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** **(Application of Wilmington Trust, National Association for Payment of Fees)**
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. OVERVIEW

1. Dominion (the CCAA Applicants) submits this bench brief in response to the application of Wilmington Trust, National Association, in its capacity as "**Trustee**" (among other roles) under the trust indenture pursuant to which the Notes held by the Second Lien Lenders (the "**Noteholders**") are issued (the "**Trust Indenture**") for payment of the post-filing fees and expenses of the Trustee and its United States and Canadian counsel, Dentons US LLP and Dentons Canada LLP.

2. Issues and legal authorities relevant to the Trustee's application were previously considered by this Court in the context of an application by the ad hoc group of Noteholders (the "**AHG**") for payment of their fees filed on May 6, 2020 and heard on May 15, 2020.[1]

3. This Court dismissed the AHG Application, with leave to the AHG to re-apply, on the basis that it was not convinced (at that stage) that the AHG had met the "necessity" test for such relief as provided by s. 11.52(1)(c) of the CCAA.[2]

4. The Trustee's current application, which was initially filed on May 13, 2020 but adjourned and not heard on May 15, 2020,[3] suffers from the same flaws as the AHG Application and should be dismissed at this stage on the same basis.

5. Specifically, the Trustee's application:

(a) does not directly engage with the statutory "necessity" test for the relief it seeks;

(b) provides no evidence that the relief it seeks is necessary for the effective participation of the Trustee in these proceedings as required by section 11.52(1)(c) of the CCAA; and

[1] Application (Direction for Payment of Fees), filed May 8, 2020; Brief of Law and Argument (Payment of Ad Hoc Bondholders' Fees), filed May 7, 2020.

[2] Transcript of Proceedings, May 15, 2020, Court's Decision, pages 59 – 60, Tab 14.

[3] Trustee's Application (Direction for Payment of Noteholder Trustee's Fees), filed May 13, 2020; Affidavit of Mark Freake, filed May 13, 2020; Trustee's Bench Brief (Application for Payment of Noteholder Trustee's Fees), filed May 14, 2020 ("**Trustee Bench Brief**").

(c) does not cite any case authority in which the relief it seeks from this Court has been granted in analogous circumstances.

6. The failure of the Trustee to engage directly with the necessity test prescribed by section 11.52(1)(c) of the CCAA and the absence of any evidence and case authority to support the Trustee's position demonstrates that the Trustee's application proceeds on a misconceived basis.

7. The Trustee is a sophisticated party, with significant resources and financial wherewithal, internal expertise, experienced professional advisors, and extensive experience acting in high profile Canadian CCAA and US Chapter 11 restructuring proceedings.[4] In other words, the Trustee is a sophisticated insolvency litigant that (in its own words) "has the institutional and operational capacity required to effectively discharge the Trustee's contractual, statutory, fiduciary, and other common law duties to all Noteholders."[5] To order that an insolvent CCAA debtor be forced to fund the fees of the Trustee in these proceedings would violate the intention and express wording of the CCAA. It would also set a dangerous precedent for future CCAA proceedings.

8. It is respectfully submitted that the Trustee has failed to meet its burden of establishing that the relief it seeks is necessary for the Trustee's effective participation in these proceedings and should be dismissed on this basis.

II. LAW & ARGUMENT

A. Summary of Trustee's Position

9. The Trustee makes three arguments in support of its position that these CCAA Applicants should be required by this Court to pay the fees of the Trustee and its US and Canadian counsel:

(a) the CCAA "permits" the relief sought by the Trustee;[6]

[4] Trustee Bench Brief, paras. 41 – 42.
[5] Trustee Bench Brief, para. 34.
[6] Trustee Bench Brief, paras. 25 – 27.

(b) the Trust Indenture and Intercreditor Agreement "permit" the relief sought by the Trustee;[7] and

(c) the application "by analogy" of the US doctrine of adequate protection supports the relief sought by the Trustee.[8]

10. For the reasons set out below, none of these arguments provides a basis for granting an order under s. 11.52(1)(c) of the CCAA for payment of the Trustee's legal and other fees in the circumstances of this case.

B. The Relief Sought by the Trustee is Not "Necessary"

i. The Trustee Does Not Meet the Statutory Test

11. The Trustee's application notes and relies upon s. 11.52(1)(c) of the CCAA. The specific language of that section is important:

> 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
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> (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;
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> (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. [Emphasis added]

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

[7] Trustee Bench Brief, paras. 22 – 24.

[8] Trustee Bench Brief, paras. 35 – 40.

13. Subsection (c) is different. It applies to advisors engaged by stakeholders other than the company and adopts a different test in that context.[9]

14. 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.[10] 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 for interested parties such as the Trustee to establish that the payment of their fees is **necessary for their effective participation** in CCAA proceedings.

15. 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 and/or the payment of their professional fees in order to be able to effectively 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. In other words, the payment of the fees of vulnerable stakeholders may be necessary to ensure their ability to effectively participate in CCAA proceedings.

16. The relief sought by the Trustee does not fall within the text or spirit of section 11.52(1)(c) of the CCAA. The only hint that the Trustee requires funding to participate in these proceedings is its bald statement that the "Trustee does not have access to independent funding to fund its participation in these CCAA proceedings."[11] There is no evidence to support this assertion.

17. The absence of any evidence from the Trustee on this application is not a procedural irregularity. It is the result of the implausibility of the Trustee's assertion that it lacks the financial wherewithal to fund its participation in these CCAA proceedings. The Trustee, which voluntarily accepted its mandate on behalf of the Noteholders, is "one of the most financially sound and

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[9] *Re Homburg Invest Inc.*, 2014 QCCS 980 at para. 86 [Tab 1].

[10] The rationale and test for the payment of fees is the same as the underpinning of section 11.52(1)(c) which speaks of a charge. As noted by the court in *Homburg* "[i]f the Court has the power to grant a charge to secure payment by the Debtor, surely the general jurisdiction under Section 11 allows for an order of payment of such amounts. This is *a fortiori* when the payments to be made will be advances subject to reimbursement." See *Homburg, infra* note 14, para. 23.

[11] Trustee Bench Brief, para. 21.

successful companies in the U.S. financial services industry." It has, among other things, (a) US $124.6 billion in assets; (b) US $103 billion in assets under management; (c) US $15.8 billion in shareholders' equity; (d) US $94.1 billion in loans and leases; (e) US $100.2 billion in deposits; and (f) been consistently profitable for the past 175 consecutive quarters.[12]

18. There is no doubt the Trustee is a well-funded and sophisticated institution. It has effectively participated in high-profile CCAA and Chapter 11 restructuring proceedings, has already retained experienced insolvency counsel in both Canada and the United States, and has actively participated in all aspects of these CCAA proceedings. An order of this Court prioritizing the interests of the Trustee over those of other creditors of the Applicants who, while lacking the resources of the Trustee, are funding their own participation in these proceedings is not "necessary" to secure the Trustee's participation.

19. The Trustee has not, and cannot, meet the statutory test prescribed by the CCAA under section 11.52(1)(c).

20. The Monitor remains of the view that there is currently insufficient justification to support the relief sought by the Trustee and, in particular, that it does not appear that payment by the Applicants of the Trustee's costs is necessary for its effective participation in these proceedings.[13]

ii. The Caselaw Does Not Support the Trustee's Arguments

21. The Trustee cites nine (9) cases in support of its position that it should be granted relief under section 11.52(1)(c). A close reading of these cases shows that they do not support the Trustee's position.

(a) *Homburg Invest Inc.*, Montreal (No. 500-11-041305-117), QCSC (17 February 2012)[14]

22. This case does not support the Trustee's position for, among others, the following reasons.

23. The three indentures at issue in *Homburg* were with respect to 9,500 bondholders who were mainly individuals (as opposed to corporations), resident in Holland, with each bond being in "a relatively small amount" (the average being 31,999 Euros).[15] In these circumstances, the

[12] Affidavit of Debra Wallace, sworn June 18, 2020, Exhibit "A".
[13] Fifth Report of the Monitor, para. 48.
[14] *Homburg Invest Inc.*, Montreal (No. 500-11-041305-117), QCSC (17 February 2012) [*Homburg*], Tab 2.
[15] *Ibid.*, para. 16.

court held that there was "a combination of geographic, linguistic and financial barriers impeding the bondholders from proper representation by the appropriate professionals in this CCAA file."[16] The court further noted that "it is impractical to canvass 9,500 members to contribute to a fund for the payment of the professional fees."[17]

24. It is evident that in *Homburg* the statutory necessity test under s. 11.52(1)(c) was considered and established on the evidentiary record before the court.

25. In contrast, in the present case the Trustee has not provided any evidence regarding the necessity of the relief it seeks. To the contrary, the Trustee's position on this application is that it "has the institutional and operational capacity required to effectively discharge the Trustee's contractual, statutory, fiduciary and other common law duties to all Noteholders."[18] There is no evidence that there are any "geographic, linguistic and financial barriers" impeding the Trustee from discharging the duties it agreed to exercise on behalf of the Noteholders in this case (as it regularly does on behalf of other noteholders in other restructuring proceedings). Nor is there any evidence that it would be impractical for the Trustee to canvass the Noteholders to contribute to a fund for the payment of the Trustee's professional fees or that the Trustee has made efforts to do so. It is also notable that the three members of the AHG who collectively hold a majority of all of the Notes are being effectively represented by their professional advisors in these proceedings and that they are in close contact with other substantial Noteholders.[19]

26. The authorities cited by the court in this *Homburg* decision also illustrate the types of cases that are likely to meet the section 11.52(1)(c) necessity threshold, none of which are analogous to the Trustee's position:[20]

> [25] […] In *Nortel*, the Court ordered the CCAA Debtor to pay the fees of the lawyer of three thousand five hundred employees. In the *ABCP Commercial Paper* case, the CCAA Debtor was ordered to pay the fees of counsel to retail purchasers of asset-backed commercial paper. Equally, in *Edgeworth*, the Debtor was ordered to pay counsel representing four thousand Asian investors.
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> [26] The undersigned is aware of the decision of the Hon. Mr. Justice Clement Gascon, j.s.c. in the matter of *Mecachrome* where he refused to allow security for the payment of the legal fees of the board of directors, the banking syndicate and

[16] *Ibid*., para. 18.

[17] *Ibid*., para. 24.

[18] Trustee's Bench Brief, para. 34.

[19] Affidavit #2 of Eric Hoff, sworn June 17, 2020, para. 5.

[20] *Homburg*, Tab 2, paras. 25 – 26.

> certain other groups of creditors. Mr. Justice Gascon felt that no adequate explanation had been given to justify such treatment and most significantly nothing was demonstrated to him that would indicate that the participation of these groups in the CCAA process would indicate that the participation of these groups in the CCAA process would be jeopardized by the failure to grant them the benefit of a charge for the payment of legal fees. In the present case, it has been demonstrated to the undersigned that because of the large number of relatively small denomination of bonds held by foreign individuals, the advances for fees of professionals appointed to represent such bondholders is essential to their effective participation in the present CCAA process. [Emphasis added. Notes omitted.]

27. Also of note is the court's statement in *Homburg* that "[if] the Debtor was put in the position to borrow in order to advance fees to the bondholders, the Court would have been reticent to grant the Motion" before it.[21] In other words, even though the applicants before it satisfied the necessity threshold under section 11.52(1)(c), the court in *Homburg* would have been reticent to grant an order in the absence of evidence that "there is presently or will be shortly, cash available to pay professional fees".[22]

28. In the present case, the CCAA Applicants are applying for approval of an interim facility to fund their business operations and the costs of these CCAA proceedings. The Trustee has also not provided any estimate of the fees it claims, and it is therefore impossible to determine the impact of the relief sought by the Trustee on the Applicants' current cashflow projections.

