchasers' Closing Deliveries

(a) On the Closing Date, each Purchaser shall deliver, or cause to be delivered, a direction to irrevocably release its portion of the Subscription Cash to the Receiver, on behalf of Southern Pacific and ResidualCo, pursuant to Section 2.2.

(b) On the Closing Date, each Purchaser shall deliver, or cause to be delivered, to Southern Pacific and ResidualCo, the following in form and substance satisfactory to Southern Pacific and ResidualCo, each acting reasonably:

(i) the certificate referred to in 5.1(a);

(ii) a certificate of status, compliance, good standing or like certificate with respect to the Purchaser issued by appropriate Governmental Authority of its jurisdiction of incorporation; and

(iii) all such other assurances, consents, agreements, documents and instruments as may be reasonably required by Southern Pacific, ResidualCo or the Receiver to complete the Transactions.

ARTICLE 5
CONDITIONS PRECEDENT

5.1 Conditions for the Benefit of Southern Pacific

The obligation of Southern Pacific to complete the Transactions is subject to fulfilment of each of the following conditions on the date stated for fulfilment thereof, and if not so stated on or before the Closing Time, each of which is acknowledged to be for the exclusive benefit of Southern Pacific and may be waived by Southern Pacific in whole or in part:

(a) **Representations and Warranties.** The representations and warranties of the Purchasers in Section 3.2 and 3.3 shall be true and accurate in all material respects as at the Closing Time with the same force and effect as if made at and as of such time, and the Purchasers shall have each executed and delivered a certificate to that effect;

(b) **Fulfilment of Purchaser's Covenants.** All of the terms, covenants and conditions of this Subscription Agreement to be complied with or performed by the Purchasers at or before the Closing Time shall have been complied with or performed in all material respects and the Purchasers shall not be in material breach of any agreement or covenant on its part contained in this Subscription Agreement; and

(c) **Delivery.** The Purchasers shall have paid, in aggregate, the Purchase Price and delivered the documents and other items referred to in Section 4.5.

5.2 Conditions for the Benefit of the Purchasers

The obligation of the Purchasers to complete the Transactions is subject to fulfilment of each of the following conditions on or before the Closing Time, each of which is included for the exclusive benefit of the Purchaser and may be waived by the Purchasers in whole or in part:

(a) **Representations and Warranties.** The representations and warranties of Southern Pacific in Section 3.1 shall be true and accurate in all material respects as at the Closing Time with the same force and effect as if made at and as of such time, and Southern Pacific shall have executed and delivered a certificate to that effect;

(b) **Fulfilment of Southern Pacific's Covenants**. All of the terms, covenants and conditions of this Subscription Agreement to be complied with or performed by Southern Pacific at or before the Closing Time shall have been complied with or performed in all material respects and Southern Pacific shall not be in material breach of any agreement or covenant on its part contained in this Subscription Agreement; and

(c) **Delivery.** Southern Pacific shall have delivered the documents and other items referred to in Section 4.4.

5.3 Mutual Conditions for the Benefit of Southern Pacific and the Purchasers

The obligation of each of Southern Pacific and the Purchaser to complete the Transactions is subject to the fulfillment of each of the following conditions or before the Closing Time, each of which is included for the benefit of Southern Pacific and the Purchasers and may be waived in whole or in part upon the mutual agreement of the Parties:

(a) **Actions or Proceedings.** No Order shall have been issued and no action or proceeding shall have been commenced or threatened to enjoin, restrict or prohibit the Transactions contemplated hereby;

(b) **The Receivership Order**. The Receiver shall be authorized and directed, *nunc pro tunc*, to enter into this Subscription Agreement and to perform the obligations of Southern Pacific the Subsidiaries and ResidualCo, as applicable, thereunder;

(c) **Approval and Vesting Order**. The Approval and Vesting Order shall have been issued and entered;

(d) **Timing of Receivership Proceeding**. The Receivership Order shall be granted concurrently with the Approval and Vesting Order; and

(e) **Outside Date.** The Closing Date shall occur on or before three (3) Business Days following the grating of the Receivership Order or such later date as Southern Pacific and the Purchasers may agree (the "**Outside Date**").

5.4 Non-Satisfaction of Conditions

If any condition set out in Section 5.1, 5.2 or 5.3 is not satisfied or performed prior to the Outside Date, the Party for whose benefit the condition is inserted may:

(a) in writing, waive compliance with the condition in whole or in part in its sole discretion by notice to the other Parties and without prejudice to any of its rights of termination in the event of non-fulfilment of any other condition in whole or in part; or

(b) elect to terminate this Subscription Agreement, in which case none of the Parties shall be under any further obligation to the others to complete the Transactions, except that if this Subscription Agreement is terminated by a Party because of a breach of this Subscription Agreement by another Party or because a condition for the benefit of the terminating Party has not been satisfied because another Party has failed to perform any of its obligations or covenants under this Subscription Agreement, the terminating Party's right to pursue all legal remedies will survive such termination unimpaired.

ARTICLE 6
COVENANTS OF THE PARTIES

6.1 Payments in Respect of Excluded Assets

If at any time after Closing, the Debtors or the Purchasers receive a payment or other consideration in respect of or relating to an Excluded Asset (including a Tax Refund), the recipient of such payment or other consideration shall promptly notify the Receiver and promptly pay and transfer such payment or other consideration to the Receiver, on behalf of ResidualCo. From and after Closing, the Debtors and the Purchasers shall provide reasonable cooperation to ResidualCo and the Receiver to enable ResidualCo and the Receiver to obtain the benefit of any Excluded Asset.

6.2 Access to Books and Records

ResidualCo shall be entitled to retain a copy of the Books and Records and, from and after Closing, the Debtors and the Purchasers shall provide the Receiver and ResidualCo with reasonable access to information in respect of the Debtors as requested by the Receiver and/or ResidualCo, as may be required by the Receiver and/or ResidualCo to comply with applicable Law or in connection with the completion of the Receivership Proceedings, provided that such access shall be granted during normal business hours and at the Receiver's and/or ResidualCo's own cost.

6.3 Survival of Covenants

The provisions of this Article 6 shall survive and not merge on Closing.

ARTICLE 7
GENERAL

7.1 Receiver's Capacity

The Purchasers acknowledge and agree that the Receiver, acting in its capacity as the Receiver in the Receivership Proceedings, will have no liability whatsoever in connection with this Subscription Agreement or the Transactions, whether in its capacity as Receiver, in its personal capacity or otherwise, and that the representations, covenants, obligations and agreements of the Debtors and ResidualCo pursuant to this Subscription Agreement and any related or ancillary document shall be those of the Debtors and ResidualCo exclusively and shall not constitute, or be deemed to constitute, representations, covenants, obligations or agreements of the Receiver.

7.2 Expenses

Each of the Parties shall pay their respective legal, accounting, and other professional advisory fees, costs and expenses incurred by them in connection with this Subscription Agreement and the Transactions, including in connection with the review, negotiation, preparation, execution and performance of this Subscription Agreement.

7.3 Notices

Any notice, direction, approval, consent or other communication given regarding the matters contemplated by this Subscription Agreement (each a "**Notice**") shall be in writing and shall be sufficiently given if delivered by courier service, personal delivery or electronic mail:

(a) in the case of a Notice to Southern Pacific, any of the Debtors or ResidualCo, to:

Southern Pacific Resource Corp.
c/o PricewaterhouseCoopers Inc.
111 5th Avenue SW, Suite 3100, East Tower
Calgary, Alberta T2P 5L3

Attention: Paul Darby
Email: paul.j.darby@pwc.com

with a copy to:

Borden Ladner Gervais LLP
1900, 520 3rd Avenue SW
Calgary, Alberta T2P 0R3

Attention: Robyn Gurofsky
E-mail: rgurofsky@blg.com

(b) in the case of a Notice to the Purchasers, to:

McCarthy Tétrault LLP
4000, 421 – 7th Avenue S.W.
Calgary, Alberta T2P 4K9

Attention: Walker MacLeod / Erinn Wilson
Telephone: 403-260-3710 / 403-260-3682
E-mail: wmacleod@mccarthy.ca / erinnwilson@mccarthy.ca

(c) in the case of a Notice to the Receiver, to:

PricewaterhouseCoopers Inc.
111 5th Avenue SW, Suite 3100, East Tower
Calgary, Alberta T2P 5L3

Attention: Paul Darby
Email: paul.j.darby@pwc.com

with a copy to:

Borden Ladner Gervais LLP

1900, 520 3rd Avenue SW
Calgary, Alberta T2P 0R3

Attention: Robyn Gurofsky
E-mail: rgurofsky@blg.com

Any Notice delivered or transmitted to a party as provided above shall be deemed to have been given and received on the day it is delivered or transmitted, provided that it is delivered or transmitted on a Business Day prior to 5:00 p.m. local time in the place of delivery or receipt. However, if the Notice is delivered or transmitted after 5:00 p.m. local time or if such day is not a Business Day then the Notice shall be deemed to have been given and received on the next Business Day. Any party may, from time to time, change its address by giving Notice to the other parties in accordance with the provisions of this Section 7.3.

7.4 Time of Essence

Time shall be of the essence of this Subscription Agreement in all respects.

7.5 Successors and Assigns

This Subscription Agreement shall become effective only when executed by each of the Parties and shall thereafter be binding on and enure to the benefit of the Parties and their respective successors and permitted assigns.

7.6 Assignment

Neither this Subscription Agreement nor any of the rights or obligations under this Subscription Agreement may be assigned or transferred, in whole or in part, by any Party without the prior written consent of each of the other Parties.

7.7 Amendment

This Subscription Agreement may only be amended, supplemented or otherwise modified by written agreement by the Parties.

7.8 Waiver

No waiver of any of the provision of this Subscription Agreement will constitute a waiver of any other provision (whether or not similar). No waiver will be binding unless executed in writing by the Party to be bound by the waiver. A Party's failure or delay in exercising any right under this Subscription Agreement will not operate as a waiver of that right. A single or partial exercise of any right will not preclude a Party from any other or further exercise of that right or the exercise of any other right.

7.9 Survival

Other than those representations, warranties, covenants or other agreements which by their terms contemplate performance after Closing (including those set forth in Article 6) or unless otherwise

expressly provided in this Subscription Agreement (including Section 3.3 (which in each case shall remain in full force and effect after Closing), the representations, warranties, covenants and other agreements contained in this Subscription Agreement shall not survive Closing.

7.10 Further Assurances

The Parties shall, with reasonable diligence, do all such things and provide all such reasonable assurances as may be required to consummate the Transactions, and each Party shall provide such further documents or instruments required by any other Party as may be reasonably necessary or desirable to effect the purpose of this Subscription Agreement and carry out its provisions, whether before or after the Closing provided that the costs and expenses of any actions taken after Closing at the request of a Party shall be the responsibility of the requesting Party.

7.11 Severability

If any covenant or other provision of this Subscription Agreement is invalid, illegal or incapable of being enforced by reason of any rule of Law or public policy, then such covenant or other provision will be severed from and will not affect any other provision of this Subscription Agreement and this Subscription Agreement will be construed as if such invalid, illegal or unenforceable provision had never been contained in this Subscription Agreement. All other covenants and provisions of this Subscription Agreement will, nevertheless, remain in full force and effect and no covenant or provision will be deemed dependent upon any other covenant or provision unless so expressed herein.

7.12 Specific Performance

The Purchasers acknowledges and agrees that Southern Pacific and its estate would be damaged irreparably in the event the Purchasers do not perform their respective obligations under this Subscription Agreement in accordance with its specific terms or otherwise breach this Subscription Agreement, so that, in addition to any other remedy that Southern Pacific may have under law or equity, Southern Pacific shall be entitled, without the requirement of posting a bond or other security, to injunctive relief to prevent any breaches of the provisions of this Subscription Agreement and to enforce specifically this Subscription Agreement and the terms and provisions hereof.

7.13 Governing Law and Jurisdiction

(a) This Subscription Agreement, the rights and obligations of the Parties hereunder, and any Claim based upon or arising out of this Subscription Agreement or the Transaction (or any part thereof) shall be governed by and interpreted and construed in accordance with the laws of the Province of Alberta and the federal laws of Canada applicable therein.

(b) Each Party irrevocably attorns and submits to the exclusive jurisdiction of the Court in any action, application, reference or other proceeding arising out of or relating to this Subscription Agreement or the Transaction (including any part thereof) and consents to all Claims in respect of any such action, application, reference or other proceeding being heard and determined in the Court.

7.14 Execution and Delivery

This Subscription Agreement may be executed in any number of counterparts, each of which is deemed to be an original, and such counterparts together constitute one and the same instrument. Transmission of an executed signature page by email or other electronic means is as effective as a manually executed counterpart of this Subscription Agreement.

[Remainder of page intentionally left blank]

IN WITNESS OF WHICH the Parties have executed this Subscription Agreement as of the date first written above.

PRICEWATERHOUSECOOPERS INC. in its capacity as receiver and manager of the assets, undertaking and property of SOUTHERN PACIFIC RESOURCE CORP., SOUTHERN PACIFIC ENERGY LTD., 1614789 ALBERTA LTD., 1717712 ALBERTA LTD. AND SOUTHERN PACIFIC RESOURCE PARTNERSHIP and not in its personal capacity

By: _____
Name:
Title:

SPARK CAPITAL CORPORATION

By: _____
Name:
Title:

SANDY EDMONSTONE

_____ _____
Witness

NICHOLAS LAU

_____ _____
Witness

BRADLEY G. SQUIBB PROFESSIONAL CORPORATION

By: _____
Name:
Title:

TOREY CELINSKIS

_____ _____

Witness

2436544 ALBERTA LTD.

By: _____

Name:
Title:

SCHEDULE "A"
FORM OF APPROVAL AND VESTING ORDER

See attached.

SCHEDULE "B"
REORGANIZATION TRANSACTIONS

The following steps and transactions to be effected pursuant to the Subscription Agreement and the Approval and Vesting Order shall occur, and be deemed to have occurred, in the following order in five minute increments (unless otherwise noted herein or agreed to by the Borrower, ResidualCo and the Purchasers), without any further act or formality on the Closing Date beginning at the Closing Time:

1. All of the Debtors' right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in the name of ResidualCo and all Claims and Encumbrances attached to the Excluded Assets shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer.

2. Concurrently with step 1 above, all Excluded Liabilities shall be transferred to, assumed by and vest absolutely and exclusively in the name of ResidualCo, and the Excluded Liabilities shall be novated and become obligations of ResidualCo and not obligations of the Debtors.

3. Concurrently with steps 1 and 2 above, the Debtors shall be forever released and discharged from such all Excluded Liabilities, and all Encumbrances securing Excluded Liabilities shall be forever released and discharged in respect of the Debtors and the Retained Assets.

4. Southern Pacific shall: (i) create the Class A Common Shares, (ii) add a right to each of the issued and outstanding Common Shares that allows for such shares to be redeemed by Southern Pacific for the Common Share Redemption Amount, and (iii) issue the Purchased Shares to the Purchasers in accordance with Section 2.1 and Schedule "C" of the Subscription Agreement, free and clear of any Claims or Encumbrances, in consideration of the receipt of the ResidualCo Cash and the Subscription Cash from the Purchasers.

5. Immediately after step 4 above, Southern Pacific shall thereafter exercise, and be deemed to exercise, such right of redemption such that each of the Common Shares shall be have been fully, completely and irrevocably redeemed by Southern Pacific for the Common Share Redemption Amount.

6. Immediately after step 5 above, any classes or series of shares in Southern Pacific that have no shares issued or outstanding in that particular class or series shall be cancelled.

7. Following the above steps, the ResidualCo Cash shall be released by the Receiver for the benefit of ResidualCo.

SCHEDULE "C"
ALLOCATION OF PURCHASED SHARES

Purchaser	Number of Class A Common Shares
SPARK CAPITAL CORPORATION	310,000
SANDY EDMONSTONE	310,000
NICHOLAS LAU	40,000
BRADLEY G. SQUIBB PROFESSIONAL CORPORATION	25,000
TOREY CELINSKIS	15,000

SCHEDULE "D"
FORM OF RECEIVERSHIP ORDER

See attached.

SCHEDULE "E"
FORM OF DISCHARGE ORDER

See attached.

TAB M

COURT FILE NUMBER	2201-12935
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	FORAGE SUBORDINATED DEBT LP III
DEFENDANTS	ENTERRA FEED CORPORATION, ENTERRA FEED US CORPORATION, ENTERRA FEED US SALES CORPORATION, and ENTERRA FEED MARION CORPORATION
DOCUMENT	**APPROVAL AND REVERSE VESTING ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT AIKINS LLP 2100 Livingston Place 222 3rd Avenue SW Calgary, AB T2P 0B4 Attention: Ryan Zahara Tel: (403) 693-5420 Fax: (403) 508-4349 Email: RZahara@mltaikins.com

I hereby certify this to be a true copy of the original Order
Dated this 16 day of March 2023
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED:	**March 2, 2023**
LOCATION OF HEARING OR TRIAL:	**Calgary, Alberta**
NAME OF MASTER/JUDGE WHO MADE THIS ORDER:	**JUSTICE B.E.C. ROMAINE**

UPON the application (the "**Application**") of FTI Consulting Canada Inc. (the "**Receiver**"), in its capacity as the court-appointed receiver and manager of the undertakings, property and assets of the defendant, Enterra Feed Corporation ("**Enterra**"), in the within proceedings (the "**Receivership Proceedings**"), for an order approving the sale transaction (the "**Transaction**") contemplated by a second amended subscription agreement dated February 22, 2023 attached hereto (the "**Agreement**") between Enterra, Forage Subordinated Debt LP III (the "**Purchaser**"), and 2488172 Alberta Ltd. (the "**ResidualCo**"), and attached as Schedule "**B**" hereto, including the reorganization transactions contemplated in Schedule "B" to the Agreement (the "**Reorganization**");

AND UPON HAVING READ the Receivership Order dated November 8, 2022 (the "**Receivership Order**"), the First Report of the Receiver, dated February 7, 2023 (the "**Report**") and the Affidavit of Service of Joy Mutuku, sworn on February 13, 2023 (the "**Service Affidavit**"), each filed; the Affidavit of Catherine Gilzean sworn on February 17, 2023; **AND UPON** hearing counsel for the Purchaser, counsel for the Receiver, counsel for Prairies Economic Development Canada and for any other parties who may be present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the Application and the Report is abridged, if necessary, the Application is properly returnable today, service of the Application and the Report on the service list (the "**Service List**") attached as Exhibit "2-78" to the Service Affidavit, in the manner described in the Service Affidavit, is good and sufficient, and no other persons other than those listed on the Service List, are entitled to service of the Application or the Report.

CAPITALIZED TERMS

2. Capitalized terms used herein but not otherwise defined in this Order shall have the meaning given to such terms in the Agreement.

APPROVAL OF THE TRANSACTION

3. The Agreement and the Transaction (including the Reorganization) are hereby approved, and the execution of the Agreement by the Receiver, for and on behalf of Enterra, is hereby authorized and approved, with such amendments to the Agreement as Enterra, the Purchaser and the ResidualCo may agree to with the consent of the Receiver. The performance by Enterra of its obligations under the Agreement is hereby authorized and approved and the Receiver and Enterra are hereby authorized to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction, including, without limitation, the Reorganization.

REORGANIZATION

4. Enterra and ResidualCo are authorized to undertake and complete the Reorganization contemplated in Schedule "B" to the Agreement and, without limiting the generality of the foregoing, subject to the terms of the Agreement, upon the delivery of a Receiver's certificate substantially in the form attached as Schedule "**A**" hereto (the "**Receiver's Certificate**") to Enterra and the Purchaser, the following shall be deemed to occur in accordance with the timing, sequence, terms and conditions set forth in the Agreement:

   (a) All of Enterra's right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in the name of ResidualCo and all Claims and Encumbrances attached to the Excluded Assets shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer;

   (b) Concurrently with step (a) above, all Excluded Liabilities shall be transferred to, assumed by and vest absolutely and exclusively in the name of ResidualCo, and the Excluded Liabilities shall be novated and become obligations of ResidualCo and not obligations of Enterra;

   (c) Concurrently with steps (a) and (b) above, Enterra shall be forever released and discharged from such all Excluded Liabilities, and all Encumbrances securing Excluded Liabilities shall be forever released and discharged in respect of Enterra and the Retained Assets;

   (d) Enterra shall: (i) create the Class A Common Shares, (ii) add a right to each of the issued and outstanding Existing Shares that allows for such shares to be redeemed by Enterra for the Existing Share Redemption Amount, and (iii) issue the Purchased Shares to the Purchaser in accordance with Section 2.1 and Schedule "C" of the Agreement, free and clear of any Claims or Encumbrances, in consideration of the receipt of the Subscription Cash by the Receiver from the Purchaser;

(e) Immediately after step (d) above, Enterra shall thereafter exercise, and be deemed to exercise, such right of redemption such that each of the Existing Shares shall be have been fully, completely and irrevocably redeemed by Enterra for the Existing Share Redemption Amount; and

(f) Immediately after step (e) above, any classes or series of shares in Enterra that have no shares issued or outstanding in that particular class or series shall be cancelled and all remaining Equity Interests in Enterra shall be cancelled;

5. Following the completion of the above steps the Subscription Cash shall be released by the Receiver for the benefit of ResidualCo, the Purchaser shall deliver the Subscription Cash to Enterra and the Purchaser shall be the sole legal and beneficial shareholders of Enterra.

6. The Receiver, Enterra and ResidualCo, in completing the transactions contemplated in the Reorganization, are authorized:

(a) to execute and deliver any documents and assurances governing or giving effect to the Reorganization as the Receiver, Enterra and/or ResidualCo, in their discretion, may deem to be reasonably necessary or advisable to conclude the Reorganization, including the execution of all such ancillary documents as may be contemplated in the Agreement or necessary or desirable for the completion and implementation of the Reorganization, and all such ancillary documents are hereby ratified, approved and confirmed; and

(b) to take such steps as are, in the opinion of the Receiver, Enterra and/or ResidualCo, necessary or incidental to the implementation of the Reorganization.

7. The Receiver, Enterra and ResidualCo are hereby permitted to execute and file articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Reorganization, including, without limitation, the issuance of the Purchased Shares, and such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective notwithstanding any requirement under federal or provincial law to obtain director or

shareholder approval with respect to such actions or to deliver any statutory declarations that may otherwise be required under corporate law to effect the Reorganization.

8. This Order shall constitute the only authorization required by the Receiver, Enterra or ResidualCo to proceed with the Transaction, including, without limitation, the Reorganization and, except as specifically provided in the Agreement, no director or shareholder approval shall be required and no authorization, approval or other action by or notice to or filing with any governmental authority or regulatory body exercising jurisdiction in respect of Enterra is required for the due execution, delivery and performance by the Receiver, Enterra and by ResidualCo of the Agreement and the completion of the Transaction.

VESTING OF ASSETS AND LIABILITIES

9. Subject to the terms of the Agreement, upon the delivery of the Receiver's Certificate to Enterra and the Purchaser, the following shall be deemed to occur in accordance with the timing, sequence, terms and conditions set forth in the Agreement:

   (a) all of Enterra's right, title and interest in and to the Excluded Assets (including, for certainty, the right to receive the Subscription Cash and Receiver's Cash) shall vest absolutely and exclusively in the name of ResidualCo and all Claims and Encumbrances attached to the Excluded Assets shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer;

   (b) all Excluded Liabilities shall be transferred to, assumed by and vest absolutely and exclusively in the name of ResidualCo, and the Excluded Liabilities shall be novated and become obligations of ResidualCo and not obligations of Enterra, and Enterra shall be forever released and discharged from such Excluded Liabilities, and all Encumbrances securing the Excluded Liabilities shall be forever released and discharged in respect of Enterra, provided that nothing in this Order shall be deemed to cancel any Encumbrances expressly permitted by the Agreement as against Enterra;

(c) the commencement or prosecution, whether directly, indirectly, derivatively or otherwise of any demands, claims, actions, counterclaims, suits, judgements, or other remedy or recovery with respect to any indebtedness, liability, obligation or cause of action against Enterra in respect of the Excluded Liabilities shall be permanently enjoined;

(d) the nature of the Retained Liabilities retained by Enterra, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Agreement or the steps and actions taken in accordance with the terms thereof;

(e) the nature and priority of the Excluded Liabilities assumed by ResidualCo, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to and assumption by ResidualCo; and

(f) any Person that, prior to the Closing Date, had a valid Claim against Enterra in respect of the Excluded Liabilities shall no longer have such Claim against Enterra but will have an equivalent Claim against ResidualCo (including, without limitation, in respect of the net proceeds of the Transaction received by ResidualCo pursuant to the Agreement) in respect of the Excluded Liabilities from and after the Closing Date in its place and stead, and, nothing in this Order limits, lessens or extinguishes the Excluded Liabilities or the Claim of any person as against ResidualCo.

10. Upon delivery of the Receiver's Certificate to Enterra and the Purchaser, and upon filing of a certified copy of this Order, together with any applicable registration fees, all governmental authorities (collectively, "**Governmental Authorities**") are hereby authorized, requested and directed to accept delivery of such Receiver's Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required in order to give effect to the terms of this Order and the Agreement.

11. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order and the Agreement. Presentment of this Order and the Receiver's Certificate shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations such that the Retained Assets of Enterra shall be free from all Encumbrances.

12. The Purchaser shall be authorized to take all steps as may be necessary to effect the discharge of the Encumbrances as against the Retained Assets of Enterra.

COURT PROCEEDINGS

13. Upon the filing of the Receiver's Certificate:

(a) ResidualCo shall be added as a debtor in these Receivership Proceedings and any reference in any Order of this Court in respect of these Receivership Proceedings to a "Debtor" shall refer to ResidualCo, *mutatis mutandis*;

(b) Enterra shall be deemed to cease to be the Debtor in these Receivership Proceedings and shall be deemed to be released from the purview of any Order of this Court granted in respect of these Receivership Proceedings, save an except for this Order, the terms of which as they relate to Enterra shall continue to apply in all respects to Enterra; and

(c) the title of these Receivership Proceedings is hereby, and shall be deemed to be, amended as follows:

DEFENDANT 2488172 ALBERTA LTD.

and any document filed thereafter in these Receivership Proceedings (other than the Receiver's Certificate) shall be filed using such revised title of proceedings.

THE RECEIVER

14. Without in any way limiting the Receiver's powers set out in the Receivership Order or any other Order of this Court in these Receivership Proceedings or applicable law, the Receiver is hereby authorized to undertake and perform such activities and obligations as are contemplated to be undertaken or performed by the Receiver pursuant to this Order and the Agreement or any ancillary document related thereto, and shall incur no liability in connection therewith, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall affect, vary, derogate from, limit or otherwise amend any of the protections in favour of the Receiver at law, the Receivership Order or any other Order granted in these Receivership Proceedings.

15. The Receiver is directed to file with the Court a copy of the Receiver's Certificate forthwith after delivery thereof to Enterra and the Purchaser.

16. The Receiver may rely on written notice from Enterra and the Purchaser or their respective counsel regarding the satisfaction of the Purchase Price and the fulfillment of the conditions to closing under the Agreement and shall incur no liability with respect to the delivery of the Receiver's Certificate.

17. The Receiver, in addition to its prescribed rights and obligations under the Receivership Order, is authorized, entitled and empowered to assign or cause to be assigned, at any time after the Closing Date, ResidualCo into bankruptcy and the Receiver shall be entitled but not obligated to act as trustee in bankruptcy thereof.

RELEASE

18. Effective upon the filing of the Receiver's Certificate, (i) Enterra; (ii) Keith Driver and Jim Taylor, the present and/or former directors and officers of Enterra and ResidualCo, respectively, (or either of them) and (iii) the Receiver and its legal counsel (the persons listed in (i), (ii) and (iii) being collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims (including without limitations, claims for contribution and indemnity), liabilities,

indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgements, executions recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the issuance of the Receiver's Certificate in connection with the Transaction (including the Reorganization) or completed pursuant to the terms of this Order (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties.

MISCELLANEOUS

19. Enterra shall not be obligated to make any payments or other distributions to Existing Holders in respect of the redemption of the Existing Shares in circumstances where the total amount payable to any Existing Holder is equal to or less than the sum of two ($2.00) dollars.

20. Notwithstanding:

(a) the pendency of these Receivership Proceedings and any declaration of insolvency made herein;

(b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), in respect of ResidualCo, and any bankruptcy order issued pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of ResidualCo; and

(d) the provisions of any federal or provincial statute,

the execution of the Agreement, the implementation of the Reorganization (including the transfer of the Excluded Assets and the Excluded Liabilities to ResidualCo and the issuance of the Purchased Shares to the Purchaser) and the implementation of the Transaction shall be binding on any trustee in bankruptcy that may be appointed in respect of ResidualCo, and shall not be void or voidable by creditors of ResidualCo, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

21. The actions and activities of the Receiver as set out in the First Report and the Confidential Supplement, including its fees and disbursements, are hereby ratified and approved.

22. The Receiver, Enterra, ResidualCo and the Purchaser shall each be at liberty to apply for further advice, assistance and direction as may be necessary or desirable in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.

23. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

24. Service of this Order shall be deemed good and sufficient by:

    (a) serving the same on:

        (i) the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and,

(b) posting a copy of this Order on the Receiver's website at http://cfcanada.fticonsulting.com/Enterra/.

and service on any other person is hereby dispensed with.

25. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

26. Nothing in this Order shall prejudice the rights and remedies of bcIMC Realty Corporation as against ResidualCo or the Excluded Assets.

Justice of the Court of King's Bench of Alberta

SCHEDULE "A"

Clerk's Stamp

RECEIVER'S CERTIFICATE

COURT FILE NUMBER	2201-12935
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	FORAGE SUBORDINATED DEBT LP III
DEFENDANTS	ENTERRA FEED CORPORATION, ENTERRA FEED US CORPORATION, ENTERRA FEED US SALES CORPORATION, and ENTERRA FEED MARION CORPORATION
DOCUMENT	**RECEIVER'S CERTIFICATE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT AIKINS LLP 2100 Livingston Place 222 3rd Avenue SW Calgary, AB T2P 0B4 Attention: Ryan Zahara Tel: (403) 693-5420 Fax: (403) 508-4349 Email: RZahara@mltaikins.com

RECITALS

A. Pursuant to an Order of the Honourable Justice C.M. Jones of the Court of King's Bench of Alberta, Judicial District of Calgary (the "**Court**") dated November 8, 2022, FTI Consulting Canada Inc., was appointed as the receiver and manager (the "**Receiver**") of all undertakings, property, and assets of Enterra Feed Corporation (the "**Debtor**") in these proceedings.

B. Pursuant to an Order of the Honourable Justice B.E.C. Romaine dated February 13, 2023 the Court, *inter alia*, approved the agreement (the "**Agreement**") among Enterra, Forage Subordinated Debt LP III (the "**Purchaser**"), and 2488172 Alberta Ltd. (the "**ResidualCo**"), and the transactions contemplated thereby.

