No. S-224444
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 A PLAN OF COMPROMISE AND ARRANGEMENT OF CANADIAN DEHUA INTERNATIONAL MINES GROUP INC., WAPITI COKING COAL MINES CORP. AND CANADIAN BULLMOOSE MINES CO., LTD.

PETITIONERS

APPLICATION RESPONSE

Application response of: West Moberly First Nations (the "application respondent")

THIS IS A RESPONSE TO the notice of application of Qu Bo Liu, filed December 31, 2024.

The application respondent estimates that the application will take 2 days.

Part 1: ORDER CONSENTED TO

The application respondent consents to the granting of NONE of the orders set out in Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of ALL the orders set out in of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of NONE of the orders set out in of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

Order of Applications

1. If there is insufficient time for the sale applications and the special costs application to be heard, the applications for sale approval should be heard first.

2. *Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1 (CA) stands for the proposition that the primary factor to be considered on a sale approval is which bid is superior. A secondary consideration is the integrity of the process by which the assets are sold, including whether considering a higher bid would compromise that process.

3. The application for special costs is based on alleged reprehensible conduct by West Moberly, TaneMahuta Capital Ltd. ("**TMC**"), and counsel, Mr. Amanat and Ms. Fellowes. In this case, the alleged misconduct is distinct both legally and factually from whether the court should consider and approve a higher bid from West Moberly.

4. If the sales process was protracted by reason of reprehensible conduct of West Moberly or its counsel, which West Moberly says was not the case, that is a separate matter that can and should be addressed in a costs award regardless of which offer is approved.

Undisclosed Principal

5. It is a fact that West Moberly First Nations' ("**West Moberly**") role as the buyer was not disclosed. This is described by Qu Bo Liu ("**Mrs. Liu**" or the "**DIP Lender**") as an intentional deception of the court. The intention not to disclose the agency was obviously deliberate, but that is not the point. The assertions of the DIP Lender treat the non-disclosure of the agency as in fact material **and** known by the respondents to be material to the sale approval process.

6. These are extremely serious allegations to make against anyone, in particular members of the bar. They were made by the DIP Lender with no authority to support them.

7. The authorities relied upon by the DIP Lender concern a *party* or *witness* who seeks to be anonymous. A bidder is not a party to a proceeding and these authorities are wholly distinguishable on that basis. There is no authority to support the assertion that the fact of agency is necessarily material to a sale approval process and was in fact material in the circumstances of this case.

8. Chief Willson's evidence is that West Moberly had legitimate reasons for not disclosing the fact of agency. His evidence is that nothing untoward was intended by West Moberly in that regard.

9. Mr. Amanat's evidence (at p. 11 of his cross examination) was that he was not aware of any requirement to disclose the existence of a principal in a CCAA proceeding. Ms.

Fellowes K.C. is experienced insolvency counsel and advised Mr. Amanat there was no such obligation (at p. 11). Accordingly, Mr. Amanat saw nothing untoward by a bidder in not doing so.

10. In his cross examination, Mr. Amanat also stated that West Moberly's reasons for wishing to remain anonymous were legitimate (at p. 43; l. 27). Evidence is now before the court in Chief Willson's affidavit as to those reasons. Chief Willson saw nothing untoward in not disclosing West Moberly's role.

11. At p. 82 of his cross examination, Mr. Fraser accused Mr. Amanat of "lies and nonsense you'd put in your affidavits". Mr. Amanat's response was, again, that he saw nothing wrong in bidding as an agent for an undisclosed principal.

12. The object of the SISP established in this proceeding was to obtain and approve the most superior bid in a fair and reasonable process. There was no other creditor involvement in the West Moberly bid or any other factor in this CCAA proceeding that would have made disclosure of the agency material to the sale approval process.

13. The role of West Moberly was not material to the sales process in this case and there was no obligation for it to be disclosed to the court. It was disclosed by West Moberly because allegations by the DIP Lender in October (which West Moberly asserts were not relevant and were unfounded) were viewed by West Moberly as distracting the court from whether to consider and approve a higher bid. This was explained in Mr. Lam's November 25, 2024 letter to the Monitor and in the Chief's affidavit.

14. The Monitor made no inquiry as to whether TMC was an agent, its source of funds or what it intended to do with the assets if it was the successful bidder. It was of the view after the November hearing that better bids could be obtained from the two bidders, and the future sales process should take this into account. It was clear that TMC had an ability to close the purchase and of course the same can be said of West Moberly.