(b) *Lightstream Resources Ltd*., Calgary 1601-12571, ABQB (26 September 2016)[23]

29. This was a case where the CCAA debtors applied (in the context of an application for an initial order) for the fees of counsel to the debtor's first lien lenders and counsel to an ad hoc committee of certain holders of second lien secured notes to have the benefit of the administration charge.[24] In that case, the form of order sought by the CCAA debtor expressly provided, among other things, that the first lien lenders were to be treated as unaffected with respect to their rights under a credit agreement, forbearance agreement, and other agreements with the CCAA

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[21] *Ibid*, para. 15.

[22] *Ibid*.

[23] *Lightstream Resources Ltd*., Calgary 1601-12571, ABQB (2016 September 2016), Tab 3.

[24] *Ibid*., page 2.

debtors.[25] The ad hoc committee and the CCAA debtors were also party to a restructuring support agreement. [26] This context has no application to the present case.

(c) *Jaguar Mining Inc*., Toronto, CV-13-1038300CL, ONSC (23 December 2013)[27]

30. This was again a case where the CCAA debtors applied (in the context of an application for an initial order) for an order that the fees of domestic and foreign counsel to an ad hoc committee of holders of secured notes be paid.[28] The CCAA debtor's restructuring plan was supported by beneficial holders of approximately 93% of the outstanding principal value of the notes. Holders of approximately 96% of the outstanding obligations under the "2014 Notes" and 89% of the outstanding obligations under the "2016 Notes" had executed a support agreement with the CCAA debtor and its subsidiaries with respect to the CCAA debtors' proposed plan.[29] This context again has no application to the present case.

(d) *Essar Steel Algoma Inc*. Toronto, CV-15-000011169CL (ONSC) (25 February 2016)[30]

31. This is 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 not applicable to the issue before this Court.

32. The order is *Essar Algoma* is relevant in one respect only. It demonstrates that the issue of the payment of the Trustee's fees under the provision of the Trust Indenture referenced in the Trustee's Bench Brief is a matter to be dealt with in the context of any distribution. In other words, if a distribution is to be made pursuant to the Trust Indenture, on the Trustee's reading of the Trust Indenture any money properly collected will be paid first to the Trustee (subject to the Intercreditor Agreement) on account of "amounts due under Section 7.6 [of the Trust Indenture], including payment of all compensation, expenses and liabilities incurred, and all advances made, by the Trustee […]".[31]

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[25] *Ibid*., para. 4

[26] *Ibid*., para. 12.

[27] *Jaguar Mining Inc*., Toronto, CV-13-1038300CL, ONSC (23 December 2013), Tab 4.

[28] *Ibid*., page 1.

[29] Affidavit of David M. Petroff, sworn December 23, 2013, paras. 6 and 95, Tab 5.

[30] *Essar Steel Algoma Inc*. Toronto, CV-15-000011169CL, ONSC (25 February 2016) [*Essar Steel*], Tab 6.

[31] Trustee Bench Brief, para. 22(b).

(e) *Re Nortel Networks Corp.*, (2009) 53 C.B.R. (5th) 196 (Ont. S.C.J.)[32]

33. This case addressed five competing motions in which various parties sought to be appointed as representative counsel for various factions of Nortel's current and former employees. At the CCAA filing date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pensions and/or benefits from retirement plans sponsored by Nortel.[33] The representative counsel which was ultimately successful on its motion sought "to represent all former employees, including pensioners, of the [CCAA] Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the [CCAA] Applicants."[34]

34. Nortel consented to the appointment of the representative counsel that was ultimately successful on its motion. The monitor supported Nortel's recommendation regarding the appointment of such counsel. No party opposed the appointment of representative counsel.[35]

35. In appointing representative counsel in the circumstances, the court stated that it agreed with these general submissions made by the proposed representative counsel:[36]

> […] it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

36. None of the factors that supported the motion of the proposed representative counsel in *Nortel* are applicable to the present case. In the present case, the Trustee has already been actively engaged in these CCAA proceedings (i.e., a representative counsel engagement is not sought). The Trustee has also admitted that it has the institutional and operational capacity

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[32] *Re Nortel Networks Corp*., (2009) 53 C.B.R. (5th) 196 (Ont. S.C.J) [*Nortel*],Tab 7.

[33] *Ibid*., para. 5.

[34] *Ibid*., para. 3(i).

[35] *Ibid*., para. 15.

[36] *Ibid*., paras. 13 – 14.

required to effectively discharge the Trustee's contractual, statutory, fiduciary and other common law duties to the Noteholders. There is no evidence that the Trustee's ability to effectively discharge its duties would be compromised if the relief sought by the Trustee is not granted.

(f) *Re Target Canada Co*, 2015 ONSC 303[37]

37. The facts of *Target* are like those of *Nortel.* At the time of its CCAA filing, Target employed approximately 17,600 individuals.[38] Target requested, among other protections for their employees, the appointment of representative counsel to "ensure that employee interests are adequately protected"[39] and consented to the payment of the representative counsel's fees. In granting this relief, the court noted the factors taken into account by the court in *Nortel*, stating that in granting the order it had taken into account (a) the vulnerability and resources of the employee group; (b) the social benefit to be derived from the representation of the employee group; (c) the avoidance of the multiplicity of legal retainers; and (d) the balance of convenience and whether it is fair and just to the creditors of the estate.[40]

38. None of the factors that supported the appointment of representative counsel in *Target* are applicable to the present case. As noted above, the Trustee is not seeking the appointment of representative counsel. Rather, the Trustee acknowledges that it is contractually mandated to exercise its functions on behalf of the Noteholders and that it has the institutional and operational capacity required to do so effectively.

(g) *Re Metcalfe & Mansfield*, Toronto Court File No. CV-08-CL-7440[41]

39. The order cited by the Trustee was granted upon the application of an ad hoc committee representing 1,800 retail investors holding non-bank sponsored asset-backed commercial paper. At the time of the application for representation there had been no formal representation for this investment group. The relief sought by the ad hoc committee was supported by three affidavits.

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[37] *Re Target Canada Co*., 2015 ONSC 303 [*Target*], Tab 8.
[38] *Ibid*., para. 51.
[39] *Ibid*., para. 60.
[40] *Ibid*. para. 61.
[41] *Re Metcalfe & Mansfield*, Toronto Court File No. CV-08-CL-7440, ONSC (15 April 2008), Tab 9.

There is no indication that the relief sought was opposed or spoken to by any party other than counsel for the ad hoc committee.[42]

(h) *Re League Assets Corp*, 2013 BCSC 2043[43]

40. In this case the monitor applied for the appointment of representative counsel for a group of approximately 3,200 investors.[44] In requesting this relief the monitor reported to the court that, among other things, "it is unlikely that many of the individual investors will either have the financial wherewithal or means to engage legal counsel to provide for their meaningful participation in these proceedings."[45] In granting the requested relief the court noted that the monitor had fielded over 100 enquiries from various investors, that 460 investors participated in a call with the monitor, and that the "Monitor is not in a position to assist any further in alerting the investors to these proceedings, organizing the investor group and advising them on issues that may affect them either as a group or individually."[46] The appointment of representative counsel appears not to have been opposed by any party.[47]

41. The court in *League* also noted that the cost of the appointment of representative counsel was "modest" (with authorized fees of $125,000) and that it was anticipated that the representative counsel "will make efforts to determine whether it is possible to raise retainer funds within the investor group itself for any representation beyond the comeback hearing, rather than securing further amounts from the League Group."[48]

(i) *Canwest Publishing Inc. (Re)*, 2010 ONSC 222[49]

42. This case cited by the Trustee is not a case decided under s.11.52(1)(c) of the CCAA.

43. 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

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[42] Notice of Motion in *Re Metcalfe & Mansfield*, Toronto Court File No. CV-08-CL-7440, ONSC (11 April 2008), pages 9-10, Tab 10

[43] *Re League Assets Corp*, 2013 BCSC 2043 [*League*], Tab 11.

[44] *Ibid*., para. 64.

[45] *Ibid*., para. 68.

[46] *Ibid*., para. 66.

[47] *Ibid*., para. 67.

[48] *Ibid*., paras. 80-81.

[49] *Re Canwest Publishing Inc.*, 2010 ONSC 222, Tab 12.

advisor.[50] 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.

C. The Trustee's Alleged Contractual Entitlement to Payment of Fees is a Red Herring

44. The Trustee's reliance on contractual clauses with respect to the payment of its and its counsel's fees and expenses is a red herring. The Trustee's contractual entitlements (if any) are stayed by this Court's order granted under the CCAA.

45. The impact of a CCAA stay of proceedings on incidental claims for payment of lenders' fees was addressed in *Re White Birch Paper Holding Co*.,[51] as follows:

> Dune [i.e., the CCAA debtor's secured lenders under a Second Amended and Restated Second Term Loan Credit Agreement] also seeks the payment of its professional fees, costs and expenses during the Stay period.
>
> During the hearing of March 18, 2010, I questioned the legal basis upon which Dune relies to seek these reliefs. In my opinion and with respect for the contrary view, I must say that I found none, nor was I presented with one.
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> Dune argues that theses fees, costs and expenses are due under the terms and conditions of the Second Lien Term Loan.
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> That may be so but inasmuch as the Stay Order of February 24, 2010, suspends the Debtors' obligation to pay principal and interest under the said Loan Agreement, it follows that incidental additional costs due by the Debtors under the same Agreement are also suspended.
>
> Otherwise, there would be little or no interest in seeking and obtaining protection under the CCAA.

46. In the present case, the Trustee has similarly not established a valid legal basis for the payment of amounts that are expressly stayed by operation of the CCAA stay of proceedings. The Trustee's position in this regard is no different than that of the Applicants' other creditors whose contractual rights to receive payments have been stayed. The Trustee's claims for fees simply represent "indebtedness" of the Applicants like the claims of all other creditors.

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[50] *Ibid*., para. 52.

[51] *Re White Birch Paper Holding Co*., 2010 QCCS 1176, Tab 13, paras. 42 – 45.

47. The Trustee's arguments regarding the Intercreditor Agreement were addressed in the Bench Brief of the First Lien Lenders dated May 13, 2020 and will not be repeated here.

D. The US Doctrine of "Adequate Protection" is Not Applicable

48. The Trustee's arguments with respect to the US doctrine of adequate protection and US case law are irrelevant to the issues before this Court.

49. The Trustee has not cited a single case where a Canadian court has applied the US concept of adequate protection as proposed by the Trustee or at all. Nor is there any expert evidence before this Court on the state of US jurisprudence on this issue.

50. Parties have in prior cases unsuccessfully attempted to obtain relief like that sought by the Trustee based on US concepts other than that of "adequate protection". For example, in *Homburg*, an indenture trustee unsuccessfully attempted to argue that it was entitled to full payment of its expenses before any distribution to any stakeholder based on the US concept of "substantial contribution."[52] In rejecting the indenture trustee's motion, the Court found that there was no legal basis, nor any reason to endorse and import into the CCAA, the foreign concept of "substantial contribution" when section 11.52(1)(c) provides for the relief being sought.[53]

51. In any event, as with the concept of "substantial contribution", which the court in *Homburg* found no reason to endorse, there is no principled legal basis upon which the concept of "adequate protection" provided for under the US *Bankruptcy Code* could be imported into the rules governing restructurings under the CCAA. The CCAA has its own mechanisms to deal with fees and expenses relating to a restructuring and does not need to import foreign concepts to apply them.

