CLERK'S STAMP	
COURT FILE NUMBER	2001-05630
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
APPLICANTS	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED** **AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC, and DOMINION FINCO INC.**
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS** **(Payment of Fees of the Ad Hoc Note Group and the Noteholder Trustee)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BLAKE, CASSELS & GRAYDON LLP** Barristers and Solicitors 3500 Bankers Hall East 855 – 2nd Street SW Calgary, Alberta T2P 4J8 Attention: Peter L. Rubin / Peter Bychawski / Claire Hildebrand / Morgan Crilly Telephone No.: 604.631.3315 / 604.631.4218 / 604.631.3331 / 403.260.9657 Email: peter.rubin@blakes.com / peter.bychawski@blakes.com / claire.hildebrand@blakes.com / morgan.crilly@blakes.com Fax No.: 604.631.3309

I. INTRODUCTION

1. Dominion (the CCAA Applicants) submits this bench brief in response to the application of an ad hoc committee of certain holders of the Applicants' senior secured second lien notes (the "**Notes**"), composed of DDJ Capital Management ("**DDJ**"), Barings LLC ("**Barings**"), and Brigade Capital Management, LP ("**Brigade**", collectively with DDJ and Barings, the "**Ad Hoc Note Group**") for payment of their legal and financial advisory fees in this *Companies' Creditors Arrangement Act*[1] (the "**CCAA**") proceeding. This bench brief is also submitted in response to the follow-on application of Wilmington Trust, National Association, in its capacity as "**Trustee**" (among other roles) under the trust indenture pursuant to which the Notes are issued (the "**Trust Indenture**") for payment of the Trustee's post-filing fees and expenses.[2]

2. The Applicants respectfully submit that both applications should be dismissed. The evidence before the Court is abundantly clear that the Ad Hoc Note Group does not meet the applicable statutory test set out in s.11.52(1)(c) of the CCAA as no order is, to use the words set out in the CCAA, "necessary" to ensure the Ad Hoc Note Group is able to participate in these proceedings. The Trustee's application suffers a similar fate.

3. The applications of the Ad Hoc Note Group and the Trustee proceed on a fundamental misconception as to the nature and purpose of such an application and seek to have the Court apply a test that is not applicable in these circumstances.

4. The Ad Hoc Note Group and Trustee are sophisticated parties, with substantial investments, resources and wherewithal, internal professionals and expertise, and external advisors. To order that an insolvent CCAA debtor be forced to fund these parties in these circumstances not only violates the intention and wording of the CCAA, but would also set a dangerous precedent for future CCAA proceedings.

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

[2] Capitalized terms not defined in this bench brief shall have the meaning given to them in the first affidavit of Kristal Kaye, sworn April 21, 2020

5. This is not an application about whether the Ad Hoc Note Group, or the Trustee, are or may be important stakeholders. There are many such stakeholders. It also does not matter whether the Trustee has a contractual entitlement to the payment of fees – that is a red herring. The CCAA Applicants are not able to meet many of their contractual obligations, which is why they are under CCAA protection and a stay of proceedings has been granted in their favour.

6. This application is about whether it is necessary that the insolvent CCAA debtors pay the legal and financial advisory fees of the well-heeled Ad Hoc Note Group and their Trustee.

II. FACTS

7. The Ad Hoc Note Group relies on affidavit evidence from Eric Hoff (the "**Hoff Affidavit**"), a senior research analyst with DDJ. The Hoff Affidavit does not disclose all of the relevant evidence with respect to the involvement of the three members of the Ad Hoc Note Group in these proceedings. Kristal Kaye, the CFO of Dominion Diamond (among other roles), has sworn an affidavit (the "**Kaye Affidavit**") in response to certain of the evidence contained in the Hoff Affidavit.

8. The Kaye Affidavit makes it abundantly clear that the assertion of the Ad Hoc Note Group that they are somehow "starting from a disadvantaged position" and have "information deficiencies not suffered by other major stakeholders" is quite simply not borne out by the evidence.[3]

(A) The Ad Hoc Group Had Access to Significant Information

9. The Hoff Affidavit implies that prior to these CCAA proceedings, the Ad Hoc Note Group was somehow denied sufficient information regarding the Applicants' business. This is incorrect.

10. As a starting point, as noted in the Hoff Affidavit, the three members of the Ad Hoc Note Group are "large", "well-known", and "sophisticated institutions" who, along with

[3] Bench brief of the Ad Hoc Note Group at para. 17

others, invested approximately $550 million USD in the Applicants' business in 2017.[4] It strains credulity for these parties to suggest that that such sophisticated institutions would invest such amounts without undertaking appropriate due diligence in advance of an investment of this magnitude.

11. Further, as noted in the Kaye Affidavit, in the months and years preceding the commencement of these proceedings: (a) Dominion held quarterly investor calls, where management provided an update on the business and members of the Ad Hoc Note Group (and others) were provided with an opportunity to ask questions; (b) an in person "Life of Mine" update was held in New York in September 2019; and (c) a further "Life of Mine" update was held in November 2019, all of which the Ad Hoc Note Group were invited to attend.[5]

12. The Ad Hoc Note Group (as well as the Applicants' other active bondholders and lenders) was also granted access to an investor portal that was set up in late 2017, which contains financial and other business information regarding the Applicants, including quarterly financial statements, Management Discussions & Analysis reports, Dominion's annual budget and financial forecasts.[6]

13. Any allegations in the Hoff Affidavit that the Ad Hoc Note Group did not have sufficient information regarding the Applicants' business prior to these proceedings is not borne out.

(B) Consultation Prior to the CCAA Proceedings

14. With respect to the commencement of these proceedings, the Hoff Affidavit states that no member of the Ad Hoc Note Group was "notified or consulted in advance regarding the commencement of CCAA proceedings by Dominion Diamond", which caused the Ad

[4] Hoff Affidavit at paras. 10, 6, 13, 40

[5] Kaye Affidavit at para. 5

[6] Kaye Affidavit at para. 6

Hoc Note Group to act "from a disadvantaged position given their lack of prior involvement and notice".[7] This is also inaccurate.

15. At the outset, it is important to note that the Applicants' Notes trade in the open market. That is, the holders of the Notes are not static and the Notes are purchased and sold by various market participants. As such, like a public company that trades on a stock market, the disclosure of confidential and non-public information with respect to the Applicants' business must be carefully guarded and protected.[8] The Applicants could not engage in substantial discussions with the Ad Hoc Note Group until sufficient contractual protection in the form of NDAs was in place.

16. As set out in the Kaye Affidavit, attempts were made by Dominion Diamond as early as April 17, 2020 (5 days prior to the Applicants' CCAA filing) to engage in confidential discussions with members of the Ad Hoc Note Group about the Applicants' restructuring needs. Specifically:

(a) on April 17, 2020, Ms. Kaye spoke with representatives of both DDJ and Barings to engage in a strategic discussion around restructuring and to ask if they would be prepared to execute a non-disclosure agreement ("**NDA**") to allow these confidential discussions to progress;[9]

(b) on April 18, 2020, Ms. Kaye sent NDAs to a number of holders of the Applicants' Notes, including the members of the Ad Hoc Note Group;[10]

(c) on April 20, 2020, an NDA was executed with two of the largest noteholders, one of which was Brigade (a member of the Ad Hoc Note Group);[11]

[7] Hoff Affidavit at paras. 13, 17
[8] Kaye Affidavit at para. 7
[9] Kaye Affidavit at para. 10
[10] Kaye Affidavit at para. 10
[11] Kaye Affidavit at para. 10

(d) on April 21, 2020, Evercore Group L.L.C. ("**Evercore**"), financial advisors to the Applicants, called Brigade and provided a "forecast" as to the Applicants' potential needs with respect to interim financing;[12]

(e) on April 22, 2020 (the day of the Applicants' filing for CCAA protection) Barings and DDJ (members of the Ad Hoc Note Group) delivered a markup of the NDA. Dominion's revisions were provided back to Barings and DDJ that same day;[13]

(f) on April 24, 2020, Brigade was provided with a request for proposals ("**RFP**") for interim financing for the Applicants;[14]

(g) on April 25, 2020, counsel to the Applicants, Blake, Cassels & Graydon LLP ("**Blakes**"), followed up with Barings as to the status of the NDA provided to Barings and no response from Barings was given;[15]

(h) on April 28, 2020, Blakes was contacted by Torys LLP ("**Torys**") to confirm they had been retained by the Ad Hoc Note Group and to provide a mark up of the NDAs with respect the remaining members of the Ad Hoc Note Group, Barings and DDJ;[16]

(i) on April 30, 2020, the form of the NDAs for Barings and DDJ was settled between Torys and Blakes;[17] and

(j) on May 2, 2020, the Barings and DDJ NDAs were signed, access to the interim financing dataroom was provided to Houlihan Lokey, Inc., financial advisors to the Ad Hoc Note Group, and an interim financing RFP was provided to Barings and DDJ.[18]

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[12] Kaye Affidavit at para. 10
[13] Kaye Affidavit at para. 10
[14] Kaye Affidavit at para. 10
[15] Kaye Affidavit at para. 10
[16] Kaye Affidavit at para. 10
[17] Kaye Affidavit at para. 10
[18] Kaye Affidavit at para. 10

17. What is clear from the above is that any delay, to the extent there was any material delay, rests at the feet of the Ad Hoc Note Group, not Dominion.

18. Also contrary to the suggestion in the Hoff Affidavit, the Ad Hoc Note Group did not act "immediately" upon delivery of confidentiality agreements to them.[19] NDAs were provided to the Ad Hoc Note Group on April 18, 2020. Brigade executed an NDA on April 20, 2020 and was provided with confidential information as to the Applicants' requirements for interim financing the next day. DDJ and Barings, however, did not execute their NDAs until May 2, 2020, 14 days after the NDAs were provided to them and some 12 days after their fellow Ad Hoc Note Group member (Brigade) did. On the same day as these NDAs were signed, an RFP was provided to both DDJ and Barings and their financial advisors were granted access to an interim financing dataroom.