15. Even if the court were to determine as a matter of first impression that the agency ought to have been disclosed by West Moberly, there was no intention on the part of West Moberly (or the other respondents) to mislead the court by failing to do so. The DIP Lender's submission in para. 96 of its application that the West Moberly bid should be ignored because of misconduct is without merit.

16. It is noteworthy that the DIP Lender expressed no interest in who TMC was, its source of funds or its intentions for the assets until the prospect of a higher bid loomed in October. At that point, the DIP Lender sought to refocus the hearing by pursuing an inquiry about the source of funds for the bid and the future intentions of a bidder for the assets. Moreover, in doing so, the DIP Lender's sole purpose was to persuade the court to refuse to consider a higher bid, to the prejudice of the other creditors.

Allegations related to the change in number of coal licences

17. At para. 73(f) of the application, the DIP Lender asserts that Ms. Fellowes made allegations about the DIP Lender's conduct, the conduct of her counsel and that of the Monitor.

18. Ms. Fellowes did raise concerns at the October hearings over the transfer of coal licences by Mrs. Liu to her son's company for no consideration. In the 19th Monitor's Report on October 16, 2024, the Monitor observed that while the "optics surrounding the events of the coal licences is not ideal, the Monitor has no evidence to suggest it was done with a view to defeating creditors given the licences were returned to Wapiti and some lapsed due to illiquidity."

19. The question for the purpose of special costs is whether there was a reasonable basis for TMC (and its counsel) to raise concerns about Mrs. Liu's conduct, including alleging that the transfer of the licences was a fraudulent conveyance. There was nothing improper in making such an allegation concerning the transfers. The fact of the transfers to her son without consideration was sufficient to warrant the submissions made in the proceedings. Further, there has been no determination by the court that Ms. Liu did not fraudulently convey the licenses to her son's company, regardless of whether they were later returned.

Other alleged "inconsistencies" in the position of West Moberly and its agents

20. Ms. Fellowes raised the need for a site visit after the subsidiaries were added and they made financial disclosure. She was advised by Mr. Bradshaw that there was nothing at the site and therefore no point to a site visit. Core samples had, for example, been delivered to China.

21. Mr. Amanat's evidence in cross examination (at p. 78) was that West Moberly is interested in conservation in its territory and recognizes a balance must be struck between development and conservation. In his affidavit, Chief Wilson explained the complex process in working towards conservation goals, while striking a balance with development.

22. West Moberly has given evidence about the possible future plans for the assets if they were acquired and its approach to the stewardship of the lands, to respond to the speculation from the DIP Lender about this issue. West Moberly submits that what a bidder intends to do with the licenses is not relevant to whether its bid should be considered or approved.

Part 5: LEGAL BASIS

23. The authorities governing an award of special costs, including awards against counsel are not controversial. In this case, there is manifestly no basis for finding that the high bar for an award of special costs against West Moberly or counsel has been approached.

24. There was no misconduct or bad faith by West Moberly or its counsel in the course of these proceedings. It is plain on the evidence there was no intention to conceal from the court

any material matters by not disclosing the agency. There was nothing inappropriate in Ms. Fellowes raising concerns about the transfer of coal licences by Ms. Liu to her son's company for no consideration.

Use of an agent to bid on assets was not reprehensible conduct

25. There is no authority which stands for the proposition that that it would be improper in a CCAA proceeding for a person to bid through an agent without disclosing the fact of the agency. Whether disclosure of an agency is necessarily material is therefore a matter of first impression.

26. There is nothing inherently inappropriate in having an undisclosed purchaser bid through an agent in a court order sale process or CCAA proceeding. In other proceedings, courts have approved purchases by undisclosed buyers or refused to approve such purchases where the identity of the buyer is material to the sale, for instance because there is some risk that the undisclosed buyer might not close the transaction.

ICR Commercial Real Estate (Regina) Ltd v Bricore Land Group Ltd, 2007 SKCA 72 at paras. 8 and 12
Hector's Ltd v 26th Avenue Estates Ltd et al (1963), 43 WWR (ns) 85 (Alta KB), 1963 CanLII 1160

27. The authorities relied upon by the DIP Lender to support her assertion that the respondents "deceived" the court concern anonymity for parties or witnesses. Regardless, these cases also find that in some circumstances anonymity may be permissible, so long as that anonymity does not undermine the proceedings. Where the identity of a witness or party is not material, anonymity may be available.