52. Indeed, the Trustee has applied for relief under section 11.52(1)(c) of the CCAA, which expressly contemplates the granting of the relief sought by the Trustee provided it is shown to be necessary in the circumstances. The Trustee's proposed reliance on the US concept of adequate protection to justify the relief it is not entitled to under section 11.52(1)(c) would not only disregard but in fact override the applicable provision of the CCAA.

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[52] *Homburg,* para. 49, Tab 1.

[53] *Ibid*., paras. 84 – 85.

E. Further Considerations

53. In their Bench Brief submitted in response to the AHG Application, the Applicants posed several questions which are equally applicable to the present application.

54. What is to distinguish the Trustee from other important stakeholders – most of which do not have its resources and financial wherewithal?

55. If the Trustee is paid its fees, then must all other "important" stakeholders or creditors who rank in priority to the Noteholders also have their fees and expenses paid? This would include the First Lien Lenders – would it also include DDMI?

56. What if the Noteholders are "out of the money" – if that is the case then should the Trustee's fees be paid? If they are, is that then reducing the recovery to those creditors who rank in priority to the Noteholders?

57. On the other hand, if the Noteholders are "in the money" or the "fulcrum creditor" – then why does the Trustee need to have its fees and expenses paid now? The Trustee clearly can, and has, retained professional advisors. If the Noteholders are in the money, the payment of the Trustee's fees is simply a matter to be addressed at the conclusion of these proceedings in the context of a distribution (as was done in the *Essar Steel* case cited above).

58. If the Trustee can rely on s. 11.52(1)(c) to force the Applicants (without their consent) to pay its fees and those of its US and Canadian counsel on the basis that the Noteholders 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 Trustee is clearly able to participate effectively in these proceedings. There is no reason to open the proverbial "floodgates" to such applications.

III. CONCLUSION

59. For the reasons set out above, the relief sought by the Trustee is not necessary for the fairness and integrity of the CCAA process – rather, it is contrary to it.

60. The Applicants respectfully submit that this Court should decline to grant the order sought by the Trustee.

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

BLAKE, CASSELS & GRAYDON LLP

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

LIST OF AUTHORITIES

TAB	Description
1	*Re Homburg Invest Inc.*, 2014 QCCS 980.
2	*Re Homburg Invest Inc*., Montreal (No. 500-11-041305-117), QCSC (17 February 2012).
3	*Re Lightstream Resources Ltd*., Calgary 1601-12571, ABQB (26 September 2016).
4	*Re Jaguar Mining Inc*., Toronto, CV-13-1038300CL, ONSC (23 December 2013).
5	Affidavit of David M. Petroff, sworn December 23, 2013 in *Jaguar Mining Inc*., Toronto, CV-13-1038300CL, ONSC.
6	*Re Essar Steel Algoma Inc*. Toronto, CV-15-000011169CL, ONSC (25 February 2016).
7	*Re Nortel Networks Corp*., (2009) 53 C.B.R. (5th) 196 (Ont. S.C.J.).
8	*Re Target Canada Co*., 2015 ONSC 303.
9	*Re Metcalfe & Mansfield*, Toronto Court File No. CV-08-CL-7440, ONSC (15 April 2008).
10	Notice of Motion in *Re Metcalfe & Mansfield*, Toronto Court File No. CV-08-CL-7440, ONSC (11 April 2008).
11	*Re League Assets Corp*, 2013 BCSC 2043.
12	*Re Canwest Publishing Inc.*, 2010 ONSC 222.
13	*Re White Birch Paper Holding Co*., 2010 QCCS 1176.

TAB 1

2014 QCCS 980
Cour supérieure du Québec

Homburg Invest Inc., Re

2014 CarswellQue 2155, 2014 QCCS 980, J.E. 2014-641, EYB 2014-234678

In the matter of the plan of compromise or arrangement of : Homburg Invest Inc. et als, Debtors, v. 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

Gouin J.C.S.

Heard: 5 february 2014 - 7 february 2014
Judgment: 17 march 2014
Docket: C.S. Qué. Montréal 500-11-041305-117

Counsel: *Me Guy Martel, Me Nathalie Nouvet*, for Petitioners
Me Mason Poplaw, Me Jocelyn T. Perreault, for Monitor
Me Sandra Abitan, Me Martin Desrosiers, for Debtors and Mises en cause

***Gouin J.C.S.*:**

1. CONTEXT AND STICHTING MOTIONS

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.

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**").

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] .

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:

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:

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)

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 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] .

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.

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. <u>Substantial contribution</u>:

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?

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. <u>Subsidiarily - Pre-filing contractual obligations</u>:

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. <u>In any event</u>:

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 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*.

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.

[. . .]

[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.

100 (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 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 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 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.

131 *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.

Footnotes

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

2 Exhibit R-2.

3 Exhibit R-1.

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.

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

11 Exhibit M-4.

12 Exhibit R-5, filed under confidential seal.

13 AHOA (Exhibit R-5), art. 2.1.

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).

17 Exhibit R-5.

18 Exhibit R-8.

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.

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

26 *Bankruptcy Code*, 11 USC § 503.

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.

28 2009 QCCS 1575.

29 Corporate Bonds Indenture (Exhibit R-1) and Mortgage Bonds Indenture (Exhibit R-2).

30 *Id.*

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

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

TAB 2

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
N°: 500-11-041305-117

DATE : February 17, 2012

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

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

HOMBURG INVEST INC.
HOMBURG SHARECO INC.
CHURCHILL ESTATES DEVELOPMENT LTD
INVERNESS ESTATES DEVELOPMENT LTD
CP DEVELOPMENT LTD

Debtors / Petitioners

And

HOMCO REALTY FUND (52) LIMITED PARTNERSHIP
HOMCO REALTY FUND (88) LIMITED PARTNERSHIP
HOMCO REALTY FUND (89) LIMITED PARTNERSHIP
HOMCO REALTY FUND (92) LIMITED PARTNERSHIP
HOMCO REALTY FUND (94) LIMITED PARTNERSHIP
HOMCO REALTY FUND (105) LIMITED PARTNERSHIP
HOMCO REALTY FUND (121) LIMITED PARTNERSHIP
HOMCO REALTY FUND (122) LIMITED PARTNERSHIP
HOMCO REALTY FUND (142) LIMITED PARTNERSHIP
HOMCO REALTY FUND (199) LIMITED PARTNERSHIP

Mis en cause

And

SAMSON BELAIR/DELOITTE & TOUCHE INC.

Monitor

And

STICHTING HOMBURG BONDS
STICHTING HOMBURG CAPITAL SECURITIES
Trustees

And

TABERNA EUROPE CDO I PLC
TABERNA EUROPE CDO II PLC
TABERNA PREFERRED FUNDIND VIII, LTD
TABERNA PREFERRED FUNDIND VI, LTD
rontesting Parties

REASONS FOR JUDGMENT

JS 1319

INTRODUCTION

[1] The amended motion of Stichting Homburg Bonds and Stichting Homburg Capital Securities (collectively « Stichting ») for the payment of fees of professional advisors was heard on February 13, 2012 at which time the Court indicated that the motion would be granted in part with an order and reasons to follow. These are the reasons for the order which issued on February 15, 2012 a copy of which is annexed hereto.

[2] On September 9, 2011, the Debtor filed and obtained an initial stay order (« Initial Order ») pursuant to sections 4, 5 and 11 of the Companies' Creditors Arrangement Act (« CCAA »)[1].

[3] The stay granted under the Initial Order has been extended several times and the most recent order of this Court extends the protection under the CCAA to March 16, 2012. The Honourable Mr. Justice Louis J. Gouin, j.s.c. is charged with the management of the case but due to a conflict of interest with the attorneys representing the Contesting Parties, the undersigned presided over the hearing of the motion referred to above.

[4] Stichting seeks an order of this Court providing for the advance by the Debtor of the reasonable fees of the trustees of Stichting as well as the attorneys and financial advisors engaged by them to represent Stichting in the matter of the present CCAA filing. The request is limited to fees incurred since December 3,

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

2011. The advances of these fees will be set-off against payments to be made to Stichting under an eventual plan of arrangement.

[5] One creditor or group of creditors, Taberna Europe CDO 1 PLC and related entities (« Contesting Parties ») contested the motion although one of the main thrusts of such contestation was settled by the parties before the hearing and reflected in the drafting of the proposed order, as will be set forth in more detail herein below.

[6] Both the Debtor and the Monitor consented to the motion.

[7] The matter was heard on the basis of the affidavit supporting the motion and the documentary evidence filed by Stichting. The representative of the Monitor, Mr. Pierre Laporte, C.A., testified briefly before the undersigned.

FACTS

[8] Petitioners are two entities created under the laws of the Netherlands who act as trustees under three trust indentures which govern the issuance of three series of bonds : (i) corporate bonds, (ii) mortgage bonds and, (iii) capital securities.

[9] The indentures constitute Stichting as the trustee thereunder as the duly authorized representatives of the holders of the debt or bonds with the power to declare default, claim payment and agree to extensions of periods of payment, amongst other things.

[10] Most significantly for present purposes, the trustees also have the right to engage advisors including lawyers and accountants.

[11] The trustees have engaged Canadian litigation and corporate counsel, Dutch attorneys and a Canadian financial advisor.

[12] The trust indentures provide that the trustees' remuneration and that of its professional advisers, including legal fees, are payable by the Debtors.

POSITION OF THE CONTESTING PARTY

[13] The crux of the contestation by the Contesting Parties is that the holders of the corporate securities have « equity claims » and as such rank subordinate

to all other creditors[2] such that it is extremely unlikely that they will receive the payment of any dividend on their claims. This is significant since the motion is predicated on seeking an advance for purposes of paying professional fees, which advance will ultimately be reimbursed from the proceeds of a distribution by the Debtor.

[14] The Contesting Parties also took the position before the undersigned that notwithstanding the wording of the trust indentures, as a matter of Quebec law, the payment of professional or at least legal fees could not form part of the claims of any of the bondholders in the CCAA proceedings. No claims process has as yet been put in place and in the opinion of this Court, it would be at best, premature to deal with this issue at the present time.

DISCUSSION

[15] The Monitor indicated and it is common ground that there is presently or will be shortly, cash available to pay professional fees. The Debtor has or will shortly receive substantial funds following the purchase of its holdings in the Canmarc REIT. In any event, with the consent of all parties the order issued reflects that fees can only be paid out of available cash. If the Debtor was put in the position to borrow in order to advance fees to the bondholders, the Court would have been reticent to grant the Motion.

[16] There are approximately 9500 bondholders under the three indentures. They are mainly individuals (as opposed to corporations), resident in Holland. Each of the bonds is in a relatively small amount. The largest is 2,340,000 Euros; the average is 31,999 Euros.

[17] Despite the small individual amounts of the bonds, in the aggregate, this group constitutes the largest single creditor body in the present CCAA filing and may even have sufficient claims in dollars to carry an eventual vote on an arrangement.

[18] In the circumstances described above there is a combination of geographic, linguistic and financial barriers impeding the bondholders from proper representation by the appropriate professionals in this CCAA file. Though nothing might stop individual bondholders from engaging their own counsel, this is clearly unrealistic for the most part, in the circumstances. Without funding this important group of creditors will be denied appropriate representation.

[19] Most significantly, the uncontradicted proof in the record before the undersigned is that there will in all probability be a significant distribution to the

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[2] ss. 19 and 2 CCAA and s. 140.1 Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

bondholders. The possible exception of course being the holders of the corporate securities who in the submission of the Contesting Parties hold equity claims which would be subordinated to all other claims.