19. Further, as is noted in the Kaye Affidavit, and in response to the allegations in the Hoff Affidavit that the Ad Hoc Note Group was somehow in a "disadvantaged" position, communications with the Ad Hoc Note Group were made on a very similar timeline as the contact made with the Applicants' senior secured lenders under the Credit Agreement (the "**First Lien Lenders**").[20]

(C) The Ad Hoc Group Had Sufficient Information with Respect to Interim Financing

20. The Hoff Affidavit also alleges that the Ad Hoc Note Group has been somehow disadvantaged in its ability to submit a proposal for interim financing in these CCAA proceedings.

21. As is set out above, the Applicants made considerable efforts to provide the Ad Hoc Note Group with information as to their interim financing needs, and any delay suffered by the Ad Hoc Note Group is of their own doing. Brigade was provided with an interim financing forecast as early as April 21, 2020, whereas DDJ and Barings were provided with information on May 2, 2020 (the same day their NDAs were executed). On

[19] Hoff Affidavit at para. 23

[20] Kaye Affidavit at para. 11

the other hand, third parties that are unrelated and have no connection to the Applicants submitted interim financing proposals as early as April 30, 2020.

22. In addition, the Ad Hoc Note Group did submit an interim financing proposal on May 11, 2020.[21]

III. LAW AND ISSUES

23. There is no basis for granting an order under s. 11.52(1)(c) of the CCAA for payment of the Ad Hoc Group's legal and financial expenses. The legal issue is straightforward and well-defined – is such an order necessary to ensure that the Ad Hoc Note Group may effectively participate in this proceeding?

24. As is evident from both Mr. Hoff's and Ms. Kaye's affidavits, the answer is "no" – no such order is necessary. It is equally the case that such an order is not appropriate in the circumstances.

(A) The Ad Hoc Note Group Has Not Met the Statutory Test

25. The Ad Hoc Note Group's application notes and relies upon s. 11.52(1)(c) of the CCAA. The specific language of that section is important and reads as follows

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > **(c)** any financial, legal or other experts engaged by any other interested person **if the court is satisfied** that the security or charge is **necessary for their effective participation** in proceedings under this Act.

[21] Kaye Affidavit at para. 13

26. This wording of the different subsections of this provision are of note. Subsections (a) and (b) relate to the monitor and advisors/experts engaged by the debtor company.

27. Subsection (c) is different, in that it applies to advisors engaged by other stakeholders other than the company and adopts a different test in that context.[22]

28. Subsection 11.52(1)(c) gives the court jurisdiction to grant an order in respect of the fees and expenses of advisors if the court is satisfied such charge is necessary for the effective participation of an interested person in CCAA proceedings. This section is worded differently from subsections (a) and (b), which do not contain "necessity" language – a significant distinction. The wording in s. 11.52(1)(c) is deliberate and specific. It creates a statutory requirement of necessity for any advisors retained by interested parties other than the CCAA debtors.

29. Orders granted under s.11.52(1)(c) are typically granted in limited circumstances in order to secure the payment of fees of representative counsel, being where a vulnerable and disparate group of stakeholders (such as large groups of employees, pensioners, or individual unsecured investors) requires a court-ordered charge in order to be able to participate in the restructuring process. This makes sense in the right circumstances as absent an order from the court under section 11.52(1)(c), these stakeholders would not be able to effectively participate (or participate at all) in a large commercial restructuring.

30. The Ad Hoc Note Group does not meet the statutory test. Rather, the evidence from the Ad Hoc Note Group demonstrates the opposite of what is required under s. 11.52(1)(c).

31. There is no doubt the members of the Ad Hoc Note Group are well-funded and sophisticated organizations. They have the ability to effectively participate in these proceedings and are doing so. They have already retained experienced insolvency counsel, retained a financial advisor, submitted a DIP proposal, attended court hearings, "negotiated, settled, and executed confidentiality agreements", and "engaged in multiple

[22] *Re Homburg Invest Inc.*, 2014 QCCS 980 [Tab 1]

discussions with representatives of Dominion Diamond, the court-appointed Monitor, their respective advisors, and other major stakeholders in these proceedings".[23]

32. This is not a situation where there are hundreds of individuals with no ability to coordinate or obtain funding to pay counsel or where there are significant logistical issues to overcome. No order prioritizing their interests over those of other creditors of the Applicants is "necessary" to secure the Ad Hoc Note Group's participation. The same goes for the Trustee.

33. There also is no suggestion that the Ad Hoc Note Group will be unable to fund their advisors or continue to participate in these CCAA proceedings if the order they seek is not granted. As counsel for the Ad Hoc Note Group rightfully and fairly acknowledged at the adjournment hearing on May 8, 2020, his clients are "well funded".

(B) The Caselaw Does Not Support the Ad Hoc Note Group's Application

34. The caselaw cited by the Ad Hoc Note Group on their application also does not support their position.

35. The *Canwest Publishing Inc. (Re)* case relied on by the Ad Hoc Note group is not a case decided under s.11.52(1)(c) of the CCAA.[24]

36. This decision of Justice Pepall considers whether to grant a $3 million administrative charge to secure the fees of the monitor and their counsel as well as various advisors to the CCAA applicants and their counsel, as well as a $10 million charge in favour of the applicants' financial advisor.[25] Clearly, this case is distinguishable from the application before the Court. As set out above, the language of s.11.52(1)(c) is different from the other subsections and there is a different statutory test for whether an order can be made under that section – under s. 11.52(1)(c) the order must be necessary for the effective participation in CCAA proceedings.

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[23] Hoff Affidavit at paras. 19, 20, 22, 25, 39, Kaye Affidavit at para. 13

[24] *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 [Tab 1 of the Ad Hoc Note Group's Bench Brief]

[25] *Canwest* at paras. 16, 52

37. The other three authorities cited in the Ad Hoc Note Group's brief are also of no assistance to them. Tabs 2 and 4 of the Ad Hoc Note Group's brief are Initial Orders granted in CCAA proceedings (*Lightstream* and *Jaguar Mining Inc.*). These orders demonstrate that in these two cases, an order was made for the payment of fees and expenses of ad hoc committees on an initial application for CCAA protection. There is no analysis or written reasons of the court provided by the Ad Hoc Note Group and no suggestion this was a contested hearing or anything other than a consent order.[26]

38. The third order the Ad Hoc Note Group relies on is from the *Essar Algoma* restructuring (Tab 3 of their brief). This appears to be a distribution order dictating that amounts to be paid in respect of certain notes should first be paid to the trustee for its expenses, then the ad hoc group and then to the holders of the notes. It is irrelevant to the application before the Court.

(C) Further Considerations

39. Irrespective of the fact that the Ad Hoc Note Group does not meet the statutory test, for the reasons set out below, there are additional reasons as to why the Court should not force the Applicants to pay the fees and expenses of the Ad Hoc Note Group.

40. What is to distinguish the Ad Hoc Note Group from other important stakeholders – most of which do not have the financial wherewithal of the Ad Hoc Note Group.

41. The First Lien Lenders' expenses or fees are not being paid by the company but even if they were, this does not entitle the Ad Hoc Note Group to similar treatment.

42. If the Ad Hoc Note Group is paid their fees, then do all of the other creditors who rank in priority to that group also have to have their fees and expenses paid? This would include the Trustee and the First Lien Lenders – would it also include DDMI?

[26] Reasons of Justice Morawetz in *Jaguar Mining Inc*, dated January 16, 2014 [Tab 2]

43. What if the Ad Hoc Note Group is “out of the money” – if that is the case then should their fees be paid? If they are, is that then reducing the recovery to those creditors who rank in priority to the Ad Hoc Note Group?

44. On the other hand, if the Ad Hoc Note Group is “in the money” or the “fulcrum creditor” – then why do they need their fees and expenses paid now? They clearly have the ability to, and have, retained professional advice. That is, if they are in the money, the Ad Hoc Note Group will recover sufficient funds to pay their advisors’ fees at the conclusion of these proceedings and this is simply an issue of timing.

45. The Applicants are not sitting on excess cash. The cash flow projections demonstrate that the Applicants’ significant needs through the CCAA process.

46. If the Ad Hoc Note Group can rely on s. 11.52(1)(c) to force the Applicants (without their consent) to pay their advisory expenses on the basis that the Ad Hoc Note Group are important stakeholders who are owed significant amounts in a complex restructuring, there will be no end of applications before the courts from a myriad of creditors seeking similar treatment. This is particularly important in the case at bar, where the Ad Hoc Note Group are clearly able to participate effectively in these proceedings absent assistance from this Court. There is no reason to ‘open the floodgates’.

47. Contrary to the position of the Ad Hoc Note Group in their brief, the order sought is not necessary for the fairness and integrity of the CCAA process – rather, it is contrary to it.

(D) The Trustee’s Application is Stayed by the Initial Order and Should Not Otherwise be Granted

48. The arguments made by the Applicants above with respect to the Ad Hoc Note Group apply equally, but with slight modifications, to the application brought by the Trustee and it should not be granted on the same or similar basis.

49. Further, as is the case with the Ad Hoc Note Group, there is no suggestion here that the Trustee is currently not able to participate in these proceedings. Should there be any distribution with respect to the amounts owing under the Notes, the fees of the

Trustee will be paid from those funds. On this basis alone, the Trustee's application is premature and ought to be dismissed.

IV. CONCLUSION

50. On the basis of the above, the Applicants respectfully submit that this Court should decline to grant the orders sought by both the Ad Hoc Note Group and the Trustee for payment of their advisory fees and expenses.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13 DAY OF MAY, 2020

BLAKE, CASSELS & GRAYDON LLP

Peter Rubin

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

LIST OF AUTHORITIES

TAB	Description
1	*Re Homburg Invest Inc.*, 2014 QCCS 980
2	Reasons of Justice Morawetz in *Jaguar Mining Inc*, dated January 16, 2014

TAB 1

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO: 500-11-041305-117

DATE: March 17, 2014

PRESIDING: THE HONOURABLE LOUIS J. GOUIN, J.S.C.