C. Unless otherwise indicated herein, capitalized terms have the meanings set out in the Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has satisfied the Purchase Price in accordance with the Agreement;

2. The conditions to Closing as set out in the Agreement have been satisfied or waived by Enterra and the Purchaser;

3. The Transaction has been completed to the satisfaction of the Receiver; and

4. This Certificate was delivered by the Receiver at _____ **[a.m./p.m.]** on _____, 2023.

FTI CONSULTING CANADA INC. in its capacity as receiver and manager of the assets, undertaking and property of ENTERRA FEED CORPORATION and not in its personal or corporate capacity

Per: _____
Name:
Title:

SCHEDULE "B"

THE SECOND AMENDED SUBSCRIPTION AGREEMENT

[see attached]

SCHEDULE "B"

REORGANIZATION TRANSACTIONS

The following steps and transactions to be effected pursuant to the Subscription Agreement and the Approval and Vesting Order shall occur, and be deemed to have occurred, in the following order in five minute increments (unless otherwise noted herein or agreed to by Enterra, ResidualCo and the Purchaser), without any further act or formality on the Closing Date beginning at the Closing Time:

1. All of Enterra' right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in the name of ResidualCo and all Claims and Encumbrances attached to the Excluded Assets shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer.

2. Concurrently with step 1 above, all Excluded Liabilities shall be transferred to, assumed by and vest absolutely and exclusively in the name of ResidualCo, and the Excluded Liabilities shall be novated and become obligations of ResidualCo and not obligations of Enterra.

3. Concurrently with steps 1 and 2 above, Enterra shall be forever released and discharged from such all Excluded Liabilities, and all Encumbrances securing Excluded Liabilities shall be forever released and discharged in respect of Enterra and the Retained Assets.

4. Enterra shall: (i) create the Class A Common Shares, (ii) add a right to each of the issued and outstanding Existing Shares that allows for such shares to be redeemed by Enterra for the Existing Share Redemption Amount, and (iii) issue the Purchased Shares to the Purchaser in accordance with Section 2.1 and Schedule "C" of the Subscription Agreement, free and clear of any Claims or Encumbrances, in consideration of the receipt of the Subscription Cash from the Purchaser.

5. Immediately after step 4 above, Enterra shall thereafter exercise, and be deemed to exercise, such right of redemption such that each of the Existing Shares shall be have been fully, completely and irrevocably redeemed by Enterra for the Existing Share Redemption Amount.

6. Immediately after step 5 above, any classes or series of shares in Enterra that have no shares issued or outstanding in that particular class or series shall be cancelled and all remaining Equity Interests in Enterra shall be cancelled.

7. Following the above steps, the Subscription Cash and the Receiver's Cash shall be released by the Receiver for the use and benefit of ResidualCo.

SCHEDULE "C"

ALLOCATION OF PURCHASED SHARES

Purchaser	Number of Class A Common Shares
FORAGE SUBORDINATED DEBT LP III	100

TAB N

603450

Clerk's Stamp:

COURT FILE NUMBER	1901-13767
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

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 BELLATRIX EXPLORATION LTD.

APPLICANT	BELLATRIX EXPLORATION LTD.
DOCUMENT	APPROVAL AND VESTING ORDER
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Goodmans LLP** Bay Adelaide Centre 333 Bay Street, Suite 3400 Toronto, ON M5H 2S7 Attn: Robert J. Chadwick / Caroline Descours Tel: 416.597.4285 / 416.597.6275 Fax: 416.979.1234 Email: rchadwick@goodmans.ca / cdescours@goodmans.ca

DATE ON WHICH ORDER WAS PRONOUNCED:	June 22, 2021
NAME OF JUSTICE WHO MADE THIS ORDER:	The Honourable Justice Hollins
LOCATION WHERE ORDER WAS PRONOUNCED:	Calgary, Alberta

UPON THE APPLICATION by Bellatrix Exploration Ltd. ("**Bellatrix**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order (this "**Order**"), *inter alia*, approving the transactions (the "**Transaction**") contemplated by the agreement dated as of June 8, 2021 (the "**Agreement**") among Bellatrix, 2350810 Alberta Ltd. ("**Newco**") and 1184262 B.C. Ltd. (the "**Purchaser**"), a copy of which is attached as Exhibit "B" to the Abel Affidavit (as defined below), including the reorganization transactions contemplated in Schedule "B" therein (the "**Reorganization**");

AND UPON HAVING READ the Application, the Affidavit of Shane K. Abel sworn June 9, 2021 (the "**Abel Affidavit**"), the Affidavit of Service of Andrew Harmes sworn June 10, 2021, and the twelfth report of PricewaterhouseCoopers Inc. in its capacity as Court-appointed monitor of Bellatrix (the "**Monitor**") dated June 18, 2021, each filed; **AND UPON HEARING** the submissions of counsel for Bellatrix, the Monitor and such other parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of notice of this Application for this Order and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this Application and time for service of this Application is abridged to that actually given.

CAPITALIZED TERMS

2. Capitalized terms used but not otherwise defined in this Order shall have the meaning given to such terms in the Agreement.

APPROVAL OF THE TRANSACTION

3. The Agreement and the Transaction (including the Reorganization) are hereby approved, and the execution of the Agreement by Bellatrix is hereby authorized and approved, with such amendments to the Agreement as Bellatrix, Newco and the Purchaser may agree to with the consent of the Monitor. The performance by Bellatrix of its obligations under the Agreement is hereby authorized and approved. Bellatrix is hereby authorized to take such

additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction, including, without limitation, the Reorganization.

REORGANIZATION

4. Bellatrix and Newco are authorized to undertake and complete the Reorganization contemplated in Schedule "B" to the Agreement and, without limiting the generality of the foregoing, subject to the terms of the Agreement, upon the delivery of a Monitor's certificate substantially in the form attached as Schedule "A" hereto (the "**Monitor's Certificate**") to Bellatrix and the Purchaser, the following shall be deemed to occur in accordance with the timing, sequence, terms and conditions set forth in the Agreement:

   (a) Bellatrix shall issue the Promissory Note to the Purchaser (and/or its nominees as determined by the Purchaser) in consideration for the advance of the Loan Amount in the form of the Loan Proceeds Cash;

   (b) Bellatrix shall issue the Purchased Shares to the Purchaser in consideration for the Subscription Cash;

   (c) any and all outstanding shares of Bellatrix other than Common Shares, and any all options, warrants, and other rights and entitlements to Common Shares and other shares of Bellatrix existing prior to the Closing Date shall be deemed cancelled and extinguished without any consideration or any other Claim against Bellatrix or Newco therefor; and

   (d) any directors of Bellatrix immediately prior to the Closing Time shall be deemed to resign, and the new directors named in the Agreement shall be deemed to be appointed as directors of Bellatrix.

5. The Promissory Note and the Purchased Shares shall be issued by Bellatrix to the Purchaser free and clear of and from any and all Claims or Encumbrances.

6. Bellatrix and Newco, in completing the transactions contemplated in the Reorganization, are authorized:

(a) to execute and deliver any documents and assurances governing or giving effect to the Reorganization as Bellatrix and/or Newco, in their discretion, may deem to be reasonably necessary or advisable to conclude the Reorganization, including the execution of all such ancillary documents as may be contemplated in the Agreement or necessary or desirable for the completion and implementation of the Reorganization, and all such ancillary documents are hereby ratified, approved and confirmed; and

(b) to take such steps as are, in the opinion of Bellatrix and/or Newco, necessary or incidental to the implementation of the Reorganization.

7. Bellatrix and Newco are hereby permitted to execute and file articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Reorganization, including, without limitation, the issuance of the Promissory Note and of the Purchased Shares and the appointment and resignation of directors of Bellatrix, and such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective notwithstanding any requirement under federal or provincial law to obtain director or shareholder approval with respect to such actions or to deliver any statutory declarations that may otherwise be required under corporate law to effect the Reorganization.

8. This Order shall constitute the only authorization required by Bellatrix or Newco to proceed with the Transaction, including, without limitation, the Reorganization and, except as specifically provided in the Agreement, no director or shareholder approval shall be required and no authorization, approval or other action by or notice to or filing with any governmental authority or regulatory body exercising jurisdiction in respect of Bellatrix is required for the due execution, delivery and performance by Bellatrix and by Newco of the Agreement and the completion of the Transaction, including, without limitation, the Reorganization contemplated thereby. Without limiting the generality of the foregoing, Bellatrix shall not be required to comply with the requirements of Multilateral Instrument 61-101 - *Protection of Minority Security Holders in Special Transactions*, National Policy 11-207 – *Failure-to-File Cease Trade Orders* or the CTO in connection with implementing

the Reorganization; however, for greater certainty, the CTO shall remain in effect after the Reorganization is fully implemented.

9. The Director appointed pursuant to Section 260 of the CBCA shall accept and receive any articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Reorganization contemplated in the Agreement, filed by either Bellatrix or Newco, as the case may be.

VESTING OF ASSETS AND LIABILITIES

10. Subject to the terms of the Agreement, upon the delivery of the Monitor's Certificate to Bellatrix and the Purchaser, the following shall be deemed to occur in accordance with the timing, sequence, terms and conditions set forth in the Agreement:

(a) all of Bellatrix's right, title and interest in and to the Excluded Assets (including, for certainty, the Loan Proceeds Cash and the right to receive the Subscription Cash) shall vest absolutely and exclusively in the name of Newco and all Claims and Encumbrances attached to the Excluded Assets shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer;

(b) all Excluded Liabilities shall be transferred to, assumed by and vest absolutely and exclusively in the name of Newco, and the Excluded Liabilities shall be novated and become obligations of Newco and not obligations of Bellatrix, and Bellatrix shall be forever released and discharged from such Excluded Liabilities, and all Encumbrances securing the Excluded Liabilities shall be forever released and discharged in respect of Bellatrix, provided that nothing in this Order shall be deemed to cancel any Encumbrances expressly permitted by the Agreement as against Bellatrix;

(c) the commencement or prosecution, whether directly, indirectly, derivatively or otherwise of any demands, claims, actions, counterclaims, suits, judgements, or other remedy or recovery with respect to any indebtedness, liability, obligation or

cause of action against Bellatrix in respect of the Excluded Liabilities shall be permanently enjoined;

(d) the nature of the Retained Liabilities retained by Bellatrix, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Agreement or the steps and actions taken in accordance with the terms thereof;

(e) the nature and priority of the Excluded Liabilities assumed by Newco, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to and assumption by Newco; and

(f) any Person that, prior to the Closing Date, had a valid Claim against Bellatrix in respect of the Excluded Liabilities shall no longer have such Claim against Bellatrix, but will have an equivalent Claim against Newco (including, without limitation, in respect of the net proceeds of the Transaction received by Newco pursuant to the Agreement) in respect of the Excluded Liabilities from and after the Closing Date in its place and stead, and, nothing in this Order limits, lessens or extinguishes the Excluded Liabilities or the Claim of any person as against Newco.

11. Upon delivery of the Monitor's Certificate to Bellatrix and the Purchaser, and upon filing of a certified copy of this Order, together with any applicable registration fees, all governmental authorities (collectively, "**Governmental Authorities**") are hereby authorized, requested and directed to accept delivery of such Monitor's Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required in order to give effect to the terms of this Order and the Agreement.

12. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order and the Agreement. Presentment of this Order and the Monitor's Certificate shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations such that the Retained Assets of Bellatrix shall be free from all Encumbrances.

13. The Purchaser shall be authorized to take all steps as may be necessary to effect the discharge of the Encumbrances as against the Retained Assets of Bellatrix.

14. Notwithstanding anything to the contrary in this Order, the transfer or assignment of any remaining applicable licenses and any underlying assets and related obligations of Bellatrix in respect thereof pursuant to the Transaction shall be subject to the prior approval of the Alberta Energy Regulator, the British Columbia Oil and Gas Commission and the Saskatchewan Ministry of Energy and Resources, or otherwise subject to further Order of this Court.

CCAA APPLICANTS

15. Upon the filing of the Monitor's Certificate:

(a) Newco shall be deemed to be a company to which the CCAA applies;

(b) Newco shall be added as an applicant in these CCAA proceedings and any reference in any Order of this Court in respect of these CCAA proceedings to an "Applicant" shall refer to Newco, *mutatis mutandis*, and, for greater certainty, each of the Charges (as such term is defined in the Initial Order granted by this Court in these CCAA proceedings dated October 2, 2019 (the "**Initial Order**")) shall, subject to the Distribution and Transition Order granted by this Court in these CCAA proceedings dated May 25, 2021 (the "**May 2021 Order**"), constitute a charge on the assets, property and undertaking of Newco;

(c) Bellatrix shall be deemed to cease to be an applicant in these CCAA proceedings, and shall be deemed to be released from the purview of any Order of this Court granted in respect of these CCAA proceedings, save an except for this Order, the terms of which as they relate to Bellatrix shall continue to apply in all respects to Bellatrix;

(d) without limiting the generality of (c), each of the Charges shall cease to constitute a charge on the assets, property and undertakings of Bellatrix, and Bellatrix shall have no obligation or liability in relation to the Charges; and

(e) the title of these CCAA proceedings is hereby, and shall be deemed to be, amended as follows:

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 2350810 ALBERTA LTD.

and any document filed thereafter in these CCAA proceedings (other than the Monitor's Certificate) shall be filed using such revised title of proceedings.

RELEASES

16. Effective upon the filing of the Monitor's Certificate, (i) the present and former directors, officers, employees, legal counsel and advisors of Bellatrix and Newco (or either of them), and (ii) the Monitor and its legal counsel (the persons listed in (i) and (ii) being collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims (including, without limitations, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the issuance of the Monitor's Certificate in connection with the Transaction (including the Reorganization) or completed pursuant to the terms of this Order (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, provided that nothing in this paragraph 16 shall waive, discharge, release, cancel or bar any claim against the directors and officers of Bellatrix and/or Newco that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

THE MONITOR

17. Without in any way limiting the Monitor's powers set out in the Initial Order, the May 2021 Order, any other Order of this Court in these CCAA proceedings, or under the CCAA or applicable law, the Monitor is hereby authorized to undertake and perform such activities and obligations as are contemplated to be undertaken or performed by the Monitor pursuant to this Order and the Agreement or any ancillary document related thereto, and shall incur no liability in connection therewith, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall affect, vary, derogate from, limit or otherwise amend any of the protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order or any other Order granted in these CCAA proceedings. For greater certainty, the terms of the May 2021 Order shall apply in respect of authorizing the Monitor to take such steps and actions on behalf of Bellatrix as necessary or desirable to complete the Transaction pursuant to this Order.

18. The Monitor is directed to file with the Court a copy of the Monitor's Certificate forthwith after delivery thereof to Bellatrix and the Purchaser.

19. The Monitor may rely on written notice from Bellatrix and the Purchaser or their respective counsel regarding the satisfaction of the Purchase Price and the fulfillment of the conditions to closing under the Agreement and shall incur no liability with respect to the delivery of the Monitor's Certificate.

20. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is authorized, entitled and empowered to assign or cause to be assigned, at any time after the Closing Date, Newco into bankruptcy and the Monitor shall be entitled but not obligated to act as trustee in bankruptcy thereof.

MISCELLANEOUS

21. Notwithstanding:

    (a) the pendency of these proceedings and any declaration of insolvency made herein;

    (b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, as amended

(the "**BIA**"), in respect of Bellatrix or Newco, and any bankruptcy order issued pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of Bellatrix or Newco; and

(d) the provisions of any federal or provincial statute,

the execution of the Agreement, the implementation of the Reorganization (including the transfer of the Excluded Assets and the Excluded Liabilities to Newco and the issuance of the Promissory Note and the Purchased Shares to the Purchaser) and the implementation of the Transaction shall be binding on any trustee in bankruptcy that may be appointed in respect of Bellatrix or Newco, and shall not be void or voidable by creditors of Bellatrix, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

22. Bellatrix, Newco, the Monitor and the Purchaser shall each be at liberty to apply for further advice, assistance and direction as may be necessary or desirable in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.

23. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist Bellatrix, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to Bellatrix and to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order, or to assist Bellatrix and the Monitor and their respective agents in carrying out the terms of this Order.

24. Service of this Order shall be deemed good and sufficient by: (a) serving this Order upon those interested parties attending or represented at the within Application, and (b) posting a copy of this Order on the Monitor's website at: http://www.pwc.com/ca/Bellatrix, and service of this Order on any other person is hereby dispensed with.

25. Service of this Order may be effected by fax, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Michele H. Hollins
Justice of the Court of Queen's Bench of Alberta

SCHEDULE A

FORM OF MONITOR'S CERTIFICATE

Clerk's Stamp:

COURT FILE NUMBER	1901-13767
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	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 BELLATRIX EXPLORATION LTD.
APPLICANT	BELLATRIX EXPLORATION LTD.
DOCUMENT	MONITOR'S CERTIFICATE
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Goodmans LLP** Bay Adelaide Centre 333 Bay Street, Suite 3400 Toronto, ON M5H 2S7 Attn: Robert J. Chadwick / Caroline Descours Tel: 416.597.4285 / 416.597.6275 Fax: 416.979.1234 Email: rchadwick@goodmans.ca / cdescours@goodmans.ca

RECITALS

A. Pursuant to an Order of the Honourable Justice Jones of the Court of Queen's Bench of Alberta, Judicial District of Calgary (the "**Court**") dated October 2, 2019, PricewaterhouseCoopers Inc. was appointed as the monitor (the "**Monitor**") of Bellatrix Exploration Ltd. ("**Bellatrix**") in proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

B. Pursuant to an Order of the Court dated June 22, 2021, the Court, *inter alia*, approved the agreement dated as of June 8, 2021 (the "**Agreement**") among Bellatrix, 2350810 Alberta Ltd. ("**Newco**") and1184262 B.C. Ltd. (the "**Purchaser**") and the transactions contemplated thereby.

C. Unless otherwise indicated herein, capitalized terms have the meanings set out in the Agreement.

THE MONITOR CERTIFIES the following:

1. The Purchaser has satisfied the Purchase Price in accordance with the Agreement;

2. The conditions to Closing as set out in the Agreement have been satisfied or waived by Bellatrix and the Purchaser;

3. The Transaction has been completed to the satisfaction of the Monitor; and

4. This Certificate was delivered by the Monitor at _____ **[a.m./p.m.]** on _____, 2021.

PRICEWATERHOUSECOOPERS INC. in its capacity as Monitor of Bellatrix Exploration Ltd. and not in its personal capacity

Per: _____
Name:
Title:

TAB O

2021 ONSC 5564
Ontario Superior Court of Justice [Commercial List]

CCAA Plan of Arrangement - Clearbeach and Forbes

2021 CarswellOnt 12453, 2021 ONSC 5564, 335 A.C.W.S. (3d) 700, 94 C.B.R. (6th) 239

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF CLEARBEACH RESOURCES INC. AND FORBES RESOURCES CORP.

C. Gilmore J.

Heard: July 14, 2021
Judgment: August 16, 2021
Docket: CV-21-00662483

Counsel: Richard Swan, Raj Sahni, Joshua Foster, for Applicants, Clearbeach and Forbes
Graham Phoenix, for Monitor, MNP Ltd.
Ananthan Sinnadurai, for Province of Ontario
Paula Boutis, for Norfolk County
David Taylor, for Municipality of Chatham-Kent
Steven Gibson, for Elgin County
Stuart R. Mackay, for Eugenie Gaiswinkler

Subject: Insolvency; Property; Public; Tax — Miscellaneous; Municipal

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Applicants were companies, involved in oil and gas industry — Companies entered bankruptcy proceedings — Companies sought approval of reverse vesting order (RVO) that would allow for restructuring — RVO was opposed by some respondent municipalities — Companies applied to court for approval under Companies' Creditors Arrangement Act (CCAA) — Application granted — Process leading to transaction was reasonable, and was preferable to that of public sale — Monitor approved transaction, finding that sale to non-related purchaser would not provide better result — Consideration was fair and reasonable — Other requirements under CCAA and applicable caselaw were met.

APPLICATION by company, for approval of arrangement in bankruptcy proceedings.

***C. Gilmore J.*:**

OVERVIEW

1 This endorsement relates to a motion by the Applicants heard on July 14, 2021 with additional written submissions received from counsel from Norfolk County and Chatham-Kent on July 30 and a written response from the Applicants on August 5, 2021.

2 The Applicants seek to restructure by way of a reverse vesting order ("the RVO"). The restructuring is not opposed by CRA, the Monitor or the Ministry of Natural Resources and Forestry ("MNRF"). The RVO is opposed by certain municipalities including Elgin County and certain of its included municipalities ("Elgin"), Norfolk County ("Norfolk") and the municipality

of Chatham-Kent ("Chatham") (together "the municipalities"). The opposition relates to outstanding municipal taxes owed by the Applicant to the municipalities as the RVO would extinguish most of the outstanding tax liabilities.

3 For the reasons set out below, I approve the RVO transaction and include with this endorsement a signed copy of the Order sought by the Applicants.

FACTUAL BACKGROUND

4 The Applicants are privately-owned affiliated companies in Ontario's oil and gas sector. Clearbeach owns 400 oil and gas wells in Southwestern Ontario, most of which are located on private farmland. MNRF issued orders requiring Clearbeach to plug 41 inactive wells by June 30, 2021. Five wells have been plugged to date. The estimated cost to plug the remaining 36 wells is $433,000.

5 Due to poor financial performance caused by challenging commodity prices and significant environmental obligations, Clearbeach has been unable to pay royalties to landowners, municipal taxes or service its debt to Pace. Pace subsequently took enforcement steps which precipitated Proposal Proceedings.

6 Clearbeach and Forbes commenced Proposal Proceedings under the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, in July 2020.

7 In May 2021, to prevent the bankruptcies of Clearbeach and Forbes and to provide some flexibility to consider restructuring options, a CCAA Initial Order was obtained authorizing the continuation of CCAA proceedings and appointing a Monitor.

8 Prior to the CCAA proceedings, the Monitor commissioned the Sproule Report to assess the potential value of the wells. Each well has an abandonment and reclamation obligation related to the costs to plug the well and reclaim the land at the end of the well's useful life. Historically, Clearbeach's abandonment and reclamation cost was $40,000 per well. With 400 wells, this cost could exceed $16M. This obligation gives rise to a priority interest in all of Clearbeach's assets.

9 The Sproule Report estimated an actual cost of abandonment and reclamation of $9M along with a negative after-tax cash flow of $3.6 to $4M. According to the Report, these costs exceed the gas and oil resources estimated to be available from the remaining active wells.

10 In consultation with the Monitor, the Applicants seek approval of an RVO which is structured as a share sale in order to preserve the MNRF licenses and to ensure that the stewardship and environmental obligations in connection with the Clearbeac h wells remain with Clearbeach. The Applicants seek approval of an RVO which would see the Purchaser purchase new common shares under the SPA and become the sole owner of 100% of the outstanding shares of Clearbeach.

11 Pursuant to the terms of the RVO, all Excluded Liabilities will vest in ResidualCo. The Excluded Liabilities include royalty interests and municipal taxes. The municipalities oppose the RVO on the grounds that lost tax arrears will significantly impact vulnerable taxpayers and affect services and infrastructure.

THE POSITIONS OF THE PARTIES

The Applicants

12 The Applicants submit that the RVO is the only viable transaction to emerge after a year-long insolvency process. It would avoid a devastating bankruptcy for Clearbeach while ensuring that Clearbeach can address its environmental and stewardship obligations associated with its oil and gas wells.

13 In order to implement the transaction the Applicants seek an approval and vesting order (the RVO). The structure of the RVO involves six steps:

a. a share purchase agreement ("the SPA") between Clearbeach and the Purchaser ("Oil Patch Services" or "OPS") authorizing Clearbeach to implement the transaction;

b. adding a corporation ("ResidualCo"), to be incorporated prior to the closing of the transaction as a wholly-owned subsidiary of Forbes, as an Applicant in this CCAA proceeding;

c. transferring and vesting Clearbeach's title to the Excluded Assets (as defined in the SPA) in ResidualCo;

d. cancelling and extinguishing all equity interests in Clearbeach existing prior to the Closing Date other than the issued and outstanding common shares;

e. authorizing Clearbeach to issue new common shares and vesting title to those shares in the Purchaser;

f. authorizing the Monitor to file an assignment in bankruptcy for ResidualCo and Forbes with MNP acting as Trustee

14 The Applicants submit that the RVO should be approved because it meets the criteria in *Royal Bank v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.), for the following reasons:

a. The process leading to the transaction was reasonable as the proposed transaction was the culmination of a year long process of consideration of various restructuring options. A public sale was not an option given that Clearbeach has no realizable assets.

b. Any sale process would require interim financing which is unlikely to be obtained given that Clearbeach has no assets.

c. The Monitor was consulted in relation to the transaction and is supportive of it.

d. MNRF was consulted in relation to the transaction and took no position.

e. The Transaction is the only viable option and is in the best interest of the Applicants and their creditors. A bankruptcy would have disastrous consequences for all stakeholders including the landowners and MNRF.

f. The consideration is fair and reasonable and commensurate with the value of Clearbeach's assets.

g. The process is expressly contemplated in s. 36(4) of the CCAA.

15 The terms of the SPA include assumption of all Excluded Liabilities by ResidualCo. Excluded Liabilities include Gross Overriding Loyalty Interests ("GORRs") and outstanding municipal taxes, interest and penalties.

16 The proposed RVO includes a release in favour of landowners upon whose property the oil and gas assets are situated with respect to any outstanding municipal tax liabilities in relation to those assets.

Norfolk

17 Norfolk opposes the plan put forward by the Applicants and supports the submissions of both Elgin and Chatham. It is owed $678,493.25 in property taxes by Clearbeach. The SPA would result in that liability being rolled into ResidualCo which would then declare bankruptcy. The tax debt would then be eliminated. The release proposed by the Applicants would prevent Norfolk from collecting any tax arrears from any landowners who have leases with Clearbeach.

18 Norfolk objects to the proposed plan on the grounds that it represents an unreasonable loss of revenue. Norfolk is left without a remedy to collect the tax arrears as the municipality cannot collect on the taxes owed in relation to the pipeline or from the landowners.

19 Norfolk further objects to the plan on the basis that it is fundamentally unfair. Further, there is great concern about future environmental liabilities in relation to the wells. MNRF has made it clear that it does not have any financial responsibility for

those liabilities. The alleged primary benefit of the proposed plan is in meeting environmental obligations that would otherwise fall on landowners, and potentially others. Norfolk submits that it is being asked to forgo arrears of taxes to fund liabilities which should be the responsibility of the Province, the landowners or both.

Chatham

20 Chatham's share of arrears to be assumed by ResidualCo total $212,352.96 plus interest. Chatham is concerned about further arrears of $1,039,277.26 owed by Lagasco Inc., a related company to Clearbeach.

21 Chatham submits that there has been a complete lack of consultation by the Applicants with the municipalities. This is contrary to the principles set out in Soundair. Chatham also expresses concerns similar to those of Norfolk with respect to the releases proposed to be granted to landowners as well as the uneven balance of the elimination of tax arrears in relation to the alleged benefit of compliance with outstanding MNRF orders.

22 Chatham is concerned that the restructured version of Clearbeach will be controlled by the same individuals who controlled the original entity but with "hand-picked" assets and liabilities including the extinguishment of all municipal tax debt. This makes the proposed plan patently unfair.

23 The ownership of three of the municipality's tax rolls is also in question. Chatham is dissatisfied with the explanations given by the Applicant and submits that it is unclear that those tax rolls are associated with Clearbeach. That is, Clearbeach is using the RVO to expunge tax debt from related entities as well as from Clearbeach.

ANALYSIS AND RULING

24 It is clear that this Court has the jurisdiction to approve the RVO pursuant to sections 36 and 11 of the CCAA. In order to properly exercise this jurisdiction, the Court must consider both the factors set out in s. 36(3) of the CCAA and the *Soundair* principles. The factors in s. 36(3) are as follows:

> (a) whether the process leading to the proposed sale was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale;
>
> (c) whether the monitor filed a report stating that in its opinion the proposed sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which creditors were consulted;
>
> (e) the effects of the proposed sale 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.

25 The relevant principles enumerated in *Soundair* are set out below:

> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the efficacy and integrity of the process by which offers have been obtained;
>
> (c) whether the interests of all parties have been considered; and
>
> (d) whether there has been unfairness in the working out of the process.

26 The abovementioned principles have been applied in cases involving RVOs. In the Green Reliefcase, 2020 ONSC 6837, the Court approved an RVO in which the shares of Green Relief were acquired by ResidualCo, which assumed all of Green Relief's assets and liabilities.

27 Turning to the specific factors to be considered under the CCAA and *Soundair*, I make the following findings:

a. The Process leading to the transaction was reasonable. Multiple restructuring options have been considered by the Applicants over the last many months. I am aware of this, having case managed this matter for more than a year. A public sale was never a viable option given that Clearbeach has no realizable assets and given its environmental obligations.

b. The Monitor supports the transaction as set out in its Second Report. Specifically, the Monitor's position is that a sale to a non-related purchaser is unlikely to provide a transaction more favourable than the RVO. Further, a sales process would require funding. It is unlikely that such funding could be obtained given Clearbeach's abandonment and reclamation obligations and its stewardship and environmental obligations to MNRF. Further, the Monitor views the RVO as superior to a bankruptcy and the only commercially viable alternative.

c. While MNRF did not provide any written materials for this hearing, counsel for MNRF made brief submissions pointing out that Clearbeach's abandonment and reclamation obligations would be in priority to any arrears of municipal taxes and far exceed the amount of those taxes. MNRF did not support a bankruptcy.

d. Bankruptcy is not a viable option given Clearbeach's stewardship obligations and the fact that it has no assets. The RVO provides a going-concern result and the ability to satisfy Clearbeach's ongoing environmental and stewardship obligations by personnel who have experience in doing so, in consultation with MNRF. A potential piecemeal sale of the oil and gas assets to new operators with less experience would create uncertainty and delay. Abandonment of the wells could result in environmental damage which would potentially be borne by the landowners or MNRF.

e. The consideration received is fair and reasonable. There is $7.5M owed to Pace on a secured basis. The assets of Clearbeach would need to generate $11.1M more than the value estimated in the Sproule Report for there to be funds available for creditors ranking behind Pace.

f. The third-party releases are needed to protect landowners from being held responsible for municipal taxes and penalties related to land used in Clearbeach's operations. They also protect Clearbeach from claims by landowners in relation to municipal taxes and penalties included in the Excluded Liabilities. The releases benefit the creditors and the debtors and are fair and reasonable.

g. Clearbeach's obligations under various Ministry Inspector's Orders are not provable in bankruptcy and need to be addressed in priority to any secured and unsecured creditors. Therefore, the RVO seeks to mitigate the harm that would result from a bankruptcy including ensuring the ongoing operation of Clearbeach so that it can meet its environmental obligations and pay future municipal taxes.

h. The granting of the RVO will prejudice any holders of Gross Overriding Royalty Agreements (GORRs). However, those GORR holders would be equally prejudiced in the event of a bankruptcy.

i. The prejudice to municipalities with Municipal Tax Claims will be increased in the event of Clearbeach's bankruptcy. If a bankruptcy occurs, Clearbeach must pay its environmental obligations with no funds available for past or future municipal taxes. As was made clear in the Sproule Report, Clearbeach has no equity in any of its property nor in the Retained Assets defined in the SPA.

j. The municipalities submitted that the consultation with them regarding the transaction was deficient. Creditor consultation is only one of the factors to be considered by the Court in the approval of the proposed RVO in accordance with the *Soundair* principles and s. 36(3) of the CCAA. There was extensive consultation with MNRF in order to address Clearbeach's environmental and stewardship obligations. Failure to engage MNRF and the senior creditor, Pace, would have led to a bankruptcy.

k. The municipalities also submit that they are disproportionately affected by the treatment of the Excluded Liabilities. However, if the RVO fails there will be no funds with which to pay future taxes. I adopt the reasoning of Patillo, J. in *Grafton-Fraser v.* Cadillac,2017 ONSC 2496 at paras. 23 and 24 as set out below:

> 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 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.

l. The municipalities are concerned that the Excluded Liabilities include tax liabilities that do not belong to Clearbeach. While much of this confusion was cleared following the written submissions of the municipalities, the SPA provides that the Excluded Liabilities include municipal taxes owed by *Clearbeach*. If there are tax roll numbers related to other entities, they would not form part of the Excluded Liabilities.

m. The municipalities also submitted that Clearbeach has overestimated its environmental obligations and relies on those obligations as a reason to include arrears of municipal taxes in its list of Excluded Liabilities. However, the municipalities did not provide any independent evidence of the environmental obligations. The Sproule Report (commissioned by the Monitor) estimates those obligations at $9.4M. MNRF estimates them to be in range of $12M.

n. This Court has authority under the CCAA to grant reorganizations without shareholder approval in order to ensure that shareholders (who have the lowest priority) cannot block the proposed reorganization. I agree that it is appropriate for the Court to exercise its discretion to do so in this case.