[20] As stated above the request for the advance of fees is premised on a reimbursement. The hesitation of the Court and the preoccupation of the Contesting Parties was that in the event there is no distribution to the holders of the corporate securities then there would be no practical means to seek reimbursement of the advance made to them for fees. This concern has been addressed by the drafting of the order which provides that reimbursement of any fees advanced is to be made by way of set-off (or compensation) against the aggregate payment to the three classes of bondholders. Accordingly should the holders of corporate securities not receive a distribution their share of the advance for fees would be reimbursed to the Debtor by the holders of the other two classes of debt.

[21] The foregoing should not be misinterpreted. The Court makes no determination or finding at this time as to whether the rights under the corporate securities are equity claims. The Contesting Parties or any other party may seek to make such argument at the appropriate time.

[22] The advance of fees sought herein is not strictly provided on a literal reading of the CCAA. Section 11.52(1)(c) provides for the possibility of granting a security or charge over the assets of the Debtor to secure the payment of fees. The rationale is to allow the effective participation of a class of creditors that might otherwise be denied the possibility of representation when such class of creditors is a significant stakeholder[3],

[23] It appears to the Court that the rationale for the payment here is the same as the underpinning of Section 11.52(1)(c). If the Court has the power to grant a charge to secure payment by the Debtor, surely the general jurisdiction under Section 11 allows for an order of payment of such amounts. This is *a fortiori* when the payments to be made will be advances subject to reimbursement.

[24] As stated, the circumstances described above justify the making of such an advance. The group of creditors is significant, if not the most significant group of creditors. Because of the factors enumerated above the group requires professional representation and it is impractical to canvass 9,500 members to contribute to a fund for the payment of the professional fees.

[25] The jurisdiction to order the payment of fees in such circumstances has been recognized by the courts. In *Nortel*[4], the Court ordered the CCAA Debtor to pay the fees of the lawyer of three thousand five hundred employees. In the

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[3] Bill C-55 : Industry Canada, clause by clause briefing book.
[4] *Re Norte! Networks Corp.,* (2009) 53 C.B.R. (5th) 196 (Ont. S.C.J.).

ABCP Commercial Paper case[5], the CCAA Debtor was ordered to pay the fees of counsel to retail purchasers of asset-backed commercial paper. Equally, in *Edgeworth*[6], the Debtor was ordered to pay counsel representing four thousand Asian investors.

[26] The undersigned is aware of the decision of the Hon. Mr. Justice Clement Gascon, j.s.c. in the matter of *Mecachrome*[7] where he refused to allow security for the payment of the legal fees of the board of directors, the banking syndicate and certain other groups of creditors. Mr. Justice Gascon felt that no adequate explanation had been given to justify such treatment and most significantly nothing was demonstrated to him that would indicate that the participation of these groups in the CCAA process would be jeopardized by the failure to grant them the benefit of a charge for the payment of legal fees[5]. In the present case, it has been demonstrated to the undersigned that because of the large number of relatively small denomination of bonds held by foreign individuals, the advances for the fees of professionals appointed to represent such bondholders is essential to their effective participation in the present CCAA process.

CONCLUSION

[27] For all of the foregoing reasons the motion was granted and the attached order was issued.

[28] Costs were not sought and the nature of the contestation by way more of intervention does not merit the awarding of costs against the Contesting Parties.

MARK SCHRAGER, j.s.c.

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5 *Re Metcalfe & Mansfield,* n° 08-CL-7440, Order, Re Appointment of Representative Counsel in ABCP, (Ont. S.C.J.), 15 avril 2008, j. Campbell.

6 *Re Edgeworth,* n° CV-11-9409-00CL, Initial Order, (Ont. S.C.J.), 10 novembre 2011, j. Campbell.

Re Mecachrome International Inc., C.S. Montreal, n° 500-11-035041-082, 13 janvier 2009, j. Gascon.

8 *Re Mecachrome, id.,* par. 79 a 81.

Me Martin Desrosiers
Me Julien Morissette
Osier, Hoskin & Harcourt
Attorneys for the Debtors / Petitioners

Me Mason Poplaw
Me Jocelyn Perreault
McCarthy Tetrault
Attorneys for the Monitor

Me Guy P. Martel
Me Nathalie Nouvet
Stikeman Elliott
Attorneys for the Trustees

Me Sylvain Rigaud
Norton Rose
Attorneys for the Contesting parties

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-11-041305-117

DATE: February 15, 2012

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

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

HOMBURG INVEST INC.
HOMBURG SHARECO INC.
CHURCHILL ESTATES DEVELOPMENT LTD.
INVERNESS ESTATES DEVELOPMENT LTD.
CP DEVELOPMENT LTD.
Debtors

-and-

HOMCO REALTY FUND (52) LIMITED PARTNERSHIP
HOMCO REALTY FUND (88) LIMITED PARTNERSHIP
HOMCO REALTY FUND (89) LIMITED PARTNERSHIP
HOMCO REALTY FUND (92) LIMITED PARTNERSHIP
HOMCO REALTY FUND (94) LIMITED PARTNERSHIP
HOMCO REALTY FUND (105) LIMITED PARTNERSHIP
HOMCO REALTY FUND (121) LIMITED PARTNERSHIP
HOMCO REALTY FUND (122) LIMITED PARTNERSHIP
HOMCO REALTY FUND (142) LIMITED PARTNERSHIP
HOMCO REALTY FUND (199) LIMITED PARTNERSHIP
Mis-en-cause

-and-

SAMSON BELAIR/DELOITTE & TOUCHE INC.
Monitor

-and-

STICHTING HOMBURG BONDS
STICHTING HOMBURG CAPITAL SECURITIES
Trustees

ORDER ON THE TRUSTEES' AMENDED MOTION FOR THE PAYMENT OF FEES, DISBURSEMENTS AND EXPENSES

FURTHER to the court hearing held on February 13, 2012 and the representations of counsel to Stichting Homburg Bonds and Stichting Homburg Capital Securities (the **"Trustees")** as well as counsel to other interested parties;

CONSIDERING the Trustees'*Amended Motion for the Payment of Fees, Disbursements and Expenses of the Indenture Trustees and the Indenture Trustees' Advisors and Related Relief* (the **"Motion");**

CONSIDERING the Initial Order issued by the Court on September 9, 2011 (the **"Initial Order"),** as extended and amended by the First Extension Order issued on October 7, 2011 and the Second Extension Order issued on December 8, 2011;

CONSIDERING the:

a. Trust Indenture made as of May 31, 2006, between Homburg Invest Inc. **("HII")** and Stichting Homburg Bonds, as supplemented by several Supplemental Indentures (the **"Corporate Bonds Indenture R-1"),** pursuant to which four series of corporate bonds were issued (the **"Corporate Bonds");**

b. Trust Indenture made as of December 15, 2002, between Homburg ShareCo Inc. and Homburg Stichting Homburg Mortgage Bond, as supplemented by several Supplemental Indentures (the "**Mortgage Bonds Indenture R-2"),** pursuant to which four series of mortgage bonds were issued (the "**Mortgage Bonds");**

c. Trust Indenture made as of February 28, 2009, between HII and Stichting Homburg Capital Securities (the **"Capital Securities Indenture R-3"),** pursuant to which capital debt securities were issued (the **"Capital Securities");**

(the Corporate Bonds, Mortgage Bonds and the Capital Securities, collectively the **"Securities");**

CONSIDERING that the Trustees have retained the services of:

a. Mr. Henk Knuvers, Ms. Marian Hogeslag, Mr. Wouter de Jong, Mr. Hendrik Stadman Robaard and Mr. Karel de Vries, to act as directors of each Trustee;

b. Stikeman Elliott LLP **("Stikeman")** and Cox & Palmer **("C&P"),** as Canadian counsel, and Van Doorne N.V. **("Van Doorne"),** as Dutch counsel, in order to assist in connection with these CCAA proceedings and advise the Trustees as to their duties, rights and remedies, as well as, in the case of Stikeman, to represent the Trustees before this Court;

c. PricewaterhouseCoopers Inc. **("PwC"),** through Stikeman, to act as financial advisors in connection with these CCAA proceedings and assist the Trustees in reviewing financial data, evaluating available options and preparing for discussions and negotiations with the stakeholders involved in these proceedings;

(collectively, and together with any other director, legal, financial, or other advisors of the Trustees, the **"Trustees' Advisors");**

CONSIDERING the 5th Report to the Court submitted by Samson Belair/Deloitte & Touche Inc., in its capacity as Monitor; and

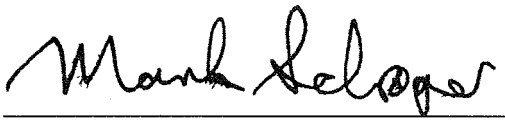
CONSIDERING the powers granted to this Court under the *Companies' Creditors Arrangement Act* and more specifically section 11 thereof.

FOR THESE REASONS, THE COURT:

[1] **GRANTS** the Trustees' Motion, in part;

[2] **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 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.

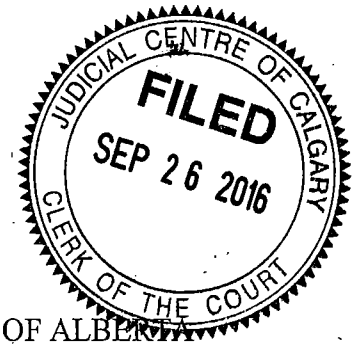
THE WHOLE WITHOUT COSTS.



MARK SCHRAGER, J.S.C.

TAB 3

Clerk's stamp:



COURT FILE NUMBER:	1601-12571
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

I hereby certify this to be a true copy of the original Order
Dated this 26 day of Sept, 2016
for Clerk of the Court

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD, LTS RESOURCES PARTNERSHIP, 1863360 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP

APPLICANTS:	LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD AND 1863360 ALBERTA LTD
PARTIES IN INTEREST:	LTS RESOURCES PARTNERSHIP AND BAKKEN RESOURCES PARTNERSHIP
DOCUMENT:	**CCAA INITIAL ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
3500 Bankers Hall East
855 – 2nd Street SW
Solicitor: Kelly Bourassa / Milly Chow
Telephone: 403-260-9697 / 416-863-2594
Facsimile: 403-260-9700
Email: kelly.bourassa@blakes.com / milly.chow@blakes.com
File Number: 89691/8

DATE ON WHICH ORDER WAS PRONOUNCED:	September 26, 2016
NAME OF JUDGE WHO MADE THIS ORDER:	Honourable Mr. Justice A.D. Macleod
LOCATION OF HEARING:	Calgary Courts Centre

UPON the application of Lightstream Resources Ltd. ("**LTS**"), 1863359 Alberta Ltd. and 1863360 Alberta Ltd. (collectively with LTS, the "**Applicants**"); **AND UPON** having read the Originating Application, the Affidavit of Peter D. Scott, sworn September 21, 2016, filed (the "**Scott Affidavit**"), the Supplemental Affidavit of Peter D. Scott, sworn September 23, 2016, filed and the Affidavits of Service of Serene Hawkins, sworn September 22, 2016, and September 26, 2016, each filed; **AND UPON** reading the consent of FTI Consulting Canada Inc. to act as monitor (the "**Monitor**"); **AND UPON** noting that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application; **AND UPON** hearing counsel for the Applicants, counsel for the agent (the "**Agent**") and certain other financial institutions, as lenders (together with the Agent, the "**First Lien Lenders**") under a third amended and restated credit agreement, as amended from time to time, dated as of May 29, 2015 (the "**Credit Agreement**"), counsel for an *ad hoc* committee of certain holders (the "***Ad Hoc* Committee**") of 9.875% second lien secured notes due June 15, 2019 pursuant to a note indenture dated July 2, 2015, counsel for certain holders (the "**Unsecured Noteholders**") of 8.625% senior unsecured notes due February 1, 2020 pursuant to a note indenture dated January 30, 2012, and counsel for other interested parties; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicants are companies to which the CCAA applies and, although not Applicants, LTS Resources Partnership and Bakken Resources Partnership (collectively, the "**CCAA Parties**") are necessary parties and shall receive the benefit of the relief granted in this Order.