28. Bidders in a CCAA process are not parties, nor are they witnesses. These authorities are readily distinguishable:

(a) The passage quoted from *Festing v Canada (Attorney General)*, 2001 BCCA 612, is from a dissent. In any event, when the passage is quoted in full, it stands for the opposite proposition, acknowledging that privilege may be claimed before the court *without disclosing to the Court the name of the client or person on whose behalf it is claimed.*

(b) *Millas v. British Columbia (Attorney General)*, [1999] B.C.J. No. 3007, a law firm attempted to claim funds found in a garbage can without revealing the name of its client. Following submissions, the court ordered the lawyer to identify his client to pursue his claim, and when that did not occur, struck his claim. In that case, it is difficult to understand how the lawyer's clients' entitlement to funds found in a garbage can could be tested without knowing the identity of the person.

(c) *Carter v Canada (Attorney General)*, 2011 BCSC 1371 concerned anonymity for a witness. The court concluded that while anonymous witnesses had been permitted to testify in the *Polygamy Reference*, the evidence in this case could not be tested on cross examination without knowing details about the witness (para. 83).

(d) Both *College of Opticians of Ontario v John Doe* (2006), 154 ACWS (3d) 335 (Ont Sup Ct J), 2006 CanLII 42599 *Ontario Medical Association v Ontario (Information and Privacy Commissioner)*, 2017 ONSC 1650 (Div Ct) concerned *parties to proceeding* who wished to obtain the benefit of a court order without disclosing their identity.

29. In this case there was nothing material about the identity of the undisclosed principal that would have compelled disclosure to the court. In particular, the SISP process in this case was not designed to protect interests beyond creditor recovery (i.e. employees, maintenance of a going concern business), and there was no closing risk associated with the bid because the funds were either on deposit with the Monitor or in a lawyer's trust account.

30. Even in circumstances where there has been material non-disclosure on an *ex parte* application, special costs are not appropriate where that material non-disclosure was the result of an error in judgment or careless failure to appreciate the matters which were relevant to the application.

Pierce v Baynham, 2015 BCCA 188
at paras. 43 and 47
Nuttall v Krekovic, 2018 BCCA 341 at para. 29

31. Therefore, even if this court finds that the agency was material and ought to have been disclosed, it did not amount to reprehensible conduct in these circumstances.

Allegations concerning the transfer of the coal licences were not made recklessly

32. While special costs can be ordered in circumstances where a party "maintains unfounded allegations of fraud or dishonesty", it must be shown that those allegations were known to be baseless, motivated by spite or other forms of ill-will. To ground a claim for special costs, it "must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice."

Animal Welfare International Inc v W3 International Media Ltd, 2016 BCCA 372 at paras. 46 and 49.

33. In considering whether the allegations were unfounded, the court must assess the matter from the point of view of the party that made the allegation, at the time it was made or maintained.

Animal Welfare International Inc v W3 International Media Ltd, 2016 BCCA 372 at para. 49

34. Further, in this case there has been no finding by this Court on the validity of the impugned allegation, including in particular the allegations concerning the fraudulent conveyance of mineral licences. At this stage, the best that can be said is that the optics surrounding the events of the coal licences were "not ideal" but that there *is no evidence that these transfers were done with a view* to defeat creditors because the licences were ultimately returned to the subsidiary, and subsequently lapsed due to illiquidity.

19th Report of the Monitor, para. 66

35. In this case, at the time the impugned allegations were advanced, there was no explanation available from the pleadings, affidavits or other sources to explain the state of the mineral licences. After the allegation was advanced, it was explored through submissions in Court, and by investigations from the Monitor, before those submission were ultimately withdrawn. It cannot be said that the submission were made or maintained recklessly or with malice.

Scope of the proposed special costs order is overly broad

36. The DIP Lender seeks an award of special costs for the period following August 30, 2024. If an award of special costs is made, there is no basis for the breadth of such an order. There would still have been a hearing on September 17. There would still have been an application to add the subsidiaries as petitioners (which took place on October 9). There would still have been a need to provide financial disclosure in respect of those petitioners. There would still have been a need for the court to consider if a higher bid should be considered. Accordingly, even if the court decides to order special costs, the portion of the proceedings to which the order applies must be identified.