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

HOMBURG INVEST INC. & et als.

Debtors

- and -

HOMCO REALTY FUND (52) LIMITED PARTNERSHIP & et als.

Mises-en-cause

- and -

SAMSON BÉLAIR/DELOITTE & TOUCHE INC.

Monitor

- and -

STICHTING HOMBURG BONDS and **1028167 ALBERTA LTD.**

Petitioners

- and -

HOMBURG CANADA INC.

Mise-en-cause

JUDGMENT

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1. CONTEXT AND STICHTING MOTIONS

[1] On September 9, 2011, an initial order (the "**Initial Order**") was issued by the Court pursuant to the *Companies' Creditors Arrangement Act*[1] (the "***CCAA***") granting court protection to the Debtors (the "**HII Group**") and the Mises-en-cause.

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[1] R.S.C. 1985 c. C-36.

JG2270

[2] Samson Bélair/Deloitte & Touche Inc. was appointed as monitor (the « **Monitor** ») under the *CCAA* and the Initial Order.

[3] The undersigned was then charged with the court supervision of the HII Group's restructuring under the *CCAA* (the "**Restructuring**").

[4] As of the date hereof, 52 court orders have been issued, and the HII Group is presently working on implementing the plans approved by its creditors, and sanctioned by the Court on June 5, 2013 (the "**Plans**").

[5] The Court is now seized with three motions presented by the Petitioners Stichting Homburg Bonds ("**SHB**") and 1028167 Alberta Ltd. ("**Alberta**"), namely:

a. "*Motion in Appeal of a Disallowance of a Proof of Claim, pursuant to the "Claims Process Order" issued on April 30, 2012*" (Cote #154), dated February 14, 2013 and filed by SHB (the "**First Appeal Motion**");

b. "*Motion in Appeal of the Disallowance of Proofs of Claim filed pursuant to the "Claims Process Order" issued on April 30, 2012*" (Cote #212), dated May 17, 2013 and filed by SHB and Alberta (the "**Second Appeal Motion**"); and

c. "*Amended Motion for the Payment of the Fees and Expenses of Stichting Homburg Bonds and Other Relief*" (Cote #228), dated February 4, 2014 (initially dated October 9, 2013) and filed by SHB (the "**Expenses Payment Motion**");

(the First Appeal Motion, the Second Appeal Motion and the Expenses Payment Motion collectively called the "**Stichting Motions**").

[6] Essentially, by the Expenses Payment Motion, SHB requests payment of 100% of its fees and expenses incurred since the issuance of the Initial Order, on the basis of its "substantial contribution" to the successful Restructuring, without being compromised under the Plans.

[7] Subsidiarily, by the First Appeal Motion and the Second Appeal Motion, SHB and Alberta request that such fees and expenses be included in their respective claims filed pursuant to the *Claims Process Order* issued by this Court on April 30, 2012 (the "**CPO**"), the "*Order for the convening, holding and conduct of the HII/Shareco creditors' meeting and granting other relief*" issued on April 29, 2013 (the "**HII/Shareco Meeting Order**"), and the "*Order for the convening, holding and conduct of a creditors' meeting in respect of Homco Realty Fund (61) Limited Partnership* ("**Homco 61**") *and granting other relief*" issued on April 29, 2013 (the "**Homco 61 Meeting Order**") (the HII/Shareco Meeting Order and Homco 61 Meeting Order collectively called the "**Meeting Orders**") and the Plans, and that such claims be accepted as "*Proven Claims*" as defined in the

Meeting Orders (the "**Stichting Proven Claims**") and compromised under the Plans.

[8] The First Appeal Motion covers such Stichting's and Alberta's fees and expenses for the period between the Initial Order and December 3, 2011, namely $2.1 million (the "**Pre-December 3 Expenses**").

[9] The Second Appeal Motion covers such Stichting's and Alberta's fees and expenses for the period after December 3, 2011, namely an amount of approximately $7.6 million (the "**Post-December 3 Expenses**").

[10] Somehow, the Expenses Payment Motion encompasses all SHB's and Alberta's requests under the Stichting Motions, and they claim thereunder both the Pre-December 3 Expenses and the Post-December 3 Expenses (collectively called the "**Stichting Expenses**").

[11] To facilitate the reading of this judgment, SHB and/or Alberta, as petitioners under one or the other of the Stichting Motions, and/or SHCS (defined hereinafter), are referred to herein as "**Stichting**".

[12] During the hearing, Stichting renounced to its subsidiary conclusions appearing at pages 20 and 21 of the Expenses Payment Motion and dealing with the setting aside of a "reserve" for the Pre-December 3 Expenses, including related requests thereto.

2. RELEVANT FACTS

2.1 Trust Indentures

[13] Stichting is the indenture trustee under, *inter alia*, the following trust indentures:

a. a trust indenture made as of December 15, 2002 between the debtor Homburg Shareco Inc. ("**Shareco**") and Stichting Homburg Mortgage Bond (now SHB), as supplemented by several supplemental indentures (the "**Mortgage Bonds Indenture**")[2];

b. a trust indenture made as of May 31, 2006, between the debtor Homburg Invest Inc. ("**HII**") and SHB, as supplemented by several supplemental indentures (the "**Corporate Bonds Indenture**")[3];

(the Mortgage Bonds Indenture and the Corporate Bonds Indenture collectively called the "**Indentures**")

c. a trust indenture made as of February 28, 2009, between HII and Stichting Homburg Capital Securities ("**SHCS**").

[2] Exhibit R-2.
[3] Exhibit R-1.

[14] HII has unconditionally and irrevocably guaranteed all amounts payable by Shareco under the Mortgage Bonds Indenture pursuant to a guarantee agreement dated December 15, 2002 and supplemental guarantee agreements under each supplemental indenture to the Mortgage Bonds Indenture (collectively the "**Guarantee**")[4].

[15] Under the Indentures, Stichting is the representative of approximately 9,500 holders of bonds (the "**Bonds**") issued thereunder (the "**Bondholders**").

[16] While questions with respect to the status of Sitchting as "representative" of the Bondholders have been raised in the past, this was not an issue at the time the Stichting Motions were heard before the Court.

[17] The Bondholders under the Indentures hold in excess of $593 million in claims, representing approximately 75% of the unsecured unconsolidated proven claims against HII under the Plans.

2.2 Pre-Initial Order agreements involving HII, HCI and Stichting

[18] On July 6, 2011, a *Voting power of attorney agreement* ("**VA**") was entered into between Richard Homburg ("**RH**"), Homburg Finance A.G. ("**Finance**") and HII, pursuant to which RH and Finance, as shareholders of HII, appointed the Attorney (as defined therein) to vote their shares in respect of the electing and removing of directors of HII[5].

[19] RH controls, directly or indirectly, Finance.

[20] On September 8, 2011, a *Heads of Agreement* ("**HOA**")[6] was entered into between, *inter alia*, RH, Finance, Homburg Canada Inc. ("**HCI**"), Homburg L.P. Management inc. ("**Management**"), SHB and SHCS (HII was not a party thereto) in order, *inter alia*, to address control issues (the "**Control Issues**") raised by the Dutch Authority for the Financial Markets (the "**AFM**") with respect to RH's, Finance's, HCI's and related entities' holdings in HII and related entities[7], and to provide for the transfer of their shares in HII to Stichting, subject to the terms and conditions therein.

[21] RH controls, directly or indirectly, HCI and Management.

[22] Concurrently, on September 8, 2011, a *Voting Power of Attorney and Standstill Agreement* ("**POA**")[8] was entered into between RH, Finance and Stichting, and it replaced the VA[9].

[4] Exhibit R-2, Appendix D and Appendixes C to the supplemental Mortgage Bonds Indenture.
[5] HOA (Exhibit R-4), art. 3.1.1.
[6] Exhibit R-4, filed under confidential seal.
[7] HOA (Exhibit R-4), paragr. (A) and art. 4.
[8] Exhibit R-3, filed under confidential seal.
[9] POA (Exhibit R-3), art. 3.1.1.

[23] The POA provided that Stichting was to vote on behalf of RH and Finance their voting shares held in HII, and it included the following indemnification clause agreed to by RH and Finance:

> "[…] [RH and Finance] shall jointly and severally indemnify and hold the Attorneys [Stichting] harmless from and against any and all actions and suits whether groundless or otherwise and from and against any and all losses, damages, costs, charges, counsel fees, payments, expenses and liabilities arising directly or indirectly out of the duties of the Attorneys […] ".[10]
>
> (the " **POA Indemnity**")

[24] The HOA and the POA gave rise to a "proxy battle" in the early days of the Restructuring, starting with HII's annual general meeting held in Montréal on the morning of September 9, 2011.

2.3 Proceedings filed by Stichting

[25] In addition to contesting the issuance of the Initial Order in the afternoon and evening of September 9, 2011, Stichting filed immediately thereafter the following proceedings:

a. a "*De Bene Esse Motion for an Order Lifting the Stay of Proceedings for the Purposes of Seeking Relief in respect of Homburg Invest Inc.'s Annual General Meeting*" dated September 16, 2011;

b. a "*Motion for Amendments to the Initial Order*" dated September 16, 2011, and amended on October 4, 2011; and

c. a "*Motion for the Payment of Fees, Disbursements and Expenses of the Indenture Trustees and the Indenture Trustees' Advisors and Related Relief*" dated October 4, 2011 (the "**Original Motion for Funding**"),

(collectively the "**Stichting Proceedings**").

[26] Concurrently, the Monitor filed a "*Motion to Obtain Lists of Registered Bondholders*" further to Stichting's refusal to provide same, the whole resulting in the Court issuing, on October 7, 2011, the "*Bondholders Listing Order*".

[27] Also, the Court issued a number of "*Case Management Orders*" specifically requesting that the parties make all reasonable efforts to settle their outstanding issues.