PLAN OF ARRANGEMENT

3. The Applicants and the CCAA Parties shall have the authority to file and may, subject to further order of this Court, file with this Court a plan or plans of compromise or arrangement (hereinafter referred to as the "**Plan**").

4. The First Lien Lenders shall be treated as unaffected in any Plan filed by the Applicants and the CCAA Parties under the CCAA, or any proposal filed by the Applicants and the CCAA Parties under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), with respect to any obligations of the Applicants and the CCAA Parties under the Credit Agreement or the Loan Documents, including the Swap Documents (each as defined in the Credit Agreement). The Applicants and the CCAA Parties are hereby authorized and, to the extent within the control of the Applicants and the CCAA Parties, directed to fulfil their obligations under the Second Forbearance Agreement dated September 15, 2016, between the Applicants, the CCAA Parties, the Agent and the First Lien Lenders (the "**Forbearance Agreement**").

POSSESSION OF PROPERTY AND OPERATIONS

5. The Applicants and the CCAA Parties shall:

   (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property;

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order;

   (d) subject to the terms of the Forbearance Agreement, continue to have access to their cash accounts with The Toronto-Dominion Bank;

(e) be entitled to continue to utilize the corporate credit cards in place with HSBC Bank Canada (the "**Credit Cards**"). HSBC Bank Canada is hereby granted a charge (the "**Credit Card Charge**") on the Property to secure all obligations owed to it by the Applicants or the CCAA Parties relating to the Credit Cards, including without limitation principal interest and fees, to a maximum amount of $105,000. The Credit Card Charge shall have the priority set out in paragraphs 35 and 37 hereof;

(f) be entitled to continue to utilize the centralized Cash Management System currently in place as described at paragraph 39 of the Scott Affidavit, and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicant of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as defined herein) other than the Applicants and the CCAA Parties; and

(g) be authorized to make inter-company transfers and advances to pay costs, expenses and amounts otherwise authorized in these proceedings.

6. To the extent permitted by law, the Applicants and the CCAA Parties shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Applicants and the CCAA Parties in respect of these proceedings, at their standard rates and charges.

7. The engagement letter entered into between TD Securities Inc., ("**TD Securities**") and LTS dated May 26, 2016, the engagement letter entered into between Evercore Capital L.L.C.("**Evercore**") and LTS dated May 1, 2016, the engagement letter entered into between RBC Dominion Securities Inc. ("**RBC**") and LTS dated June 1, 2016, as amended on July 14, 2016, and the engagement letter entered into among BMO Nesbitt Burns Inc. ("**BMO**"), LTS, Goodmans LLP and the members of the *Ad Hoc* Committee and dated May 17, 2016 (the "**Financial Advisors' Engagement Letters**") attached as Exhibits "16", "17", "18" and "21" to the Scott Affidavit, are hereby approved and LTS is authorized and directed to continue the engagement of TD Securities, Evercore and RBC as Assistants thereunder and to comply with all of its obligations thereunder (TD Securities, Evercore, RBC and BMO in its capacity as financial advisor to the *Ad Hoc* Committee, are hereinafter collectively referred to as the "**Financial Advisors**"). The Financial Advisors are hereby granted a single charge in the maximum aggregate amount of $19,410,000 (collectively, the "**Financial Advisors' Charge**") on the Property to secure all obligations under the Financial Advisors' Engagement Letters. The Financial Advisors' Charge shall have the priority set out in paragraphs 35 and 37 hereof. The claims of the Financial Advisors under the Financial Advisors' Engagement Letters shall be treated as unaffected in any Plan filed by the Applicants and the CCAA Parties under the CCAA, or any proposal filed by the Applicants and the CCAA Parties under the BIA.

8. Except as otherwise provided to the contrary herein, the Applicants and the CCAA Parties shall be entitled but not required to pay all reasonable expenses incurred by the Applicants or the CCAA Parties in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

   (b) payment for goods or services actually supplied to the Applicants or the CCAA Parties following the date of this Order;

(c) payments in respect of the Credit Cards required by paragraph 5(e) hereof; and

(d) subject to the cash flow forecast attached as Exhibit "22" to the Scott Affidavit (the "**Cash Flow Forecast**"), payment of certain pre-filing amounts or honouring cheques issued prior to the date of filing that, in consultation with the Monitor, are necessary to facilitate the Applicants' and the CCAA Parties' ongoing operations.

9. The Applicants and the CCAA Parties shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants or the CCAA Parties in connection with the sale of goods and services by the Applicants or the CCAA Parties, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants and the CCAA Parties.

10. Until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants and the CCAA Parties may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants or the CCAA Parties from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

11. Except as specifically permitted in this Order, the Applicants and the CCAA Parties are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants or the CCAA Parties to any of their creditors as of the date of this Order other than interest payments under the Credit Agreement and other Loan Documents (as defined in the Credit Agreement);

(b) to grant no security interests, trusts, liens, charges or encumbrances upon or in respect of any of their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

12. The Applicants and the CCAA Parties shall, subject to such requirements as are imposed by the CCAA and the terms and conditions of the Amended and Restated Support Agreement entered into among the Applicants, the CCAA Parties and the members of the Ad Hoc Committee (the "**Support Agreement**"), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding $3,000,000 in any one transaction or $12,500,000 in the aggregate, with proceeds paid to the Agent in permanent reduction of any obligations under the Credit Agreement and the Loan Documents (as defined in the Credit Agreement), provided that any sale that is either (i) in excess of the above thresholds, or (ii) in

favour of a person related to the Applicants and the CCAA Parties (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants or the CCAA Parties and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and

(c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants and the CCAA Parties to proceed with an orderly restructuring of the Business (the "**Restructuring**").

13. The Applicants and the CCAA Parties shall provide each of the relevant landlords with notice of the Applicants' or the CCAA Parties' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' or the CCAA Parties' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants or the CCAA Parties, as applicable, or by further order of this Court upon application by the Applicants and the CCAA Parties on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants or the CCAA Parties disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' or the CCAA Parties' claim to the fixtures in dispute.

14. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants, the CCAA Parties and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants or the CCAA Parties, as applicable, in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants or the CCAA Parties, as applicable, of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS, THE CCAA PARTIES OR THE PROPERTY

15. Until and including October 26, 2016, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants, the CCAA Parties or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or the CCAA Parties or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

16. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory

or non-statutory against or in respect of the Applicants, the CCAA Parties or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

(a) empower the Applicants and the CCAA Parties to carry on any business which the Applicants and the CCAA Parties are not lawfully entitled to carry on;

(b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

(c) prevent the filing of any registration to preserve or perfect a security interest; or

(d) prevent the registration of a claim for lien.

17. Nothing in this Order shall prevent any party from taking an action against the Applicants or the CCAA Parties where such an action must be taken in order to comply with statutory time limitations in order to preserve its rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

18. During the Stay Period, no person (other than the First Lien Lenders, in respect of any rights of termination under the Forbearance Agreement, and the *Ad Hoc* Committee, in respect of any rights of termination under the Support Agreement) shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants or the CCAA Parties, including, without limitation, any rights or remedies or provision that purports to effect or cause a cessation of operatorship, in any agreement, construction, ownership and operating agreement, joint venture agreement or any such similar agreements to which any of the Applicants or CCAA Parties is a party as a result of the occurrence of any default or non-performance by or the insolvency of any of the Applicants or the CCAA Parties, the making or filing of these proceedings or any

allegation, admission or evidence in these proceedings and under no circumstances shall any of the Applicants or the CCAA Parties be replaced as operator pursuant to any such agreements, except with the written consent of the Applicants or the CCAA Parties, as applicable, and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

19. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicants or the CCAA Parties, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business, the Applicants or the CCAA Parties,

are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or the CCAA Parties or exercising any other remedy provided under such agreements or arrangements. The Applicants and the CCAA Parties shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants and the CCAA Parties in accordance with the payment practices of the Applicants and the CCAA Parties, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants, the CCAA Parties, and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order.

NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT

20. Notwithstanding anything else contained in this Order, no creditor of the Applicants or the CCAA Parties shall be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants or the CCAA Parties.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

21. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 17 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants or the CCAA Parties whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants and the CCAA Parties, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants and the CCAA Parties or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

22. The Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

23. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,500,000, as security for the indemnity provided in paragraph 22 of this Order. The Directors' Charge shall have the priority set out in paragraphs 35 and 37 herein.

24. Notwithstanding any language in any applicable insurance policy to the contrary:

(a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

(b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 22 of this Order.

APPOINTMENT OF MONITOR

25. FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business and financial affairs of the Applicants and the CCAA Parties with the powers and obligations set out in the CCAA or set forth herein and that the Applicants, the CCAA Parties and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants or the CCAA Parties pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

26. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' and the CCAA Parties' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants and the CCAA Parties;

(c) advise the Applicants and the CCAA Parties in their development of the Plan and any amendments to the Plan;

(d) advise the Applicants and the CCAA Parties, to the extent required by them, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants and the CCAA Parties to the extent that is necessary to adequately assess the Applicants' and the CCAA Parties' Property, Business and financial affairs or to perform its duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(g) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants or the CCAA Parties and any other Person; and

(h) perform such other duties as are required by this Order or by this Court from time to time.

27. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation.

28. The Monitor shall provide any creditor of the Applicants or the CCAA Parties with information provided by the Applicants or the CCAA Parties in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants or the CCAA Parties is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants or the CCAA Parties, as applicable, may agree.

29. The Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

30. The Monitor, counsel to the Monitor, counsel to the Applicants and the CCAA Parties, independent counsel to the Applicants' directors and officers, counsel to the First Lien Lenders, PricewaterhouseCoopers Inc. ("**PwC**"), in its capacity as financial advisor to the First Lien Lenders, counsel to the *Ad Hoc* Committee and BMO (on account of BMO's monthly work fee) shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements) in each case at their standard rates and charges, by the Applicants and the CCAA Parties as part of the costs of these proceedings. The Applicants and the CCAA Parties are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Applicants and the CCAA Parties, counsel for the First Lien Lenders, PwC and counsel for the *Ad Hoc* Committee on a bi-weekly basis and the accounts of BMO on a monthly basis, in addition, the Applicants and the CCAA Parties are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicants and the CCAA Parties, retainers in the respective amounts of $100,000, $100,000 and $250,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

31. The Monitor and its legal counsel shall pass their accounts from time to time.

32. The Monitor, counsel to the Monitor, counsel to the Applicants and the CCAA Parties, independent counsel to the Applicants' directors and officers, counsel to the First Lien Lenders, PwC, counsel to the *Ad Hoc* Committee and BMO (on account of BMO's monthly work fee), as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,000,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor, PwC, and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 35 and 37 hereof.