37. Even if the agency had been disclosed at the outset, it is probable the DIP Lender would have nonetheless raised issues about the source of funds (as it did based upon the size of West Moberly's population, and maintained in response to West Moberly's January 7, 2025 application) or based upon West Moberly's intentions for the coal licences.

38. It is an error in principle to order special costs in respects of steps that would have had to be taken regardless of the impugned conduct of the respondents.

Commonwealth Trust Company (In Liquidation) (Re), 2012 BCCA 138 at para. 45

Assessment is required for all special costs orders

39. In para. 88 of the application, the DIP Lender submits that it does not ask the court to assess special costs and further that it does not require an assessment. There is no authority for

an award of special costs to be made on a lump sum basis outside the scope of the *Supreme Court Civil Rules*. Any award of lump sum costs must be consistent with the award that a registrar would make in similar circumstances, based on the factors established in the Rules.

Gichuru v Smith, 2014 BCCA 414 at paras. 98 and 102

40. If an award of special costs is made, the reasonableness of those costs must be assessed by the court. Further, as part of the assessment of special costs, a party seeking those costs is required to produce its file, including communications with its counsel. The DIP Lender's attempt to bypass these procedures must be rejected.

Gichuru v Smith, 2014 BCCA 414 at paras. 103-104, 114

41. The discretion of a judge to assess costs should be used sparingly, as the judge's knowledge and experience in assessing costs is seldom matched by that of a registrar, who has extensive experience in assessing legal bills. Given the magnitude of the costs in this case (totalling more than $350,000), it cannot be said that the amounts involved do not justify the time and cost of a registrar's hearing.

Gichuru v Smith, 2014 BCCA 414 at paras. 106-107

42. There is no special exception to the requirement that costs be assessed for court appointed receivers, and, by logical extension, monitors.

Hy's North Transportation Ltd v Yukon Zinc Corporation, 2014 BCSC 2291 at paras. 54-58

"Full Indemnity Costs" are not available

43. At para. 78 of the notice of application, Mrs. Liu seeks "special costs on a full indemnity basis since October 30, 2024". It is not clear what the basis is for the selection of that date, but regardless, "full indemnity costs" are not available in British Columbia. A judge cannot impose costs sanctions that are not authorized by the *Rules*.

West Van Holdings Ltd v Economical Mutual Insurance Company, 2019 BCCA 110 at para. 95

Other remedies available for alleged delays in disclosure or prolongation of the process

44. If this court finds that the respondents' conduct delayed matters, such that steps that needed to be taken took longer than would otherwise have been needed, that alone does not amount to reprehensible conduct. But the court may consider an order for increased costs if it concludes that time was wasted because of the conduct of any party to a proceeding. If

such an order is made against a person in the proceedings, the court must identify those portions of the proceedings to which it applies.

Westsea Construction Ltd v 0759553 BC Ltd, 2013 BCSC 1352 at paras. 79, 82, 83, 86
Walker v John Doe, 2014 BCSC 294

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Roland Willson, made January 7, 2025.
2. Affidavit #1 of Nadia Walnicki, made January 7, 2025.
3. 16th Report of the Monitor.
4. 17th Report of the Monitor.
5. 18th Report of the Monitor.
6. 19th Report of the Monitor.
7. 20th Report of the Monitor.
8. Supplement to the 20th Report of the Monitor.
9. 21st Report of the Monitor.

_ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

X The application respondent has not filed in this proceeding a document that contains an address for service.

The application respondent's ADDRESS FOR SERVICE is: Stephen R. Schachter, of the firm of Nathanson, Schachter & Thompson LLP, Barristers and Solicitors, whose place of business and address for service is Suite 750 – 900 Howe Street, Vancouver, B.C. V6Z 2M4, telephone (604) 662-8840 and whose email address for service is sschachter@nst.ca

Date: January 9, 2025

Counsel for the application respondent
Stephen R. Schachter, K.C. / Julia Lockhart

THIS APPLICATION RESPONSE is prepared by Stephen R. Schachter, of the firm of Nathanson, Schachter & Thompson LLP, Barristers and Solicitors, whose place of business and address for service is Suite 750 – 900 Howe Street, Vancouver, B.C. V6Z 2M4, telephone (604) 662-8840 and whose email address for service is sschachter@nst.ca.