[28] Amongst those issues were Stichting's involvement in the Restructuring and Stichting's fees and expenses:

[10] POA (Exhibit R-3), art. 4.

a. In the "*Case Management Order #1*" issued on September 26, 2011, the Court declared and ordered, *inter alia*, the following:

> [7] **DECLARES** that the Monitor shall act as the "conductor of orchestra" ("chef d'orchestre") in coordinating efforts with the AFM and the DNB [De Nederlandsche Bank] to protect any licence issued by the AFM to HII and in determining the Steps, including when it will be advisable to involve a duly authorized representative of the Trustees [Stichting];
>
> [8] **ORDERS** the Monitor, when necessary, to keep informed the duly authorized representative of the Trustees as to the Steps and their enforcement, and as to the involvement of such representative in the enforcement of the Steps;"

b. In the "*Case Management Order #3*" issued on October 7, 2011, the Court declared:

> **"C. MOTION FOR FEES [Original Motion for Funding]**
>
> [12] **DECLARES** that the Court may be prepared to consider a request by an interested person under Section 11.52(1) of the CCAA [request for indemnification of certain fees and expenses], subject to a favourable recommendation from the Monitor, the "conductor of orchestra" as referred to in the CMO #1 [Case Management Order #1], and subject to such interested person playing in the same orchestra, i.e. being an effective participant in the orchestra;"

[29] The Monitor has always maintained that the HII Group was not obliged to pay or reimburse any such fees and expenses, which in effect would have been tantamount to granting security ranking in priority over all other stakeholders, nor to permit that such fees and expenses be included in Stichting's claims under the Plans. The negotiations referred to hereinafter were conducted on that basis.

2.4 Negotiations and related agreements

2.4.1 Purchase agreement involving HCI and HII Group

[30] On November 17, 2011, a *Purchase Agreement* (the "**Purchase**")[11] was entered into, between, *inter alia*, HCI, Management, RH and HII (Stichting was not a party thereto), providing, *inter alia*, for the purchase by HII Group of HCI's property management of HII's business and assets, with certain exceptions.

[31] One of the conditions precedent to the Purchase was the settlement of all proceedings involving HII and Stichting:

[11] Exhibit M-4.

> "10.9 Withdrawal of proceedings by Trustees [Stichting]
>
> The trustees [Stichting] acting in that capacity for the bondholders of Homburg Shareco Inc. or HII (the "**Trustees**") shall have entered into a settlement agreement with certain members of the HII Group and shall have respected their obligations thereunder, including without limitation, the withdrawal of certain motions or proceedings before the CCAA Court."

[32] The Purchase was approved by this Court on January 12, 2012, thereby authorizing HCI and RH to transfer their controlling interests in HII and related entities to HII, the whole for a consideration of approximately $21 million.

2.4.2 Amending agreements involving HCI and Stichting

[33] On December 3, 2011, an *Amended Heads of Agreement and Voting Agreement* ("**AHOA**")[12] was entered into between, *inter alia*, HCI, Management, Finance, RH and Stichting (HII was not a party thereto), which amended the HOA and the restructuring transactions provided therein and the POA, and which provided, *inter alia*, for the payment of Stichting's Pre-December 3 Expenses by HCI[13] further to, and in accordance with, the POA Indemnity.

[34] However, the AHOA also provided for Stichting's undertaking to use its "commercial best efforts" (the "**Stichting Undertaking**") to recover the Pre-December 3 Expenses from HII in order to reimburse HCI:

> "3.2 The Trustees [Stichting] agree that:
>
> (a) they shall use commercial best efforts to obtain the approval of the CCAA Court to their motion for funding (**Funding Motion** [Original Motion for Funding]) as soon as practicable after the date hereof;
>
> (a) whether or not the Funding Motion is granted, the Trustees shall use commercial best efforts to recover their fees and expenses, including the Termination Amount [the Pre-December 3 Expenses], in the context of the proceedings initiated by HII and certain of its subsidiaries through the *Companies' Creditors Arrangement Act* (the **CCAA Proceedings**) and to reimburse to HC [HCI], to the maximum extent practicable from any such recovery, the Termination Amount; and
>
> (b) any reimbursement due to HC shall be remitted to HC by the Trustees within ten (10) days of receipt of recovery through the CCAA Proceedings."
>
> (quoted as is)

[12] Exhibit R-5, filed under confidential seal.
[13] AHOA (Exhibit R-5), art. 2.1.

[35] Concurrently, on December 3, 2011, an *Amended and Restated Voting Power of Attorney and Standstill Agreement* ("**APOA**")[14] was entered into between RH, Finance and Stichting (HII was not a party thereto), which amended and restated the POA, including the removal of the POA Indemnity for the period post-December 3, 201.

2.4.3 Settlement Agreement involving HII Group and Stichting

[36] On December 3, 2011, a Settlement Agreement (the "**Settlement Agreement**")[15] was entered into between the HII Group and Stichting (RH and HCI were not parties thereto), which provided, *inter alia*, for the settlement of the Stichting Proceedings, including the following undertaking from all parties:

> "to (ii) immediately cease and desist from making any allegations negatively affecting the credibility and appropriateness of the CCAA Proceedings or any allegations of conflict of interest in respect of the Parties, the Monitor or their respective legal counsel or, subject to the relevant provisions of the Indentures in respect of the rights and powers of the Trustees, the standing of the Trustees;"[16]

[37] This is very telling of the acrimonious ambiance that then prevailed; it was far from being a situation involving an "effective participation" for the proper advancement of the Restructuring.

[38] Thus, by the Settlement Agreement, the HII Group and Stichting wanted to resolve their differences and to work towards a successful restructuring in establishing the *modus vivendi* rules to govern their relations, including bridge-fundings of Stichting's fees and expenses to be incurred thereafter, namely the Post-December 3 Expenses, particularly because it was impossible from a practical point of view to request funding from more than 9,500 Bondholders, each having an average holding of approximately €31,999.

[39] To that end, the Settlement Agreement provided for the necessary amendments to the Original Motion for Funding (the "**Amended Motion for Funding**"), which resulted in the issuance of an order by this Court, on February 15, 2012, along with the accompanying reasons on February 17, 2012 (collectively the "**Funding Order**") to specifically deal with the Post-December 3 Expenses:

> **"ORDERS** that the Petitioners shall advance from the available cash of the Debtors, on the same payment terms as the fees and disbursements payable by the Petitioners pursuant to paragraph [41] of the Initial Order dated September 9, 2011 as amended and/or restated, amounts equivalent to the reasonable fees and expenses incurred as and from December 3rd, 2011 in connection with the CCAA proceedings and the Restructuring by the Trustees' Advisors, the aggregate of which advances (the "**Stichting Advances**") up to the

[14] Exhibit R-6, filed under confidential seal.
[15] Exhibit R-7, filed under confidential seal.
[16] Settlement Agreement (Exhibit R-7), art. 5(ii).

> maximum amount to be distributed or paid (i) shall become due and payable to the Debtors immediately prior to any distribution or payment, including pursuant to a sale of assets, liquidation or realization of security or otherwise (each a "**Distribution Event**"), to be made to or for the benefit of the holders of the Securities, as the case may be, (ii) shall be set-off/compensated against the aggregate of any distribution to be made to or for the benefit of the holders of Securities pursuant to any such Distribution Event and (iii) shall be allocated, as between the holders of Securities, on a pro-rata basis, based on the amount, if any, to be distributed or paid in respect of each of the Corporate Bonds, Mortgage Bonds and Capital Securities as a percentage of the total amount to be distributed in respect of all Securities."
>
> (the "**Stichting Advances**")

[40] The Amended Motion for Funding and the draft Funding Order were intensively negotiated among the parties, with the result that only the funding of the Post-December 3 Expenses was included therein.

[41] It was unacceptable for the Monitor to include any funding for the Pre-December 3 Expenses, or to provide for the payment by the HII Group of any of the Expenses.

[42] In fact, Stichting acknowledged the gist of the Settlement Agreement in the AHOA[17]:

> "3.1 The Trustees acknowledge and agree that, as of the date hereof, the Trustees have reached an agreement to effect a settlement of the issues in dispute between them and HII, including but not limited to the issue of HII's responsibility to pay or contribute to the fees and expenses of the Trustees and its advisors in connection with the Trustee's participation in the CCAA Proceedings from and after the date hereof."
>
> (the Court underlines)

2.5 Proofs of claims and Notices of disallowance

2.5.1 Stichting's Proofs of claim

[43] On July 6, 2012, further to the CPO issued by this Court on April 30, 2012, Stichting filed a *Proof of Claim of Stichting Homburg Bonds and Stichting Homburg Capital Securities Against Homburg Invest Inc.* claiming the Pre-December 3 Expenses, on the basis of claims resulting from pre-filing contractual obligations (the "**Pre-December 3 POC**")[18].

[17] Exhibit R-5.
[18] Exhibit R-8.

[44] Also, on July 6, 2012, Stichting filed a series of proofs of claim for Stichting, claiming, *inter alia*, the Post-December 3, 2011 Expenses, on the basis of claims resulting from pre-filing contractual obligations (the "**Post-December 3 POC**")[19].

2.5.2 Monitor's Notices of disallowance

[45] On February 4, 2013, the Monitor disallowed[20] the Pre-December 3 POC on the basis that the Pre-December 3 Expenses did not qualify as obligations under the Indentures, nor under the Guarantee.

[46] On May 10, 2013, the Monitor issued several notices[21] disallowing in part the Post-December 3 POC on the basis, *inter alia*, that the Post-December 3 Expenses represented the Stichting Advances pursuant to the Funding Order, reimbursable to HII and thus did not form part of a claim pursuant to the CPO, the Meeting Orders and the Plans.

[47] As mentioned above, Stichting appealed these disallowances by filing, on February 14, 2013, the First Appeal Motion and, on May 17, 2013, the Second Appeal Motion.