KEY EMPLOYEE RETENTION AND INCENTIVE PLANS

33. The Key Employee Retention Plan and the Key Employee Incentive Plan described in the Scott Affidavit (the "**KERP**" and "**KEIP**", respectively), are hereby authorized and approved and the Applicants and the CCAA Parties are authorized and directed to make the payments contemplated in the KERP and the KEIP. The directors and officers of the Applicants shall have no liability for the payments contemplated in the KERP or the KEIP (and for certainty, any and all claims under the KERP or the KEIP shall be secured solely by the KERP Charge or the KEIP Charge (each as defined below), as applicable, and shall not be secured, directly or indirectly, by the Directors' Charge).

34. The beneficiaries of the KERP are hereby granted a charge (the "**KERP Charge**") on the Property to secure all obligations under the KERP, up to the maximum amount of $4,115,250.The beneficiaries of the KEIP are hereby granted a charge (the "**KEIP Charge**") on the Property to secure all obligations under the KEIP, up to the amount of $5,007,417. The KERP Charge and the KEIP Charge shall have the priority set out in paragraphs 35 and 37 hereof.

VALIDITY AND PRIORITY OF CHARGES

35. The priorities of the Administration Charge, the Credit Card Charge, the Directors' Charge, the KERP Charge, the KEIP Charge and the Financial Advisors' Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $2,000,000);

Second – Credit Card Charge (to the maximum amount of $105,000);

Third – Directors' Charge (to the maximum amount of $2,500,000);

Fourth – (and subordinate to the indebtedness to the First Lien Lenders under the Credit Agreement) KERP Charge (to the maximum amount of $4,115,250);

Fifth – (and subordinate to the indebtedness to the First Lien Lenders under the Credit Agreement) KEIP Charge (to the maximum amount of $5,007,417); and

Sixth – (and subordinate to the indebtedness to the First Lien Lenders under the Credit Agreement) Financial Advisors' Charge (to the maximum amount of $19,410,000),

(all of which are, collectively, the "**Charges**").

36. The filing, registration or perfection of the Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

37. The Charges (all as constituted and defined herein) shall constitute a charge on the Property and, subject always to section 34(11) of the CCAA, such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except as otherwise set out herein.

38. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants and the CCAA Parties shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the

Applicants and the CCAA Parties also obtain the prior written consent of the Monitor, and the other beneficiaries of the Charges, or further order of this Court.

39. The Charges, shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants or the CCAA Parties, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Applicants or the CCAA Parties of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(iii) the payments made by the Applicants and the CCAA Parties pursuant to this order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive

conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

40. Any interested Person may apply to this Court on notice to any other party likely to be affected, for an order to allocate the Charges, amongst the various assets comprising the Property.

SALE PROCEDURES

41. The sale procedures (the "**Sale Procedures**") attached as Appendix "A" to this Order be and are hereby approved, and TD Securities, the Monitor, the Applicants and the CCAA Parties are authorized and directed to perform each of their obligations thereunder and to do all things reasonably necessary to perform their obligations thereunder.

42. Each of the Monitor and TD Securities, and their respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of the Sale Procedures, except to the extent such losses, claims, damages or liabilities result from the gross negligence or willful misconduct of the Monitor or TD Securities, as applicable, in performing its obligations under the Sale Procedures (as determined by this Court).

43. In connection with the Sale Procedures and pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act (Canada)*, the Applicants, the CCAA Parties, TD Securities and the Monitor are authorized and permitted to disclose personal information of identifiable individuals to prospective purchasers or offerors and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sale transactions (each, a "**Transaction**"). Each prospective purchaser or offeror to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Applicants, the CCAA Parties, TD Securities or the Monitor, as

applicable; (ii) destroy all such information; or (iii) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Applicants and the CCAA Parties, and shall return all other personal information to the Applicants, the CCAA Parties, TD Securities or the Monitor, as applicable, or ensure that all other personal information is destroyed.

SEALING

44. The Confidential KERP/KEIP Summary marked as Exhibit "20" of the Scott Affidavit shall be sealed on the Court file, notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*. The Confidential KERP/KEIP Summary shall be kept confidential and shall not form part of the public record. The Confidential KERP/KEIP Summary shall be placed, separate and apart from all contents in the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order.

SERVICE AND NOTICE

45. The Monitor shall (i) without delay, publish in the Calgary Herald, Daily Oil Bulletin, and Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants or the CCAA Parties of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

46. The Applicants, the CCAA Parties, and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence,

by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Applicants' and the CCAA Parties' creditors or other interested Persons at their respective addresses as last shown on the records of the Applicants and the CCAA Parties and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor shall establish and maintain a website in respect of these proceedings at cfcanada.fticonsulting.com/Lightstream and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders or other materials filed in these proceedings by or behalf of the Monitor, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

GENERAL

47. The Applicants, the CCAA Parties or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

48. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.

49. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the CCAA Parties, the Business or the Property.

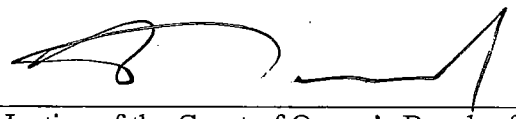
50. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the CCAA Parties, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory

and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants, the CCAA Parties and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants, the CCAA Parties and the Monitor and their respective agents in carrying out the terms of this Order.

51. Each of the Applicants, the CCAA Parties and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

52. Any interested party (including the Applicants, the CCAA Parties and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

53. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.



Justice of the Court of Queen's Bench of Alberta

Appendix "A"

LIGHTSTREAM

Sale Procedures

Pursuant to an initial order (as it may be amended, restated or supplemented from time to time, the "**Initial Order**") of the Court of Queen's Bench of Alberta (the "**Court**") dated September 26, 2016, Lightstream Resources Ltd. ("**LTS**") and its wholly owned direct and indirect subsidiaries, 1863359 Alberta Ltd. and 1863360 Alberta Ltd., LTS Resources Partnership and Bakken Resources Partnership (collectively, "**Lightstream**" or the "**Company**", and each individually, a "**Lightstream Entity**") obtained protection from their creditors pursuant to proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**") bearing Court File No. 1601-12571 (the "**CCAA Proceedings**").

Pursuant to the Initial Order, the Court approved sale procedures to be continued in respect of the Company to seek a Successful Bid, in accordance with the terms and conditions set forth herein (as such process may be amended, restated or supplemented pursuant to the terms herein, the "**Sale Procedures**").

Defined Terms; Interpretation

1. All capitalized terms used herein shall have the meanings given to them in **Appendix "A"** hereto.

Sale Process

2. These Sale Procedures describe, among other things (collectively, the "**Sale Process**"):

   (a) the manner and timelines in which any interested party (each, a "**Prospective Bidder**") may gain access to or continue to have access to due diligence materials concerning the Lightstream Property and the Lightstream Business;

   (b) the manner and timelines in which Prospective Bidders may submit an Indication of Interest for all or substantially all of the Lightstream Property or any of the Parcels, and the required content of any Indication of Interest;

   (c) the manner and timelines in which Qualified Phase I Bidders may submit a Qualified Indication of Interest and the required content of a Qualified Indication of Interest;

   (d) the manner and timelines in which Qualified Phase II Bidders may submit a Qualified Bid and the required content of a Qualified Bid;

   (e) the process and criteria for the ultimate selection of one or more Successful Bids; and

   (f) the process for obtaining approval of one or more Successful Bids by the Court.

Conduct of the Sale Procedures

3. The Sale Process will be carried out by the Company in accordance with these Sale Procedures, with the assistance of, and in consultation with, the Sale Advisor and the Monitor. The Company, the Sale Advisor and the Monitor are fully and exclusively authorized, empowered and directed to take any and all actions and steps pursuant to these Sale Procedures. In the event that there is a disagreement as to the interpretation or application of these Sale Procedures, the Court will have the jurisdiction to hear and resolve such dispute.

4. In addition to the disclosure covenants in the Support Agreement with the *Ad Hoc* Committee of Second Lien Noteholders and the Second Forbearance Agreement with the First Lien Lenders, the Company shall provide the *Ad Hoc* Committee of Second Lien Noteholders, the First Lien Agent and their respective legal and financial advisors, on a confidential basis, with such additional information and disclosures regarding the Sale Process (Indications of Interest and Qualified Phase 1 Bidders, Qualified Bids and Qualified Phase II Bidders, Successful Bids and Successful Bidders) as they may request.

Sale Opportunity

5. The Sale Advisor, in consultation with the Company, the Monitor and their respective advisors, shall prepare a list of persons who may constitute Prospective Bidders and shall distribute to each such person, (a) the Process Letter, (b) a teaser (the "**Teaser**") describing the opportunity to acquire the Lightstream Property or any of the Parcels, (c) a copy of the Initial Order (including the Sale Procedures), and (d) the form of required Confidentiality Agreement. Any offer for a Parcel will be considered in combination with other offers, if any, received for other Parcels.

"As Is, Where Is"

6. Any Sale will be on an "as is, where is" and "without recourse" basis and without surviving representations, warranties, covenants or indemnities of any kind, nature, or description by the Company, Sale Advisor, Monitor or any of their Representatives, except to the extent set forth in a Definitive Agreement with a Successful Bidder.

Free of Any and All Claims and Interests

7. Except to the extent otherwise set forth in the relevant definitive purchase and sale agreement (a "**Definitive Sale Agreement**") with a Successful Bidder, in the event of a Sale, all of the rights, title and interests of the Company in and to the Lightstream Property or any of the Parcels to be acquired pursuant to an approval and vesting Order of the Court will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests thereon.

Participation Requirements

8. Unless otherwise provided for herein, ordered by the Court, or agreed by the Company, in order to participate in the Sale Procedures and be considered for qualification as a Qualified Phase I Bidder, a Prospective Bidder must deliver to the Company in the

manner and at the address specified in **Schedule "A"** hereto, and prior to the distribution of any confidential information by the Company to a Prospective Bidder:

(a) an executed Confidentiality Agreement, which shall enure to the benefit of any Successful Bidder of the Lightstream Property or any of the Parcels on the closing of the Successful Bid;

(b) a specific indication of the anticipated sources of capital for such Prospective Bidder and preliminary evidence of the availability of such capital, or such other form of financial disclosure and credit support or enhancement that will allow the Company and its Representatives, including the Sale Advisor, to make, in their reasonable business or professional judgment, a determination as to the Prospective Bidder's financial and other capabilities to consummate the proposed Sale.

(c) a letter setting forth the identity of the Prospective Bidder, the contact information for such Prospective Bidder, full disclosure of the direct and indirect owners of the Prospective Bidder and their principals; and

(d) a written acknowledgement of receipt of a copy of the Initial Order approving these Sale Procedures and agreeing to accept and be bound by the provisions contained therein.

9. A Prospective Bidder that has satisfied all of the requirements described in section 8 above and who the Company, in consultation with the Sale Advisor and the Monitor, determines has a reasonable prospect of completing a transaction contemplated herein, will be deemed a "**Qualified Phase I Bidder**" and will be promptly notified of such classification by the Company. Notwithstanding these requirements, the Company may, in consultation with the Sale Advisor and the Monitor, designate any Prospective Bidder as a Qualified Phase I Bidder in its sole discretion.

Due Diligence

10. The Company or Sale Advisor shall provide any person deemed to be a Qualified Phase I Bidder with access to the Data Room and the Company shall provide to the Qualified Phase I Bidders further access to such due diligence materials and information relating to (i) the Lightstream Property available for Sale (including the Parcels); and (ii) the debt and equity interests of the Company as the Company deems appropriate, including, as appropriate, access to further information in the Data Room, and management presentations, where appropriate and only to the extent that such management presentations do not cause unreasonable disruption to the Company's management and/or the Lightstream Business operations.