28 Given all of the above, I find that the Transaction meets the requirements under both the CCAA and *Soundair*. Further, it is fair, reasonable and no other commercially reasonable transaction could be obtained from an arm's length party. I have therefore signed the draft Order provided by the Applicants which is attached.

Application granted.

Appendix

Court File No.: CV-21-00662483-00CL

ONTARIO SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

THE HONOURABLE JUSTICE GILMORE	)))	WEDNESDAY, THE 14{th} DAY OF JULY, 2021

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 CLEARBEACH RESOURCES INC. AND FORBES RESOURCES CORP. Applicants

TAB P

2020 ONSC 6837
Ontario Superior Court of Justice [Commercial List]

Re Green Relief Inc.

2020 CarswellOnt 19933, 2020 ONSC 6837, 331 A.C.W.S. (3d) 419, 88 C.B.R. (6th) 305

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 GREEN RELIEF INC. (the "Applicant")

Koehnen J.

Heard: November 2-3, 2020
Judgment: November 9, 2020
Docket: CV-20-00639217-00CL

Counsel: C. Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell, for Applicant
Peter Osborne, Christopher Yung, for Directors, Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel
Mark Abradjian, for Tony Battaglia in his capacity as shareholder and creditor
David Ward, for 2650064 Ontario Inc.
Alex Henderson, for Susan Basmaji
Gavin Finlayson, for Auxley Cannabis Group Inc. and Kolab Project Inc.
Anton Granic, for himself
Rory McGovern, for Steve LeBlanc
Alan Dick, Adrienne Boudreau, for Thomas Saunders
Steven Weisz, Amanda McInnis, for Lyn Mary Bravo
Brian Duxbury, for Warren Bravo
Robert Kennaley, Joshua W. Winter, for Henry Schilthuis and Mark Lloyd
Danny Nunes, for Monitor

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Applicant was company, that had filed for bankruptcy — Company sought order approving transaction for sale of its assets, under Companies' Creditors Arrangement Act (CCAA) — Stakeholders challenged release that approval was to grant in favour of releasees, as condition precedent for sale — Company applied for above-noted relief — Application granted — Whether release was condition precedent or not, was not barrier to court approval of release — Absence of relevant plan was similarly not barrier to release — Claim being released had little to no chance of success, so that deprivation of cause of action was not major issue — Released parties were necessary to restructuring — Claims released were rationally connected to purpose of plan — Releasees had contributed to efforts, so that company could apply for relief — Release benefitted debtor as well as creditors — Creditors had proper notice of release — All of these factors were in favour of approval of release and transaction — Application judge remained seized of all issues Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 36 (3).

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Applicant was company, that had filed for bankruptcy — Company sought order approving transaction for sale of its assets, under Companies' Creditors Arrangement Act (CCAA) — Stakeholders challenged release that approval was to grant in favour

of releasees, as condition precedent for sale — Company applied for above-noted relief — Application granted — Relief was not extended to shareholder, who was not part of negotiation — It was not clear on evidence whether shareholder helped bring about transaction.

APPLICATION by company for order approving transaction and release in bankruptcy proceedings.

***Koehnen J.*:**

1 The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the*Companies'* Creditors Arrangement Act, R.S.C. 1985, c. C-36 , as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.

2 For the reasons set out below, I:

a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.

b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.

c. Decline to extend the benefit of the release to Susan Basmaji.

I. The Sale Transaction

3 Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.

4 265 Co. will pay $5,000,000 for the common shares. Approximately $1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will pay Residual Co. up to $7,000,000 as an earn out during the first two fiscal years following closing. The earn out is based on a payment of 25% of annual EBITDA above $5,000,000.

5 Section 36(3) of the CCAA provides that, when deciding whether to authorize a sale of assets, the court should 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;

(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;

(d) the extent to which creditors were consulted;

(e) the effects of the proposed sale or distribution 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.

6 These factors are consistent with the principles set out inRoyal Bank v. Soundair Corp.1991 CanLII 2727(ON CA) at para. 16 for the approval of a sales transaction.

7 I am satisfied that the principles of *Soundair* and the factors set out in section 36 (3) of the CCAA have been met here.

8 The process leading to the Transaction was reasonable in the circumstances. While there was no formal sale and investor solicitation process, the transaction was the culmination of a seven-month long Notice of Intention and CCAA proceeding. The proceeding involved vigorously competing stakeholders and a competitive bidding process between interested purchasers. The competing stakeholder groups had ample opportunity to bring the business to the attention of potential purchasers. I am satisfied that there was ample information available and ample time for stakeholders to participate in the purchase process or bring the purchase to the attention of market players who may be interested in acquiring Green Relief. The Monitor approved the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

9 No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

II. The Release

10 The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.

11 There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.

12 The Objectors argue that I should reject the release because:

(i) It was improper to include it as a condition precedent to the Transaction.

(ii) I have no jurisdiction to approve the release.

(iii) The release fails to meet the test set out in case law concerning releases.

(iv) The release is too broad in scope.

(i) Release as a Condition Precedent

13 The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.

14 Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

15 That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.

(ii) Jurisdiction to Grant Release

16 The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.

17 The Objectors begin their analysis with section 5.1 (1) ofthe CCAA which provides:

> 5.1 (1) **A compromise or arrangement** made in respect of a debtor company **may include** in its terms provision for the **compromise of claims against directors** of the company **that arose before the commencement of proceedings under this Act** and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations (emphasis added).

18 The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to prefiling claims

19 The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.

20 The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.

21 Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put $3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.

22 Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

23 While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

24 The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In largepart I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

25 Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court undersection 11 of the CCAA to make any order that it considers appropriate in the circumstances.

26 At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.*, 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

27 In *Lydian International Limited (Re)*, 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

> (a) Whether the claims to be released are rationally connected to the purpose of the plan;
>
> (b) Whether the plan can succeed without the releases;
>
> (c) Whether the parties being released contributed to the plan;
>
> (d) Whether the releases benefit the debtors as well as the creditors generally;
>
> (e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and
>
> (f) Whether the releases are fair, reasonable and not overly-broad.

28 As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

29 In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian*, it warrants separate identification on the facts of the case before me.

30 The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

The Quality of the Claims being Released

31 As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.

32 On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.

33 This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.

34 This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

35 The Objectors' primary opposition to the release is based on their desire to bring an action against the current directors, the Company's legal advisors during the CCAA proceedings, the Monitor and its counsel for their conduct during the CCAA proceedings. The Objectors submit that the current Board, the Monitor and their legal counsel misled the court by suggesting that they had a transaction in the offing that would have injected $20,000,000 into Green Relief. The Objectors say that the releasees did insufficient due diligence to determine whether the proposed purchaser in fact had $20,000,000 available.

36 The Objectors submit that the Company has incurred needless professional fees because of the fruitless pursuit of the $20,000,000 transaction and that Green Relief suffered a loss of chance in that it was deprived of the ability to pursue alternative transactions.

37 If anything, the proposed action demonstrates the need for a release. In the overall circumstances of the case, the threat of litigation against the current board, the Company's counsel, the Monitor and its counsel is unfounded and disproportionate. To demonstrate this requires some context and background.

38 At the outset of the proceeding, 265 Co. proposed to extend a $5,000,000 operating loan to Green Relief. The loan provided no money for creditors. The board feared that accepting the loan would inevitably put Green Relief further into debt and ultimately end up with 265 Co. having ownership of Green Relief without having provided anything for other stakeholders. Mr. Leblanc supported the 265 Co. proposal and urged that I adopt it.

39 The board urged me to allow them to pursue a proposal from another investor, Mr. Vercouteren. The Vercouteren proposal would have injected $20,000,000 into Green Relief. As it turns out, the Vercouteren proposal did not materialize. Initially the court was advised that the Vercouteren proposal was being delayed because of administrative holdups attributable to the Covid 19 pandemic. A few months later it was discovered that the delays were attributable to the fact that the Vercouteren proposal was contingent upon the completion of another transaction in Europe. The nature of that transaction, its status, closing date, likelihood of closing and reason for not closing to date were never revealed.

40 It is fair to say that when I discovered this, I expressed frustration to the Applicant for having failed to disclose the true status of the Vercouteren proposal from the outset. The Applicant assured me that they had done due diligence on Mr. Vercouteren and had been assured by his counsel, a reputable law firm, that he was a person of financial substance with the means to complete a transaction of the sort he had proposed.

41 With the benefit of hindsight one can debate whether the board acted perfectly, their conduct, however, ultimately led to the situation we find ourselves in now which is one that has 265 Co. offering more money to creditors and potentially other stakeholders than its initial proposal did. The proposal I am being asked to approve would see 265 Co. inject $5,000,000 of which $1,500,000 would be for operating purposes and $3,500,000 would be for distribution to creditors. In addition, the 265 Co. proposal contains an earn out of up to an additional $7,000,000 for distribution to creditors. While I agree that it does not offer $20,000,000, the reality is that $20,000,000 was not on the table.

42 Mr. McGovern, on behalf of Mr. Leblanc submits that the fact that the current offer of 265 Co. is superior to the prior offer does not end the analysis because the board and its advisors got that superior offer by engaging in questionable conduct. According to Mr. McGovern, this introduces moral hazard into the equation which is undesirable.

43 On that analysis, if anyone has been damaged by the alleged moral hazard, it is 265 Co. which has been led to improve its previous offers based on allegedly misleading information. However, 265 Co. does not complain. It wishes to close the Transaction.

44 Mr. Dick on behalf of Mr. Saunders and Mr. Kennaley on behalf of Messrs. Schilthuis and Lloyd submit that the Objectors should be able to pursue their loss of chance claim. They argue that there were no other bids for Green Relief because the size

of the Vercouteren proposal inhibited others from bidding. While perhaps initially appealing as a basis to speculate about what other bids may have been available, I do not accept the submission for three reasons.

45 First, the Vercouteren proposal did not stop 265 Co. from making its $5,000,000 operating loan proposal. It also did not stop 265 Co. from making a significantly more superior offer later subject to an exit right based on what its due diligence revealed. Anyone who was seriously interested in the business could have made an offer with a due diligence exit right. There is nothing unusual in that type of proposal

46 Second, the founders supported 265 Co.'s initial inferior proposal. Had they truly believed Green Relief was worth $20,000,000, it is unlikely they would have done so. In addition, the founders were ideally placed to find other financial solutions preferable to the one on offer. They did not do so. Even when they learned that the current proposal was conditional on the release, the Objectors did not suggest that the company return to the drawing board to search for another transaction. The Objectors want me to approve the Transaction but with the release removed.

47 Third, no creditor objects to the Transaction. Any hope of a transaction that would offer more funds for creditors, let alone shareholders, than the Transaction does is illusory. At an earlier stage in this proceeding, Mr. Weisz stated that "Green Relief is hopelessly insolvent": see my endorsement of April 20, 2020 at para. 6. At the time, Green Relief was in default of leases, had tax arrears of over $100,000 and was over five months in arrears on a mortgage in favour of Rescom. Hopelessly insolvent companies do not have enough money to pay off creditors, let alone provide value to shareholders. This particular hopelessly insolvent company is a cannabis business. The entire cannabis industry is undergoing a fundamental shakeup. There is no shortage ofCCAA proceedings involving players in the cannabis industry. The harsh business reality is that creditors, let alone shareholders, will come out short in these restructurings. If anyone stands to gain from a superior offer, it is creditors. Yet no creditor, apart from Ms. Bravo who asserts that she is a creditor, wants to pursue a claim against anyone for their conduct of the CCAA proceeding.

48 In those circumstances, I am satisfied that whatever right of action is being removed by the release is so insubstantial that the court need not be concerned about depriving anyone of a cause of action that has even a remote chance of success. At best, it is a cause of action that is entirely without legal merit but which might have some economic value if a defendant were prepared to settle on the basis of the claim's nuisance value. Permitting unmeritorious claims to proceed so that the founders can try to extract a nuisance value settlement arising from steps that were approved by the court at each stage would amount to legally authorized extortion which I am not inclined to permit.

49 In the circumstances described above, the quality of the claims released would incline me to approve the release.

Application of the Lydian Factors

50 *Releasees necessary and essential:* The released parties here were necessary and essential to the restructuring. A CCAA proceeding quite obviously cannot proceed without a Monitor, Monitor's counsel or company counsel. Similarly, a restructuring cannot proceed without the other releasees like directors, officers and employees.

51 *Rational connection between claims released and the purpose of the plan:* The claims released are rationally connected to the purpose of the plan. The object of the release is to diminish indemnity claims by the releasees against Residual Co. and the pool of cash that is being created in its hands to satisfy creditor claims. Given that one purpose of a CCAA proceeding is to maximize creditor recovery, a release which helps do that is rationally connected to the purpose of the plan.

52 *Whether the plan can succeed without the releases* is unknown. The directors have made the releases a condition precedent to the plan. The court should not accept the release simply because it is said to be a condition precedent. In the circumstances of this case, the condition precedent strikes me as more of a strong-arm tactic that courts should resist. I feel myself at liberty to call the directors' bluff and approve the Transaction without the release.

53 Success of the plan without releases should, however, also be assessed with regard to factors other than potential strong-arming by incumbent directors. Here, the pool of assets immediately available for distribution of creditors is approximately

$3,500,000. As noted, the releasees may have a claim on those funds to satisfy any indemnity claims arising out of the litigation. Mr. McGovern's announced desire to sue the Monitor, its counsel, the directors and Green Relief's counsel for their conduct during the restructuring may give rise to indemnity claims of a size that would make a significant dent in the cash available for creditors. That diminution would make the plan significantly less successful and, depending on circumstances, could eliminate assets available for creditors.

54 *Did the releasees contribute to the plan:* While there is not yet a plan, the releasees have clearly contributed to get the Company to this stage. The Monitor, its counsel, the directors and Company counsel dedicated time and effort to the CCAA proceedings. Professional advisors contributed further by deferring billing and collection. Messrs. Jha and Battaglia contributed $1,500,000 of their personal funds to provide DIP financing at relatively modest interest rates. Mr. Battaglia contributed $220,000. Dr. Jha initially contributed $500,000 and then increased his contribution to $1,250,000 in June 2020.

55 *Does the release benefit the debtor as well as creditors:* The release benefits the debtor in that it helps facilitate a transaction that will make funds available to creditors. In the absence of the release, the funds available to creditors could be significantly diminished because of indemnity claims by the releasees. Those indemnity claims would include claims for advancement of defence costs. The advancement of defence costs would be claimed in relation to an action that questions the conduct of the releasees during a court supervised and court approved the process. As noted above, the nature of those claims is highly tenuous.

56 *Creditors knowledge of the nature and effect of the release:* All creditors on the service list were served with materials relating to this motion. Creditors were free to attend the hearing, several did. Those creditors who made submissions on the motion supported the release.

57 A consideration of the foregoing *Lydian* factors would also incline me to approve the release. If I balance the right to the Objectors to pursue the releasees for their conduct during the CCAA proceeding against the right of creditors to maximize recovery against the Green Relief estate, there is simply no contest. The creditors with proven claims have legitimate, verified demands against the corporate estate. The Objectors have tenuous claims based on objections to a court supervised process that would in effect amount to a collateral attack on court orders. In those circumstances I am satisfied that the release benefits the debtor and creditors generally.

Scope of the Releases

58 Although the scope of the releases is captured by the factor that Lydian describes as whether the releases are fair, reasonable and not overly broad, I consider the scope of the release here in a standalone section because of the prominence given to it during argument.

59 The release is found in paragraph 24 of the proposed order. Its material language provides:

> ...the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicant, legal counsel and advisors of the Applicant, and (ii) the Monitor and its legal counsel (collectively, the "Released Parties") shall be ... released ... from ...all ... claims ...of any nature or kind whatsoever ... based in whole or in part on any act or omission, ... taking place prior to the filing of the Monitor's Certificate and that relate in any manner whatsoever to the Applicant or any of its assets (current or historical), obligations, business or affairs or this CCAA Proceeding, ... provided that nothing in this paragraph shall ... release... any claim: (i) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, (ii) against the former directors and officers of the Applicant for breach of trust arising from acts or omissions occurring before the date of the Initial Order, (iii) that may be made against any applicable insurance policy of the Applicant prior to the date of the Initial Order, or (iv) that may be made against the current directors and officers that would be covered by the Directors' Charge granted pursuant to the Initial Order.

60 While the release appears broad at first blush, a closer reading narrows it scope considerably. The parties being released are by and large parties who provided services to the company during the CCAA process. Given that the incremental steps in the CCAA process were approved by the court and were subject to submission by a wide variety of parties, the release is not, prima facie, unreasonable. In addition, while current directors are also released, the longest-serving of those are Messrs. Jha

and Battaglia who became directors on March 7, 2019, approximately one year before the Notice of Intention was filed. The time period for which they are being released outside of the court proceedings is therefore relatively limited. On the motion, no one advanced any basis for a claim against them for pre-Notice of Intention conduct.

61 The release then goes on to carve out certain types of claims that are not being released even as against the limited population of releasees. The carveouts include claims not permitted to be released under section 5.1 (2)of the CCAA and claims that may be made against any applicable insurance policy.

62 Section 5.1 (2) of the CCAA prohibits releases for, among other things, "wrongful or oppressive conduct by directors." Just what that means was the subject of much argument on the motion.

63 On behalf of Green Relief, Mr. Thornton submitted that the carveout for "wrongful or oppressive conduct" is broad and would include negligence claims. In other words, in the Company's view, negligence claims are not being released. Mr. Thornton submitted that the language ofsection 5.1 (2) of the CCAA effectively releases the directors from statutory liabilities for which they may be liable because the corporation failed to do something even though that failure is not attributable to any wrongdoing by directors. By way of example, directors' statutory liability for unpaid wages would fall into this category and would be captured by the release.

64 In BlueStar Battery Systems International Corp., Re2000 CanLII 22678 (ON SC) Farley J. said the following about the scope ofsection 5.1 (2) at para 14:

> "However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining "oppressive conduct". Similarly it would appear that "wrongful conduct" would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal."

65 This passage would appear to support Mr. Thornton's submission.

66 Mr. Osborne, on behalf of the current directors took a narrower view of the meaning of "wrongful or oppressive" conduct and described it as referring to "active but not "passive torts". In Mr. Osborne's submission, the release covers claims in respect of which the corporation can indemnify directors, including negligence, but does not include intentional conduct like fraud.

67 Given the difference of views, some counsel asked me to define specifically what was or was not excluded by section 5.1 (2) while others urged me not to define the scope of the section at this stage.

68 My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.

69 In that regard I would urge a heavy dose of restraint on all parties. There has been no shortage of animosity and litigation between the parties. Temperatures have run high throughout. Before continuing any existing litigation or commencing new litigation, I would urge all parties to consider whether they are proceeding out of anger and frustration, however justified it may be, or are they proceeding on a rational economic basis because there is a cogent basis for a claim that will lead to recovery considerably in excess of the costs of litigating. This is a situation where suing "out of principle" warrants considerable restraint.

70 The release also carves out claims "that may be made against any applicable insurance policy of the Applicant prior to the date of the initial order." I was advised during the motion that the directors were unable to obtain insurance after the Notice

of Intention was filed in March 2020 but that the company purchased tail coverage that extended coverage for past conduct of directors. The tail coverage expires on November 26, 2020. That still provides plaintiffs with a period of time to commence an action for which there might be insurance coverage and to which the release might therefore not apply. The tail coverage may for example, cover current and former directors for conduct that arose before the Notice of Intention was filed.

71 To permit such claims to be filed, I am temporarily lifting the stay of proceedings against officers and directors of Green Relief solely for the purpose of initiating claims that would potentially obtain the benefit of the carveouts under the release.

72 Given my preference for interpreting the release in light of actual circumstances rather than in a vacuum and given my temporary lift of the stay of proceedings against officers and directors, there is considerable benefit to the parties and considerable judicial efficiency in having the release interpreted by the same judicial officer who approved it and who had oversight of the CCAA proceedings. I will therefore remain seized of this issue and order that any issue about whether the release applies (including the issue of insurance coverage) will be determined by me.

73 To be clear, if any actions are commenced because of the temporary lift stay, the parties will still have to agree that such actions are carved out of the release by virtue of insurance coverage or I will have to determine that issue. The actions will not proceed and need not be defended until such agreement is reached or until I have determined whether the release applies.

Relief requested by Susan Basmaji

74 Susan Basmaji is a shareholder who asks that I extend the coverage of the release to her. Ms. Basmaji says she motivated a large number of other shareholders to cooperate with the Monitor and the Company to support the Transaction. She says that as a result of those efforts, Mr. Leblanc has commenced a defamation action against her.

75 I am not inclined to extend the release to Ms. Basmaji. The release was the product of negotiations between various stakeholders. It is not for the court to rewrite the release and bring other parties into the negotiation. I have extremely limited knowledge of the dispute between Mr. Leblanc and Ms. Basmaji and have no basis for concluding whether Ms. Basmaji was essential to the success of the Transaction as Lydian suggests nor do I have enough information about the defamation action to determine whether Ms. Basmaji should benefit from a release. That that said, it strikes me that the litigation between Mr. Leblanc and Ms. Basmaji a dispute to which the exhortation in paragraph 69 above is particularly relevant.

Disposition

76 For the reasons set out above, I

a. approve the Transaction;

b. approve the release;

c. will remain seized of all issues concerning the interpretation of the release and the insurance coverage referred to in it;

d. lift the stay of proceedings solely to permit actions to be brought up to and including November 26, 2020 in order to capture the benefit of insurance coverage referred to in the release;

e. reimpose the stay of proceedings effective at 12:01 AM on November 27, 2020; and

f. decline to extend the benefit of the release to Susan Basmaji.

Application granted.

End of Document

TAB Q

2010 QCCS 4915
Cour supérieure du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 10954, 2010 QCCS 4915, [2010] Q.J. No. 10469, 193
A.C.W.S. (3d) 1067, 72 C.B.R. (5th) 49, J.E. 2010-2002, EYB 2010-180748

In the Matter of the Plan of Arrangement and Compromise of : White Birch Paper Holding Company, White Birch Paper Company, Stadacona General Partner Inc., Black Spruce Paper Inc., F. F. Soucy General Partner Inc., 3120772 Nova Scotia Company, Arrimage de gros Cacouna inc. and Papier Masson ltée (Petitioners) v. Ernst & Young Inc. (Monitor) and Stadacona Limited Partnership, F. F. Soucy Limited Partnership and F. F. Soucy Inc. & Partners, Limited Partnership (Mises en cause) and Service d'impartition Industriel Inc., KSH Solutions Inc. and BD White Birch Investement LLC (Intervenant) and Sixth Avenue Investment Co. LLC, Dune Capital LLC and Dune Capital International Ltd. (Opposing parties)

Robert Mongeon, J.C.S.

Heard: 24 september 2010
Oral reasons: 24 september 2010 *
Written reasons: 15 october 2010
Docket: C.S. Montréal 500-11-038474-108

Proceedings: refused leave to appeal *White Birch Paper Holding Co., Re* (2010), 2010 QCCA 1950 (C.A. Que.)

Counsel: None given.

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Corporation experienced financial difficulties and placed itself under protection of Companies' Creditors Arrangement Act — In context of its restructuring, corporation contemplated sale of all its assets — Bidding process was launched and several investors filed offers — Corporation entered into asset sale agreement with winning bidder — US bankruptcy court approved process without modifications — Court approved process with some modifications and set date of September 17, 2010, as limit to submit bid — On September 17, unsuccessful bidder filed new bid — At outcome of bidding process, corporation decided to sell its assets once again to winning bidder — On September 24, corporation brought motion seeking court's approval of sale — Motion granted — Evidence showed that no stakeholder objected to sale and that all parties agreed to participate in bidding process — Once bidding process was started, there was no turning back unless process was defective — Court was not convinced that winning bid should be set aside just because unsuccessful bidder lost — Court was of view that bidding process met criteria established by jurisprudence — In addition, monitor supported position of winning bidder — Therefore, sale should be approved as is.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Divers

Société a connu des difficultés financières et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, la société a considéré vendre tous ses actifs — Processus d'appel d'offres a été lancé et plusieurs investisseurs ont déposé leurs offres — Société a signé une entente de vente d'actifs avec le soumissionnaire gagnant — Tribunal américain de faillite a approuvé le processus sans modifications — Tribunal a approuvé le processus avec quelques modifications et a fixé la date du 17 septembre 2010 comme étant la date limite pour soumettre une soumission — Soumissionnaire déçu a déposé une nouvelle offre le 17 septembre — Au terme du processus d'appel d'offres, la société a décidé de vendre ses actifs une fois de plus au soumissionnaire gagnant — Société a déposé, le 24 septembre, une requête visant

à obtenir l'approbation de la vente par le tribunal — Requête accueillie — Preuve démontrait qu'aucune partie intéressée ne s'était opposée à la vente et que toutes les parties avaient convenu de participer au processus d'appel d'offres — Une fois le processus d'appel d'offres lancé, il n'était pas question de l'interrompre à moins que le processus ne s'avère déficient — Tribunal n'était pas convaincu que le soumissionnaire gagnant devrait être exclu simplement parce que le soumissionnaire déçu avait perdu — Tribunal était d'avis que le processus d'appel d'offres satisfaisait aux critères établis par la jurisprudence — De plus, le contrôleur était en faveur de la position défendue par le soumissionnaire gagnant — Par conséquent, la vente devrait être approuvée telle quelle.

MOTION by corporation seeking court's approval of sale.

***Robert Mongeon, J.C.S.*:**

BACKGROUND

1 On 24 February 2010, I issued an Initial Order under the CCAA protecting the assets of the Debtors and Mis-en-cause (the WB Group). Ernst & Young was appointed Monitor.

2 On the same date, Bear Island Paper Company LLC (Bear Island) filed for protection of Chapter 11 of the US Bankruptcy code before the US Bankruptcy Court for the Eastern District of Virginia.

3 On April 28, 2010, the US Bankruptcy Court issued an order approving a Sale and Investor Solicitation Process (« SISP ») for the sale of substantially all of the WB Group's assets. I issued a similar order on April 29, 2010. No one objected to the issuance of the April 29, 2010 order. No appeal was lodged in either jurisdiction.

4 The SISP caused several third parties to show some interest in the assets of the WG Group and led to the execution of an Asset Sale Agreement (ASA) between the WB Group and BD White Birch Investment LLC (« BDWB »). The ASA is dated August 10, 2010. Under the ASA, BDWB would acquire all of the assets of the Group and would:

a) assume from the Sellers and become obligated to pay the Assumed Liabilities (as defined in the ASA);

b) pay US$90 million in cash;

c) pay the Reserve Payment Amount (as defined);

d) pay all fees and disbursements necessary or incidental for the closing of the transaction; and

e) deliver the Wind Down Amount (as defined).

the whole for a consideration estimated between $150 and $178 million dollars.

5 BDWB was to acquire the Assets through a Stalking Horse Bid process. Accordingly, Motions were brought before the US Bankruptcy Court and before this Court for orders approving:

a) the ASA

b) BDWB as the stalking horse bidder

c) The Bidding Procedures

6 On September 1, 2010, the US Bankruptcy Court issued an order approving the foregoing without modifications.

7 On September 10, 2010, I issued an order approving the foregoing with some modifications (mainly reducing the Break-Up Fee and Expense Reimbursement clauses from an aggregate total sought of US$5 million, down to an aggregate total not to exceed US$3 million).

8 My order also modified the various key dates of implementation of the above. The date of September 17 was set as the limit to submit a qualified bid under stalking horse bidding procedures, approved by both Courts and the date of September 21 st was set as the auction date. Finally, the approval of the outcome of the process was set for September 24, 2010 [1] .

9 No appeal was lodged with respect to my decision of September 10, 2010.

10 On September 17, 2010, Sixth Avenue Investment Co. LLC (« Sixth Avenue ») submitted a qualified bid.

11 On September 21, 2010, the WB Group and the Monitor commenced the auction for the sale of the assets of the group. The winning bid was the bid of BDWB at US$236,052,825.00.

12 BDWB's bid consists of:

i) US$90 million in cash allocated to the current assets of the WB Group;

ii) $4.5 million of cash allocated to the fixed assets;

iii) $78 million in the form of a credit bid under the First Lien Credit Agreement allocated to the WB Group's Canadian fixed assets which are collateral to the First Lien Debt affecting the WB Group;

iv) miscellaneous additional charges to be assumed by the purchaser.

13 Sixth Avenue's bid was equivalent to the BDWB winning bid less US$500,000.00, that is to say US$235,552,825.00. The major difference between the two bids being that BDWB used credit bidding to the extent of $78 million whilst Sixth Avenue offered an additional $78 million in cash. For a full description of the components of each bid, see the Monitor's Report of September 23, 2010.

14 The Sixth Avenue bidder and the BDWB bidder are both former lenders of the WB Group regrouped in new entities.

15 On April 8, 2005, the WB Group entered into a First Lien Credit Agreement with Credit Suisse AG Cayman Islands and Credit Suisse AG Toronto acting as agents for a number of lenders.