2.6 Dutch Proceedings by HCI

[48] In October 2013, HCI instituted proceedings in the Netherlands against Stichting and certain existing and former directors (the "**Dutch Proceedings**")[22] seeking a condemnation for an amount of $2.1 million on the basis that they failed to use their "commercial best efforts" to recover the Pre-December 3 Expenses from HII in accordance with the Stichting Undertaking under the AHOA[23].

3. POSITION OF PARTIES

3.1 Stichting

3.1.1 Full recovery on the basis of "substantial contribution"

[49] Stichting argues that it is entitled to full payment of the Stichting Expenses before any distribution to any stakeholder under the Plans, based on the US concept of "substantial contribution" to a successful restructuring, which concept stems from Section 503(b)(5) of the *US Bankruptcy Code*[24].

[50] Stichting contends that its actions and involvement in the Restructuring have contributed in a meaningful way to the successful approval of the Plans, and have ultimately benefited, not only the Bondholders, but all HII Group's creditors.

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[19] Exhibit R-9.
[20] Exhibit R-10.
[21] Exhibit R-11.
[22] Exhibit R-12.
[23] AHOA (Exhibit R-5), art. 3.2(a).
[24] *Bankruptcy Code*, 11 USC § 503.

[51] Furthermore, according to Stichting, the Stichting Expenses are reasonable in the circumstances, particularly considering the composition of the group of Bondholders and the complexity of the multiple issues that were addressed over the last two years in order to effect a successful Restructuring of the HII Group.

[52] Therefore, Stichting requests that the Stichting Expenses be paid entirely before any distribution under the Plans and not be compromised thereunder; this reimbursement right being entirely independent of the contractual entitlement to the reimbursement thereof pursuant to the Indentures and argued on a subsidiary basis.

[53] If the Court confirms such right, then Stichting requests the authorization to remit the full amount of the Pre-December 3 Expenses to HCI, as the latter paid same to Stichting at the time the AHOA was signed, the whole in satisfaction of the Stichting Undertaking under the AHOA.

3.1.2 Subsidiarily: recovery on the basis of pre-filing contractual obligation

[54] Subsidiarily, Stichting submits that the Indentures provide for the payment of all its fees and expenses, including the Stichting Expenses, the whole in accordance with standard financing practices.

[55] Therefore, according to Stichting, the Stichting Expenses were incurred as a result of pre-filing contractual obligations of HII and Shareco, and thereby constitute claims under the CPO, the Meeting Orders and the Plans.

[56] Furthermore, Stichting argues that the Funding Order provides for the reimbursement of the Stichting Advances relating to the Post-December 3 Expenses by way of set-off/compensation against any distribution to be made to, or for the benefit of, the Bondholders. Thus Stichting is not precluded from claiming same from HII and Shareco on the basis of such pre-filing contractual obligations under the Indentures. There is no waiver or release of any such claim.

[57] Stichting submits that the Stichting Advances constituted only bridge-fundings of the Post-December 3 Expenses, duly authorized by the Funding Order, with no effect on Stichting's right to claim the Post-December 3 Expenses under the CPO, the Meeting Orders and the Plans, on the basis of HII's and Shareco's pre-filing contractual obligations.

[58] Therefore, the First Appeal Motion and the Second Appeal Motion should be granted, and the Stichting Expenses should be included in the Stichting Proven Claims, with entitlement to distributions under the Plans.

[59] Furthermore, whether or not the First Appeal Motion and the Second Appeal Motion are granted by the Court, Stichting requests that any portion of the Pre-December 3 Expenses, remaining unpaid following the implementation of the Plans, be deducted from the Bondholders' distributions thereunder, such that 100% of the Pre-December 3 Expenses be paid to Stichting. The same set-

off/compensation mechanism provided under the Funding Order with respect to the Post-December 3 Expenses should apply.

[60] In such event, Stichting requests the authorization to remit to HCI any amounts to be received on account of the Pre-December 3 Expenses, up to the sum of $2.1 million, the whole in satisfaction of the Stichtching Undertaking under the AHOA.

[61] On the other hand, it is understood that any distribution to be received by Stichting under the Plans on account of the Post-December 3 Expenses would be for the benefit of, and returned to, the Bondholders, reducing their related liability thereunder as provided in the Funding Order.

3.1.3 Protection against the Dutch Proceedings

[62] Finally, and as a reply to the Dutch Proceedings, Stichting submits that the First Appeal Motion and the Expenses Payment Motion are an eloquent demonstration that it is using its "commercial best efforts" to recover from HII the Pre-December 3 Expenses, thereby meeting its obligations under the Stichting Undertaking provided in the AHOA.

[63] Notwithstanding such defence, Stichting requests, in the event the Dutch Proceedings are successful, an order from this Court authorizing its indemnification for all its current and future fees and expenses relating to the Dutch Proceedings (the "**Dutch Proceedings Expenses**").

[64] Such indemnification would be enforced prior to the final distribution to the Bondholders under the Plans, by applying the same set-off/compensation mechanism provided under the Funding Order for the Stichting Advances relating to the Post-December 3 Expenses.

3.2 Monitor

[65] According to the Monitor, the parties settled all matters relating to the Stichting Expenses in virtue of the Settlement Agreement and the Funding Order. Stichting cannot revisit this issue.

[66] As a matter of fact, the Settlement Agreement includes the withdrawal of the Original Motion for Funding.

[67] Moreover, the Pre-December 3 Expenses were not incurred for the purpose of advancing or protecting the interests of the Bondholders; they were far from an "effective participation" by Stichting and its experts in a successful Restructuring, or a "substantial contribution" thereto.

[68] On the contrary, during the pre-December 3 period, Stichting's acts impaired seriously HII Group's efforts to achieve a successful Restructuring.

[69] Finally, the Monitor adds that this concept of "substantial contribution" does not exist under Canadian law, and should not be "imported" from the United States.

[70] As to the post-December 3 period, the Monitor submits that Stichting's involvement did not extend beyond the standard functions which indenture trustees customarily engage in, and it has always been understood that any such expenses were for the Bondholders' account, and not for HII Group's account.

[71] In any event, the Monitor points out that the Stichting Expenses are not included in the determination of Stichting Proven Claims pursuant to the Meeting Orders, which are limited to the capital owed under the Indentures and Bonds issued pursuant thereto, plus interest as of September 9, 2011 (the date of the Initial Order) for HII and Shareco, or February 6, 2013 for Homco 61 (Homco 61 filing date under the *CCAA*)[25].

[72] As such, the Stichting Expenses are "post-filing claims", namely obligations incurred after the Initial Order, and therefore they fall outside the scope of an allowable claim pursuant to the *CCAA* and the Meeting Orders.

[73] In addition, the Monitor stresses that Stichting failed to prove that the Pre-December 3 Expenses are reasonable and incurred in relation to the administration or execution of the Indentures.

[74] Finally, the Monitor concludes that it will be totally unacceptable that any recovery in relation to the Pre-December 3 Expenses be for the benefit of HCI, including that the Bondholders be ordered to pay any of the Dutch Proceedings Expenses.

[75] RH and HCI have constantly created hurdles in the Restructuring, including instituting the Dutch Proceedings, and the Court should not endorse such behaviour by granting Stichting's requests for reimbursement of fees.

4. ISSUES TO BE CONSIDERED

[76] The Court identifies the following issues:

a. Substantial contribution:

i. Should the US concept of "substantial contribution" be imported into the rules governing restructurings under the *CCAA*?

ii. In the affirmative, did Stichting have a "substantial contribution" to the Restructuring?

iii. In the affirmative, is Stichting entitled to a full or partial reimbursement of the Stichting Expenses?

[25] HII/Shareco Meeting Order, art. 22, and Homco 61 Meeting Order, art. 17.

iv. In the affirmative, should the Court authorize Stichting to remit to HCI the reimbursement to be received with respect to the Pre-December 3 Expenses, up to the maximum amount of $2.1 million?

b. Subsidiarily – Pre-filing contractual obligations:

i. Can the Stichting Expenses be included in the Stichting Proven Claims on the basis that they relate to pre-filing contractual obligations under the Indentures?

ii. In the affirmative, what portion of the Stichting Expenses should be included in the Stichting Proven Claims?

c. In any event:

i. Should the Court authorize Stichting to deduct the Pre-December 3 Expenses and the Dutch Proceedings Expenses from the Bondholders' distribution under the Plans, less any portion of the Pre-December 3 Expenses that Stichting may receive on account thereon under the Plans?

ii. Should the Court authorize Stichting to remit to HCI any distribution to be received under the Plans, if any, including through set-off compensation from the Bondholders, on account of the Pre-December 3 Expenses, up to the maximum amount of $2.1 million?

5. DISCUSSION

5.1 Should the US concept of "substantial contribution" be imported into the rules governing restructurings under the *CCAA*?

5.1.1 US concept of "substantial contribution"

[77] The concept of "substantial contribution" by an indenture trustee has a statutory basis under the *US Bankruptcy Code*[26]:

> "**§ 503. Allowance of administrative expenses**
> […]
> (b) After notice and a hearing, there shall be allowed administrative expenses, other that claims allowed under section 502(f) of this title, including –
> […]
> (5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the

[26] *Bankruptcy Code*, 11 USC § 503.

> cost of comparable services other than in a case under this title;
>
> […]"
>
> (the Court underlines)

[78] The US case law[27] has restrictively applied this "substantive contribution" concept in considering several factors, including:

a. whether the actions fostered and enhanced, rather than inhibited or interrupted, the restructuring;

b. whether the expenses were duplicative of other parties' expenses; and

c. whether the services conferred a direct and demonstrable benefit on all stakeholders.

[79] The Court concludes from the proof and the various proceedings in this matter that, following the execution of the HOA and POA on September 8, 2011, Stichting's actions between the Initial Order (September 9, 2011) and December 3, 2011, were tantamount to aggressive positioning, more for the benefit of RH, Finance and HCI, than for the benefit of the Bondholders.

[80] The Court also concludes from the proof and the various proceedings in this matter that, further to the execution of the AHOA, the APOA and the Settlement Agreement on December 3, 2011, Stichting's actions were strictly in the nature of a trustee's standard functions acting for bondholders under a trust indenture.