11. The Company and its Representatives (including the Sale Advisor) and the Monitor do not make any representations or warranties whatsoever, and shall have no liability of any kind whatsoever, as to the information or the materials provided through the due diligence process or otherwise made available to any Prospective Bidder, Qualified Phase I Bidder, Qualified Phase II Bidder, Qualified Bidder, Qualified Parcel Bidder, or Successful Bidder, with respect to the Lightstream Property or any of the Parcels, Lightstream or the Lightstream Business, including any information contained in the

Process Letter, Teaser, or Data Room and provided or made in any management presentations.

12. The Company reserves the right to limit any Prospective Bidder's or Qualified Phase I Bidder's access to any confidential information (including any information in the Data Room), where, in the Company's discretion, such access could negatively impact the Sale Procedures, the ability to maintain the confidentiality of confidential information, or the value of the Lightstream Property. Requests for additional information are to be made to the Sale Advisor.

Phase I

Seeking Indications of Interest from Qualified Phase I Bidders

13. From the Filing Date until the Phase I Bid Deadline, the Company and the Sale Advisor will continue to identify and qualify Qualified Phase I Bidders, and will solicit non-binding indications of interest from Qualified Phase I Bidders to acquire all of the Lightstream Property or any of the Parcels (each an "**Indication of Interest**").

14. In order to continue to participate in these Sale Procedures, a Qualified Phase I Bidder must deliver an Indication of Interest to the Company in the manner and at the address specified in **Schedule "A"** hereto so as to be received not later than 5:00 p.m. (Mountain Time) on Friday, October 21, 2016 or such later date or time as the Company may determine appropriate in consultation with the First Lien Agent, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor, or as the Court may order (as it may be extended, as described in this section 14, the "**Phase I Bid Deadline**").

Indications of Interest by Qualified Phase I Bidders

15. Subject to Section 16, unless otherwise ordered by the Court, an Indication of Interest will be considered a "**Qualified Indication of Interest**" only if:

    (a) it is submitted by a Qualified Phase I Bidder, received on or before the Phase I Bid Deadline;

    (b) contains an indication of whether the Qualified Phase I Bidder is making an offer to acquire all of the Lightstream Property or any of the Parcels (a "**Sale Proposal**"), which identifies:

        (i) the Lightstream Property or Parcels to be included in the Sale Proposal and a detailed listing of any of the assets to be excluded from the Sale Proposal;

        (ii) the proposed purchase price for such Sale Proposal, and an explanation of proposed adjustments, if any, to the final purchase price payable at closing;

        (iii) details as to the form of consideration for the Sale Proposal, including, if non-cash consideration is being offered, supporting rationale for the value being ascribed to such consideration;

(iv) a description of any liabilities to be assumed by the Qualified Phase I Bidder and the Qualified Phase I Bidder's estimated value of such assumed liabilities;

(v) a specific indication of sources of capital for the Qualified Phase I Bidder and preliminary evidence of the availability of such capital, or such other form of financial disclosure and credit-quality support or enhancement, including contact information for capital/financing sources, that will allow the Company to make a reasonable business judgement as to the Qualified Phase I Bidder's financial or other capabilities to consummate the contemplated transaction;

(vi) an acknowledgement that the contemplated Sale will be made on an "as is, where is" and "without recourse" basis;

(vii) a description of approvals (including approvals from the board of directors, management, or investment committee, as applicable) received to date authorizing submission of the Sale Proposal and any anticipated corporate, shareholder, internal or regulatory approvals required to close the transaction and the anticipated time frame and any anticipated impediments for obtaining such approvals;

(viii) specific statements concerning the treatment of employees and plans for the ongoing involvement and roles of the Company's employees;

(ix) a timeline to closing with critical milestones and a statement with respect to the Qualified Phase I Bidder's ability to consummate the contemplated transaction by the Outside Closing Date;

(x) a detailed description of any additional due diligence required or desired to be conducted prior to the Phase II Bid Deadline, if any, and an estimated timeline for the completion of such due diligence (including with respect to any specific technical diligence matters relating to petroleum and natural gas rights or wells owned by the Company or any environmental due diligence);

(xi) all material conditions to closing that the Qualified Phase I Bidder may wish to impose;

(xii) an indication as to whether the Qualified Phase I Bidder is intending to effect the Sale Proposal through a special purpose vehicle;

(xiii) any other terms and conditions which the Qualified Phase I Bidder believes are material to the transaction;

(xiv) contact information for any business, financial or legal advisors retained or to be retained in connection with the contemplated transaction; and

(xv) such other information reasonably requested by the Lightstream Group.

16. For greater certainty, the Company shall be entitled, either prior to or following the Phase I Bid Deadline, to seek to clarify the terms of an Indication of Interest or with respect to any of the other requirements of section 15 above, and the Company, in consultation with the Monitor, may accept a revised, clarified Indication of Interest, provided that the initial Indication of Interest was received prior to the Phase I Bid Deadline. The Company, in consultation with the Sale Advisor and the Monitor, may waive compliance with any one or more of the requirements specified in Sections 15, and deem any non-compliant Indication of Interest to be a Qualified Indication of Interest.

Assessment of Qualified Indications of Interest

17. Promptly following the Phase I Bid Deadline, the Company will, in consultation with the Sale Advisor and the Monitor, assess Qualified Indications of Interest received during Phase I, if any, and will determine whether there is a reasonable prospect of obtaining a Qualified Bid. For the purpose of such consultations and evaluations, the Company, the Sale Advisor and the Monitor may request clarification of the terms of any Qualified Indication of Interest.

18. In assessing a Qualified Indication of Interest, the Company, following consultation with the Monitor, will consider, among other things, the following:

    (a) whether the form and amount of consideration being offered will satisfy at closing the Qualified Consideration Requirement;

    (b) whether the cash consideration being offered, will be sufficient at closing to satisfy the Secured Debt Repayment Requirement;

    (c) the nature and amount of debt and other liabilities to be assumed by the Qualified Phase I Bidder;

    (d) the assets to be included in or excluded from the Sale Proposal and the transaction costs and risks associated with closing multiple transactions versus a single sale transaction for all, or substantially all, of the Lightstream Property;

    (e) the demonstrated financial capability of the Qualified Phase I Bidder to consummate the proposed transaction;

    (f) the transition services required from the Company post-closing and any related costs;

    (g) the proposed treatment of stakeholders, including the shareholders, First Lien Lenders, Second Lien Noteholders, Unsecured Noteholders, employees and other creditors;

    (h) the conditions to closing of the proposed transaction; and

    (i) other factors affecting the speed, certainty and value of the Sale Proposal (including any remaining due diligence, regulatory approvals and others conditions required to close on or before the Outside Closing Date and whether,

in the Company's reasonable business judgment, it is reasonably likely to close on or before the Outside Closing Date.

19. If the Company, in consultation with the Sale Advisor and the Monitor, determine that there are or will be no Qualified Indication of Interest that would be sufficient to satisfy the Qualified Consideration Requirement and the Secured Debt Repayment Requirement at closing, the Credit Bid shall be deemed to be the "**Successful Bid**" and the Credit Bid Party shall be the "**Successful Bidder**" and the Company may forthwith terminate these Sale Procedures and seek to implement the Credit Bid.

20. If the Company, in consultation with the Monitor, determines that (i) one or more Qualified Indications of Interest (other than the Credit Bid) were received that would be sufficient to satisfy the Qualified Consideration Requirement and the Secured Debt Repayment Requirement at closing, and (ii) proceeding with these Sale Procedures is in the best interests of the Company and its stakeholders, these Sale Procedures will continue and each Qualified Phase I Bidder who has submitted a Qualified Indication of Interest that is determined by the Company likely to be able to be consummated, shall be deemed to be, and notified by the Company that it is, a "**Qualified Phase II Bidder**".

Phase II

Seeking Qualified Bids by Qualified Phase II Bidders

21. In order to continue to participate in these Sale Procedures, a Qualified Phase II Bidder must deliver a Qualified Bid to the Company and such bid must be received by the Company no later than 5:00 p.m. (Mountain Time) on Monday, November 21, 2016 or such later date or time as the Company may determine appropriate in consultation with the First Lien Lenders, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor (the "**Phase II Bid Deadline**").

Qualified Bids

22. A Sale Proposal submitted by a Qualified Phase II Bidder will be considered a "**Qualified Bid**" only if the Sale Proposal complies with all of the following:

    (a) it is received by no later than the Phase II Bid Deadline;

    (b) it includes a letter stating that the Sale Proposal is irrevocable until the earlier of (i) 11:59 p.m. on the Business Day following the closing of a transaction with a Successful Bidder in respect of the Lightstream Property or the same Parcel thereof, and (ii) thirty (30) Business Days following the Phase II Bid Deadline; provided, however, that if such Sale Proposal is selected as a Successful Bid, it shall remain irrevocable until 11:59 p.m. (Mountain Time) on the Business Day following the closing of the Successful Bid or Successful Bids, as the case may be;

    (c) it includes a duly authorized and executed Definitive Agreement based on the Form of Purchase Agreement and accompanied by a mark-up (in the form of a blackline) of the Form of Purchase Agreement showing proposed amendments and modifications made thereto, specifying the consideration, and such ancillary agreements as may be required by the Qualified Phase II Bidder with all exhibits

and schedules thereto (or term sheets that describe the material terms and provisions of such ancillary agreements) and the proposed Orders to approve such Sale by the Court;

(d) it does not include any request or entitlement to any break-fee, expense reimbursement or similar type of payment;

(e) it provides for consideration at closing sufficient to satisfy the Qualified Consideration Requirement;

(f) it provides for cash consideration at closing sufficient to satisfy the Secured Debt Repayment Requirement;

(g) it includes evidence sufficient to allow the Company, in consultation with the Monitor, to make a reasonable determination as to the bidder's (and its direct and indirect owners' and their principals') financial and other capabilities to consummate the transaction contemplated by the Sale Proposal, which evidence could include but is not limited to evidence of a firm, irrevocable commitment for all required funding and/or financing from a creditworthy bank or financial institution;

(h) it is not conditioned on (i) the outcome of unperformed due diligence by the Qualified Phase II Bidder and/or (ii) obtaining any financing capital and includes an acknowledgement and representation that the Qualified Phase II Bidder has had an opportunity to conduct any and all required due diligence prior to making its Sale Proposal;

(i) it fully discloses the identity of each entity that is bidding or otherwise that will be sponsoring or participating in the Sale Proposal, including the identification of the Qualified Phase II Bidder's direct and indirect owners and their principals, and the complete terms of any such participation;

(j) it includes an acknowledgement and representation that the Qualified Phase II Bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets to be acquired and liabilities to be assumed in making its Sale Proposal; (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the assets to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, including by the Company, Sale Advisor or Monitor or any of their Representatives, except as expressly stated in the Definitive Sale Agreement submitted by it; (iii) is a sophisticated party capable of making its own assessments in respect of making its Sale Proposal; and (iv) has had the benefit of independent legal advice in connection with its Sale Proposal;

(k) it includes evidence, in form and substance reasonably satisfactory to the Company, in consultation with the Monitor, of authorization and approval from the Qualified Phase II Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction contemplated by the Sale Proposal;

(l) except in the case of a Credit Bid, it is accompanied by a refundable deposit (the "**Deposit**") in the form of a wire transfer delivered to the Monitor (to a trust account specified by the Monitor), or such other form acceptable to the Monitor, in trust, in an amount equal to two and a half percent (2.5%) of the proposed gross Purchase Price, to be held and dealt with in accordance with these Sale Procedures;

(m) it provides for closing of a Qualified Bid by no later than the Outside Closing Date;

(n) if the Qualified Phase II Bidder is an entity newly formed for the purpose of the transaction, the bid shall contain an equity or debt commitment letter from the parent entity or sponsor, which is satisfactory to the Company, that names the Company as a third party beneficiary of any such commitment letter with recourse against such parent entity or sponsor;

(o) it includes evidence, in form and substance reasonably satisfactory to the Company, in consultation with the Monitor, of compliance or anticipated compliance with any and all applicable Canadian and any foreign regulatory approvals (including, if applicable, anti-trust regulatory approval and any approvals with respect to the grant or transfer of any permits or licenses), the anticipated time frame for such compliance and any anticipated impediments for obtaining such approvals;

(p) it includes specific statements concerning the proposed treatment of employees and plans for the ongoing involvement and roles of the Company's employees;

(q) it identifies the particular contracts and leases the Qualified Phase II Bidder wishes to assume and reject, contains full details of the Qualified Phase II Bidder's proposal for the treatment of related cure costs (and provides adequate assurance of future performance thereunder) and it identifies any particular executory contract or unexpired lease the assumption and assignment of which is a condition to closing; and

(r) it contains other information reasonably requested by the Company, in consultation with the Sale Advisor and the Monitor.