16 As of February 24, 2010, the WB Group was indebted towards the First Lien Lenders under the First Lien Credit Agreement in the approximate amount of $438 million (including interest). This amount was secured by all of the Sellers' fixed assets. The contemplated sale following the auction includes the WB Group's fixed assets and unencumbered assets.

17 BDWB is comprised of a group of lenders under the First Lien Credit Agreement and hold, in aggregate approximately 65% of the First Lien Debt. They are also « Majority Lenders » under the First Lien Credit Agreement and, as such, are entitled to make certain decisions with respect to t he First Lien Debt including the right to use the security under the First Lien Credit Agreement as tool for credit bidding.

18 Sixth Avenue is comprised of a group of First Lien Lenders holding a minority position in the First Lien Debt (approximately 10%). They are not « Majority Lenders » and accordingly, they do not benefit from the same advantages as the BDWB group of First Lien Lenders, with respect to the use of the security on the fixed assets of the WB Group, in a credit bidding process [2] .

19 The bidding process took place in New York on September 21, 2010. Only two bidders were involved: the winning bidder (BDWB) and the losing bidder [3] (Sixth Avenue).

20 In its Intervention, BDWB has analysed all of the rather complex mechanics allowing it to use the system of credit bidding as well as developing reasons why Sixth Avenue could not benefit from the same privilege. In addition to certain arguments developed in the reasons which follow, I also accept as my own BDWB's submissions developed in section (e), paragraphs [40]

to [53] of its Intervention as well as the arguments brought forward in paragraphs [54] to [60] validating BDWB's specific right to credit bid in the present circumstances.

21 Essentially, BDWB establishes its right to credit bid by referring not only to the September 10 Court Order but also by referring to the debt and security documents themselves, namely the First Lien Credit Agreement, the US First Lien Credit Agreement and under the Canadian Security Agreements whereby the « Majority Lender » may direct the « Agents » to support such credit bid in favour of such « Majority Lenders ». Conversely, this position is not available to the « Minority Lenders ». This reasoning has not been seriously challenged before me.

22 The Debtors and Mis-en-cause are now asking me to approve the sale of all and/or substantially all the assets of the WB Group to BDWB. The disgruntled bidder asks me to not only dismiss this application but also to declare it the winning bidder or, alternatively, to order a new auction.

23 On September 24, 2010, I delivered oral reasons in support of the Debtors' Motion to approve the sale. Here is a transcript of these reasons.

REASONS (delivered orally on September 24, 2010)

24 I am asked by the Petitioners to approve the sale of substantially all the WB Group's assets following a bid process in the form of a « Stalking Horse » bid process which was not only announced in the originating proceedings in this file, I believe back in early 2010, but more specifically as from May/June 2010 when I was asked to authorise the Sale and Investors Solicitation Process (SISP). The SISP order led to the canvassing of proposed bidders, qualified bidders and the eventual submission of a « Stalking Horse » bidder. In this context, a Motion to approve the « Stalking Horse » Bid process to approve the assets sale agreement and to approve a bidding procedure for the sale of substantially all of the assets of the WB Group was submitted and sanctioned by my decision of September 10, 2010.

25 I note that throughout the implementation of this sale process, all of its various preliminary steps were put in place and approved without any contestation whatsoever by any of the interested stakeholders except for the two construction lien holders KSH [4] and SIII [5] who, for very specific reasons, took a strong position towards the process itself (not that much with the bidding process but with the consequences of this process upon their respective claims.

26 The various arguments of KSH and SIII against the entire Stalking Horse bid process have now become moot, considering that both BDWB and Sixth Avenue have agreed to honour the construction liens and to assume the value of same (to be later determined).

27 Today, the Motion of the Debtors is principally contested by a group which was identified as the « Sixth Avenue » bidders and more particularly, identified in paragraph 20 of the Motion now before me. The « Stalking Horse » bidder, of course, is the Black Diamond group identified as « BD White Birch Investment LLC ». The Dune Group of companies who are also secured creditors of the WB Group are joining in, supporting the position of Sixth Avenue. Their contestation rests on the argument that the best and highest bid at the auction, which took place in New York on September 21, should not have been identified as the Black Diamond bid. To the contrary, the winning bid should have been, according to the contestants, the « Sixth Avenue » bid which was for a lesser dollar amount ($500,000.00), for a larger cash amount (approximately $78,000,000.00 more cash) and for a different allocation of the purchase price.

28 Notwithstanding the foregoing, the Monitor, in its report of August 23, supports the « Black Diamond » winning bid and the Monitor recommends to the Court that the sale of the assets of the WB Group be made on that basis.

29 The main argument of « Sixth Avenue » as averred, sometimes referred to as the « bitter bidder », comes from the fact that the winning bid relied upon the tool of credit bidding to the extent of $78,000,000.00 in arriving at its total offer of $236,052,825.00.

30 If I take the comments of « Sixth Avenue », the use of credit bidding was not only a surprise, but a rather bad surprise, in that they did not really expect that this would be the way the « Black Diamond » bid would be ultimately constructed. However, the possibility of reverting to credit bidding was something which was always part of the process. I quote from paragraph 7 of the Motion to Approve the Sale of the Assets, which itself quotes paragraph 24 of the SISP Order, stating that:

> 24. Notwithstanding anything herein to the contrary, including without limitation, the bidding requirements herein, the agent under the White Birch DIP Facility (the « DIP Agent ») and the agent to the WB Group's first lien term loan lenders (the First Lien Term Agent »), on behalf of the lenders under White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be deemed Qualified Bidders and any bid submitted by such agent on behalf of the respective lenders in respect of all or a portion of the Assets shall be deemed both Phase 1 Qualified Bids and Phase 2 Qualified Bids. The DIP Agent and First Lien Term Agent, on behalf of the lenders under the White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be permitted in their sole discretion, to credit bid up to the full amount of any allowed secure claims under the White Birch DIP Facility and the first lien term loan agreement, respectively, to the extent permitted under Section 363(k) of the Bankruptcy Code and other applicable law.

31 The words « and other applicable law » could, in my view, tolerate the inclusion of similar rules of procedure in the province of Quebec. [6]

32 The possibility of reverting to credit bidding was also mentioned in the bidding procedure sanctioned by my decision of September 10, 2010 as follows and I now quote from paragraph 13 of the Debtors' Motion:

> 13. « Notwithstanding anything herein to the contrary, the applicable agent under the DIP Credit Agreement and the application agent under the First Lien Credit Agreement shall each be entitled to credit bid pursuant to Section 363(k) of the Bankruptcy Code and other applicable law.

33 I draw from these excerpts that when the « Stalking Horse » bid process was put in place, those bidders able to benefit from a credit bidding situation could very well revert to the use of this lever or tool in order to arrive at a better bid [7]

34 Furthermore, many comments were made today with respect to the dollar value of a credit bid versus the dollar value of a cash bid. I think that it is appropriate to conclude that if credit bidding is to take place, it goes without saying that the amount of the credit bid should not exceed, but should be allowed to go as, high as the face value amount of the credit instrument upon which the credit bidder is allowed to rely. The credit bid should not be limited to the fair market value of the corresponding encumbered assets. It would then be just impossible to function otherwise because it would require an evaluation of such encumbered assets, a difficult, complex and costly exercise.

35 Our Courts have always accepted the dollar value appearing on the face of the instrument as the basis for credit bidding. Rightly or wrongly, this is the situation which prevails.

36 Many arguments were brought forward, for and against the respective position of the two opposing bidders. At the end of the day, it is my considered opinion that the « Black Diamond » winning bid should prevail and the « Sixth Avenue » bid, the bitter bidder, should fail.

37 I have dealt briefly with the process. I don't wish to go through every single step of the process but I reiterate that this process was put in place without any opposition whatsoever. It is not enough to appear before a Court and say: « Well, we've got nothing to say now. We may have something to say later » and then, use this argument to reopen the entire process once the result is known and the result turns out to be not as satisfactory as it may have been expected. In other words, silence sometimes may be equivalent to acquiescence. All stakeholders knew what to expect before walking into the auction room.

38 Once the process is put in place, once the various stakeholders accept the rules, and once the accepted rules call for the possibility of credit bidding, I do not think that, at the end of the day, the fact that credit bidding was used as a tool, may be raised as an argument to set aside a valid bidding and auction process.

39 Today, the process is completed and to allow "Sixth Avenue" to come before the Court and say: "My bid is essentially better than the other bid and Court ratify my bid as the highest and best bid as opposed to the winning bid" is the equivalent to a complete eradication of all proceedings and judgments rendered to this date with respect to the Sale of Assets authorized in this file since May/June 2010 and I am not prepared to accept this as a valid argument. Sixth Avenue should have expected that BDWB would want to revert to credit bidding and should have sought a modification of the bidding procedure in due time.

40 The parties have agreed to go through the bidding process. Once the bidding process is started, then there is no coming back. Or if there is coming back, it is because the process is vitiated by an illegality or non-compliance of proper procedures and not because a bidder has decided to credit bid in accordance with the bidding procedures previously adopted by the Court.

41 The Court cannot take position today which would have the effect of annihilating the auction which took place last week. The Court has to take the result of this auction and then apply the necessary test to approve or not to approve that result. But this is not what the contestants before me ask me to do. They are asking me to make them win a bid which they have lost.

42 It should be remembered that "Sixth Avenue" agreed to continue to bid even after the credit bidding tool was used in the bidding process during the auction. If that process was improper, then "Sixth Avenue" should have withdrawn or should have addressed the Court for directions but nothing of the sort was done. The process was allowed to continue and it appears evident that it is only because of the end result which is not satisfactory that we now have a contestation of the results.

43 The arguments which were put before me with a view to setting aside the winning bid (leaving aside those under Section 36 of the CCAA to which I will come to a minute) have not convinced me to set it aside. The winning bid certainly satisfies a great number of interested parties in this file, including the winning bidders, including the Monitor and several other creditors.

44 I have adverse representations from two specific groups of creditors who are secured creditors of the White Birch Group prior to the issue of the Initial Order which have, from the beginning, taken strong exceptions to the whole process but nevertheless, they constitute a limited group of stakeholders. I cannot say that they speak for more interests than those of their own. I do not think that these creditors speak necessarily for the mass of unsecured creditors which they allege to be speaking for. I see no benefit to the mass of creditors in accepting their submissions, other than the fact that the Monitor will dispose of US$500,000.00 less than it will if the winning bid is allowed to stand.

45 I now wish to address the question of Section 36 CCAA.

46 In order to approve the sale, the Court must take into account the provisions of Section 36 CCAA and in my respectful view, these conditions are respected.

47 Section 36 CCAA reads as follows:

> 36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;

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

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (*a*) or (*b*).

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

(added underlining)

48 The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.

49 The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.

50 Nevertheless, I was given two authorities as to what should guide the Court in similar circumstances, I refer firstly to the comments of Madame Justice Sarah Peppall in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 CarswellOnt 3509 (Ont. S.C.J. [Commercial List]), and she writes at paragraph 13:

The proposed disposition of assets meets the Section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.*decision. Indeed, to a large degree, the criteria overlap. The process was reasonable as the Monitor was content with it (and this is the case here). Sufficient efforts were made to attract the best possible bid (this was done here through the

process, I don't have to review this in detail); the SISP was widely publicized (I am given to understand that, in this present instance, the SISP was publicized enough to generate the interest of many interested bidders and then a smaller group of Qualified Bidders which ended up in the choice of one « Stalking Horse » bidder); ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy (this was all done in the present case.) The logical extension of that conclusion is that the AHC Transaction is as well (and, of course, understand that the words « preferable to a bankruptcy » must be added to this last sentence). The effect of the proposed sale on other interested parties is very positive. (It doesn't mean by saying that, that it is positive upon all the creditors and that no creditor will not suffer from the process but given the representations made before me, I have to conclude that the proposed sale is the better solution for the creditors taken as a whole and not taken specifically one by one) Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors.

51 Here, we may have an argument that the sale will not provide significant recoveries for unsecured creditors but the question which needs to be asked is the following: "Is it absolutely necessary to provide interest for all classes of creditors in order to approve or to set aside a "Stalking Horse bid process"?

52 In my respectful view, it is not necessary. It is, of course, always better to expect that it will happen but unfortunately, in any restructuring venture, some creditors do better than others and sometimes, some creditors do very badly. That is quite unfortunate but it is also true in the bankruptcy alternative. In any event, in similar circumstances, the Court must rely upon the final recommendation of the Monitor which, in the present instance, supports the position of the winning bidder.

53 In *Nortel Networks Corp., Re*, Mister Justice Morawetz, in the context of a Motion for the Approval of an Assets Sale Agreement, Vesting Order of approval of an intellectual Property Licence Agreement, etc. basically took a similar position (2009 CarswellOnt 4838 (Ont. S.C.J. [Commercial List]), at paragraph 35):

The duties of the Court in reviewing a proposed sale of assets are as follows:

1) It should consider whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

2) It should consider the interests of all parties;

3) It should consider the efficacy and integrity of the process by which offers have been obtained;

4) and it should consider whether there has been unfairness in the working out of the process.

54 I agree with this statement and it is my belief that the process applied to the present case meets these criteria.

55 I will make no comment as to the standing of the « bitter bidder ». Sixth Avenue mayo have standing as a stakeholder while it may not have any, as a disgruntled bidder.

56 I am, however, impressed by the comments of my colleague Clément Gascon, j.s.c. in *Abitibi Bowater*, in his decision of May 3rd, 2010 where, in no unclear terms he did not think that as such, a bitter bidder should be allowed a second strike at the proverbial can.

57 There may be other arguments that could need to be addressed in order to give satisfaction to all the arguments provided to me by counsel. Again, this has been a long day, this has been a very important and very interesting debate but at the end of the whole process, I am satisfied that the integrity of the « Stalking Horse » bid process in this file, as it was put forth and as it was conducted, meets the criteria of the case law and the CCAA. I do not think that it would be in the interest of any of the parties before me today to conclude otherwise. If I were to conclude otherwise, I would certainly not be able to grant the

suggestion of « Sixth Avenue », to qualify its bid as the winning bid; I would have to eradicate the entire process and cause a new auction to be held. I am not prepared to do that.

58 I believe that the price which will be paid by the winning bidder is satisfactory given the whole circumstances of this file. The terms and conditions of the winning bid are also acceptable so as a result, I am prepared to grant the Motion. I do not know whether the Order which you would like me to sign is available and I know that some wording was to be reviewed by some of the parties and attorneys in this room. I don't know if this has been done. Has it been done? Are KSH and SIII satisfied or content with the wording?

Attorney:

I believe, Mister Justice, that KSH and SIII have.....their satisfaction with the wording. I believe also that Dow Jones, who's present, ...their satisfaction. However, AT&T has communicated that they wish to have some minor adjustments.

The Court:

Are you prepared to deal with this now or do you wish to deal with it during the week-end and submit an Order for signature once you will have ironed out the difficulties, unless there is a major difficulty that will require further hearing?

Attorney:

I think that the second option you suggested is probably the better one. So, we'd be happy to reach an agreement and then submit it to you and we'll recirculate everyone the wording.

The Court:

Very well.

The Motion to Approve the Sale of substantially all of the WB Group assets (no. 87) is *granted,* in accordance with the terms of an Order which will be completed and circulated and which will be submitted to me for signature as of Monday, next at the convenience of the parties;

The Motion of Dow Jones Company Inc. (no. 79) will be continued sine die;

The Amended Contestation of the Motion to Approve the Sale (no. 84) on behalf of « Sixth Avenue » is *dismissed* without costs (I believe that the debate was worth the effort and it will serve no purpose to impose any cost upon the contestant);

Also for the position taken by Dunes, there is no formal Motion before me but Mr. Ferland's position was important to the whole debate but I don't think that costs should be imposed upon his client as well;

The Motion to Stay the Assignment of a Contract from AT&T (no. 86) will be continued sine die;

The Intervention and Memorandum of arguments of BD White Birch Investment LLC is *granted*, without costs.

Motion granted.

Footnotes

* Leave to appeal refused at *White Birch Paper Holding Co., Re* (2010), 2010 CarswellQue 11534, 2010 QCCA 1950 (C.A. Que.).

1 See my Order of September 10, 2010.

2 For a more comprehensive analysis of the relationship of BDWB members and Sixth Avenue members as lenders under the original First Lien Credit Agreement of April 8, 2005, see paragraphs 15 to 19 of BDWB's Intervention.

3 Sometimes referred to as the « bitter bidder » or « disgruntled bidder » See *AbitibiBowater inc., Re*, 2010 QCCS 1742 (C.S. Que.) (Gascon J.)

4 KSH Solutions Inc.

5 Service d'Impartition Industriel Inc.

6 The concept of credit bidding is not foreign to Quebec civil law and procedure. See for example articles 689 and 730 of the Quebec code of Civil Procedure which read as follows:
689. The purchase price must be paid within five days, at the expiry of which time interest begins to run.

Nevertheless, when the immovable is adjudged to the seizing creditor or any hypothecary creditor who has filed an opposition or whose claim is mentioned in the statement certified by the registrar, he may retain the purchase-money to the extent of the claim until the judgment of distribution is served upon him.

730. A purchaser who has not paid the purchase price must, within ten days after the judgment of homologation is transmitted to him, pay the sheriff the amounts necessary to satisfy the claims which have priority over his own; if he fails to do so, any interested party may demand the resale of the immovable upon him for false bidding.

When the purchaser has fulfilled his obligation, the sheriff must give him a certificate that the purchase price has been paid in full.
See also Denis Ferland and Benoit Emery, 4ème edition, volume 2 (Éditions Yvon Blais (2003)):
La loi prévoit donc que, lorsque l'immeuble est adjugé au saisissant ou à un créancier hypothécaire qui a fait opposition, ou dont la créance est portée à l'état certifié par l'officier de la publicité des droits, l'adjudicataire peut retenir le prix, y compris le prix minimum annoncé dans l'avis de vente (art. 670, al. 1, e), 688.1 C.p.c.), jusqu'à concurrence de sa créance et tant que ne lui a pas été signifié le jugement de distribution prévu à l'article 730 C.p.c. (art. 689, al 2 C.p.c.). Il n'aura alors à payer, dans les cinq jours suivant la signification de ce jugement, que la différence entre le prix d'adjudication et le montant de sa créance pour satisfaire aux créances préférées à la sienne (art. 730, al. 1 C.p.c.). La Cour d'appel a déclaré, à ce sujet, que puisque le deuxième alinéa de l'article 689 C.p.c. est une exception à la règle du paiement lors de la vente par l'adjudicataire du prix minimal d'adjudication (art. 688.1, al. 1 C.p.c.) et à celle du paiement du solde du prix d'adjudication dans les cinq jours suivants (art. 689, al. 1 C.p.c.), il doit être interprété de façon restrictive. Le sens du mot « créance », contenu dans cet article, ne permet alors à l'adjudicataire de retenir que la partie de sa créance qui est colloquée ou susceptible de l'être, tout en tenant compte des priorités établies par la loi.
See, finally, *Cie Montréal Trust c. Jori Investments Inc.*, J.E. 80-220 (C.S. Que.) [1980 CarswellQue 85 (C.S. Que.)], *Eugène Marcoux Inc. c. Côté*, [1990] R.J.Q. 1221 (C.A. Que.)

7 The SISP, the bidding procedure and corresponding orders recognize the principle of credit bidding at the auction and these orders were not the subject of any appeal procedure.

See paragraphs 24, 25 and 26 of BDWB's Intervention.

As for the right to credit bid in a sale by auction under the CCAA, see *Maax Corporation, Re* (July 10, 2008), Doc. 500-11-033561-081 (C.S. Que.) (Buffoni J.)

See also Re: *Brainhunter* (OSC Commercial List, no.09-8482-00CL, January 22, 2010)

TAB R

CANADA

CONSOLIDATION

CODIFICATION

Canada Business Corporations Act

Loi canadienne sur les sociétés par actions

R.S.C., 1985, c. C-44

L.R.C. (1985), ch. C-44

Current to May 29, 2023

Last amended on August 31, 2022

À jour au 29 mai 2023

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PART XIV.1

Disclosure Relating to Diversity

Diversity in corporations

172.1 (1) The directors of a prescribed corporation shall place before the shareholders, at every annual meeting, the prescribed information respecting diversity among the directors and among the *members of senior management* as defined by regulation.

Information to shareholders and Director

(2) The corporation shall provide the information referred to in subsection (1) to each shareholder, except to a shareholder who has informed the corporation in writing that they do not want to receive that information, by sending the information along with the notice referred to in subsection 135(1) or by making the information available along with a proxy circular referred to in subsection 150(1).

Information to Director

(3) The corporation shall concurrently send the information referred to in subsection (1) to the Director.

2018, c. 8, s. 24.

PARTIE XIV.1

Présentation de renseignements relatifs à la diversité

Diversité dans les sociétés

172.1 (1) À chaque assemblée annuelle, les administrateurs d'une société visée par règlement présentent aux actionnaires les renseignements réglementaires concernant la diversité au sein des administrateurs et au sein des *membres de la haute direction* au sens des règlements.

Envoi au directeur et aux actionnaires

(2) La société fournit les renseignements visés au paragraphe (1) à chaque actionnaire, sauf à ceux qui l'ont informée par écrit qu'ils ne souhaitent pas les recevoir, en les envoyant avec l'avis visé au paragraphe 135(1) ou en les mettant à sa disposition avec toute circulaire visée au paragraphe 150(1).

Envoi au directeur

(3) La société envoie simultanément au directeur les renseignements visés au paragraphe (1).

2018, ch. 8, art. 24.

PART XV

Fundamental Changes

Amendment of articles

173 (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

(a) change its name;

(b) change the province in which its registered office is situated;

(c) add, change or remove any restriction on the business or businesses that the corporation may carry on;

(d) change any maximum number of shares that the corporation is authorized to issue;

(e) create new classes of shares;

(f) reduce or increase its stated capital, if its stated capital is set out in the articles;

PARTIE XV

Modifications de structure

Modification des statuts

173 (1) Sous réserve des articles 176 et 177, les statuts de la société peuvent, par résolution spéciale, être modifiés afin :

a) d'en changer la dénomination sociale;

b) de transférer le siège social dans une autre province;

c) d'ajouter, de modifier ou de supprimer toute restriction quant à ses activités commerciales;

d) de modifier le nombre maximal d'actions qu'elle est autorisée à émettre;

e) de créer de nouvelles catégories d'actions;

f) de réduire ou d'augmenter son capital déclaré, si celui-ci figure dans les statuts;

(g) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;

(h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;

(i) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(j) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(k) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;

(l) revoke, diminish or enlarge any authority conferred under paragraphs (j) and (k);

(m) increase or decrease the number of directors or the minimum or maximum number of directors, subject to sections 107 and 112;

(n) add, change or remove restrictions on the issue, transfer or ownership of shares; or

(o) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

g) de modifier la désignation de tout ou partie de ses actions, et d'ajouter, de modifier ou de supprimer tous droits, privilèges, restrictions et conditions, y compris le droit à des dividendes accumulés, concernant tout ou partie de ses actions, émises ou non;

h) de modifier le nombre d'actions, émises ou non, d'une catégorie ou d'une série ou de les changer de catégorie ou de série;

i) de diviser en séries une catégorie d'actions, émises ou non, en indiquant le nombre d'actions par série, ainsi que les droits, privilèges, restrictions et conditions dont elles sont assorties;

j) d'autoriser les administrateurs à diviser en séries une catégorie d'actions non émises, en indiquant le nombre d'actions par série, ainsi que les droits, privilèges, restrictions et conditions dont elles sont assorties;

k) d'autoriser les administrateurs à modifier les droits, privilèges, restrictions et conditions dont sont assorties les actions non émises d'une série;

l) de révoquer ou de modifier les autorisations conférées en vertu des alinéas j) et k);

m) d'augmenter ou de diminuer le nombre fixe, minimal ou maximal d'administrateurs, sous réserve des articles 107 et 112;

n) d'apporter, de modifier ou de supprimer des restrictions quant à l'émission, au transfert ou au droit de propriété des actions;

o) d'ajouter, de modifier ou de supprimer toute autre disposition que la présente loi autorise à y insérer.

Termination

(2) The directors of a corporation may, if authorized by the shareholders in the special resolution effecting an amendment under this section, revoke the resolution before it is acted on without further approval of the shareholders.

Annulation

(2) Les administrateurs peuvent, si les actionnaires les y autorisent par la résolution spéciale prévue au présent article, annuler la résolution avant qu'il n'y soit donné suite.

Amendment of number name

(3) Notwithstanding subsection (1), where a corporation has a designating number as a name, the directors may amend its articles to change that name to a verbal name.

R.S., 1985, c. C-44, s. 173; 1994, c. 24, s. 19; 2001, c. 14, ss. 83, 134(F).

Modification de la dénomination exprimée en chiffres

(3) Nonobstant le paragraphe (1), les administrateurs d'une société ayant une dénomination sociale numérique peuvent en modifier les statuts pour adopter une dénomination exprimée en lettres.

L.R. (1985), ch. C-44, art. 173; 1994, ch. 24, art. 19; 2001, ch. 14, art. 83 et 134(F).

Constraints on shares

174 (1) Subject to sections 176 and 177, a distributing corporation, any of the issued shares of which remain

Restrictions concernant les actions

174 (1) Sous réserve des articles 176 et 177, la société ayant fait appel au public dont des actions en circulation

Validity of acts

(7) An issue or a transfer of a share or an act of a corporation is valid notwithstanding any failure to comply with this section or the regulations.

R.S., 1985, c. C-44, s. 174; 1991, c. 45, s. 554, c. 47, s. 722; 1994, c. 21, s. 125; 2001, c. 14, ss. 84, 134(F); 2011, c. 21, s. 58(E).

Proposal to amend

175 (1) Subject to subsection (2), a director or a shareholder who is entitled to vote at an annual meeting of shareholders may, in accordance with section 137, make a proposal to amend the articles.

Notice of amendment

(2) Notice of a meeting of shareholders at which a proposal to amend the articles is to be considered shall set out the proposed amendment and, where applicable, shall state that a dissenting shareholder is entitled to be paid the fair value of their shares in accordance with section 190, but failure to make that statement does not invalidate an amendment.

R.S., 1985, c. C-44, s. 175; 2001, c. 14, s. 135(E).

Class vote

176 (1) The holders of shares of a class or, subject to subsection (4), of a series are, unless the articles otherwise provide in the case of an amendment referred to in paragraphs (a), (b) and (e), entitled to vote separately as a class or series on a proposal to amend the articles to

(a) increase or decrease any maximum number of authorized shares of such class, or increase any maximum number of authorized shares of a class having rights or privileges equal or superior to the shares of such class;

(b) effect an exchange, reclassification or cancellation of all or part of the shares of such class;

(c) add, change or remove the rights, privileges, restrictions or conditions attached to the shares of such class and, without limiting the generality of the foregoing,

(i) remove or change prejudicially rights to accrued dividends or rights to cumulative dividends,

(ii) add, remove or change prejudicially redemption rights,

(iii) reduce or remove a dividend preference or a liquidation preference, or

(iv) add, remove or change prejudicially conversion privileges, options, voting, transfer or pre-emptive

Validité des actes

(7) L'émission ou le transfert d'actions ainsi que les actes d'une société sont valides nonobstant l'inobservation du présent article ou des règlements.

L.R. (1985), ch. C-44, art. 174; 1991, ch. 45, art. 554, ch. 47, art. 722; 1994, ch. 21, art. 125; 2001, ch. 14, art. 84 et 134(F); 2011, ch. 21, art. 58(A).

Proposition de modification

175 (1) Sous réserve du paragraphe (2), tout administrateur ou tout actionnaire ayant le droit de voter à une assemblée annuelle peut, conformément à l'article 137, présenter une proposition de modification des statuts.

Avis de modification

(2) La proposition de modification doit figurer dans l'avis de convocation de l'assemblée où elle sera examinée; elle précise, s'il y a lieu, que les actionnaires dissidents ont le droit de se faire verser la juste valeur de leurs actions conformément à l'article 190; cependant, le défaut de cette précision ne rend pas nulle la modification.

L.R. (1985), ch. C-44, art. 175; 2001, ch. 14, art. 135(A).

Vote par catégorie

176 (1) Sauf disposition contraire des statuts relative aux modifications visées aux alinéas a), b) et e), les détenteurs d'actions d'une catégorie ou, sous réserve du paragraphe (4), d'une série, sont fondés à voter séparément sur les propositions de modification des statuts tendant à :

a) changer le nombre maximal autorisé d'actions de ladite catégorie ou à augmenter le nombre maximal d'actions autorisées d'une autre catégorie conférant des droits ou des privilèges égaux ou supérieurs;

b) faire échanger, reclasser ou annuler tout ou partie des actions de cette catégorie;

c) étendre, modifier ou supprimer les droits, privilèges, restrictions ou conditions dont sont assorties les actions de ladite catégorie, notamment :

(i) en supprimant ou modifiant, de manière préjudiciable, le droit aux dividendes accumulés ou cumulatifs,

(ii) en étendant, supprimant ou modifiant, de manière préjudiciable, les droits de rachat,

(iii) en réduisant ou supprimant une préférence en matière de dividende ou de liquidation,

(iv) en étendant, supprimant ou modifiant, de manière préjudiciable, les privilèges de conversion, options, droits de vote, de transfert, de préemption ou

Definition of *reorganization*

191 (1) In this section, ***reorganization*** means a court order made under

(a) section 241;

(b) the *Bankruptcy and Insolvency Act* approving a proposal; or

(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

Powers of court

(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.

Further powers

(3) If a court makes an order referred to in subsection (1), the court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

Articles of reorganization

(4) After an order referred to in subsection (1) has been made, articles of reorganization in the form that the Director fixes shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

Certificate of reorganization

(5) On receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 262.

Effect of certificate

(6) A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

Définition de *réorganisation*

191 (1) Au présent article, la réorganisation d'une société se fait par voie d'ordonnance que le tribunal rend en vertu :

a) soit de l'article 241;

b) soit de la *Loi sur la faillite et l'insolvabilité*pour approuver une proposition;

c) soit de toute loi fédérale touchant les rapports de droit entre la société, ses actionnaires ou ses créanciers.

Pouvoirs du tribunal

(2) L'ordonnance rendue conformément au paragraphe (1) à l'égard d'une société peut effectuer dans ses statuts les modifications prévues à l'article 173.

Pouvoirs supplémentaires

(3) Le tribunal qui rend l'ordonnance visée au paragraphe (1) peut également :

a) autoriser, en en fixant les modalités, l'émission de titres de créance, convertibles ou non en actions de toute catégorie ou assortis du droit ou de l'option d'acquérir de telles actions;

b) ajouter d'autres administrateurs ou remplacer ceux qui sont en fonctions.

Réorganisation

(4) Après le prononcé de l'ordonnance visée au paragraphe (1), les clauses réglementant la réorganisation sont envoyées au directeur, en la forme établie par lui, accompagnées, le cas échéant, des documents exigés aux articles 19 et 113.

Certificat

(5) Sur réception des clauses de réorganisation, le directeur délivre un certificat de modification en conformité avec l'article 262.