[81] Indeed, most of the work related to informing and advising the Bondholders through consultations and newsletters posted on Stichting's web site, reviewing documents submitted by the Monitor, attending planning meetings with the Monitor, the AFM and/or potential investors, all in order to be in a position to adequately inform and advise the Bondholders.

[82] When Stichting was incurring fees and expenses for the general benefit of the HII Group, such as arranging and attending meetings with the Bondholders, the HII Group paid the related fees and expenses of Stichting.

[83] Therefore, the Court is of the opinion that Stichting did not make a "substantial contribution" to the Restructuring.

[84] In any event, the Court does not agree that the concept of "substantial contribution" provided under the US *Bankruptcy Code* should be imported into the rules governing restructurings under the *CCAA*.

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[27] Robert J. ROSENBERG et al., *Ad Hoc Committees and Other (Unofficial) Creditor Groups : Management, Disclosure and Ethical Issues*, American Bankruptcy Institute Business Reorganization Committee Newsletter, June 2008, p. 270-271.

[85] There is no legal basis, nor any reason to endorse and import such a concept into the *CCAA*, which has its own mechanisms to deal with fees and expenses relating to a restructuring.

[86] Indeed, Section 11.52(1)(c) of the *CCAA* already provides the possibility for an interested person to request a security or charge, affecting all or part of a debtor's property, to cover the fees and expenses of its financial, legal or other experts having an "effective participation" [une "participation efficace"] in the debtor's ongoing restructuring.

[87] The Court is of the opinion that authorizing the payment of fees and expenses prior to any distribution to HII Group's stakeholders is equivalent to granting prior ranking security. Therefore, the analysis of Section 11.52(1)(c) of the *CCAA* is relevant for the purpose of these presents.

5.1.2 Section 11.52 of the *CCAA*

[88] Section 11.52 of the *CCAA* provides for the following:

> **11.52** (1) **[Court may order security or charge to cover certain costs]** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation [participation efficace] in proceedings under this Act.
>
> (2) **[Priority]** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (the Court underlines)

[89] On October 4, 2011, Stichting filed its Original Motion for Funding pursuant to Section 11.52 of the *CCAA*.

[90] Concurrently, and as mentioned above, on October 7, 2011, the Court issued the *Case Management Order* #3 declaring that it was prepared to consider an interested person's request under Section 11.52 of the *CCAA*, subject to the Monitor's ("conductor of orchestra") favourable recommendation and the interested person being an "effective participant" in the Monitor's orchestra.

[91] Thus, the Court already gave some indication as to what it would take into consideration if it were to proceed on the merits with the Original Motion for Funding.

[92] Thereafter, HII Group and Stichting settled their disagreements in that regard, and Stichting proceeded with the Amended Motion for Funding, in accordance with the terms of the Settlement Agreement agreed to by them, and both parties consented to the issuance of the February 15, 2012 Funding Order.

[93] Therefore, Stichting's initial indemnification request pursuant to Section 11.52(1)(c) of the *CCAA* was resolved by the issuance of the Funding Order.

[94] Now, Stichting brings the Expenses Payment Motion before the Court, not on the basis of Section 11.52(1)(c) of the *CCAA*, but on the basis of the US concept of "substantial contribution" which, as mentioned above, the Court rejects and refuses to import into the rules governing restructurings under the *CCAA*.

[95] Nevertheless, the Court is of the opinion that a request similar to the Expenses Payment Motion must be analyzed pursuant to Section 11.52(1)(c) of the *CCAA*, even if no security or charge is requested. As mentioned above, authorizing the payment of fees and expenses prior to any distribution to HII Group's stakeholders would be equivalent to granting prior ranking security.

[96] During the hearing, the Court stressed the importance of the timing issue for a request under Section 11.52(1)(c) of the *CCAA*, as an "effective participation" to be secured in a restructuring must be agreed on as soon as it can be established that the interested person requires such security to cover the fees and expenses of its financial, legal or other experts for their "effective participation" in the restructuring.

[97] "After the fact" requests for security protecting any such fees and expenses, or for the payment or reimbursement thereof as in the present instance, namely after the creditors' and the Court's approval of the Plans, must be discouraged and avoided, as it would directly affect the distribution to the creditors.

[98] The Court cannot, once a plan of arrangement has been approved by the creditors and the Court, change the distribution provided thereunder.

[99] The Court is also of the opinion that before incurring, or continuing to incur, any such fees and expenses to be claimed from a debtor in a *CCAA* restructuring, either through direct payment or by way of security on the debtor's assets, the interested person must first take the appropriate steps to set up with the monitor and the debtor the rules applicable to the "effective participation" of its financial, legal or other experts, the whole subject to the Court's approval.

[100] Such rules would take into consideration many factors, including the following:

a. a court officer is already involved, namely the court appointed monitor and, as such, he is the "eyes and ears" of the Court, and he must, at all

times, remain independent and act impartially for the benefit of all stakeholders;

b. therefore, services already rendered or to be rendered by the monitor must not be duplicated by the interested person's financial, legal or other experts, at least, not for the debtor's account;

c. an "effective participation" has to be pro-active and constructive, never losing sight of the global picture of the restructuring and the interests of all stakeholders;

d. an "effective participation" shall not include challenging the merits *per se* of the restructuring proceedings; the debtor need not fund the opponent of its restructuring;

e. "time is of the essence": the monitor must be in a position to assess appropriately, and budget for, the fees and expenses to be incurred in a restructuring; therefore, interested persons claiming the right to be indemnified or secured for their financial, legal or other experts' "effective participation" must act quickly to obtain confirmation of said right and set up the applicable rules;

f. once the rules are established by the claimant, the monitor and the debtor, they must be authorized by the Court, including whether or not fees and expenses already incurred ought to be included;

g. finally, and as authorizing the payment of fees and expenses before any distribution to a debtor's stakeholders is tantamount to granting prior ranking security, the Court endorses Judge Clément Gascon's, j.s.c (now j.c.a.) comments on the principles governing the granting of a *CCAA* administration charge in the matter of *Mecachrome International Inc.*[28] :

> « **LA CHARGE D'ADMINISTRATION**
>
> […]
>
> [77] Les critères déjà énumérés confirment qu'une charge prioritaire établie en vertu de la *LACC* se veut exceptionnelle. Le Tribunal se doit de l'accorder avec parcimonie, en la limitant seulement à ce qui est essentiel au succès d'une restructuration.
>
> [78] Dans cette perspective, le Tribunal est d'avis qu'à moins de circonstances particulières bien appuyées par une preuve convaincante, une charge d'administration ne devrait pas inclure des conseillers juridiques ou financiers autres que ceux du contrôleur et des débitrices.
>
> […]

[28] 2009 QCCS 1575.

> [80] Rien n'explique en quoi leur demande est essentielle au succès de la restructuration envisagée. Rien n'établit que leurs interventions placent les intérêts des Débitrices Canadiennes ou le succès de la restructuration avant la protection de leurs clients respectifs.
>
> […]
>
> [89] L'objectif de la Charge d'Administration n'est pas de protéger le maximum de professionnels possible. C'est plutôt de mettre en place une charge qui facilite le but d'en arriver à un arrangement au meilleur coût possible pour les créanciers qui en feront, en dernière analyse, les frais.
>
> [90] Que chacun des acteurs retienne ses conseillers juridiques ou financiers est légitime. Que tous le fassent aux frais des Débitrices Canadiennes, et partant des créanciers les moins protégés, est, de l'avis du Tribunal, exagéré. »
>
> (the Court underlines)

[101] A restructuring process is very expensive, and every effort should be made to reduce and control the related fees and expenses.

[102] There must be "clear added value for the benefit of all stakeholders" if the fees and expenses of an interested person's financial, legal or other experts are to be paid by the debtor.

5.1.3 Conclusion

[103] The Court is of the opinion that the US concept of "substantial contribution" must not be imported into the rules governing restructurings under the *CCAA*.

[104] Furthermore, the Court is also of the opinion that a request pursuant to Section 11.52(1)(c) of the *CCAA* cannot be presented by an interested person "after the fact".

[105] The applicable rules must be set up with the monitor and the debtor as soon as possible and, ideally, before incurring the related fees and expenses, the whole subject to the Court's final approval, and before the creditors vote on the plan of arrangement.

[106] Considering this negative answer to the first question under the heading "substantial contribution", there is no need to answer the three other questions listed thereunder.

5.2 Can the Stichting Expenses be included in the Stichting Proven Claims on the basis that they relate to pre-filing contractual obligations under the Indentures?

5.2.1 The Indentures

[107] The Indentures provide for the payment by HII and Shareco of Stichting's reasonable fees and expenses, both before and after default thereunder:

> "**12.1** ***General Covenants***
>
> The Corporation [HII or Shareco] hereby covenants and agrees with the Trustee [Stichting] for the benefit of the Trustee and the Bondholders as follows:
>
> […]
>
> (e) *To Pay Trustee*. That the Corporation will pay to the Trustee reasonable remuneration for its services hereunder and will pay or reimburse the Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by the Trustee in the administration or execution of the trusts hereby created (including the reasonable compensation and the disbursements of its counsel and all other advisers and assistants not regularly in its employ), both before any default hereunder and thereafter until all duties of the Trustee under the trust hereof shall be finally and fully performed, except any such expense, disbursement or advance as may arise from its negligence or bad faith.
>
> […]"[29]
>
> (the Court underlines)

[108] Stichting's right to retain the services of financial, legal or other experts is also clearly provided in the Indentures:

> "**16.4** ***Delegation; Experts and Advisers***
>
> […]
>
> (b) The Trustee [Stichting] may employ or retain such counsel, auditors or accountants (who may be the Corporation [HII or Shareco]'s auditors), appraisers, architects, engineers or such other experts or advisers as it may reasonably require for the purpose of discharging its duties hereunder.
>
> (c) The Trustee may pay reasonable remuneration for all services performed for it in the discharge of the trusts hereof by any such agent or attorney, or expert or adviser, without taxation for costs or fees of any counsel, solicitor or attorney."[30]
>
> (the Court underlines)

[109] Similarly, the Guarantee provides for the payment by HII of any such fees and expenses:

> "**SECTION 15. Expenses.** The Guarantor [HII] shall pay, or reimburse, the Trustee [Stichting] and the Holders for all costs and expenses including, without limitation, reasonable attorneys' fees

[29] Corporate Bonds Indenture (Exhibit R-1) and Mortgage Bonds Indenture (Exhibit R-2).
[30] *Id.*

> and disbursements reasonably incurred by it in connection with the enforcement of this Guarantee Agreement; provided, however, that the Guarantor shall only be required to pay, or reimburse, for the reasonable attorneys' fees and disbursements for one counsel for the Trustee and the Holders."[31]
>
> (the Court underlines)

[110] Therefore, HII and Shareco have covenanted to pay Stiching's fees and expenses (the "**Payment Covenant**") under, and as provided in, the Indentures and Guarantee, entered into before the Initial Order.

5.2.2 Analysis

[111] As is the situation with respect to most of the contractual obligations, the Court is of the opinion that, failing specific provision to the contrary in the Initial Order, the Payment Covenant was stayed by the Initial Order.

[112] A line must be drawn between fees and expenses incurred before the Initial Order and those to be incurred thereafter, which are conditional upon services being effectively rendered. This is controllable, and must be controlled.

[113] The Court is of the opinion that any enforcement of the Payment Covenant with respect to the Stichting Expenses, incurred after the Initial Order, was subject to establishing the rules applicable thereto, with the Monitor and the HII Group, and the Court's final approval. The factors mentioned above with respect to a request pursuant to Section 11.52(1)(c) of the *CCAA* would apply.

[114] The Court cannot help but imagine what would happen if all HII Group's stakeholders had undertakings similar to the Payment Covenant and that such covenant was not stayed by the Initial Order.

[115] The Restructuring would then be burdened by unlimited and uncontrollable fees and expenses, the only limit being that they be "reasonable", but the aggregate thereof would not be reasonable.

[116] No fees and expenses of the nature of the Stichting Expenses should be paid or reimbursed by a debtor if there is no post-filing agreement thereon, including applicable control rules, with the monitor and the debtor, and confirmed by the Court.

[117] In any event, the Court is of the opinion that the Stichting Proven Claims under the Meeting Orders are limited to the aggregate principal amount owed under the terms of the Indentures and the Bonds, together with accrued and unpaid interest, to September 9, 2011 (the date of the Initial Order) for HII and

[31] Guarantee (Exhibit R-2, Appendix D).

Shareco, and February 6, 2013 for Homco 61 (Homco 61 filing date under the *CCAA*)[32].

[118] Interest accruing after September 9, 2011 and February 6, 2013 is not included in the definition of Stichting Proven Claims in the Meeting Orders, nor any fees and expenses in the nature of the Stichting Expenses.

[119] It is rather surprising that Stichting does not contest the Monitor's disallowance of its claims as they relate to the post-filing interest, but does contest the exclusion of the Stichting Expenses.

5.2.3 Conclusion

[120] The Stichting Expenses are not, and cannot be, included in the Stichting Proven Claims, and therefore Stichting cannot claim reimbursement thereof from the HII Group.

[121] Considering this negative answer to the first question under the heading "subsidiarily – pre-filing contractual obligations", there is no need to answer the second question listed thereunder.

5.3 Should the Court authorize Stichting to deduct the Pre-December 3 Expenses and the Dutch Proceedings Expenses from the Bondholders' distribution under the Plans, less any portion of the Pre-December 3 Expenses that Stichting may receive on account thereon under the Plans?

[122] As already mentioned, Stichting's actions between the Initial Order (September 9, 2011) and December 3, 2011, were tantamount to aggressive positioning, more for the benefit of RH, Finance and HCI, than for the benefit of the Bondholders.

[123] In such circumstances, it would be unacceptable that the Bondholders, in addition to their losses in this matter, assume the payment of the Pre-December 3 Expenses. This matter was settled at the time the Funding Order was issued.

[124] If Stichting's efforts had focused, from day one, on working positively towards a successful Restructuring, the Pre-December 3 Expenses would have been much lower.

[125] In any event, the Court cannot consider such a request from Stichting, including with respect to the Dutch Proceedings Expenses, without having heard the Bondholders' position thereon; the Bondholders are not parties to the present

[32] HII/Shareco Meeting Order, art. 22, and Homco 61 Meeting Order, art. 17.

proceedings. It is an issue to be debated between Stichting and the Bondholders and, no doubt, the basic rule of "*audi alteram partem*" applies.

[126] In requesting such a conclusion against the Bondholders, Stichting is certainly not acting for the Bondholders' interests.

[127] Therefore, the Court will not authorize Stichting to deduct the Pre-December 3 Expenses and the Dutch Proceedings Expenses from the Bondholders' distribution under the Plans.

5.4 Should the Court authorize Stichting to remit to HCI any distribution to be received under the Plans, if any, including through set-off compensation from the Bondholders, on account of the Pre-December 3 Expenses, up to the maximum amount of $2.1 million?

[128] Considering the answers to the above questions, there is no need to answer this last question.

[129] On the other hand, the Court finds awkward that Stichting requests court authorization to remit to HCI any distribution that it may receive on account of the Pre-December 3 Expenses.

[130] The Control Issues involving RH and HCI, and raised by the AFM, have caused major hurdles and serious delays in the Restructuring and, in those circumstances, such a request is rather bold and quite questionable, if not unacceptable, for both the HII Group and the Bondholders.

6. CONCLUSION

[131] The Court will dismiss the Stichting Motions.

FOR THESE REASONS, THE COURT:

[132] **DISMISSES** the "*Amended Motion for the Payment of the Fees and Expenses of Stichting Homburg Bonds and Other Relief*" (Cote #228) (the Expenses Payment Motion);

[133] **DISMISSES** the "*Motion in Appeal of a Disallowance of a Proof of Claim, pursuant to the "Claims Process Order" issued on April 30, 2012*" (Cote #154) (the First Appeal Motion);

[134] **DISMISSES** the "*Motion in Appeal of the Disallowance of Proofs of Claim filed pursuant to the "Claims Process Order" issued on April 30, 2012*" (Cote #212) (the Second Appeal Motion);

[135] **THE WHOLE** with costs in each of the three Motions.

LOUIS J. GOUIN, J.S.C.

Me Guy Martel
Me Nathalie Nouvet
Stikeman Elliott LLP
Counsel to Petitioners

Me Mason Poplaw
Me Jocelyn T. Perreault
McCarthy Tétrault LLP
Counsel to Monitor

Me Sandra Abitan
Me Martin Desrosiers
Osler, Hoskin & Harcourt LLP
Counsel to Debtors and Mises-en-cause

Hearing dates : February 5, 6 and 7, 2014

TAB 2

CITATION: Jaguar Mining Inc. (Re), 2014 ONSC
COURT FILE NO.: CV-13-10383-00CL
DATE: 20140116

SUPERIOR COURT OF JUSTICE — ONTARIO
(COMMERCIAL LIST)

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

AND:

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JAGUAR MINING INC., Applicant

BEFORE: MORAWETZ R.S.J.

COUNSEL: Tony Reyes and Evan Cobb, for the Applicant, Jaguar Mining Inc.

Robert J. Chadwick and Caroline Descours, for the Ad Hoc Committee of Noteholders

Joseph Bellissimo, for Global Resource Fund, Secured Lender

Jeremy Docks, for FTI Consulting Canada Inc., Proposed Monitor

Robin B. Schwill, for the Special Committee of the Board of Directors

HEARD &
ENDORSED: DECEMBER 23, 2013

REASONS: JANUARY 16, 2014

ENDORSEMENT

[1] On December 23, 2013, I heard the CCAA application of Jaguar Mining Inc. ("Jaguar") and made the following three endorsements:

I. CCAA protection granted. Initial Order signed. Reasons will follow. It is expected that parties will utilize the e-Service Protocol which can be confirmed on comeback motion. Sealing Order of confidential exhibits granted.

2. Meeting Order granted in form submitted.

3. Claims Procedure Order granted in form submitted.

[2] These are my reasons.

[3] Jaguar sought protection from its creditors under the *Companies' Creditors Arrangement Act* ("CCAA") and requested authorization to commence a process for the approval and implementation of a plan of compromise and arrangement affecting its unsecured creditors.

[4] Jaguar also requested certain protections in favour of its wholly-owned subsidiaries that are not applicants (the "Subsidiaries" and, together with the Applicant, the "Jaguar Group").

[5] Counsel to Jaguar submits that the principal objective of these proceedings is to effect a recapitalization and financing transaction (the "Recapitalization") on an expedited basis through a plan of compromise and arrangement (the "Plan") to provide a financial foundation for the Jaguar Group going forward and additional liquidity to allow the Jaguar Group to continue to work towards its operational and financial goals. The Recapitalization, if implemented, is expected to result in a reduction of over $268 million of debt and new liquidity upon exit of approximately $50 million

[6] Jaguar's senior unsecured convertible notes (the "Notes") are the primary liabilities affected by the Recapitalization. Any other affected liabilities of Jaguar, which is a holding company with no active business operations, are limited and identifiable.

[7] The Recapitalization is supported by an Ad Hoc Committee of Noteholders of the Notes (the "Ad Hoc Committee of Noteholders") and other Consenting Noteholders, who collectively represent approximately 93% of the Notes.

[8] The background facts are set out in the affidavit of David M. Petrov sworn December 23, 2013 (the "Petrov Affidavit"), the important points of which are summarized below.

[9] Jaguar is a corporation existing under the *Business Corporations Act,* R.S.O. 1990 c. B.16, with a registered office in Toronto, Ontario. Jaguar has assets in Canada.

[10] Jaguar is the public parent corporation of other corporations in the Jaguar Group that carry on active gold mining and exploration hi Brazil, employing in excess of 1,000 people. Jaguar itself does not carry on active gold mining operations.