Effet du certificat

(6) La réorganisation prend effet à la date figurant sur le certificat de modification; les statuts constitutifs sont modifiés en conséquence.

TAB S

2003 CarswellOnt 787
Ontario Superior Court of Justice

Laidlaw, Re

2003 CarswellOnt 787, [2003] O.J. No. 865, 120 A.C.W.S. (3d) 935, 39 C.B.R. (4th) 239

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended

In the Matter of the Business Corporations Act (Ontario), R.S.O. 1990 c. B. 16, as Amended

In the Matter of Laidlaw Inc. and Laidlaw Investments Ltd.

Farley J.

Heard: February 28, 2003
Judgment: February 28, 2003
Docket: 01-CL-4178

Counsel: *J. Carfagnini*, *B. Empey*, for Laidlaw Applicants
D. Tay, for Ernst & Young Inc., Monitor
S.R. Orzy, *K.J. Zych*, for Bondholders Subcommittee
D. Byers, for Bank Subcommittee
J. Marin, for Safety Kleen Corporation
R. Jaipargas, for Federal Insurance Company, Chubb Insurance Company

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Applicant debtors and others commenced proceedings under chapter 11 of United States Bankruptcy Code — Joint plan of reorganization for debtors was confirmed by U.S. judge — Debtors brought application for order pursuant to s. 18.6(2) of Companies' Creditors Arrangement Act recognizing and implementing order confirming plan and for order pursuant to s. 18.6(2) of Act recognizing and implementing plan in Canada — Application granted — Section 18.6(2) of Act provides court with authority to coordinate proceedings under Act with any foreign proceeding — Applicant debtors were entitled to relief under Act and U.S. proceedings had been recognized as foreign proceeding for purposes of Act — Global nature of plan of restructuring was appropriate consideration on application — Over 90% of revenues for debtors were produced by operations in United States — Ontario court had been apprised of developments relating to U.S. proceedings on regular basis — In these circumstances, full force and effect should be given in Canada to confirmation order and to plan of reorganization pursuant to s. 18.6(2) of Act.

APPLICATION by debtors for order recognizing and implementing United States order confirming plan of reorganization and for order recognizing and implementing plan in Canada.

***Farley J.*:**

1 The applicants sought an order as follows:

a. an order pursuant to section 18.6(2) of the *Companies' Creditors Arrangement Act* (the "CCAA") recognizing and implementing in Canada the Order (the "U.S. Confirmation Order") of the Honourable Judge Kaplan of the United States Bankruptcy Court for the Western District of New York (the "U.S. Court") providing for, *inter alia*, confirmation of the

Third Amended Joint Plan of Reorganization of Laidlaw USA, Inc. and its Debtor Affiliates, as may be amended from time to time prior to the date of the U.S. Confirmation Order (the "POR");

b. an order pursuant to section 18.6(2) of the CCAA recognizing and implementing in Canada the POR;

c. an order, pursuant to section 191 of the *Canada Business Corporations Act* ("CBCA"), authorizing the amendment of LINC's articles in accordance with articles of reorganization substantially in the form attached as Schedule "A" hereto;

d. an order extending the stay of proceedings.

2 The facts in this matter have been appropriately summarized in the factum of the applicants as follows:

PART II — THE FACTS

A. The Cross Border Reorganization

. . . . .

3. On June 28, 2001, the Applicants, together with Laidlaw USA, Inc., Laidlaw One, Inc., Laidlaw International Finance Corporation and Laidlaw Transportation, Inc. (collectively, the "Debtors") commenced proceedings under chapter 11 of the United States Bankruptcy Code in the U.S. Court, which proceedings are jointly administered under Case Nos. 01-14099 K through 01-14104 K (the "U.S. Proceedings").

4. Pursuant to the order of this Honourable Court dated June 28, 2001 (the "June 28 Order"), this Honourable Court, among other things, ordered that the Applicants were entitled to relief under the CCAA and granted a stay of proceedings.

5. Pursuant to the June 28 Order, this Court also recognized the U.S. Proceedings as foreign proceedings for the purposes of the CCAA.

6. By Order dated August 10, 2001 (the "August 10 Order"), this Honourable Court, among other things, approved a cross-border insolvency protocol (which has also been approved by the U.S. Court) (the "Protocol") to assist in coordinating activities in these proceedings and the U.S. Proceedings.

7. The Protocol was developed to promote the following mutually desirable goals and objectives:

(a) harmonize, coordinate and minimize and avoid duplication of activities in the proceedings before the U.S. Court and this Court;

(b) promote the orderly and efficient administration of the proceedings in the U.S. Court and this Court to, *inter alia*, reduce the costs associated therewith and avoid duplication of effort, all in order to allow the businesses operated by LINC's subsidiaries to be recoganized as a global enterprise; and

(c) promote international cooperation and respect for comity among the Courts.

8. For the past several years, United States-based operations have generated more than 90% of LINC's revenue on a consolidated basis.

B. Single Claims Process

9. Pursuant to the August 10 Order, this Honourable Court also recognized and approved, as the single claims process applicable to and binding on all creditors, wherever located, of the Debtors, a claims process approved by Order of the U.S. Court on August 7, 2001, (the "Claims Process").

10. Notice of the Claims Process was (i) published in the national editions of the *National Post* and *The Globe and Mail* and, in French, in *La Presse*, as well as in *The Wall Street Journal* and *The New York Times*, (ii) mailed to addresses of known creditors of the Debtors in the United States, Canada and elsewhere and (iii) posted on LINC's website.

11. Approximately 950 proofs of claim were received in response to the Claims Process. The Debtors have entered into settlement agreements involving many of the largest unliquidated claims.

C. POR and Disclosure Statement

(a) Previous Versions of the POR and Disclosure Statement

12. Previous versions of the POR and a Disclosure Statement for the POR (the "Disclosure Statement") have been filed with the U.S. Court and with this Honourable Court at the commencement of the respective proceedings in June, 2001 and on August 6, 2002 and September 20, 2002 (the "September Disclosure Statement").

(b) Initial Solicitation Process

13. On September 24, 2002, the U.S. Court entered an order (the "September 24 Order") which, among other things: (a) approved the September Disclosure Statement; (b) approved a form of confirmation hearing notice (the "September Confirmation Hearing Notice"); (c) scheduled the hearing for the confirmation of the POR by the U.S. Court (the "November Confirmation Hearing"); and (d) required the Debtors to publish a notice substantially in the form of the September confirmation Hearing Notice not less than 25 days before the November Confirmation Hearing.

14. On September 27, 2002, this Honourable Court granted an Order (the "September 27 Order") which, among other things: (a) declared that the U.S. Court has the jurisdiction to compromise claims against the Applicants; (b) recognized, and declared to be effective in Canada, the September 24 Order; (c) relieved the Applicants from any obligation to file a separate plan in Canada under the CCAA; (d) provided for the Applicants to publish a notice of the granting of such relief (the "Canadian Notice") in various newspapers in Canada; and (e) allowed interested persons to bring a motion to apply to this Court to vary or rescind the September 27 Order within 14 days after the publication of the Canadian Notice.

15. The Canadian Notice was published on Friday, October 4, 2002 in the *National Post, The Globe and Mail* and *La Presse*. No person has brought a motion to vary the September 27 Order.

(c) Amended POR and Disclosure Statement

16. Following the granting of the September 24 Order and the September 27 Order, the Debtors and their advisors continued their efforts to resolve certain outstanding issues before the September Confirmation Hearing Notice could be published and before the September Disclosure Statement could be printed. Included in those efforts were discussions with the Pension Benefit Guaranty Corporation (the "PBGC") of the United States which contacted the Debtors after the Orders had been granted and advised that it had concerns about the impact of the POR on certain claims that the PBGC had or may assert.

17. As discussions continued, the Debtors and their advisors determined that the September Disclosure Statement would not be printed and the September Confirmation Hearing Notice would not be published until the material issues were resolved. As a result, the Confirmation Hearing did not take place as scheduled.

18. An agreement in principle had been reached between the Debtors and PBGC. The POR and Disclosure Statement have been amended to reflect the discussions and settlement reached among the Debtors and PBGC.

19. The POR provides for, among other things: (a) cancellation of approximately US$3.4 billion of indebtedness in exchange for cash or newly-issued common stock (the "New Common Stock") of Reorganized LIL ("New LINC"), which will, through a series of restructuring transactions, become the ultimate parent holding company of the remaining Reorganized Debtors and their non-debtor affiliates; (b) the cancellation of the Old Common Stock and Old Preferred Stock of LINC; (c) the assumption, assumption and assignment or rejection of certain Executory Contracts and Unexpired Leases to which one or more of the Debtors is a party; (d) settlements of certain disputes between or among the Debtors and various creditor groups; and (e) implementation of the Laidlaw Bondholders' Settlement and the Safety-Kleen Settlement, each of which has previously been approved by this Honourable Court and the U.S. Court.

(d) Amended Solicitation Process

20. As a result of the amendments to the POR and the Disclosure Statement, on January 23, 2003 amended versions of the POR and the Disclosure Statement were filed with the U.S. Court and the U.S. Court granted a further Order (the "January 23 Order") approving the form of Disclosure Statement, establishing procedures for solicitation and tabulation of votes, setting 5:00 p.m., Eastern Time, February 24, 2003, as the Voting Deadline for the submission of ballots, scheduling the Confirmation Hearing before the U.S. Court for February 27, 2003 at 10:00 a.m., Eastern Time, and approving the Form of Notice of the Voting Deadline and the Confirmation Hearing (the "February Confirmation Hearing Notice").

21. Other than the necessary changes to dates involved in the process, neither the January 23, Order nor the February confirmation Hearing Notice are substantially different from the September 24 Order and November Confirmation Hearing Notice which were recognized by this Honourable Court pursuant to the September 27 Order. No party was prejudiced by the subsequent delay in the voting process.

D. Approval of POR

22. The February Confirmation Hearing Notice was published on or about January 31, 2003 in the following newspapers in Canada and the United States: (a) the *National Post*; (b) *The Globe and Mail*; (c) *La Presse*; (d) *The Wall Street Journal*; and (e) *The New York Times*.

23. The Voting Deadline set out in the January 23 Order has now passed. The voting in all relevant Classes has been overwhelmingly in favour of the POR.

24. Prior to the objection deadline established by the U.S. Court and after distribution of over 100,000 copies of the POR and Disclosure Statement to parties in interest, only 6 objections to confirmation of the POR were filed. The Debtors and their advisors expect that these objections (to the extent not resolved or withdrawn) will be overruled at the Confirmation Hearing.

25. On February 27, 2003, the U.S. Court issued the U.S. Confirmation Order. The U.S. Court found, among other things, that the POR complied in all respects with the requirements of the United States Bankruptcy Code and related rules. In particular, the U.S. Court found that:

(a) the POR contained all provisions required by law;

(b) the POR was proposed in good faith;

(c) the POR was in the best interests of the creditors of the Debtors;

(d) the POR was feasible; and

(e) the POR satisfied the "cram-down" requirements of the United States Bankruptcy Code.

26. The POR, as approved by the U.S. Confirmation Order, expressly contemplates and requires that the Applicants will seek an order effecting and implementing in Canada certain elements of the Restructuring Transactions and the POR.

3 Allow me now to turn to the law as it applies to this particular fact situation. Section 18.6(2) of the CCAA provides the Court with authority of latitude to coordinate proceedings under the CCAA with any "foreign proceeding" (that term being defined in s.18.6(1) to mean "a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally").

s.18.6(2) The Court may, in respect of a debtor, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

The applicants are debtor companies entitled to relief pursuant to the CCAA and the U.S. Proceedings have been recognized by the June 28 Order as a "foreign proceeding" for the purposes of the CCAA.

4 The purpose of s. 18.6(2) is to give the Court broad and flexible jurisdiction to facilitate cross-border insolvency proceedings which involve concurrent filings in Canada under the CCAA and in a foreign jurisdiction under the insolvency laws of that latter jurisdiction. The discretion given to a Canadian judge thereby must be exercised judicially. In appropriate circumstances, this may include a Canadian Court making an order which recognizes and gives effect to insolvency proceedings in foreign Courts and orders thereby emanating from those foreign Courts. As I observed in *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) at pp 107-8, factors which reasonably ought to be considered under the "recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged" and that an enterprise should be permitted to "reorganize as a global unit."

5 Given that in this case, there are the following facts:

(a) the Protocol has been implemented by both this Court and the U.S. Court;

(b) the U.S. Proceedings are foreign proceedings for the purposes of the CCAA;

(c) the stakeholders of the Applicants (and the other Debtors) have been subject to a single claims process which treats them equally regardless of the jurisdiction in which they reside;

(d) the global nature of the restructuring proposed by the POR;

(e) ample notice has been given of the existence of these proceedings and the U.S. Proceedings;

(f) over 90% of revenues for the Debtors are produced by operations in the United States; and

(g) this Court has been apprised of developments relating to the U.S. Proceedings on a regular basis.

and further that in applying the guidelines set out in *Babcock & Wilcox Canada Ltd.* I granted the September 27 Order providing *inter alia*:

(a) ordering and declaring that the U.S. Court has the jurisdiction to determine, compromise or otherwise affect the interest of claimants against, including creditors and shareholders of, the Applicants; and

(b) relieving the Applicants from the obligation to file a Plan of Compromise in Canada under the CCAA unless and until the proposed POR was rejected or refused by the U.S. Court.

and further given that I have already determined that the U.S. Court is the appropriate forum for adjudicating, determining, compromising or otherwise affecting all claims against the applicants and given that I have relieved the applicants (in the particular circumstances of this case) of the obligation to file a CCAA plan, it seems to me that it is appropriate in the circumstances to recognize and give full force and effect in Canada, to the Confirmation Order and the POR pursuant to s.18.6(2). I note in that respect that the POR has now been approved by the creditors of the Debtors, including the creditors of the applicants and confirmed by the U.S. Court following a Confirmation Hearing. That approval by the creditors of the applicants was by an overwhelming vote of over 96% in number and over 99% in value of each of the classes of creditors, which creditors had the benefit of fulsome disclosure.

6 The POR expressly contemplates that the Canadian Court would be asked for a s.18.6(2) order recognizing and implementing in Canada the Confirmation Order and the POR. In my view in the circumstances of this case that would be a fair and reasonable result *vis-à-vis* all affected persons on either side of the U.S. — Canadian border in providing an equitable solution. See *Loewen Group Inc., Re* (2001), 32 C.B.R. (4th) 54 (Ont. S.C.J. [Commercial List]) for a case of quite similar circumstances.

7 In addition the applicants sought an order pursuant to s.191 of the CBCA amending LINC's articles. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder or dissent rights.

> 191(1) In this section, "reorganization" means a court order made under
>
> (a) section 241;
>
> (b) the *Bankruptcy and Insolvency Act* approving a proposal; or
>
> (c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.
>
> (2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.
>
> (3) If a court makes an order referred to in subsection (1), the court may also
>
> (a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and
>
> (b) appoint directors in place of or in addition to all or any of the directors then in office.
>
> (4) After an order referred to in subsection (1) has been made, articles of reorganization in the form that the Director fixes shall be sent to the Director together with the documents required by section 19 and 113, if applicable.
>
> (5) On receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 262.
>
> (6) A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.
>
> (7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

8 The CCAA is an "other Act of Parliament that affects the rights among the corporation, its shareholders and creditors". See s.20 of the CCAA; *Beatrice Foods Inc., Re* (October 21, 1996), Doc. 295-96 (Ont. Gen. Div.), Houlden J.A., unreported.

9 The amendment to the articles would effect a cancellation of all presently outstanding shares of LINC. This is appropriate in the circumstances since:

> (a) such shares do not have value and are not likely to have value in the foreseeable future;
>
> (b) subsection 191(2) of the CBCA, which permits the Court to amend articles to effect any change that might be made under Section 173 of the CBCA, grants substantive, and not simply procedural, powers to amend the articles of a CBCA corporation;
>
> (c) paragraph 173(o) of the CBCA provides that articles may be amended to "add, change or remove any other provision that is permitted by the [CBCA] to be set out in the articles"; and
>
> (d) Section 173 of the CBCA is supported by paragraph 176(1)(b) of the CBCA, which contemplates amendments to the articles of a corporation to effect the cancellation of all or part of the shares of a class of shares.

See *Beatrice Foods Inc., Re*; *Algoma Steel Inc., Re* (2001), 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]), R. Dickerson, L. Getz and J. Howard, *Proposals for a New Business Corporations Law for Canada*, vol 1 (Ottawa: Information Canada, 1971) at p. 124.

10 The requested relief is granted. Order to issue as per my fiat.

11 I would wish to reiterate my comments at the end of today's hearing as to my appreciation to counsel on all sides throughout these CCAA proceedings and to Judge Kaplan of the U.S. Bankruptcy Court who shouldered so well the bulk of the burden of these coordinated U.S./Canadian proceedings.

Application granted.

TAB T

BUSINESS CORPORATIONS ACT

Chapter B-9

Table of Contents

(9) When under subsection (8) the auditor or a former auditor informs the directors of an error or misstatement in a financial statement,

(a) the directors shall prepare and issue revised financial statements or otherwise inform the shareholders, and

(b) if the corporation is a reporting issuer, the corporation shall file the revised financial statements with the Executive Director or inform the Executive Director of the error or misstatement in the same manner that the shareholders were informed of it.

(10) Every director or officer of a corporation who knowingly contravenes subsection (7) or (9) is guilty of an offence and liable to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

RSA 2000 cB-9 s171;2021 c18 s71

Qualified privilege

172 Any oral or written statement or report made under this Act by the auditor or a former auditor of a corporation has qualified privilege.

1981 cB-15 s166

Part 14
Fundamental Changes

Amendment of articles

173(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

(a) change its name, subject to section 12,

(b) add, change or remove any restriction on the business or businesses that the corporation may carry on,

(b.1) waive, or modify or revoke a waiver, in an interest, expectancy or offer under section 16.1,

(c) change any maximum number of shares that the corporation is authorized to issue,

(d) create new classes of shares,

(e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,

(f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series,

(g) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions of that series,

(h) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

(i) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions of that series,

(j) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series,

(k) revoke, diminish or enlarge any authority conferred under clauses (i) and (j),

(l) increase or decrease the number of directors or the minimum or maximum number of directors, subject to sections 107 and 112,

(m) subject to section 48(8), add, change or remove restrictions on the transfer of shares,

(m.1) add or remove an express statement establishing the unlimited liability of shareholders as set out in section 15.2, or

(n) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

(2) The directors of a corporation may, if authorized by the shareholders in the special resolution effecting an amendment under this section, revoke the resolution before it is acted on without further approval of the shareholders.

(3) Notwithstanding subsection (1), but subject to section 12, where a corporation has a designating number as a name, the directors may amend its articles to change that name to a verbal name.

RSA 2000 cB-9 s173;2005 c8 s42;2021 c18 s43

full rights as a shareholder, failing which the shareholder retains a status as a claimant against the corporation, to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors of the corporation but in priority to its shareholders.

(20) A corporation shall not make a payment to a dissenting shareholder under this section if there are reasonable grounds for believing that

(a) the corporation is or would after the payment be unable to pay its liabilities as they become due, or

(b) the realizable value of the corporation's assets would by reason of the payment be less than the aggregate of its liabilities.

RSA 2000 cB-9 s191;2005 c40 s7;2009 c53 s30

Part 15
Corporate Reorganization and Arrangements

Articles of reorganization resulting from court order

192(1) In this section, "order for reorganization" means an order of the Court made under

(a) section 242,

(b) the *Bankruptcy and Insolvency Act* (Canada) approving a proposal, or

(c) any other Act of the Parliament of Canada or an Act of the Legislature that affects the rights among the corporation, its shareholders and creditors.

(2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 173.

(3) If the Court makes an order for reorganization, the Court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms of those debt obligations, and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

TAB U

2010 QCCS 376
Cour supérieure du Québec

Raymor Industries inc., Re

2010 CarswellQue 892, 2010 CarswellQue 9092, 2010 QCCS 376, [2010] R.J.Q. 608, 188 A.C.W.S. (3d) 343, 66 C.B.R. (5th) 202, J.E. 2010-433, EYB 2010-169275

Dans l'affaire de la proposition conjointe de : Raymor Industries inc., AP & C Revêtements & Poudres avancées inc., Raymor Nanotech inc., Gestion Raymor inc. et Raymor Aerospace inc., Débitrices, c. KPMG inc., Syndic, et Jacques Forest et Fiducie familiale Béliveau, Intervenants

Déziel J.C.S.

Judgment: 27 janvier 2010
Oral reasons: 27 janvier 2010
Written reasons: 5 février 2010
Docket: C.S. Qué. Terrebonne 700-11-010756-098, 700-11-010752-097, 700-11-010753-095, 700-11-010755-090, 700-11-010754-093

Counsel: *Me Alain Tardif*, pour la débitrice
Me David Beaudoin, Me Jacques Demers, pour Jacques Forest
Me Dany S. Perras, pour Fiducie familiale Béliveau

***Déziel J.C.S.*:**

[UNOFFICIAL ENGLISH TRANSLATION]

1 *INTRODUCTION*

2 *THE COURT* has before it a motion for the approval of an amended proposal and reorganization under s. 50 of the *Bankruptcy and Insolvency Act* and s. 192 of the Alberta *Business Corporations Act* (the "ABCA").

3 This proceeding is countered by the amended intervention and objection of a group of shareholders represented by Jacques Forest (Forest).

4 *PRELIMINARY REMARKS*

5 In paragraph 64 of the amended intervention dated January 14, 2010, Forest claims that the decisions of the Board of Directors made after February 20, 2009, are null and void.

6 The Court is of the opinion that the composition of the Board of Directors complies with the provisions of the ABCA.

7 The 1980 regulations passed under the former Alberta statute to which Forest refers were repealed, and new regulations were passed on November 23, 1983, changing the minimum number of Raymor's directors to one, and the maximum number to nine.

8 New regulations passed by the directors on May 21, 1997, and approved by the shareholders on June 30, 1997, do not stipulate a minimum or maximum number of directors. A certificate of amendment dated September 18, 2000, stipulates a minimum of one director.

9 Lastly, the 1997 regulations require a quorum of a majority of directors at a Board of Directors' meeting.

10 Consequently, the only two directors in office on February 23, 2009, had quorum to act and appoint new directors. Indeed, s. 111(1) ABCA provides that a quorum of directors may appoint another director.

11 Since this argument is dismissed, the amended proposal and reorganization merit reconsideration.

12 *THE RELEVANT FACTS*

13 Raymor operates in the specialized field of nanotechnology.

14 On January 16, 2009, Raymor Industries Inc. and Raymor Aerospace Inc. (Raymor) filed a notice of intention to make a proposal in accordance with s. 50.4(1) of the *Bankruptcy and Insolvency Act* (the "BIA").

15 On February 10, 2009, Raymor ceased operations because of cash flow problems.

16 On February 13, 2009, Pierre Journet J. refused to extend the deadline for filing a proposal by thirty days.

17 On March 30, 2009, the Court of Appeal overturned this judgment and extended the deadline for filing a proposal until April 15, 2009.

18 Raymor in fact filed its proposal on April 15, 2009.

19 This proposal was approved by the majority of creditors on April 30, 2009, and by Marc De Wever J. on May 1, 2009.

20 The proposal dated April 15, 2009, provided for the payment of an aggregate sum of $750,000 by Raymor to the Trustee, to be used to pay the employees' claims, the Crown's claims, preferred claims, and the first $1,000 of unsecured claims.

21 The amount of these claims was paid.

22 The proposal dated April 15, 2009, provided for a conversion plan in favour of the creditors, but no creditor took advantage of this option before the deadline of November 15, 2009.

23 On June 2, 2009, the Autorité des Marchés financiers (the AMF) issued a cease trade order in respect of Raymor's securities because, *inter alia*, of failure to disclose annual financial statements by the prescribed deadline.

24 On June 16 and September 13, 2009, the TSX-V issued further orders prohibiting trading in the securities of Raymor.

25 Since the filing of the proposal on April 15, 2009, the Board of Directors had dismissed Stéphane Robert as a member of Raymor's Board of Directors because of misconduct described in a motion for an injunction [1] and in paragraphs 31 to 92 of the motion now before us.

26 Essentially, large sums were allegedly wrongfully disbursed under the authorization of the said Stéphane Robert.

27 These facts, which were discovered during an internal audit, prevented Raymor from completing the 2007 and 2008 financial statements, from having the cease trade orders lifted, and from proceeding with the contemplated recapitalization.

28 On September 24, 2009, Raymor's Board of Directors set up an independent committee comprised of Alfredo Perez, who was responsible, *inter alia*, for examining all the available alternatives, including the sale or refinancing of the company.

29 This independent committee retained the services of Wise, Blackman LLP (WB) to act as an independent expert appraiser.

29 *PRIVATE PLACEMENT OFFER*

30 On December 4, 2009, the independent committee received a private placement offer of $6.5 million for Raymor from Georges Durst, Rolland Veilleux, and other investors (the Purchaser).

31 This offer contemplated the following:

a) Cancelling all the equity securities of Raymor Industries for a nominal value under the terms of a procedure to Raymor's entire satisfaction;

b) Granting an option to the holders of secured senior and junior debts (convertible debentures) and to the noteholders of converting their debt into preferred shares of Raymor in accordance with a set formula or of receiving a cash payment equal to the amount of their claim; and

c) The subscription by the Purchaser to new common shares of Raymor for a total consideration of $6,500,000 less the total amount of the new preferred shares of Raymor, which shall have been issued to the holders of secured debts.

32 In summary, the reorganization contemplated by the Articles of Reorganization involves:

a) creating a new class of redeemable common shares;

b) creating classes of new common shares and new preferred shares;

c) converting all issued and outstanding common shares into redeemable common shares;

d) cancelling all authorized and unissued common shares and preferred shares; and

e) issuing 6,500,000 new common shares.

33 On December 7, 2009, the inspectors unanimously approved the amended proposal.

34 The investment offer was conditional on its approval by the Court; hence the motion for approval of an amended proposal and a reorganization dated December 8, 2009.

35 *ARGUMENTS OF THE INTERVENER FOREST RAISED AT THE HEARING*

The purpose of the motion concerns more the reorganization of share ownership than the amendment to the ratified proposal, thereby affecting the rights of the shareholders collectively.

The restructuring plan has not been followed: the expert costs have been largely exceeded;

The debenture that was not supposed to be secured by Raymor's assets becomes so secured;

The investment offer does not provide details of the payments to be made on demand notes and other financial commitments;

Conflict of interest.

36 *ANALYSIS AND DISCUSSION*

37 Mtre Dany S. Perras, counsel for the shareholders Sylvain Béliveau, Guy Arcand, and the Béliveau family trust, supports Raymor's position.

38 He invites the Court to favour the interests of creditors over those of shareholders.

39 The payment that should have been made in December 2009 under the original proposal was not made; the only way to ensure that this payment and forthcoming payments are made is to approve the plan.

40 *PROVISIONS OF THE ABCA WITH RESPECT TO THE REORGANIZATION*

41 Section 192 ABCA has the same effect as s. 191 of the *Canada Business Corporations Act* (the "CBCA"). [2]

42 Indeed, s. 192 ABCA and s. 191 CBCA read as follows:

42 *192 ABCA*

191 *CBCA*

192 (1) In this section, "order for reorganization" means an order of the Court made under

(a) section 242,

(b) the *Bankruptcy and Insolvency Act* (Canada) approving a proposal, or

(c) any other Act of the Parliament of Canada or an Act of the Legislature that affects the rights among the corporation, its shareholders and creditors.

42

(2) If a corporation is subject to an order for reorganization, *its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 173*.

(3) If the Court makes an order for reorganization, the Court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms of those debt obligations, and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

(4) After an order for reorganization has been made, articles of reorganization in prescribed form shall be sent to the Registrar together with the documents required by sections 20 and 113, if applicable.

(5) On receipt of articles of reorganization, the Registrar shall issue a certificate of amendment in accordance with section 267.

(6) An order for reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

(7) *A shareholder is not entitled to dissent under section 191 if an amendment to the articles of incorporation is effected under this section*.

42 191. (1) In this section, "reorganization" means a court order made under

(a) section 241;

(b) the Bankruptcy and Insolvency Act approving a proposal; or

(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

(2) If a corporation is subject to an order referred to in subsection (1), *its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173*.

(3) If a court makes an order referred to in subsection (1), the court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

(4) After an order referred to in subsection (1) has been made, articles of reorganization in the form that the Director fixes shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

(5) On receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 262.

(6) A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

(7) *A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section*.

43 Accordingly, s. 192 ABCA, like s. 191 CBCA for companies incorporated under the CBCA, expressly provides for the possibility of reorganizing the share capital of a corporation as part of the approval of a proposal under the BIA.

44 Among others, ss. 173(1)(*d*), (*e*), (*f*), (*h*), and (*n*) ABCA (similarly to ss. 173(1)(*e*), (*g*), (*h*), and (*o*) CBCA), provide as follows:

44 *173(1) ABCA*

44 *173(1) CBCA*

44 *173*(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to:

. . .

173. (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to:

. . .

(d) create new classes of shares,

(e) create new classes of shares;

. . .

(e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,

(g) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;

(f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series,

. . .

(h) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

. . .

(n) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

(h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;

. . .

(o) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

45 *Canadian Airlines Corporation* [3]

46 In *Canadian Airlines*, Paperny J. had to approve a plan of arrangement that significantly affected the rights and the value of the shares of Canadian Airlines Corporation (CAC). This plan provided for a reorganization of the share capital of CAC:

47 The reorganization contemplated in *Canadian Airlines* is described as follows by Paperny J.:

[66] Subsection 185(2) of the ABCA [now 192(1) ABCA] provides:

(2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

[67] Sections 6.1(2)(d) and (e) and Schedule « D » of the Plan contemplate that:

a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and

b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

[68] The Articles of Reorganization in Schedule « D » to the Plan provide for the following amendments to CAIL's Articles of Incorporation to effect the proposed reorganization:

(a) consolidating all of the issued and outstanding common shares into one common share;

(b) redesignating the existing common shares as « Retractable Shares » and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;

(c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;

(d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;

(e) redesignating the existing Class A Preferred Shares as « Common Shares » and changing the rights, privileges, re- strictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and

(f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares; [4]

48 Accordingly, the reorganization contemplated in *Canadian Airlines* was very similar to the Reorganization contemplated in the present case. [5]

49 In *Canadian Airlines*, Paperny J. found that there are two conditions for a reorganization under s. 185 ABCA (now 192 ABCA) to be approved by the court:

49 that the corporation be "subject to an order for reorganization";

49 that the proposed amendments be authorized by section 167 ABCA (now 173 ABCA). [6]

50 As for the first condition, in the present case, there is no doubt that Raymor is "subject to an order for reorganization" within the meaning of s. 192 ABCA, which expressly provides for it as part of the approval of a proposal under the BIA.