[11] Jaguar has three wholly-owned Brazilian operating subsidiaries: MCT Mineraca'o Ltda. ("MCT"), Mineracao Serras do Oeste Ltda. ("MSOL") and Mineracao Turmalina Ltda. ("MTL") (and, together with MCT and MSOL, the "Subsidiaries"), all incorporated in Brazil.

[12] The Subsidiaries' assets include properties in the development stage and in the production stage.

[13] Jaguar has been the main corporate vehicle through which financing has been raised for the operations of the Jaguar Group. The Subsidiaries have guaranteed repayment of certain funds borrowed by Jaguar.

[14] Jaguar has raised debt financing by (a) issuing notes, and (b) borrowing from Renvest Mercantile Bank Corp. Inc., through its global resource fund ("Renvest").

[15] In aggregate, Jaguar has issued a principal amount of $268 5 million of Notes through two transactions, known as the "2014 Notes" and the "2016 Notes".

[16] Interest is paid semi-annually on the 2014 Notes and the 2016 Notes. Jaguar has not paid the last interest payment due on November 1, 2013. Under the 2014 Notes, the grace period has lapsed and an event of default has occurred.

[17] Jaguar is also the borrower under a fully drawn $30 million secured facility (the "Renvest Facility") with Renvest. The obligations under the Renvest Facility are secured by a general security agreement from Jaguar as well as guarantees and collateral security granted by each of the Subsidiaries.

[18] Jaguar has identified another potential liability. Mr. Daniel Titcomb, former chief executive officer of Jaguar, and certain other associated parties, have instituted a legal proceeding against Jaguar and certain of its current and former directors that is currently proceeding in the United States Federal Court. Counsel to Jaguar submits that this lawsuit alleges certain employment-related claims and other claims in respect of equity interests in Jaguar that are held by Mr. Titcomb and others. Counsel to Jaguar advises that Jaguar and its board of directors believe this lawsuit to be without merit.

[19] Counsel also advises that, aside from the lawsuit and professional service fees incurred by Jaguar, the unsecured liabilities of Jaguar are not material.

[20] The Jaguar Group's mines are not low-cost gold producers and the recent decline in the price of gold has negatively impacted the Jaguar Group.

[21] Based on current world prices and Jaguar Group's current level of expenditures, the Jaguar Group is expected to cease to have sufficient cash resources to continue operations early in the first quarter of 2014.

[22] Counsel also submits that, as a result of Jaguar's event of default under the 2014 Notes, certain remedies have become available, including the possible acceleration of the principal amount and accrued and unpaid interest on the 2014 Notes. As of November 13, 2013, that principal and accrued interest totalled approximately $169.3 million

[23] Jaguar's unaudited consolidated financial statements for the nine months ending September 30, 2013 show that Jaguar had an accumulated deficit of over $317 million and a net loss of over $82 million for the nine months ending September 30, 2013. Jaguar's current liabilities (at book value) exceed Jaguar's current assets (at book value) by approximately $40 million.

[24] I accept that Jaguar faces a liquidity crisis and is insolvent.

[25] Jaguar has been involved in a strategic review over the past two years. Counsel submits that the efforts of Jaguar and its advisors have shown that a comprehensive restructuring plan involving a debt-to-equity exchange and an investment of new money is the best available alternative to address Jaguar's financial issues.

[26] Counsel to Jaguar advises that the board of directors of Jaguar has determined that the Recapitalization is the best available option to Jaguar and, further, that the plan cannot be implemented outside of a CCAA proceeding. Counsel emphasizes that without the protection of the CCAA, Jaguar is exposed to the immediate risk that enforcement steps may be taken under a variety of debt instruments. Further, Jaguar is not in a position to satisfy obligations that may result from such enforcement steps.

[27] Jaguar requests a stay of proceedings in favour of non-applicant Subsidiaries contending that, because of Jaguar's dependence upon its Subsidiaries for their value generating capacity, the commencement of any proceedings or the exercise of rights or remedies against these Subsidiaries would be detrimental to Jaguar's restructuring efforts and would undermine a process that would otherwise benefit Jaguar Group's stakeholders as a whole.

[28] Jaguar also seeks a charge on its current and future assets (the "Property") in the maximum amount of $5 million (a $500,000 first-ranking charge (the "Primary Administration Charge") and a $4.5 million fourth-ranking charge (the "Subordinated Administration Charge") (together, the "Administration Charge")). The purpose of the charge is to secure the fees and disbursements incurred in connection with services rendered both before and after the commencement of the CCAA proceedings by various professionals, as well as Canaccord Genuity and Houlihan Lokey, as financial advisors to the Ad Hoc Committee (collectively, the "Financial Advisors").

[29] Counsel advises that the Financial Advisors' monthly work fees (but not their success fees) will be secured by the Primary Administration Charge, while the Financial Advisors' success fees will be secured solely by the Subordinated Administration Charge.

[30] Counsel further advises that the Proposed Initial Order contemplates the establishment of a charge on Jaguar's Property in the amount of $150,000 (the "Director's Charge") to protect the directors and officers. Counsel further advises that the benefit of the Director's Charge will only be available to the extent that a liability is not covered by existing directors and officers insurance. The directors and officers have indicated that, due to the potential for personal liability, they may not continue their service in this restructuring unless the Initial Order grants the Director's Charge.

[31] Counsel to Jaguar further advises that the proposed monitor is of the view that the Director's Charge and the Administration Charge are reasonable in these circumstances.

[32] Jaguar is unaware of any secured creditors, other than those who have received notice of the application, who are likely to be affected by the court-ordered charges.

[33] In addition to the Initial Order, Jaguar also seeks a Claims Procedure Order and a Meeting Order, submitting that it must complete the Recapitalization on an expedited timeline.

[34] Each of the Claims Procedure Order and Meeting Order include a comeback provision.

[35] Having reviewed the record and upon hearing submissions, I am satisfied the Applicant is a company to which the CCAA applies. It is insolvent and faces a looming liquidity crisis. The Applicant is subject to claims in excess of $5 million and has assets in Canada. I am also satisfied that the application is properly before me as the Applicant's registered office and certain of its assets are situated in Toronto, Ontario.

[36] I am also satisfied that the Applicant has complied with the obligations of s. 10(2) of the CCAA.

[37] I am also satisfied that an extension of the stay of proceedings to the Subsidiaries of Jaguar is appropriate in the circumstances. Further, I am also satisfied that it is reasonable and appropriate to grant the Administration Charge and the Director's Charge over the Property of the Applicant. In these circumstances, I am also prepared to approve the Engagement Letters and to seal the terms of the Engagement Letters. In deciding on the sealing provision, I have taken into account that the Engagement Letters contain sensitive commercial information, the disclosure of which could be harmful to the parties at issue. However, as I indicated at the hearing, this issue should be revisited at the comeback hearing.

[38] I am also satisfied that Jaguar should be authorized to comply with the pre-filing obligations to the extent provided in the Initial Order.

[39] In arriving at the foregoing conclusions, I reviewed the argument submitted by counsel to Jaguar that the stay of proceedings against non-applicants is appropriate. The Jaguar Group operates in a fully integrated manner and depends upon its Subsidiaries for their value generating capacity. Absent a stay of proceedings not only in favour of Jaguar but also in favour of the Subsidiaries, various creditors would be in a position to take enforcement steps which could conceivably lead to a failed restructuring, which would not be in the best interests of Jaguar's stakeholders.

[40] The court has jurisdiction to extend the stay in favour of Jaguar's Subsidiaries. See *Lehndorff General Partners Limited (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Ccdpine Canada Energy Limited (Re),* 2006 ABQB 153, 19 C.B.R. (5th) 187; *Skylink Aviation Inc. (Re),* 2013 ONSC 1500, 3 C.B.R. (6th) 150.

[41] The authority to grant the court-ordered Administration Charge and Director's Charge is contained hi ss. 11.51 and 11.52 of the CCAA.

[42] In granting the Administration Charge, I am satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate; and

(iii) the charges should extend to all of the proposed beneficiaries.

[43] In considering both the amount of the Administration Charge and who should be entitled to its benefit, the following factors can also be considered:

(a) the size and complexity of the business being restructured; and

(b) whether there is an unwarranted duplication of roles.

See *Canwest Publishing Inc. (Re),* 2010 ONSC 222, 63 C.B.R. (5th) 115.

[44] In this case, the proposed restructuring involves the proposed beneficiaries of the charge. I accept that many have played a significant role in the negotiation of the Recapitalization to date and will continue to play a role in the implementation of the Recapitalization. I am satisfied that there is no unwarranted duplication of roles among those who benefit from the proposed Administration Charge.

[45] With respect to the Director's Charge, the court must be satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate;

(iii) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and

(iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

[46] A review of the evidence satisfies me that it is appropriate to grant the Director's Charge as requested.

[47] Jaguar requested that the Initial Order authorize it to perform certain pre-filing obligations in respect of professional service providers and third parties who provide services in respect of Jaguar's public listing agreement. In the circumstances, I fmd it to be reasonable that Jaguar be authorized to perform these pre-filing obligations.

[48] In view of Jaguar's desire to move quickly to implement the Recapitalization, I have also been persuaded that it is both necessary and appropriate to grant the Claims Procedure Order and the Meeting Order at this time. These are procedural steps in the CCAA process and do not require any assessment by the court as to the fairness and reasonableness of the Plan at this stage.

[49] Counsel to Jaguar submits that Jaguar's approach to classification of the affected unsecured creditors is appropriate in these circumstances, citing a commonality of interest. Counsel also references s. 22(2) of the CCAA. For the purposes of today's motion, I am prepared to accept this argument. However, this is an issue that can, if raised, be reviewed at the comeback hearing.

[50] In the result, an Initial Order is granted together with a Meeting Order and Claims Procedure Order. All orders have been signed in the form presented.

MORAWETZ R.S.J.

Date: January 16, 2014