51 Regarding the second condition, in *Canadian Airlines*, Paperny J. found that the reorganization contemplated corresponded to changes permitted under s. 167(1) ABCA (now 173(1) ABCA):

> **[71] The relevant portions of section 167 provide as follows:**
>
> 167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to
>
> (e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued **[now 173(1)(e)]**,
>
> (f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series **[now 173(1)(f)]**,
>
> (g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series **[now 173(1)(h)]**,
>
> **[72] Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:**
>
> Proposed Amendment in Schedule « D
>
> 51 Subsection 167(1), ABCA
>
> ***(a) — consolidation of Common Shares***
>
> 167(1)(f) *[now 173(1)(f)]*
>
> ***(b) — change of designation and rights***
>
> 167(1)(e) *[now 173(1)(e)]*
>
> ***(c) — cancellation 167(1)(g.1)***
>
> 167(1)(g.1) *[now 173(1)(h)]*
>
> ***(d) — change in shares***
>
> 167(1)(f) *[now 173(1)(f)]*
>
> ***(e) — change of designation and rights***

167(1)(e) *[now 173(1)(e)]*

(f) — cancellation

167(1)(g.1) *[now 173(1)(h)]*

7

52 In the present case, the Articles of Reorganization (*R-38*) similarly provide for the amendments permitted under s. 173(1) ABCA:

Proposed amendments in "Schedule A" to the Articles of Reorganization (R-38)

52 *Subsection 173(1) ABCA permitting this amendment*

(a), (b) and (c) — creation of new classes of shares

52 173(1)(d)

(d) — conversion (change of designation and rights)

173(1)(e)

(e) — cancellation of authorized and unissued shares

173(1)(h)

(f) — issuance of shares

(gives effect to the transaction contemplated by issuing new shares created in accordance with 173(1)(d))

53 The Reorganization (*R-38*) is therefore expressly permitted by the ABCA, and the conditions for its approval are met.

54 In Canadian Airlines, some shareholders suggested that the proposed reorganization, namely, the conversion of all issued and outstanding common shares into a single retractable share for $1.00, effectively cancelled the common shares, which was not permitted by s. 167(1) ABCA (now s. 173(1) ABCA); Paperny J. dismissed this argument by concluding that the proposed reorganization did not violate s. 167(1) ABCA (now 173(1) ABCA). [8]

55 Furthermore, Paperny J. found that the proposed reorganization was actually in line with the legislature's intent to permit a reorganization of share capital in an insolvency context:

> [75] The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:
>
> > For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.
>
> 9

56 The Court subscribes to the remarks of Paperny J.

57 *Shermag Inc.* [10]

58 In *Shermag*, Robert Mongeon J. refused to approve a reorganization contemplating the cancellation of the existing shares of *Shermag*.

59 In that case, the debtor company contemplated by the reorganization was incorporated under the Quebec *Companies Act*, which, contrary to the ABCA and CBCA in particular does not expressly permit a reorganization of the share capital without the shareholders' approval when a company is in an insolvency context:

> [72] The real question is, can I do what I am asked to do under the QCA [Quebec Companies Act]?
>
> [73] It is evident that the QCA is somewhat archaic compared to more modern statutes governing corporate entities in Canada. It is common knowledge that the QCA is currently under reform and hopefully sooner than later the new Quebec Act will incorporate the most recent and more adequate statutory dispositions with respect to corporate reorganizations, as they can be found in the CBCA, the OBCA or the ABCA.
>
> [74] But, as of today, sections 191 and 173 CBCA do not have their equivalent in the Quebec statute. It is suggested that the combined effect of my discretionary powers under the CCAA, my inherent jurisdiction as a Superior Court Judge or my specific powers under article 46 of the Quebec Code of civil procedure allow me to incorporate, into the Quebec statute, provisions equivalent to sections 191 and 173 CBCA.
>
> . . .
>
> [84] Nowhere is it provided that a Tribunal may impose changes to the articles of a Quebec corporation in any context, let alone an insolvency context.
>
> [85] But for sections 191(1) and (2) CBCA this would also be true of any federally incorporated company. All the previous jurisprudence reviewed above would not exist if the said provisions would not exist under the CBCA or if corresponding provisions would not exist for example in the ABCA. Absent these corresponding provisions, Madam Justice Paperny would not have been able to ensure that the proposed arrangement in Canadian Airlines was in compliance with the Alberta law.
>
> . . .
>
> [93] A careful reading of section 11 CCAA does not disclose anything which may go as far as permitting me to amend the QCA and incorporate therein provisions equivalent to sections 191 and 173 CBCA. As Blair J. refused to incorporate into the CCAA provisions relating to removal of directors found in sections 241 and following of the CBCA, and rightly so.
>
> [94] I should also refuse to change the QCA or read in provisions of other statutes which have not been enacted by the Quebec Legislature.
>
> [11]

60 Thus, the *ratio* of the decision in *Shermag* cannot be applied in this case because, as shown above and emphasized in paragraph 85 of *Shermag*, the proposed Reorganization (*R-38*) is expressly permitted by the ABCA.

61 Moreover, in *Shermag*, not only did the debtor company fail to meet the second condition for the approval of a reorganization to the effect that the proposed amendments should be in compliance with the constituent legislation, but the debtor company also did not meet the first condition, namely, that of being "subject to an order for reorganization".

62 In fact, the application for approval was made even before the filing of the plan of arrangement under the CCAA and the creditors' vote on the plan, whereas the statutes that permit the reorganization of the share capital of an insolvent corporation (e.g., s. 192 ABCA and s. 191 CBCA) require that this application be made concurrently with the approval of a proposal under the BIA or a plan of arrangement under the CCAA. On several occasions, Mongeon J. in fact voices his discomfort at approving the contemplated reorganization without having the benefit of assessing whether the plan of arrangement is fair and reasonable:

> [12] The actual cancellation of Shermag's share capital and issuance of new shares will occur only upon the approval and homologation of the plan of arrangement.
>
> [13] Shermag intends to proceed with this proposed plan without seeking or obtaining shareholders' approval as it is normally done in corporate reorganizations affecting shareholders' rights.
>
> [14] The real purpose and object of the present Petition is therefore to seek a declaratory judgment somewhat in the form of an « advanced ruling », since the present judgment will not « per se », effect or ratify the proposed modifications to the share-capital of the Debtor. This will be done only upon approval of the plan by the creditors and its subsequent ratification by this Court.
>
> [15] The Court does not have before it all of the terms and conditions of the proposed plan of arrangement. . . .
>
> . . .
>
> [37] The circumstances of the case before me are quite different. Taken out of the context of a comprehensive plan approved by the creditors, can it be said that it will be fair and reasonable to give a blessing to the proposed changes in the share-capital and share ownership of Shermag? Am I asked to exercise my discretion in a vacuum? . . .
>
> . . .
>
> [43] I have already pointed out that I am unable to verify if the plan complies with all (explicit or implicit) statutory requirements nor am I able for that matter to verify if the proposed plan is « fair and reasonable » and in so doing, if I am really in a position to dispense the proposed share reorganization from sanction by the shareholders.
>
> [44] Would Paperny J. have been able to sanction the plan in Canadian Airlines if the ABCA would not have had specific provisions within which she could ensure that the plan met all statutory requirements? I think not.
>
> . . .
>
> [56] Firstly, I do not have a comprehensive plan before me which would normally permit me to say that the plan as a whole is fair and reasonable. Nevertheless, I am asked to rule on an important element of the plan to come. Am I really in a position to do this? The approval of a plan is the approval of a plan as a whole after the creditors have had the opportunity to vote in it. Can I really exercise my discretion under the CCAA without these elements? Can I exercise any discretion in the context of a declaratory judgment or am I obliged to look only at the statutes and apply the law as it is written? Discretion, in my view does not come into play prior to the sanction of the plan as a whole. [12]

63 Consequently, the context in the present case is different from the situation in *Shermag* because the Court is called upon to approve the Reorganization (*R-38*), having the benefit of assessing whether the amended Proposal is fair and reasonable.

64 *Mecachrome International inc*.

65 In addition, on September 1, 2009, after the decision of Mongeon J. in *Shermag*, Clément Gascon J. approved a reorganization under s. 191 CBCA as part of the approval of Mecachrome's plan of arrangement under the CCAA. [13]

66 What is more, the terms and conditions contemplated by the reorganization of Mecachrome International Inc. approved by Gascon J. on September 1, 2009, are substantially the same as those contemplated by the Reorganization (R-38) in the present case:

66 *Reorganization of Raymor (R-38)*

66 *Reorganization of Mecachrome International Inc.*

(a) creating an unlimited number of Redeemable Common Shares without par value;

(b) creating an unlimited number of New Common Shares without par value;

(c) creating an unlimited number of New Preferred Shares without par value;

66

(a) the creation of an unlimited number of Redeemable Preferred Shares, issuable in series;

(b) the creation of an unlimited number of New Common Shares;

(c) the creation of an unlimited number of Multiple Voting Redeemable Common Shares;

(d) the creation of an unlimited number of Subordinate Redeemable Common Shares;

66

(d) converting all the issued and outstanding Common Shares into Redeemable Common Shares on the basis of one Redeemable Common Share for each issued Common Share;

66

(e) the conversion of all the issued and outstanding Multiple Voting Shares into Multiple Voting Redeemable Common Shares, on the basis of one Multiple Voting Redeemable Common Share for each issued Multiple Voting Share;

(f) the conversion of all the issued and outstanding Subordinate Voting Shares into Subordinate Voting Redeemable Common Shares, on the basis of one Subordinate Voting Redeemable Common Share for each issued Subordinate Voting Share;

66

(e) cancelling all the authorized and unissued Common Shares and Preferred Shares; and

66

. . .

(g) the authorized and unissued Multiple Voting Shares and Subordinate Voting Shares shall be cancelled;

67 *EXISTING SHAREHOLDERS HAVE NO INTEREST IN OBJECTING TO THE REORGANIZATION*

68 Subsection 192(7) ABCA (like s. 191(7) CBCA) expressly provides that shareholders are not entitled to dissent in the case of a reorganization under s. 192 ABCA (or 191 CBCA).

69 In his book, author Paul Martel justifies the lack of a right to dissent during the reorganization of the share capital of an insolvent company as follows:

[TRANSLATION]

> Not only are shareholders not called upon to vote on the reorganization, but they also do not have the right to dissent. The rationale behind this departure from the statutory protection of shareholders is that, since the corporation is insolvent, their shares are worthless and it is not up to them to defeat a proposal or an arrangement with the creditors which will be to the corporation's advantage and, possibly, to that of the shareholders if the corporation manages to survive and start up again as a result of this process. [14]

70 The case law has constantly recognized this principle whereby, because they do not have an economic interest in the insolvent corporation, shareholders cannot defeat a proposal or an arrangement contemplating the reorganization of share capital that is beneficial to the corporation and all of the stakeholders:

> [76] The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading « Fair and Reasonable », there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.
>
> [77] The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of Re Royal Oak Mines Inc. (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) and T. Eaton Co., supra in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.
>
> [78] Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.
>
> [79] In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.
>
> . . .
>
> [143] Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have « a true interest to be protected » because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: Royal Oak Mines Ltd., supra, para. 4., Re Cadillac Fairview Inc. (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and T. Eaton Company, supra.
>
> [144] To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, « widens the lens » to balance a broader range of interests that includes creditors and shareholders and

beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents. [15]

[18] I have found that the common shares have no value. I agree with the applicant that, in these circumstances, the shareholders have no status to object to the plan. [16]

[53] And, in the case of an arrangement proposed under the C.C.A.A., the shareholders of the debtor company cannot expect any advantage from the arrangement. As the company is insolvent, the shareholders have no economic interest to protect. More so when, as in the present case, the shareholders are not contributing to any of the funding required by the Plan. Accordingly, they have no standing to claim a right under the proposed arrangement. . . . [17]

71 *FAIR AND EQUITABLE NATURE OF THE CONTEMPLATED TRANSACTION*

72 According to the WB report dated December 4, 2009, on the value of the shares issued by Raymor, they had a negative value of $3,710,000. The shares therefore have no value.

73 Asked to consider the $6,500,000 investment proposal, WB concluded in a second report dated December 7, 2009, that the contemplated transaction was equitable from a financial standpoint. WB noted that the investment offer is conditional on the cancellation of all existing shares.

74 The Court is of the opinion that the contemplated transaction is fair and equitable, and in the best interests of Raymor and all the stakeholders, including their creditors, employees, suppliers, and customers, in that it will allow operations to be continued and provide an improved realization for the creditors as a whole.

75 The investment offer does not prevent Raymor from accepting a proposal that is reasonably likely to be made and be more favourable than the proposed transaction before the closing of the contemplated transaction.

76 It is therefore preferable for Forest and the shareholders whom he represents to present such a proposal. This interest demonstrated during the hearing seems late given the fact that the notice of intention to make a proposal dates back to January 16, 2009.

77 *RESPONSE TO ARGUMENTS OF FOREST*

78 As we have seen, the value of the shares of Raymor's current shareholders is nil. They therefore have no economic interest to protect.

79 If the amended proposal and the reorganization are not accepted, Raymor will go bankrupt. [18]

61.(2) Where the court refuses to approve a proposal in respect of an insolvent person a copy of which has been filed under section 62,

a) the insolvent person is deemed to have thereupon made an assignment;

. . .

80 Forest does not contest the insolvency of Raymor.

81 Since Raymor does not have enough assets to pay its obligations (and the Debtors' aggregate assets are not enough either to pay the Debtors' obligations), including the obligations under the Proposal dated April 15, 2009, Raymor's shareholders do not have any interest in objecting to the Reorganization, which does not cause them any prejudice and would provide a better realization for the creditors as a whole.

82 Raymor recognizes that the reorganization of share ownership aims to privatize the business. Legislation and case law do not provide shareholders with the right to dissent during a reorganization of share capital. The argument is therefore dismissed.

83 Exceeding expert fees and expenses is not grounds for objection for shareholders. Their economic situation is not worsened as a result.

84 The fact that the debenture is now secured by Raymor's assets also has no implication for the current value of their shares.

85 The lack of detail concerning payments of demand notes and other financial commitments does not affect the shareholders.

86 Forest faults Raymor for not having convened the shareholders to approve the financial statements.

87 De Wever J. postponed this meeting on May 1, 2009, and July 9, 2009. This meeting was not convened by the deadline in this last judgment, namely October 15, 2009, because the financial statements had not been produced yet.

88 As we have seen, cease trade orders on the securities were issued by the AMF and the TSX-V because of the failure to disclose these financial statements.

89 Failure to produce the financial statements has been explained. Raymor could therefore not call this meeting.

90 The Court cannot accept the allegations of conflicts of interest by certain directors. There is no evidence that such conflicts of interest exist.

91 Mario Véronneau, from KPMG, never sat on the Board of Directors of Raymor. KPMG prepared the restructuring plan for the business.

92 At the meeting of the Board of Directors of Raymor held on December 7, 2009, [19] the directors Georges Dust and Rolland Veilleux declared their relationship with the purchaser mentioned in the offer of December 4, 2009. In fact, these two directors joined the group of buyers in the $6,500,000 investment offer.

93 Director Normand Goupil also declared his interest because he holds a convertible debenture of Raymor maturing on May 15, 2011.

94 Georges Dust, Rolland Veilleux and Normand Goupil therefore refrained from voting.

95 After considering the WB reports dated September 30, 2009 and December 7, 2009, the Board of Directors therefore approved the amended proposal and the transaction.

96 Lastly, it should be noted that the trustee, Gaétano Di Guglielmo, CA, CGA, CIRP, recommended that the Court approve the amended proposal in his report dated December 10, 2009, on the proposal (ss. 59(1) and 58(*d*) BIA). It is worth reproducing the following excerpts:

> [TRANSLATION]
>
> > 8. On December 7, the Raymor group filed an amended proposal with the Trustee, a true copy of which is appended to this report and designated as Exhibit G. In addition to the terms and conditions of the proposal dated April 15, 2009, the amended proposal provides for a reorganization of the share capital of the Raymor group in accordance with s. 192 of the *Business Corporations Act (Alberta)*. Among other things, the existing shares of Raymor will be cancelled without consideration, and new classes of shares will be created and issued pursuant to the Articles of Reorganization to be approved by the Court. Furthermore, the proposal of April 15, 2009, provided an option for creditors to convert their debts into Raymor units. The creditors wishing to exercise this option had to send the Trustee the [TRANSLATION] « Conversion Option » form before November 15, 2009. The Trustee did not receive any requests for conversion prior to November 15, 2009. The conversion option has therefore been removed from the amended proposal.

The amended proposal does not affect the amount of $750,000 available to the creditors, and the conversion option is no longer available under the terms of the proposal. The amended proposal sets out a distribution to the creditors according to the same terms and conditions as the proposal dated April 15, 2009. To date, the terms and conditions of the proposal of April 15, 2009, have been met. Among other things, the Crown's claims, preferred claims, and the first $1,000 of the dividend to unsecured creditors have been paid. The Trustee considers that the amended proposal is not prejudicial to the creditors. Moreover, it is even beneficial for them in that it reduces the risk of default with respect to the obligations of the Raymor group under the proposal by giving them access to additional financing. Without this additional financing, it seems unlikely that the Raymor group can continue its operations in the short or medium term and/or discharge its obligations under the proposal dated April 15, 2009. Moreover, in that sense, the alternative to the amended proposal seems to be the bankruptcy and/or liquidation of the assets of the Raymor group in the short or medium term.

9. On December 7, 2009, the Trustee called a meeting of the inspectors to inform them of the amended proposal. The inspectors unanimously approved the amended proposal. A true copy of the minutes is appended to this report and designated as Exhibit H. The amended proposal was filed with the Superintendent of Bankruptcy on the same date.

10. On December 2, 2009, I gave notice to the Raymor group, to the Superintendent of Bankruptcy, and to each known creditor affected by the proposal, whose number and address are found in Exhibit 1 attached hereto, that the hearing of the application for approval of the amended proposal by the Court was to take place on December 17, 2009. A true copy of the notice is attached to this report and designated as Exhibit J.

11. I am of the opinion that:

(a) As at December 10, 2009, the assets of the Raymor group and the reasonable value to be realized from its assets are as follows:

Estimated realizable value

Accounts receivable $100,000

Inventory $250,000

Property, plant and equipment $750,000

(b) The liabilities of the Raymor group are as follows:

Secured creditors $4,200,000

Preferred creditors $0

Unsecured creditors $8,094,292

12. I am of the view that:

(a) The causes of the insolvency of the Raymor group are:

Given the difficult economic context at the end of 2008, access to the funds required to finance operations was restricted. The Raymor group was then no longer in a position to discharge its financial obligations and filed for protection under the *Bankruptcy and Insolvency Act*.

(b) The Raymor group's conduct does not appear reprehensible to us, apart from certain items discovered as part of an internal audit following the approval of the proposal dated April 15, 2009, concerning certain former officers, against whom the Raymor group has exercised the necessary remedies.

(c) The facts stated in section 173 of the *Bankruptcy and Insolvency Act* do not seem to us to be likely to be proved against the Raymor group.

13. I am also of the opinion that the amended proposal of the Raymor group is to the advantage of the creditors since it offers an attractive settlement compared to realization in a bankruptcy context. The creditors are receiving dividends ranging from 13% to 100% of their claim versus no dividend in a bankruptcy scenario.

The Trustee therefore recommends the approval of the amended proposal by the Court.

97 *RULING*

98 The Court therefore *DISMISSES* the intervention and objection of Forest.

99 The Court notes the trustee's opinion and considers that the proposal is advantageous for the creditors because it provides an attractive settlement compared to realization in a bankruptcy context.

100 Furthermore, the employees will keep their jobs in the specialized nanotechnology sector, for which future prospects are promising.

101 *FOR THESE REASONS, THE COURT:*

102 *DISMISSES* the amended intervention and objection of Jacques Forest *et al.*

103 *APPROVES* the amended joint Proposal of the Debtors, Raymor Industries Inc., AP&C Advanced Powders & Coatings Inc., Raymor Nanotech Inc., Gestion Raymor Inc. and Raymor Aerospace Inc., dated December 7, 2009, and accepted by the Inspectors of the proposal (the "*Amended Proposal*");

104 *AUTHORIZES* Raymor Industries Inc. to proceed with a reorganization under s. 192 of the *Business Corporations Act*, R.S.A., 2000, c. B-9 of the province of Alberta (the "*ABCA*") (the "*Reorganization*");

105 *APPROVES* the Articles of Reorganization (R-38) (attached as Schedule A to this order) and *AUTHORIZES* Raymor Industries Inc. to file, in a form substantially similar to the Articles of Reorganization (R-38), the said Articles of Reorganization (R-38) with the Registrar pursuant to the ABCA, in the form established by the same;

106 *ORDERS* the amendment of the articles of Raymor Industries Inc., in the form and in accordance with the content provided in the Articles of Reorganization (R-38) (attached as Schedule A to this order);

107 *ORDERS* and *DECLARES* that the Articles of Reorganization shall become effective commencing on the issue date of the certificate to be issued by the Registrar under s. 267 ABCA (the "*Effective Date*") and, without restricting the generality of the foregoing, *ORDERS* that this order and the issuance of the certificate by the Registrar under s. 267 ABCA are the only approvals required so that the Debtors can proceed with the Reorganization and that no other authorization shall be required for the Articles of Reorganization to become effective;

108 *DECLARES* that on the Effective Date, all the shares authorized but not issued by Raymor Industries Inc. prior to the Reorganization, as well as all securities, options (including, to dispel any doubt, stock options and employee stock options) warrants, conversion or exchange rights, rights of first refusal, subscription rights, pre-emptive rights or other rights, contractual or of another nature, and whether or not acquired, in order to purchase or obtain shares or any other existing interest in Raymor Industries Inc. or other preferred, special or voting equity shares in the capital of Raymor Industries Inc., or any other interest in Raymor Industries Inc., and the contracts, subscriptions, commitments or agreements under which a person had or could have had the right to receive shares, securities or other interests in Raymor Industries Inc. (collectively, the "*Other Equity Interests*"), shall be cancelled without any consideration or right of dissent, and any contract, agreement, plan, trust deed, certificate or other document or instrument under which these Other Equity Interests have been created or are governed shall be resiliated;

109 *DECLARES* that all the transactions provided for in the investment offer and under the Reorganization may become effective notwithstanding the rules of the TSX Venture Exchange;

110 *ORDERS* that the current holders of senior and junior secured debts (including convertible debentures currently outstanding) as well as holders of notes mentioned in the investment offer shall be presumed to have elected to receive a cash payment on the Effective Date, which is equal to the amount of their claim, principal and interest accrued and unpaid under the investment offer insofar as the election stipulated in the investment offer is not confirmed in writing to Raymor Industries by the same no later than the Effective Date;

111 *DECLARES* that no other meeting or vote of the holders of the outstanding securities of Raymor Industries Inc. shall be required pursuant to any applicable statute with regard to the approval of the Amended Proposal and the Reorganization;

112 *DECLARES* that none of the items, transactions, releases, or other stages provided for in the Amended Proposal and in the Reorganization, are null and void, and may not be cancelled or considered to be a preference, a reviewable transaction or any other transaction that cannot be set up against another under the *Bankruptcy and Insolvency Act*, arts. 1631 *et seq.* of the *Civil Code of Québec* or any other federal or provincial legislation, nor may they serve as a basis for an oppression remedy within the meaning of the ABCA;

113 *ORDERS* the provisional enforcement of this order notwithstanding appeal and without being required to provide a surety or bond;

114 *THE WHOLE* with costs against the Interveners Jacques Forest *et al.*

Footnotes

1 540-17-003439-097.

2 See affidavit of Sean F. Collins (**R-37**).

3 *Canadian Airlines Corporation (Re)*, 2000 ABQB 442 (CanLII), [2000] 10 WWR 269 (Alta Q.B.).

4 *Canadian Airlines, ibid.* at paras. 66-68.

5 R-38.

6 *Canadian Airlines*, *supra* note 3 at para. 69.

7 *Canadian Airlines, ibid. 3* , paras. 71 and 72.

8 *Canadian Airlines*, *supra* note 3 at para. 73.

9 *Canadian Airlines*, *supra* note 3 at para. 75.

10 *Shermag Inc. (Arrangement relatif à)*, 2009 QCCS 537 (Mongeon J.).

11 *Shermag*, *ibid.* 10, paras. 72-74, 84-85 and 93-94.

12 *Shermag*, *supra* note 10 at paras. 12-15, 37, 43-44, and 56.

13 *Dans l'affaire de l'arrangement de Mecachrome International Inc. et als* (1 September 2009) 500-11-035041-082 (Sup. Ct.) (Gascon J.).

14 Maurice Martel & Paul Martel, *La Compagnie au Québec* (Montreal, Wilson & Lafleur, 2008) at para. 19-306.

15 *Canadian Airlines*, *supra* note 3 at paras. 76-79 and 143-144.

16 *Beatrice Foods (Re)*, 43 C.B.R. (4th) 10 (Houlden J.) at para. 18.

17 *Cable Satisfaction International Inc. v. Richter & Associés Inc*., 48 C.B.R. (4th), 205 (Chaput J.) at para. 53.

18 Section 61(2) BIA.

19 R. 35.

TAB V

2021 BCSC 1826
British Columbia Supreme Court

8640025 Canada Inc. (Re)

2021 CarswellBC 2888, 2021 BCSC 1826, 340 A.C.W.S. (3d) 375

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

And In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended

And In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centers Inc.

Walker J., In Chambers

Heard: September 8, 2021; September 15, 2021
Judgment: September 15, 2021
Docket: Vancouver S1610905

Counsel: D. Le Dressay, for Petitioners, 8640025 Canada Inc. and Teliphone Data Centers Inc.
J.R. Shewfelt, for Monitor, Ernst & Young
R.J. Argue, for Bond Capital Fund Limited
L.C. Hiebert, for Bell Canada, Northwestel Inc., Bell Mobility Inc., Bell Aliant Regional Communications Inc.
W.L. Roberts, for Navigata Communication Ltd.
J.R. Sandrelli, for Telus Corp.

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Petitioners were two companies that were involved in business of selling telephone services — Plan made under CCAA envisioned sale of petitioners' assets in order to maximize payment to creditors, as opposed to restructuring petitioners' business operations as going concerns — Prior to commencement of proceeding, petitioners and solvent affiliates shared business operations, senior management, and account records, operating as single entity, with all transactions recorded in common ledger — Affiliates were referred to collectively by name of TNW Group, which included company known as TNW Corp. — Identifying ownership of assets belonging to petitioners was difficult and highly contentious matter — Monitor was appointed by court pursuant to Companies' Creditors Arrangement Act (CCAA) in April 2017 to review, inventory, and otherwise investigate the affairs and assets of TNW Corp. and to determine those not derived directly or indirectly from property of petitioners — Monitor's determination in respect of assets was subject of various challenges — After conclusion of challenges, Monitor effected, with court approval, sales of two tranches of petitioners' assets to current proposed purchaser, N Ltd. — Third and final tranche of petitioners' assets included hard assets, permits and licenses, and customer accounts and lists — Petitioners claimed Monitor had not properly identified all of petitioners' remaining assets — Monitor brought application for court approval of sale of third and final tranche of petitioners' assets — Application granted — Apart from final determination made by Monitor pursuant to April 2017 order, no evidence was adduced to challenge Monitor's ability to sell proposed assets — Petitioners failed to identify any specific assets proposed to be sold as assets that were owned by others — Status of assets potentially owned by the TNW Group proposed to be sold by Monitor were confirmed as assets of petitioners in view of April 2017 order — There were no other parties whose claims to assets remained outstanding — To deny Monitor's application would result in pointless delay and expense and would be to ongoing prejudice of petitioners' secured creditors and DIP lenders — Monitor had authority to sell proposed assets to N Ltd. for purchase price proposed in new amended offer — Language of proposed release was fair and reasonable in circumstances, and necessary and essential to further liquidating CCAA, and rationally connected to purpose of

plan to liquidate petitioners' remaining assets — Prohibition from suits order proposed by Monitor was granted so long as scope of order was in respect of terms and integrity of this and prior asset sales transactions and vesting orders granted in proceeding.

APPLICATION by Monitor for court approval of sale of third and final tranche of petitioners' assets.

***Walker J., In Chambers*:**

Introduction

1 The Monitor seeks various orders to bring to a close this longstanding and highly litigious *CCAA* proceeding. By way of summary, the Monitor seeks: (a) approval to sell what it says are the remaining assets of the petitioners on terms that include a release in favour of the proposed purchaser and a prohibition against certain companies and persons bringing claims and suits against the purchaser; (b) approval of the fee accounts of the Monitor and legal counsel; and (c) discharge of most of the Monitor's current obligations.

2 By agreement of the parties appearing on the application, I heard that part of the Monitor's application regarding the proposed asset sale first. There was insufficient time to hear submissions concerning the remaining relief sought and in light of the possibility that the proposed sale could collapse due to the lengthy delays to get to this point to seek court approval, the remainder of the relief sought on the application was adjourned to be heard another day.

3 Accordingly, these reasons concern the proposed asset sale.

Background

4 The relevant lengthy history to this highly contentious *CCAA* proceeding, which has been extant in this Court since November 2016, is set out in part in the Monitor's notice of application and in some considerable detail in the reasons of the Court of Appeal in 8640025 Canada Inc. (Re), 2019 BCCA 473 and of this Court indexed at 2017 BCSC 303, 2017 BCSC 1167, 2017 BCSC 1291, 2018 BCSC 1259, 2019 BCSC 8, and 2019 BCSC 1739.

5 Insofar as the proposed asset sale is concerned, the material facts may be summarized as follows.

6 The petitioners are two companies which were involved in the business of selling telephone services. This *CCAA* proceeding is what is known as a liquidating *CCAA* as the plan envisions the petitioners' assets to be sold in order to maximize payment to creditors as opposed to restructuring the petitioners' business operations as going concerns.

7 Prior to the commencement of this proceeding, the petitioners and their solvent affiliates shared business operations, senior management, and account records. They operated as a single entity, with all transactions recorded in a common ledger. In *8640025* , the Court of Appeal referred to those affiliates collectively by the name of TNW Group, which includes a company known as TNW Networks Corp. Mr. Benoit Laliberte is one of the key principals involved in the TNW Group and the petitioners.

8 Identifying the ownership of assets belonging to the petitioners was a difficult and highly contentious matter in this proceeding given the manner in which the petitioners and the TNW Group organized their affairs. To help resolve issues surrounding ownership, the Monitor was empowered, through a court order issued on April 6, 2017 ("April 6 Order"), in para. 6, to review, inventory, and otherwise investigate the affairs and assets of TNW Networks Corp. and to determine those not derived directly or indirectly from the property of the petitioners.

9 The April 6 Order was issued on an unopposed basis and never appealed. It provided that any property the Monitor is unable to determine the origin of shall not be the property of TNW Networks Corp. In that event, the assets would, by default, be the assets of the petitioners and as such, available, *inter alia*, for sale by the Monitor as part of its obligations in this *CCAA* proceeding and more specifically, under various court orders issued in this proceeding. The April 6 order provided that any party may challenge the Monitor's determination by way of application within 10 business days.

10 The Monitor's determination in respect of assets was the subject of various challenges, including appeals to this Court and the Court of Appeal (as well as an unsuccessful leave application to the Supreme Court of Canada), and was ultimately upheld: see *8640025 Canada Inc.*

11 In its reasons in *8640025 Canada Inc.*, the Court of Appeal described the disputed claims process contained in the April 6 Order (which it called the "Derivation Order"), excerpted below, and in doing so said there was a very good reason for it:

> [6] *The nub of the underlying problem giving rise to all three appeals is the difficulty in disentangling assets owned by the insolvent entities subject to the CCAA proceeding, the Petitioners, from those assets owned by other entities affiliated in business with the Petitioners that were not insolvent and thus not subject to the CCAA proceeding.* The appellants Teliphone Corp. ("**Teliphone**") and the other named appellants (the "**Claiming Parties**") are part of this latter group (together, the "**Appellants**").
>
> [7] From the Monitor's perspective, the senior personnel involved in the Petitioners' and Appellants' operations did not cooperate fully in the solicitation process, as they were hoping for a successful restructuring. There was no successful restructuring proposal, and *the Monitor's primary function at issue on appeal was the identification and sale of assets belonging to the Petitioners.*
>
> *[8] The insolvent Petitioners and their solvent affiliates shared business operations, senior management, and accounting records. As found by the chambers judge, they operated as though a single company, with all transactions recorded in a common general ledger. As has been done elsewhere in these proceedings, I will refer to the entire group of companies as the "**TNW Group**". TNW Networks Corp. ("**TNW Networks**") is a company that is part of the TNW Group and owns certain assets the Monitor is entitled to sell, as is discussed below.*
>
> [9] *Key persons involved in the management, direction and operations of the various entities comprising the TNW Group, included Mr. Sandeep Panesar who was the CEO of 864 and TNW Networks; Mr. Lawry Trevor-Deutsch, former President of Teliphone, and Senior Vice President of the Petitioners, as well as managing director of Investel Capital Corporation ("**Investel**"), the parent company of the Petitioner 864; and Mr. Benoit Laliberte who was employed as a consultant to all the companies and was instrumental in their business operations and the overall direction of the TNW Group.* Mr. Laliberte is the husband of Ms. Anne-Marie Poudrier, who, together with their six children, is beneficiary of the trust that owns Investel, which trust could be considered the parent of the TNW Group. I will refer to Mr. Panesar, Mr. Trevor-Deutsch, and Mr. Laliberte together or separately, as "**Senior Management**" of the TNW Group.
>
> . . .
>
> [12] The reason the Monitor was permitted to sell some of TNW Networks' assets was because TNW Networks had (as directed by court order) assigned to the Monitor "all of the assets of TNW [Networks] that are used in or necessary for the business of the [P]etitioners, as determined by the Monitor, including without limitation, all customer agreements of the Petitioners and all material supplier contracts, insofar as they are held by" TNW Networks (Appeal No. 1, para. 18). This assignment was dated March 21, 2017.
>
> [13] *TNW Networks claimed that some of the assets it held were not subject to sale by the Monitor. Eventually terms of a court order were worked out to allow the Monitor to segregate out the TNW Networks assets that the Monitor was not authorized to sell, leaving the Monitor free to sell the Petitioners' assets and other, non-excluded TNW Networks' assets.* This was set out in a court order dated April 6, 2017, which I will refer to as the "**Derivation Order**". Under the Derivation Order, the Monitor was to investigate "the affairs and assets" of TNW Networks and determine what property of TNW Networks it was not permitted to sell. Paragraph 6 of the Derivation Order provided (describing TNW Networks as Networks):
>
> > Forthwith, the Monitor shall review, inventory and otherwise investigate the affairs and assets of Networks, and shall determine what Property (as defined below) of Networks was not derived directly or indirectly from the Property of

> the Petitioners, their subsidiaries, or any other entities subject to the Applicants' security (the "Networks Property"), and report the same to the Court. Any Property of Networks which the Monitor is unable to determine the origin of shall not be Networks Property, and for greater certainty, until determined as set out herein, none of the Property shall be Networks Property. Any party may challenge the determination of what constitutes Networks Property by application to this Court within 10 business days following the Monitor's report on the same and which matter shall be determined in this proceeding on a summary basis.
>
> (Chambers Reasons No. 2, para. 9) [Emphasis added]

[14] In short, in addition to selling the Petitioner's assets, under the Derivation Order the Monitor was permitted to sell TNW Networks' property except for TNW Networks' property that was excluded as "not derived directly or indirectly from":

> a) property of the Petitioners;
>
> b) their subsidiaries (agreed to mean the Petitioners' subsidiaries); or
>
> c) any other entities subject to the "Applicants' security".
>
> . . .

[243] The Claiming Parties also complain that the Monitor was both the party who determined the claims to ownership of assets, and the party advocating to defend the decisions reached on those claims on the appeals before the judge. They also suggest the Monitor had an inherent conflict of interest due to this and its fee arrangements.

[244] I see no merit to any complaint about the process before the Monitor and then the judge to determine claims of ownership of assets. I also see no merit to the argument that the Monitor was acting in an impossible conflict of interest. The process was designed to deal with unique problems involving the tangled business operations of the many related parties and the insolvency context.

[245] That the Monitor was both investigator and adjudicator did not negate its role in responding to the appeal of the Monitor's Decisions in this unique situation. It was necessary for the Monitor to respond to the appeal so that there could be a fully informed appeal, particularly where there was no other respondent and where the Monitor had specialized knowledge and a lengthy history in dealing with the Appellants. These are all special factors in the context of a *CCAA* proceeding, but even outside of a *CCAA* proceeding there can be occasions when a tribunal has standing to defend the merits of a decision under review: *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494at paras. 51 — 53.

[246]] It must be remembered that the Disputed Claims Process was in part negotiated by the parties and was based on terms in court orders that were not appealed. The process and the reasons for it were reviewed without negative comment by this Court in Appeal No. 2.

[247] Other complaints by the Claiming Party have to do with the fact that they bore the onus of proof.

[248] It was clear from the Disputed Claims Process, and the structure of the Derivation Order when dealing with claims to property held by TNW Networks (customer accounts), that the onus of proof fell on a party claiming ownership of a Disputed Asset. As noted, there was very good reason for this.

[249] The difficulty in identifying and segregating ownership of assets had to do with the common management of the related companies, who had made little or no effort during the operations of the business to segregate assets.

[250] *Further, as has already been emphasized, the Monitor received inconsistent advice from the Senior Management of the TNW Group as to ownership of assets*, from that first received when the Petitioners were hopeful for a restructuring, in late 2016 and early 2017, which was an expansive view of the assets owned by the Petitioners, to that received when it appeared clear that the restructuring was not going to happen and the Petitioners' assets would be sold for the benefit

> of creditors. It was not at all unfair to put the same parties to the onus of proof when they changed their position. Also, documentary evidence of ownership would rest entirely in the hands of the TNW Group, as the Monitor had no independent access to corporate documents. On top of this, the affidavits put forward by the Appellants seemed to obscure rather than illuminate issues regarding ownership of assets.
>
> [251] In conclusion, I see no merit to any of the issues raised by the Claiming Parties regarding the fairness of the process of determination of claims by the Monitor.
>
> [Bold and underlining emphasis in original; emphasis in italics added]

12 As a consequence of leave being denied by the Court, the Monitor's determination was final.

13 Thereafter, the Monitor effected, with court approval, sales of two tranches of the petitioners' assets to the current proposed purchaser, who as a result of a name change is now known as Navigata Communications Limited ("Navigata"). The Monitor now seeks court approval of the sale of the third and final tranche of the petitioners' assets. Those assets include hard assets, permits and licenses, and customer accounts and lists.

The Proposed Asset Sale

14 Navigata's offer to buy those remaining assets has expired. However, it recently tendered an amended offer to purchaser to reflect events that have occurred since its first offer was made in January 2018.

15 The new offer is different in these material respects.

16 First, Navigata seeks a reduction in the previously agreed to purchase of price of just under $118,000 on account of what it says, and the Monitor confirms, are funds obtained by some or all of the TNW Group through their business operations consequent on their use of assets belonging to the petitioners without the consent of the Monitor.

17 Second, Navigata requires a release and a court order prohibiting any suits from being commenced against it. The release and proposed prohibition order are limited specifically to claims that may be brought against Navigata in respect of the proposed asset sale transaction as well as prior transactions (and vesting orders) approved by the court. The prohibition order Navigata seeks would prohibit a defined group of persons, including any of the TNW Group or any other person or entity owned or controlled by or related to Mr. Laliberte, from bringing any claims or suits against Navigata.

18 Naviagata says the release and court order are essential in light of:

> (a) the highly litigious nature of this *CCAA* proceeding, which Navigata says was instigated or otherwise spearheaded by the TNW Group, Mr. Laliberte, or entities or persons controlled or directed by him, or one or more of them in combination; and
>
> (b) recent threats by some or all of those entities or persons to sue Navigata.

19 Navigata wishes to purchase the assets unencumbered with what it says is the very real spectre of ongoing and costly meritless litigation.

20 The Monitor agrees with Navigata that the terms of the proposed sale are fair and reasonable, including the proposed release and court order which the Monitor supports as warranted in the circumstances of the history of this *CCAA* proceeding and the threat of what is described as further meritless litigation against Navigata. Navigata. The Monitor advise that without the releases and court ordered prohibition, Navigata will not complete the transaction.

21 The Monitor is also most concerned that if this final asset sale is further delayed, Navigata will walk away, leaving the Monitor to engage in renewed attempts to sell the petitioners' remaining assets with attendant further costs which in turn will reduce the recovery to the petitioners' secured creditors and DIP lender.

22 The Monitor's application is supported by the various secured creditors and the DIP lender who are each taking a significant reduction in their claims to allow the proposed asset sale to proceed.

Opposition

23 The proposed sale to Navigata is opposed by the petitioners, who are represented by separate counsel. A threshold question raised by the Monitor on this application is whether the petitioners have standing to appear with separate counsel and oppose inasmuch as they have not obtained consent from the Monitor (who has enhanced powers under court orders) or court approval, which the Monitor says the petitioners are required to do and indeed have done in the past in this proceeding. It became clear during the hearing that the petitioners' opposition to the proposed sale is being spearheaded by Mr. Laliberte and others formerly involved with the petitioners and associated with the TNW Group.

24 The petitioners do not contest the purchase price. Instead, they contend that the Monitor has not properly identified all of the petitioners' remaining assets and as a result is attempting to sell assets that do not belong to the petitioner. They also object to the release and order prohibiting suits.

25 In terms of standing, the petitioners say that since they have an interest in the outcome of the sale and there is no court order in place abrogating their rights to dispute matters in court, and furthermore, as debtors who brought the proceeding and remain as parties, they have standing, and in these respects rely on Song v. Westwood Plateau Golf & Country Club, 2015 BCSC 1884, aff'd 2016 BCCA 110 and Bul River Mineral Corporation (Re), 2014 BCSC 1732.

Analysis and Determination

26 I do not need to decide the standing issue since I have concluded that even if the petitioners were entitled to standing, and with the exception of the proposed prohibition from suit order, the petitioners' substantive objections to the proposed sale are without merit and that the sale, including the release, is fair and reasonable and should be approved.

Ownership

27 I will deal first with the petitioners' complaint that the Monitor is inappropriately asking this Court to approve a sale of assets that cannot be said that the petitioners own.

28 Relying on the proposition that no court can order the sale of assets to which the putative selling party does not own or has no right to sell (see, e.g., Re Nortel Networks Corporation, 2014 ONSC 4777 at para. 11, Fright v. Fright (1995), 18 B.C.L.R. (3d) 201 (C.A.) at para. 12), the petitioners argue that the onus is on the person proposing to sell the assets that they have the right to do so.

29 They argue that in light of the comments of the Monitor in his 19th report, excerpted below, that the Monitor is unable to do so:

> 63. As a result of the lengthy and unexpected appeals process described above, (collectively, the "Appeals"), NCL and the Monitor (on behalf of the Petitioners) had been unable to confirm the full scope of the Purchased Assets that could be vested in NCL.
>
> 64. The Monitor notes that the Third Transaction (if approved) together with the First Vesting Order and the Second Vesting Order would accomplish what the Original Distributel APA set out to achieve. The Third Transaction would implement the original transaction, following a robust claim and appeal process through all levels of Court to confirm no third party assets are being sold and the Monitor is of the view that the proposed transaction is within the Court's jurisdiction.
>
> [Emphasis added]

30 As previously mentioned, the petitioners' position is that the April 6 Order is a process order that does not grant the Monitor substantive rights to sell assets it cannot say with certainty are assets of the petitioners. Nor do the court-ordered enhanced powers granted to the Monitor confer a right on the Monitor to sell assets the petitioners do not own.

31 The petitioners were candid in expressing their concern that Navigata, who is their competitor (and also, of the TNW Group) should not obtain assets it cannot lawfully purchase in order to enhance its business to the detriment of the TNW Group and of Mr. Laliberte's possible plan to re-engage in the telephone services business.

32 The petitioners' complaints are answered in part by the Monitor's use of the word "had" in para. 63 of his 19th report (excerpted in para. 29 above), where he comments on issues in the past tense, coupled with his advice in para. 82:

> 82. The Monitor has confirmed that the Remaining Purchased Assets formed part of the assets listed on the schedules contained in the Revised Distributel APA [Navigata]. The Monitor notes that all litigation with respect to any and all claims by the Claiming Persons over the Remaining Purchased Assets has concluded. The Remaining Purchased Assets can be sold by the Monitor pursuant to the April 6, 2017 Order without further opposition by the Claiming Persons and the Monitor recommends that this Honourable Court approve the Third Transaction and Proposed Vesting Order sought in connection with same.

33 Further, the petitioners have not identified any specific assets proposed to be sold as assets they do not own as owned by others.

34 The status of assets potentially owned by the TNW Group proposed to be sold by the Monitor are confirmed as assets of the petitioners in view of the April 6 Order. There are no other parties whose claims to assets remain outstanding. Any such claims have been decided long ago.

35 Apart from pointing to the Monitor's advice to the court, the evidence the petitioners relied on to challenge the Monitor's right to sell the proposed assets comes from an affidavit of Mr. Trevor-Deutsch, a former president of the petitioner, Teliphone Corp., who was also the senior vice-president of corporate affairs of the petitioner, 8540025 Canada Inc., sworn August 31, 2021. In respect of the ownership issue, Mr. Trevor-Deutsch's evidence is sweeping in nature, and only takes issue with the trade or business names the Monitor proposes to sell. Mr. Trevor-Deutsch deposes that the petitioners are not the true owners of any of those trade or business names (the term "second option notice" in his affidavit excerpted below refers to Navigata's offer to purchase):

> 10. Attached as Exhibit "B" to this my affidavit is a copy of the schedule "A" to the Second Option Notice, and the first page of the second option notice, which second option notice is referred to in paragraph 43 of the nineteenth report of the monitor and is Appendix "D" to the sixteenth report of the monitor.
>
> 11. The assets referred to in that second option notice are not all assets owned by the petitioners. For example, the trade and business name "Teliphone" referred to on page 3 of Schedule "A" is not property exclusively owned by any of the petitioners. To establish the ownership of most of those trade and business names would require some investigations to be made by Mr. Laliberte and myself.
>
> 12. However, I can certainly say that none of the companies that are petitioners in these proceedings or over which the Monitor has powers pursuant to court orders in these proceedings is the true owner of any of the trade names or business names referred to in the second option notice which are purported to be sold to 1027637 Canada Inc. pursuant to the Second Option Notice.

36 Mr. Trevor-Deutsch does not set out the basis of his knowledge nor does he say who owns those assets. In his former positions with the petitioners, Mr. Trevor-Deutsch should have knowledge or the means of obtaining such knowledge concerning ownership. The general statement in para. 12 of his affidavit is, on its own, insufficient to establish any basis to challenge the Monitor's right to sell the proposed assets.

37 Further, knowledge of the provenance and ownership of any of the impugned assets to be sold should be within the means of knowledge of the petitioners' former employees or other officers and directors, such as Mr. Laliberte, and in light of the manner in which they organized their business affairs, persons affiliated with the TNW Group. Quite apart from the final determination made by the Monitor pursuant to the April 6 Order, no evidence has been adduced from any of those potential sources of evidence to challenge the Monitor's ability to sell the proposed assets.

38 The petitioners' rationale to oppose the proposed sale on the basis that it may help a business competitor of the petitioners' failed business or of the petitioners' solvent affiliates, such as the TNW Group, or impede Mr. Laliberte's possible plan to return to the field in some other capacity, is not in the present circumstances a proper basis to oppose the sale.

39 To deny the Monitor's application in these circumstances would result in pointless delay and expense and would be to the ongoing prejudice of the petitioners' secured creditors and DIP lenders.

40 I therefore accept that the Monitor has the authority to sell the proposed assets to Navigata for the purchase price proposed in the new amended offer.

Release

41 I turn now to the proposed release.

42 In terms of the release, the petitioners contend it is overly broad and not rationally connected to the plan. They submit that it is not usual or appropriate to grant with a vesting order.

43 It is not uncommon for releases to be granted in *CCAA* proceedings when approving sales and vesting orders. That point and the factors to be considered in deciding whether to approve a release are discussed in the oft-cited decision of the Ontario Court of Appeal in Metcalfe & Mansfield Alternative Investments II Corp. (Re), 2008 ONCA 587:

> [69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> [70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.
>
> . . .
>
> [72] Here, then — as was the case in T&N — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:
>
> > I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the

> preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.
>
> . . .

[113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

> (a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> (c) the Plan cannot succeed without the releases;
>
> (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> (e) the Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> (f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> (g) the releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward,

but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings, almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices", inasmuch as everyone is adversely affected in some fashion.

[Emphasis added]

44 Having considered the history of this proceeding, the highly contentious issues surrounding ownership of assets, and recent information that Mr. Laliberte or persons or entities controlled by him may bring claims against Navigata, I am satisfied that the release is appropriate in the circumstances in order to effect the sale of the petitioners' remaining assets. I agree with the Monitor that Navigata's concern over buying assets coupled with the very real prospect of litigation in respect of the sale is well founded. Navigata's concerns are also underscored by what appears to be the impetus for the opposition to the Monitor's application, i.e., to prevent a competitor from enhancing its business through the acquisition of the petitioners' assets. The proposed release, limited in scope to the instant and prior court-approved transactions and vesting orders is, I find, necessary and essential to further this liquidating *CCAA* and rationally connected to the purpose of the plan to liquidate the petitioners' remaining assets (which will benefit all remaining creditors entitled to recovery). I am satisfied that the proposed sale and final implementation of the liquidation plan will not succeed without it and satisfied that the release language is fair and reasonable in the circumstances.

Prohibition of Suits without Leave

45 The proposed prohibition order sought by the Monitor is contained in para. 11 of the proposed draft order, and reads:

11. The Claiming Parties are hereby forever barred and prohibited from taking any actions, without prior leave of this Court, against the Purchaser or against or in respect of the Required Purchased Assets or the Optional Purchased Assets (including the Schedule A Assets (as defined in the Option Notice) and the Remaining Assets) purchased by the Purchaser pursuant to the APA, the Approval and Vesting Order granted on September 15, 2017, the Option Notice, the Subsequent Approval and Vesting Order granted on December 14, 2017, the Restated Second Option Notice, and this Order.

46 "Claiming parties" are defined in para. 10 of the proposed order as follows:

10. The Purchaser is hereby granted a full and final release from and against any and all Claims by TNW Networks Corp., Cloud-Phone Inc., ChoiceTel Networks Ltd., Titan Communications Ltd., 8583498 Canada Ltd., 9151-4877 Quebec Inc. dba Dialek Telecom, Orion Communications Inc., New York Telecommunication Exchange Inc., United American Corp. (US Florida), and Coastline Broadcasting Ltd. and any other person or entity owned or controlled by, or related to Benoit Laliberte and their respective predecessors, successors and assigns (collectively, the "Claiming Parties"), or any Claims made by the Claiming Parties against or in respect of the Required Purchased Assets or the Optional Purchased Assets (including the Schedule A Assets (as defined in the Option Notice) and the Remaining Assets) purchased by the Purchaser pursuant to the APA, the Approval and Vesting Order granted on September 15, 2017, the Option Notice, the Subsequent Approval and Vesting Order granted on December 14, 2017, the Restated Second Option Notice, and this Order.

47 The Monitor and Navigata say the proposed prohibition order is appropriate in the circumstances of this case in light of what they characterize as the past, extensive, meritless steps taken by Mr. Laliberte and others affiliated with the petitioners and the TNW Group. They drew to my attention that such an order was granted by Justice Campbell in *Metcalfe*. Further, relying on Yang v. Shi, 2020 BCSC 1857, they submit that granting such an order in this case comports with the court's jurisdiction to prevent abuses of the court's process.

48 The petitioners submit that the court lacks jurisdiction to restrict a person's right to bring a suit. It is one thing, they argue, to approve a release, but quite another to prevent a party from access to this Court without first seeking leave in the absence of a frivolous and vexatious order obtained following an application to this Court. Granting such an order at this juncture would be akin, they argue, to deciding a frivolous and vexatious application in the absence of such application and a proper record. The petitioners contend that Navigata can hold up its release to have any suit brought against Navigata covered by the release dismissed and seek costs.

49 Dealing first with *Metcalfe*, it is not clear from the reasons of the Court of Appeal and of Justice Campbell in the court below (indexed at 2008 CarswellOnt 3523, [2008] O.J. No. 2265) and from the form of order issued by Campbell J. (which counsel have provided to me), the basis on which Campbell J. ordered the broad form of prohibition orders and whether they were made unopposed or in light of evidence concerning potential frivolous and vexations suits.

50 In *Yang*, Justice Norell observed at paras. 81-87, that the Court has statutory jurisdiction under s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443 as well as inherent jurisdiction to prevent the habitual or vexatious abuse of court processes.

51 In her reasons, Norell J. said "habitual" encompasses both quantitative and qualitative features:

> [83] "Habitual" in s. 18 does not refer only to the number of different proceedings a party commences, but also to the nature of the litigant's conduct within a particular action itself: *Semenoff Estate v. Semenoff*, 2017 BCCA 17at para. 34. The term "legal proceedings" in s. 18 includes interlocutory applications that raise a new matter or cause: *Pearlman v. Vancouver Police Department*, 2012 BCSC 1179[*Pearlman*] at para. 25.

52 Vexatious proceedings are those that ought not to have been brought, such as those brought for an improper purpose such as harassment or oppression of another party through multifarious proceedings, where it is obvious that the action cannot proceed, no reasonable person can expect to obtain relief, or where the issue has been determined by a court of competent jurisdiction. In determining whether a proceeding is vexatious, the court must look at the entire history of the matter and not just whether there was originally a good cause of action: *Yang* , para. 84.

53 I do not think it appropriate to grant the order sought in the broad terms sought by the Monitor and Navigata. I agree with the petitioners that an order barring Claiming Parties from bringing *any* action or suit against in respect of the transactions is tantamount to a frivolous and vexatious order without the requisite application materials. Moreover, in light of the petitioners' submissions concerning their prior successes in the Court of Appeal in this action, I am not in a position at this juncture, based on the record before me, to make a finding that the Claiming Parties should be barred generally from bringing suits without leave due to past conduct.

54 That said, I am prepared to issue an order more limited in scope, one that prohibits the Claiming Parties, without first seeking leave, from bringing suits to challenge any of the terms and integrity of the proposed transaction as well as the prior sales transactions and vesting orders (including the Monitor's right to sell the assets and the price paid). Such an order is rationally connected to the plan for this liquidating *CCAA*, accords with the highly contentious and protracted history of disputes in this proceeding concerning ownership of assets and prior decisions of this Court and the Court of Appeal concerning the right of the Monitor to sell assets, and the nature and scope of the release. It also avoids further, costly litigation at the expense of the remaining creditors. I have to leave it up to the Monitor and Naviagata to sort out whether a prohibition order in those terms is acceptable and if it is, then I would approve a form of order with that more limited language.

Disposition

55 Accordingly, I approve of the proposed sale to Navigata, including the release. I would also approve a prohibition from suits order proposed by the Monitor so long as the scope of the order is in respect of the terms and integrity of this and prior asset sales transactions and vesting orders granted in this proceeding.

Application granted.

TAB W

2020 ONSC 4006
Ontario Superior Court of Justice [Commercial List]

Lydian International Limited (Re)

2020 CarswellOnt 9768, 2020 ONSC 4006, 321 A.C.W.S. (3d) 618, 81 C.B.R. (6th) 218

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 LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

Geoffrey B. Morawetz C.J. Ont. S.C.J.

Heard: June 29, 2020
Judgment: July 10, 2020
Docket: CV-19-00633392-00CL

Counsel: Elizabeth Pillon, Maria Konyukhova, Sanja Sopic, Nicholas Avis, for Applicants
D.J. Miller, Rachel Bergino, for Alvarez & Marsal Inc.
Robert Mason, Virginie Gauthier, for Osisko Bermuda Limited
Pamela Huff, Chris Burr, for Resource Capital Fund VI L.P.
David Bish, Michael Pickersgill, for Orion Capital Management
Alexander Steele, for Caterpillar Financial Services (UK) Limited
Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)
John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen, Atilla Bozkay, for themselves

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Applicants L Intl., L Canada, and L UK were three entities at top of group that owned development-stage gold mine in south-central Armenia — Applicants contended that they were unable to access their main operating asset due to blockades, which prevented them from completing construction of mine and generating revenue in ordinary course — Since blockades began, senior lenders had been funding applicants' efforts to find solution to situation caused by blockades — Applicants sought protection under Companies' Creditors Arrangement Act (Act proceedings), were granted initial order, and monitor was appointed — Applicants created plan of arrangement that they submitted represented culmination of their restructuring efforts and allowed for resolution of Act proceedings and would recognize and continue priority position of senior lenders in restructuring — Applicants brought motion for relief, including order sanctioning and approving plan of arrangement — Motion granted — Plan was fair and reasonable in circumstances — Senior lenders were in favour of plan, and there were no viable alternatives — It was appropriate for plan to include releases in favour of released parties.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Applicants L Intl., L Canada, and L UK were three entities at top of group that owned development-stage gold mine in south-central Armenia — Applicants contended that they were unable to access their main operating asset due to blockades, which prevented them from completing construction of mine and generating revenue in ordinary course — Since blockades began, senior lenders had been funding applicants' efforts to find solution to situation caused by blockades — Applicants sought protection under Companies' Creditors Arrangement Act (Act proceedings), were granted initial order, and mnitor was appointed — Applicants created plan of arrangement that they submitted represented culmination of their restructuring efforts and allowed for resolution of Act proceedings and would recognize and continue priority position of senior lenders in restructuring —

Majority of senior lenders agreed to fund costs associated with implementing plan and termination of Act proceedings through debtor-in-possession (DIP) exit facility amendment — DIP exit facility amendment provided for exit financing to assist in implementing plan and taking necessary ancillary steps to terminate Act proceedings — Applicants brought motion for relief, including order approving applicants' debtor-in-possession amendment — Motion granted — Requested relief was reasonably necessary and appropriate in circumstances — DIP exit credit facility was necessary to enable applicants to implement plan, and monitor was supporting of DIP exit facility amendment — DIP exit facility amendment was not anticipated to give rise to any material finance prejudice, and DIP lenders were majority of senior lenders.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Length of stay Applicants L Intl., L Canada, and L UK were three entities at top of group that owned development-stage gold mine in south-central Armenia — Applicants contended that they were unable to access their main operating asset due to blockades, which prevented them from completing construction of mine and generating revenue in ordinary course — Since blockades began, senior lenders had been funding applicants' efforts to find solution to situation caused by blockades — Applicants sought protection under Companies' Creditors Arrangement Act (Act proceedings), were granted initial order, and monitor was appointed — Applicants created plan of arrangement that they submitted represented culmination of their restructuring efforts and allowed for resolution of Act proceedings and would recognize and continue priority position of senior lenders in restructuring — On plan implementation date, Act proceedings with respect to L UK and L Canada would be terminated such that L Intl. would be only remaining applicant — Applicants brought motion for relief, including order to extend stay period for L Intl. to enable remaining applicant and monitor to take necessary steps to implement plan and terminate Act proceedings — Motion granted — Applicants demonstrated that circumstances existed that made order appropriate — Applicants acted in good faith and with due diligence such that request was appropriate.

MOTION by applicants for relief, including order and sanctioning and approving applicants' plan of arrangement.

***Geoffrey B. Morawetz C.J. Ont. S.C.J.*:**

1 Lydian International Limited, Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (the "Applicants") bring this motion for an order (the "Sanction and Implementation Order"), among other things:

> a) declaring that the Meeting of Affected Creditors held on June 19, 2020 was duly convened and held, all in accordance with the Meeting Order;
>
> b) sanctioning and approving the Applicants' Plan of Arrangement (the "Plan") as approved by a requisite majority of Affected Creditors at the Meeting, in accordance with the Plan Meeting Order (each as defined below), a copy of which is attached as Schedule "A" to the draft Sanction and Implementation Order; and
>
> c) granting various other related relief (as more particularly outlined below).

2 The Applicants submit that the Plan represents the culmination of the Applicants' restructuring efforts and allows for the resolution of these CCAA Proceedings. The Monitor and the majority of the Affected Creditors are supportive of the Plan and if sanctioned and implemented, the Plan will provide a path forward for Lydian Canada and Lydian UK as part of a privatized Restructured Lydian Group (as defined in the Plan) and ultimately lead to the termination of these CCAA Proceedings.

3 Shortly after the conclusion of the hearing on June 29, 2020, which was conducted by Zoom, I granted the motion with reasons to follow.

4 The facts with respect to this motion are more fully set out in the Affidavit of Edward A. Sellers sworn June 24, 2020 (the "Sellers Sanction Affidavit"), the Affidavit of Edward A. Sellers sworn June 15, 2020 (the "Sellers Meeting Affidavit") and the Affidavit of Mark Caiger sworn June 11, 2020 (the "BMO Affidavit"). Mr. Sellers and Mr. Caiger were not cross-examined. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Sellers Sanction Affidavit, the Sellers Meeting Affidavit, and the Plan. All references to currency in this factum are references to United States dollars, unless otherwise indicated.

Background

5 The Applicants are three entities at the top of the Lydian Group. The Lydian Group owns a development-stage gold mine in south-central Armenia through its wholly owned non-applicant operating subsidiary Lydian Armenia. The Applicants contend that they have been unable to access their main operating asset, the Amulsar mine, since June 2018 due to blockades and the associated actions and inactions of the Government of Armenia ("GOA"), and as a result, this has prevented the Applicants from completing construction of the mine and generating revenue in the ordinary course.

6 The Applicants further contend that the effects of the blockades, amongst other factors, caused the Applicants to seek protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). An Initial Order was granted on December 23, 2019. Alvarez & Marsal Canada Inc. was appointed as Monitor.

7 In the two years since the blockades began, the Applicants contend that they have used their best efforts to resolve the factors that led to their insolvency, including engaging in negotiations with the GOA, defending their commercial rights and commencing legal proceedings in Armenia to attempt to remove the blockades but these efforts have yet to result in the Applicants re-gaining access to the Amulsar site.

8 In early 2018, the Applicants retained BMO to canvass the market for potential refinancing or sale options. BMO has conducted multiple rounds of a sales process to market the Lydian Group's mining assets. BMO also ran a process to solicit interest in financing the Applicants' potential Treaty Arbitration. These efforts have not yet resulted in a transaction capable of satisfying the claims of the Applicants' secured lenders.

9 Since the blockades began, the Senior Lenders have been funding the Applicants' efforts to find a solution to the situation caused by the blockades. The Senior Lenders provided additional financial support to the Lydian Group totalling in excess of $43 million.

10 As of March 31, 2020, the Lydian Group owed its secured lenders more than $406.8 million.

11 According to the Applicants, the secured lenders are no longer willing to support the Applicants' efforts to monetize their assets. The Equipment Financiers CAT and ING have taken enforcement steps and Ameriabank has issued preliminary notice of enforcement.

12 Further, the Applicants point out that the liquidity made available to the Applicants since April 30, 2020 has been conditioned on the Applicants: (i) proposing a restructuring that would be equivalent to the Senior Lenders enforcing their security over the shares of Lydian Canada; and (ii) meeting a deadline to exit the CCAA Proceedings imposed by a majority of the Applicants' Senior Lenders, or further enforcement steps would be taken.

13 The Applicants submit that the Plan represents the most efficient mechanism to effect an orderly transition of the Lydian Group's affairs. The Applicants contend that the Plan minimizes adverse collateral impacts on Lydian Armenia, provides for winding down the proceedings before this court and the Jersey Court and avoids uncoordinated enforcement steps being taken on the Lydian Group's property to the detriment of the Lydian Group's stakeholders generally.

The Plan

14 The Plan recognizes and continues the priority position of the Senior Lenders in the Restructured Lydian Group. The Senior Lenders make up the only class eligible to vote on the Plan and receive a distribution thereunder.

15 According to the Applicants, secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders. Stakeholders with claims at the Lydian International level will continue to have their claims on the Plan Implementation Date, which are intended to be addressed through the proposed J&E Process in

Jersey. Equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan.

16 The purpose of the Plan is to (a) implement a corporate and financial restructuring of the Applicants, (b) provide for the assignment or settlement of all intercompany debts owing to the Applicants prior to the Effective Time to, among other things, minimize adverse tax consequences to Lydian Armenia and its stakeholders, (c) provide for the equivalent of an assignment of substantially all of the assets of Lydian International to an entity owned and controlled by the Senior Lenders ("SL Newco"), through an amalgamation of Lydian Canada with SL Newco resulting in a new entity ("Restructured Lydian"), and (d) provide a release of all of the existing indebtedness and obligations owing by Lydian International to the Senior Lenders. The Plan will result in the privatization of the Lydian Group to continue as the Restructured Lydian Group.

17 The steps involved in the Plan's execution are described in detailed in paragraphs 71 to 74 of the Sellers Meeting Affidavit.

18 The Plan provides for certain releases. The releases are more fully described in the Sellers Meeting Affidavit at paragraph 83.

19 Mr. Sellers in the Sellers Sanction Affidavit at para. 16 states that the releases were critical components of the negotiations and decision-making process for the D&Os and Senior Lenders in obtaining support for the Plan and resolving these CCAA Proceedings for the benefit of the Restructured Lydian Group, including Lydian Armenia, and all of its stakeholders.

20 Mr. Sellers further states that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings, which resulted directly in the preservation of the Lydian Group's business, provided numerous opportunities for the Applicants to seek to monetize their assets for the benefit of stakeholders generally and led to the successful negotiation of the Plan for the benefit of the Restructured Lydian Group.

21 The Plan provides for a Plan Implementation Date on or prior to June 30, 2020. The majority of the Applicants' Senior Lenders have agreed to fund the costs associated with implementing the Plan and termination of the CCAA Proceedings and the J&E Process in Jersey, through the DIP Exit Facility Amendment, which will make a DIP Exit Credit Facility available to the Applicants totalling an estimated additional $1.866 million.

22 The test that a debtor company must satisfy in seeking the Court's approval for a plan of compromise or arrangement under the CCAA is well established:

a) there must be strict compliance with all statutory requirements;

b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA and prior Orders of the Court in the CCAA proceedings; and

c) the plan must be fair and reasonable.

Issues

23 The issues for determination on this motion are whether:

a) the Plan is fair and reasonable and should be sanctioned;

b) the releases contemplated by the Plan are appropriate;

c) the increase to the DIP Charge to capture the amounts to be advanced under the DIP Exit Credit Facilities is appropriate;

d) the Stay Period should be extended;

e) the unredacted Sellers Sanction Affidavit should be sealed; and

f) the Monitor's activities, as detailed in the Fifth Report, Sixth Report and Seventh Report, should be approved and the fees of Monitor and its counsel through to June 23, 2020 should be approved.

LAW AND ANALYSIS

Approval of the Plan

24 To determine whether there has been strict compliance with all statutory requirements, the court considers factors such as whether: (a) the applicant meets the definition of a "debtor company" under section 2 of the CCAA; (b) the applicant has total claims against it in excess of C$5 million; (c) the notice calling the creditors' meeting was sent in accordance with the order of the court; (d) the creditors were properly classified; (e) the meeting of creditors was properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.

25 The Applicants submit that they have complied with the procedural requirements of the CCAA, the Initial Order, the Amended and Restated Initial Order, the Meeting Order and all other Orders granted by this Court during these CCAA Proceedings. In particular:

a) at the time the Initial Order was granted, the Applicants were found to be "debtor companies" to which the CCAA applied and that the Applicants' liabilities exceeded the C$5 million threshold amount under the CCAA;

b) the classification of the Applicants' Senior Lenders into one voting class (namely, the Affected Creditors class) was approved pursuant to the Meeting Order. This classification was not opposed at the hearing to approve the Meeting, nor was the Meeting Order appealed; the Applicants properly effected notice in accordance with the Meeting Order prior to the Meeting. In addition, the Applicants issued a press release on June 15, 2020 announcing their intention to seek an Order of the Court to file the Plan and call, hold and conduct a meeting of the Senior Lenders;

c) the Meeting was properly constituted and the voting on the Plan was carried out in accordance with the Meeting Order; and

d) the Plan was approved by the Required Majority.

26 Sections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning Crown claims, employee claims and pension claims. The Applicants' submit that these provisions of the CCAA are satisfied by the Plan. Crown claims and employee claims are treated by the Plan as Unaffected Claims, meaning that such claims, if any, are not compromised or otherwise affected. The Applicants do not maintain any pension plans, and thus section 6(6) of the CCAA does not apply. In compliance with s. 6(8) of the CCAA, the Plan does not provide for any recovery to equity holders.

27 I accept the foregoing submissions. I am satisfied that the statutory prerequisites to approval of the Plan have been satisfied, and that there has been strict compliance with all statutory requirements.

28 The Applicants submit that no unauthorized steps have been taken in these CCAA Proceedings and throughout the entirety of these CCAA Proceedings, they have kept this Court and Monitor appraised of all material aspects of the Applicants' conduct, activities, and key issues they have worked to resolve. I accept this submission.

29 The Applicants' submit that when considering whether a plan of compromise and arrangement is fair and reasonable, the court should consider the relative degree of prejudice that would flow from granting or refusing to grant the relief sought. Courts should also consider whether the proposed plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (see: *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at paras. 3, 94, 96, and 137 - 138; and *Canwest Global Communications Corp., Re*, 2010 ONSC 4209(Ont. S.C.J. [Commercial List])).

30 The CCAA permits the filing of a Plan by an Applicant to its secured creditors. The Applicants' submit the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement (*Anvil Range Mining Corp., Re* [2002 CarswellOnt 2254 (Ont. C.A.)], 2002 CanLII 42003; and *1078385 Ontario Ltd., Re* [2004 CarswellOnt 8034 (Ont. C.A.)], 2004 CanLII 55041 at paras 30-31 (*CanLII*), affirming [2004 CarswellOnt 8041 (Ont. S.C.J.)] 2004 CanLII 66329).

31 The Plan was presented to the Senior Lenders, who are the Applicants' only secured creditors and they voted on the Plan as a single class. The Senior Lenders voted in favour of the Plan by the Required Majority. The value of the claims of Orion and Osisko, who voted in favour of the Plan comprise 77.8% of the total value of the Affected Creditors who were present and voting.

32 RCF, a secured lender and 32% shareholder, did not vote in favour of the Plan. RCF has advised that it "does not intend at this time to propose or fund an alternative to the Plan, and in the absence of such an alternative we expect that the Court will have no choice but to issue the Sanction and Implementation Order."

33 I have been advised that an issue as between the Senior Lenders and ING has been resolved and for greater certainty this Plan does not compromise any claim that ING may have in respect of proceeds from a successfully-asserted arbitration claim. In addition, the Senior Lenders have agreed that, after payment of all claims of the Senior Lenders to proceeds from a successfully-asserted arbitration claim whether on account of: (i) claims of the Senior Lenders prior to the Plan Implementation Date; or (ii) further advances made by the Senior Lenders (or their affiliates) after the Plan Implementation Date, (whether such further advances are made as equity, secured debt or unsecured debt), the proceeds will be paid to Lydian Armenia in an amount sufficient and to be used to pay ING's claims against Lydian Armenia prior to any further monies being returned to equity holders.

34 The Applicants submit that the structure and the nature of the releases in the Plan recognizes and continues the priority position of the Senior Lenders. Secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders.

35 The Applicants state that they have considered and believe the Plan is the best available outcome for the Applicants, and the interests of the stakeholders generally in the Lydian Group.

36 As noted in the BMO Affidavit, despite multiple rounds of the SISP and the Treaty Arbitration financing solicitation process, the Applicants submit that no transaction which would satisfy the Lydian Group's secured obligations is currently available to the Applicants.

37 The Applicants submit that the monetization of Treaty Arbitration is also not open to the Applicants at this time, and if initiated would require an extended period to litigate and significant additional financial resources.

38 The Applicants submit that for the purposes of valuing an estate at a plan sanction hearing, the "value has to be determined on a current basis. [...] It is inappropriate to value the assets on a speculative or (remote) possibility basis." A relevant consideration in this analysis is the scope and extent of previous sale or capital raising efforts undertaken by the company and any financial advisors. In support of this submission, the Applicants reference: *Anvil Range Mining Corp., Re*, 2002 CanLII 42003, para 36 (*CanLII*); *Philip Services Corp., Re* [1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List])], 1999 CanLII 15012 at para 9 (*CanLII*) *1078385 Ontario Ltd., Re*, 2004 CanLII 55041 at paras 30-31 (*CanLII*), affirming *1078385 Ontario Ltd., Re*, 2004 CanLII 66329 (*CanLII*).

39 The Applicants submit that the outcome of the Plan, that being the distribution of the Applicants' estates to the Senior Lenders, is essentially identical to what would be achieved with any other options available in the circumstances. Without the Plan, the Senior Lenders could (a) privatize the Applicants' assets through the enforcement of share pledges and other security, or (b) could credit bid their debt to acquire the shares or assets; or (c) enforce their secured positions following the Applicants

filing for bankruptcy, administration, or liquidation proceedings across multiple jurisdictions. In each scenario (as with the Plan), the Applicants' assets are transitioned to the Senior Lenders.

40 The foregoing submissions were not challenged.

41 The Monitor supports the Plan. As noted in the Monitor's Seventh Report, "it is the Monitor's view that the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable."

42 I am aware that concerns with respect to the fairness of the Plan have been raised by numerous shareholders of Lydian International and oral submissions were made by John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay.

43 In addition, a number of emails were sent directly to the court, which were forwarded to counsel to the Monitor. In addition, certain emails were sent to the Monitor. None of the emails were in a proper evidentiary form.

44 The concerns of the shareholders included criminal complaints of activities in Armenia, the content of certain press releases and the impact of the COVID-19 pandemic. Some shareholders requested a delay of three months in these proceedings.

45 As previously noted, equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan. Simply put, the shareholders of Lydian International will not receive any compensation for their shareholdings. This is a reflection of the insolvency of the Applicants and the priority position afforded to shareholders by the CCAA.

46 I recognize that the shareholders' monetary loss will be crystalized if the Plan is sanctioned. However, a monetary loss resulting from the ownership, purchase or sale of their equity interest is an "equity claim" as defined in s. 2(1) of the CCAA. This definition is significant as s. 6(8) of the CCAA provides:

> 6(8) Payment - equity claims - No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

47 The Plan does not provide for payment in full of claims that are not equity claims. Consequently, equity claimants are not in the position to receive any compensation.

48 The economic reality facing the shareholders existed prior to the COVID-19 pandemic. The Applicants were insolvent when they filed these proceedings on December 23, 2019. The financial situation facing the Applicants has not improved since the filing. In fact, it has declined. The mine is not operating with the obvious result that it is not generating revenues and interest continues to accrue on the secured debt. The fact that shareholders will receive no compensation is unfortunate but is a reflection of reality which does not preclude a finding that the Plan is fair and reasonable for the purposes of this motion.

49 The Senior Lenders have voted in sufficient numbers in favour of the Plan. I am satisfied that there are no viable alternatives, and, in my view, it is not feasible to further delay these proceedings.

50 Section 6.6 of the Plan provides for full and final releases in favour of the Released Parties, who consist of (a) the Applicants, their employees, agents and advisors (including counsel) and each of the members of the Existing Lydian Group's current and former directors and officers; (b) the Monitor and its counsel; and (c) the Senior Lenders and each of their respective affiliates, affiliated funds, their directors, officers, employees, agents and advisors (including counsel) (collectively, the "Ancillary Releases"). A chart setting out the impact of the releases is attached as Schedule "A" to these reasons.

51 The Applicants submit that the releases apply to the extent permitted by law and expressly do not apply to, among other things:

> a) Lydian Canada's, Lydian UK's or the Senior Lenders' obligations under the Plan or incorporated into the Plan;

b) obligations of any Existing Lydian Group member other than Lydian International under the Credit Agreement and Stream Agreement, and any agreements entered into relating to the foregoing, from and after the Plan Implementation Date;

c) any claims arising from the willful misconduct or gross negligence of any applicable Released Party; and

d) any Director from any Director Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

52 Unsecured creditors' claims, other than the Ancillary Releases in favour of the Directors, are not compromised or released and remain in the Restructured Lydian Group.

53 The Applicants submit that it is accepted that there is jurisdiction to sanction plans containing releases if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad. There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan (see: *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at para 92 (*CanLII*) CCAA at s. 5(1); *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) at paras 61 and 70 (*CanLII*); *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]) at para 28-30 (*CanLII*); and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]) at paras 85-88 (*CanLII*).

54 The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.

55 The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

56 The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

57 The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

58 The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) at paras 71 (*CanLII*); and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]) at paras 80-82 (*CanLII*).

59 The Applicants submit that this Court has exercised its authority to grant similar releases, including in circumstances where the released claims included claims of parties who did not vote on the plan and were not eligible to receive distributions (*Target Canada Co. et al*. (2 June 2016), Toronto CV-15-10832-00CL (Ont. Sup. Ct. [Comm. List]) Sanction and Vesting Order at Schedule "B" art. 7 (*Monitor's website*); *Rubicon Minerals Corporation et al*. (8 December 2016), Toronto CV-16-11566-00CL (Ont. Sup. Ct. [Comm. List]) Sanction Order at Schedule "A" art. 7 (*Monitor's website*); and *Nortel Networks Corporation et al*. (30 November 2016), Toronto 09-CL-7950 (Ont. Sup. Ct. [Comm. List]) Plan of Compromise and Arrangement at art. 7 (*Monitor's website*)).

60 Full disclosure of the releases was made in (a) the draft Plan that was circulated to the Service List and filed with this Court as part of the Applicants' Motion Record (returnable June 18, 2020); and (b) the Plan attached to the Meeting Order. The Applicants also issued the Press Releases. This notification process ensured that the Applicants' stakeholders had notice of the nature and effect of the Plan and releases.

61 The foregoing submissions with respect to the releases were not challenged.

62 In my view, each of the Released Parties has made a contribution to the development of the Plan. In arriving at this determination, I have taken into account the activities of the Released Parties as described in the Reports of the court-appointed Monitor. I am satisfied that it is appropriate for the Plan to include the releases in favour of the Released Parties.

63 The development of this Plan has been challenging and as the Monitor has stated, "the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable".

64 I accept this assessment and find that the Plan is fair and reasonable in the circumstances.

DIP Charge

65 The terms of the DIP Exit Facility Amendment are described in the Sellers Sanction Affidavit. The DIP Exit Facility Amendment provides for exit financing totalling $1.866 million to assist in implementing the Plan and taking the necessary ancillary steps to terminate the CCAA Proceedings and support the J&E Process.

66 This Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA. These same provisions of the CCAA provide this Court with the authority to approve amendments to a DIP agreement and secure all obligations arising from the amended DIP loans with an increased DIP charge.

67 The Applicants submit that, based on the following, the DIP Amendment should be approved and the increase to the DIP Facility should be secured by the DIP Charge:

a) the DIP Exit Credit Facility is necessary to enable the Applicants to implement the Plan;

b) the Monitor is supportive of the DIP Exit Facility Amendment;

c) the DIP Exit Facility Amendment is not anticipated to give rise to any material financial prejudice; and

d) the DIP Lenders are the majority of Senior Lenders.

68 I am satisfied that the requested relief in respect to the DIP Amendment is reasonably necessary and appropriate in the circumstances.

Sealing Request

69 The Applicants seek to seal the unredacted Sellers Sanction Affidavit on the basis that the redacted portions of the Sellers Sanction Affidavit contain commercially sensitive information, the disclosure of which could be harmful to stakeholders.

70 The redactions currently being sought are consistent with previous Orders in these CCAA Proceedings. In my view, the documents in question contain sensitive commercial information. Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) at para. 53 I am satisfied that the request for a sealing order is appropriate and is granted.

Stay Period

71 On the Plan Implementation Date, the CCAA Proceedings with respect to Lydian UK and Lydian Canada will be terminated, such that Lydian International will be the only remaining Applicant in the CCAA Proceedings. The Applicants are requesting an extension of the Stay Period for Lydian International until and including the earlier of (i) the issuance of the Monitor's CCAA Termination Certificate and (ii) December 21, 2020 to enable the remaining Applicant and the Monitor to take the steps necessary to implement the Plan and terminate the CCAA Proceedings and initiate the J&E Process. The Applicants are also requesting an extension of the Stay Period for the Non-Applicant Stay Parties (other than Lydian US) until and including the earlier of the issuance of the Monitor's Plan Implementation Certificate.

72 I am satisfied that the Applicants in requesting the extension of the Stay Period have demonstrated that circumstances exist that make the order appropriate; and that they have acted and are acting in good faith and with due diligence such that the request is appropriate.

Approval of Monitor's Activities

73 The Applicants are seeking an order approving the Monitor's activities to date, as detailed in the Fifth Report, Sixth Report and the Seventh Report (collectively, the "Reports"). This Court has already approved the activities of the Monitor that were detailed in its previous reports. There was no opposition to the request.

74 I am satisfied that the Reports and the activities described therein should be approved. The Reports were prepared in a manner consistent with the Monitor's duties and the provisions of the CCAA and in compliance with the Initial Order. The Reports are approved in accordance with the language provided in the draft order.

Approval of Monitor's Fees

75 The Applicants further seek approval of the fees and disbursements of (i) the Monitor for the period April 14, 2020 to June 23, 2020, inclusive, and (ii) counsel to the Monitor for the period April 16, 2020 to June 23, 2020. The Applicants have reviewed the fees of the Monitor and its counsel and support the payment of the same.

76 I am satisfied that the fee requests are appropriate in the circumstances and they are approved.

DISPOSITION

77 The Applicants' motion is granted. The Plan is sanctioned and approved. The ancillary relief referenced in the motion is also granted and an Order reflecting the foregoing has been signed.

Schedule "A"

Lydian International Limited et al.

Impact of the Releases Described in s. 6.6 of the Plan

Type of Claim	Lydian Jersey Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)

Unsecured Guarantee of Equipment Lessors ING, CAT, Ameriabank	Not Released. Addressed in the J&E Process in Jersey	Section 6.6 (carve-out (E))
Other Unsecured Claims Includes Maverix Metals claim against Lydian Jersey	Not Released. Addressed in the J&E Process in Jersey.	Section 6.6 (carve-out (E))
Equity Claims Held by RCF, Orion, and public Shareholders	Not Released. Addressed in the J&E Process in Jersey.	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Intercompany Claims Claims by Lydian Jersey against Lydian Canada and other subsidiaries	Assigned to Lydian Canada	Section 6.3(h)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Type of Claim	Lydian Canada Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors [1] ING, CAT, Ameriabank	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Jersey in Lydian Canada	Not Released (but subject to amalgamation with SL Newco)	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Claims against the Senior Lenders and their legal counsel		
Priority Claims	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date	Section 5.2(i)
Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	

Lydian UK

Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors ING, CAT, Ameriabank [2]	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in Lydian UK	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims		Section 5.2(i)
Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	

11910728 Canada Inc. ("DirectorCo")

Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in DirectorCo	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal cousnel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Claims against the Monitor, and Monitor's legal counsel		
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian International Holdings Limited, Lydian Resources Armenia Limited, and Lydian Resources Kosovo Limited

Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Other Secured Claims Includes claim of Maverix Metals in shares of Lydian Resources Armenia Limited, which is subordinated to claims of Senior Lenders	Not Released	Section 6.6
Unsecured Claims Includes Maverix Metals claim against Lydian International Holdings Limited	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian UK in Lydian International Holdings Limited, and shareholdings of Lydian International Holdings Limited in Lydian Resources Armenia ("**BVI**") and Lydian Resources Kosovo Limited Includes Maverix Metals' share pledge in BVI	Not Released	Section 6.6 (carve-out (E))
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian Armenia

Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Equipment Lessor Secured Claims ING, CAT and Ameriabank (to the extent secured by their collateral)	Not Released	Section 6.6 (carve-out (E))
Equipment Lessor Unsecured Claims ING, CAT and Ameriabank (unsecured deficiency claims)	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims e.g. Trade creditors	Not Released	Section 6.6 (carve-out (E))
Equity Claims	Not Released	Section 3.5

Shareholdings held by BVI / DirectorCo (as sole shareholder representative of BVI		
D&O Claims Claims against the Directors	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6 (i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian US Lydian Zoloto, Lydian Resources Georgia Limited ("Lydian Georgia") and Georgian Resource Company LLC ("Lydian GRC", and collectively with Lydian US, Lydian Zoloto and Lydian Georgia, the "Released Guarantors" under the Plan)

Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Claims	Not Released	Section 6.6
Equity Claims		
(a) Shareholdings of Lydian Jersey in Lydian US, Lydian Georgia and Lydian Zoloto; and	(a) Not Released. Per s. 6.4 of the Plan, Lydian US and Lydian Zoloto to be wound-up and dissolved pursuant to the laws of Colorado and Armenia, respectively.	Section 3.5 and section 6.4
(b) Shareholdings of Lydian Georgia in Lydian GRC	(b) Lydian Georgia shares held by Lydian Jersey to be transferred to Lydian Georgia Purchaser on Plan Implementation Date. (b) Shares of Lydian GRC held by Lydian Georgia not released. See note re: Lydian Georgia above.	
D&O Claims, Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Motion granted.

Footnotes

1 This includes contractual rights as outlined in the Waiver and Consent Agreement between Lydian Jersey, Lydian Canada, Lydian UK and Lydian Armenia dated November 26, 2018 (the "**Waiver**").

2 This includes the contractual rights outlined in the Waiver.

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TAB X

2020 ABQB 751
Alberta Court of Queen's Bench

ENTREC Corporation (Re)

2020 CarswellAlta 2318, 2020 ABQB 751, [2021] A.W.L.D. 4, 325 A.C.W.S. (3d) 460, 84 C.B.R. (6th) 195

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

And In the Matter of the Compromise or Arrangement of ENTREC Corporation, Capstan Hauling Ltd., ENTREC Capital Corp., ENTREC Cranes & Heavy Haul Inc., ENTREC Holdings Inc., ENT Oilfield Group Ltd., and ENTREC Services Ltd. (Applicants)

B.E. Romaine J.

Heard: November 24, 2020
Judgment: December 3, 2020
Docket: Calgary 2001-06423

Counsel: Rick T.G. Reeson, Q.C., for Applicants
Kelsey J. Meyer (agent), for Wells Fargo Capital Finance Corporation Canada
Howard A. Gorman, Q.C., for Monitor
Kent A. Rowan, Q.C., for Directors and Officers

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Parties were involved in proceedings under Companies' Creditors Arrangement Act — Hearing was held regarding termination of proceedings under Act — Proceedings terminated, including release of all third party claims against applicants' current and former directors and officers, except for claims covered by applicable insurance policy of applicants and claims that could not be released under s. 5.1(2) of Act — Reasons for order included directors and officers provided critical direction leading up to filing of present proceedings were instrumental in administering sale and investment solicitation process for benefit of stakeholders, and played integral role in identifying and facilitating potential transactions — Transactions approved by court resulted in sale of substantially all of applicants' assets and preservation of significant number of jobs both in Canada and United States — Releases would facilitate monetary distribution of up to $1.5 million to applicants' major secured creditor, which funds would otherwise be held back for charge to secure indemnity in favour of directors and officers — Endorsement served to place particular emphasis on fact that release of claims against directors and officers was granted in specific circumstances of present case.

HEARING regarding order under *Companies' Creditors Arrangement Act*.

***B.E. Romaine J.*:**

I. Introduction

1 On November 24, 2020, I issued an oral decision granting an order terminating the *Companies' Creditors Arrangement Act* ("CCAA") proceedings of the Applicants (the "CCAA termination order"). The CCAA termination order allowed, among other relief, the release of all third party claims against the Applicants' current and former directors and officers, except for claims covered by an applicable insurance policy of the Applicants and claims that cannot be released under section 5.1(2) of the CCAA.

2 Given that a release of third party claims against directors and officers in a situation where there will not be a plan of arrangement arising from the CCAA proceedings is unusual, I take this opportunity to give written reasons on that issue, and emphasize that the relief with respect to the directors and officers was granted in the specific circumstances of this case.

II. Analysis

3 While section 11 of the CCAA confers on this Court broad discretionary power to grant a variety of orders, the breadth of this authority is not without limits. With the remedial objectives of the CCAA in mind, the Court must determine whether the applicant has demonstrated the three baseline considerations: namely, (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence: *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at para 49.

4 Appropriateness is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA: *Callidus* at para 50. Due diligence, in turn, stipulates that to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights: *Callidus* at para 51.

5 The Applicants submitted that there are no provisions within the CCAA that expressly limit this Court's jurisdiction to grant the release of third party claims against the directors and officers. In fact, section 5.1 of the CCAA contemplates the possibility of provision for the compromise of claims against directors of a company in the context of a compromise and arrangement of the company.

6 Further, the Applicants indicated that there is a recent judicial trend in which CCAA courts have exercised their discretion to grant a release of claims against directors and officers of a debtor company in the absence of a plan of arrangement. More specifically, they directed me to three orders from Ontario and Quebec: *In the Matter of Companies' Creditors Arrangement Act* (Mar 29, 2019), CV-16-11527-00CL (Ont. S.C.) [*Golf Town*]; *In the Matter of the Companies' Creditors Arrangement Act* (May 09, 2018), 500-11-053555-179 (C.S. Que.) [*RCR International*]; and *In the Matter of the Companies' Creditors Arrangement Act* (Sep 18, 2020), CV-20-00642097-00CL (Ont. S.C.) [*Beleave*].

7 In *Golf Town*, *RCR International*, and *Beleave*, the courts involved granted the release of claims against directors and officers because the applicants successfully demonstrated that the release was in the best interests of the debtor company and its stakeholders. In particular, in each case, the Court was satisfied that the directors and officers had acted in good faith, the release would facilitate the distribution of the applicants' remaining estate, the release would enhance the efficiency of the CCAA proceedings, and the release was nevertheless restricted by section 5.1(2) of the CCAA.

8 The Applicants' position is that the evidence and reasons in support of the release of claims against directors and officers in these three cases are substantially identical to the ones put forward in the present case. Specifically, the Applicants advanced the following factors that support the relief sought:

(a) The directors and officers provided critical direction leading up to the filing of the present CCAA proceedings;

(b) They were instrumental in administering the sale and investment solicitation process ("SISP") for the benefit of the Applicants' stakeholders;

(c) The directors and officers played an integral role in identifying and facilitating potential transactions to explore during the SISP process;

(d) The transactions approved by this Court resulted in the sale of substantially all of the Applicants' assets;

(e) The transactions approved by this Court resulted in the preservation of a significant number of jobs both in Canada and the U.S.;

(f) The releases will facilitate a monetary distribution of up to $1.5 million to the Applicants' major secured creditor, which funds would otherwise be held back for the charge to secure indemnity in favour of the directors and officers;

(g) The key employee retention and incentive plan approved by this Court contemplated that the Applicants would seek a Court-ordered release of claims against the directors and officers;

(h) Creditors and stakeholders of the Applicants were put on notice of the Applicants' intention to apply for a release of claims against the directors and officers;

(i) The Applicants implemented enhanced notice provisions with respect to the release, which included mailing two letters to all known creditors of the Applicants as well as their current and former employees in both Canada and the U.S.;

(j) The releases will not affect claims against directors and officers that are covered by an applicable insurance policy of the Applicants;

(k) The releases are subject to limitations under section 5.1(2) of the CCAA, which provides for an exception to the release of claims that relate to contractual rights of creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors;

(l) The releases would provide certainty and finality of the CCAA proceedings in the most efficient manner;

(m) A syndicate of lenders, as the Applicants' senior secured creditor, will suffer a substantial shortfall on the amounts owing to it, and as a result, a claims bar process and plan of arrangement would be cost-prohibitive;

(n) The CEO of the Applicants is not aware of any claim or proceeding in either Canada or the U.S. with respect to the directors or officers;

(o) The CEO is not aware of any party who has opposed or expressed an intention to oppose the releases and no one appeared at the hearing to oppose the releases;

(p) The Applicants' stakeholders had nearly two months to consider the terms of the release;

(q) Throughout the CCAA proceedings, the directors and officers acted in good faith and with due diligence; and

(r) The Monitor and agent in the present CCAA proceedings support the release.

9 In granting the CCAA termination order, I accepted these as valid reasons to grant the releases, despite the fact that they would not be subject to a vote by creditors as part of a plan of arrangement. In the specific factual matrix of the case at hand, I am satisfied that the release of third party claims against the directors and officers, subject to certain limitations, will further the policy objectives underlying the CCAA.

III. Conclusion

10 While the CCAA termination order was granted, this endorsement serves to place a particular emphasis on the fact that the release of claims against the directors and officers was granted in the specific circumstances of the present case.

Order accordingly.

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