Qualified Bids

23. Each bidder who has submitted a Qualified Bid shall hereinafter be referred to as a "**Qualified Bidder**".

24. For greater certainty, a Sale Proposal may be in respect of only one or more Parcels and in such case, such Sale Proposal shall constitute a "**Qualified Parcel Bid**" if it satisfies the requirements in section 22 hereof, as applicable, and in such case, the bidder shall constitute a "**Qualified Parcel Bidder**". Each Qualified Parcel Bid shall be deemed to be a Qualified Bid, and each Qualified Parcel Bidder shall be deemed to be a Qualified Bidder for all purposes of the Sale Procedures.

25. The Credit Bid shall be deemed to be a Qualified Bid and the Credit Bid Party shall be deemed to be a Qualified Bidder for the purposes of these Sale Procedures.

26. For greater certainty, the Company shall be entitled, either prior to or following the Phase II Bid Deadline, to seek to clarify the terms of any Sale Proposal submitted by a Qualified Phase II Bidder, and the Company, in consultation with the Monitor, may accept a revised and/or clarified Sale Proposal, provided that the initial Sale Proposal by the Qualified Phase II Bidder was received prior to the Phase II Bid Deadline.

27. Notwithstanding section 22 hereof, the Company, in consultation with the Monitor, may waive compliance with any one or more of the Qualified Bid requirements specified herein, and deem such non-compliant bids to be Qualified Purchase Bids; provided, however, that the Company shall not be entitled to waive the Qualified Consideration Requirement and Secured Debt Repayment Requirement nor deem any Sale Proposal that fails to satisfy such requirements to be a Qualified Bid.

Credit Bid

28. The Credit Bid Party will be submitting the Credit Bid, which Credit Bid when submitted shall, as set out above, be deemed to be a Qualified Indication of Interest and Qualified Bid for the purpose of these Sale Procedures and in the event that the Credit Bid is deemed to be the Successful Bid (as a result of no other Qualified Indications of Interest having been received that satisfies the Qualified Consideration Requirement and the Secured Debt Repayment Requirement or no Qualified Bid received (other than the Credit Bid)), the Company may forthwith terminate these Sale Procedures and proceed to seek implementation of the Credit Bid.

29. The Credit Bid Party shall not be entitled to increase the consideration of its Credit Bid. No members of the *Ad Hoc* Committee of Second Lien Noteholders or any of their Affiliates (other than the Credit Bid Party) shall be permitted to submit a Sale Proposal. For greater certainty, nothing in this Section 29 shall restrict the ability of the Credit Bid Party to, as agreed to by the Company, make amendments to the assets to be acquired and/or liabilities to be assumed pursuant to the Credit Bid.

30. If the Credit Bid is terminated at any time during the Sale Process, and there is no Sale Proposal received that satisfies the Qualified Consideration Requirement and the Secured Debt Repayment Requirement, the Company shall apply to the Court to seek advice and directions as to the continuation, modification or termination of the Sale Process.

Assessment of Qualified Bids

31. The Company, in consultation with the Sale Advisor and the Monitor, will assess Qualified Bids received (other than the Credit Bid), if any, and will determine whether it is likely that the transactions contemplated by such Qualified Bids are likely to be able to be consummated and whether proceeding with these Sale Procedures is in the best interests of the Company and its stakeholders. Such assessments will be made as promptly as practicable after the Phase II Bid Deadline.

32. If the Company, in consultation with the Sale Advisor and the Monitor, in accordance with section 31 above, determines that (i) no Qualified Bid has been received (other than the Credit Bid); and (ii) there is no reasonable prospect of obtaining a Qualified Bid (other than the Credit Bid), the Credit Bid shall be deemed to be the "**Successful Bid**"

and the Credit Bid Party shall be the "**Successful Bidder**" and the Company may forthwith terminate these Sale Procedures and seek to implement the Credit Bid.

33. If the Company, in consultation with the Sale Advisor and the Monitor, in accordance with section 31 above, determines that only one Qualified Bid was received (other than the Credit Bid) (which could be a combination of non-overlapping Qualified Parcel Bids), such Qualified Bid shall be a "**Successful Bid**", and the Qualified Bidder(s) making the Successful Bid shall be a "**Successful Bidder**" or "**Successful Bidders**", as the case may be) and Company may take such steps as are necessary to finalize, complete and seek Court approval of the Successful Bid. For greater certainty, the Company may accept a combination of non-overlapping Qualified Parcel Bids which commit to provide consideration of no less than the Qualified Consideration at closing (collectively, an "**Aggregated Qualified Bid**") to create one "**Successful Bid**" and in such case, the applicable Qualified Parcel Bidders will become "**Successful Bidders**".

34. If the Company, in consultation with the Sale Advisor and the Monitor, in accordance with section 31 above, determines that more than one Qualified Bid (and/or more than one Aggregated Qualified Bid, in each case other than the Credit Bid) was received with respect to one or more Parcels by the Phase II Bid Deadline, then these Sale Procedures will not be terminated and the Company may, in consultation with the Monitor and the Sale Advisor, choose (i) in consultation with the Sale Advisor, to continue negotiations with a select number of Qualified Bidders, with a view to selecting one or more non-overlapping Qualified Bids (which could be new or amended Qualified Bids, including a combination of new or amended non-overlapping Qualified Parcel Bids) as the "**Successful Bid**" and the Qualified Bidder(s) making the Successful Bid shall be a "**Successful Bidder**" or "**Successful Bidders**", as the case may be, and (ii) to take such steps as are necessary to finalize, seek Court approval of the Successful Bid.

Selection Criteria

35. In selecting the Successful Bid(s), the Company, in consultation with the Sale Advisor and the Monitor, will review each Qualified Bid.

36. Evaluation criteria with a Sale Proposal may include, but are not limited to items such as: (i) the proposed purchase price and new value (including assumed liabilities and other obligations to be performed by the bidder) and the form of such new value; (ii) the firm, irrevocable commitment for financing the proposed transaction; (iii) the claims likely to be created by such bid in relation to other bids; (iv) the counterparties to the proposed transaction; (v) the terms of proposed transaction documents; (vi) other factors affecting the speed, certainty and value of the proposed transaction (including regulatory approvals required to close the proposed transaction); (vii) proposed treatment of stakeholders; (viii) the assets proposed to be included and excluded from the bid; (ix) proposed treatment of employees; (x) any transition services required from Lightstream post-closing and related restructuring costs; and (xi) the likelihood and timing of consummating the proposed transaction.

Definitive Agreements

37. The Company and/or any Lightstream Entity, as applicable, will finalize Definitive Agreements in respect of any Successful Bidder, conditional upon approval of the Court, by no later than 5:00 p.m. (Mountain Time) on Friday, December 2, 2016 or such later

date or time as the Company may determine appropriate in consultation with the First Lien Lenders, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor.

Approval Hearing

38. As soon as reasonably possible after the execution of a Definitive Agreement by the Company and the Successful Bidder, the Company shall apply to the Court (the "**Approval Hearing**") for: (i) an Order approving each Successful Bid(s) and authorizing the Company and/or any Lightstream Entity, as applicable, to enter into any and all necessary agreements with respect to a Successful Bidder; and (ii) any Order that may be required vesting title to Lightstream Property or any of the Parcels in the name of any Successful Bidder(s).

39. The Approval Hearing will be held on a date to be scheduled by the Court upon application by the Company, and in any event, not later than Thursday , December 15, 2016 or such later date as the Company, in consultation with the First Lien Agent, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor, and the Successful Bidder may agree.

40. All Qualified Bids (other than any Successful Bid(s)) shall be deemed rejected on and as of the date of closing of the Successful Bid or date upon which all Successful Bids have closed, as the case may be.

Deposits

41. All Deposits shall be retained by the Monitor and deposited in a non-interest bearing trust account. If there is/are Successful Bid(s), the Deposit paid by a Successful Bidder whose bid is approved at the Approval Hearing shall be applied to the Purchase Price to be paid by that Successful Bidder upon closing of the approved transaction and will be non-refundable. The Deposits of Qualified Bidders not selected as a Successful Bidder shall be returned to such bidders within five (5) Business Days after the date on which their Qualified Bid is no longer irrevocable in accordance with section 22(b), as applicable. If there is no Successful Bid, all Deposits shall be returned to the bidders within five (5) Business Days of the date upon which these Sale Procedures are terminated.

42. If (i) a Successful Bidder breaches any of its obligations under any Definitive Agreements, or (ii) a Qualified Bidder breaches its obligations under the terms of the Sale Procedures or fails to complete the transaction contemplated by its Qualified Bid if required by any Lightstream Entity to complete such transaction, then, in each case, such Qualified Bidder's Deposit will be forfeited to the applicable Lightstream Entity as liquidated damages and not as a penalty. The Company shall apply and use their share of any forfeited Deposit in a manner agreed upon by the Company and the Monitor.

Approvals

43. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the applicable law in order to implement a Successful Bid.

No Amendment

44. There will be no amendments to the Sale Procedures without the approval of the Court on notice to the Service List in the CCAA Proceedings, subject to such non-material amendments as may be agreed to by the Company and the Monitor.

General

45. The Initial Order, the Sale Procedures, and any other Orders of the Court made in the CCAA Proceedings relating to the Sale Procedures shall exclusively govern the process for soliciting and selecting bids for the Sale of all of the Lightstream Property or any of the Parcels.

46. These Sale Procedures do not, and will not be interpreted to create any contractual or other legal relationship between any Lightstream Entity and any Qualified Bidder, other than as specifically set forth in any Definitive Agreements that may be signed with Lightstream or any Lightstream Entity.

47. Unless otherwise indicated herein, any event that occurs on a day that is not a Business Day shall be deemed to occur on the next Business Day.

48. All dollar amounts expressed herein, unless otherwise noted, are in Canadian currency.

49. Each Qualified Phase I Bidder, upon being declared as such under the Sale Procedures, shall be deemed to have irrevocably and unconditionally attorned and submitted to the jurisdiction of the Court in respect of any action, proceeding or dispute in relation to the conduct or any aspect of the Sale Procedures and the Sale Process.

50. At any time during these Sale Procedures, the Company, Sale Advisor or Monitor may apply to the Court for advice and directions with respect to their obligations and duties herein.

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APPENDIX "A"

Defined Terms

"***Ad Hoc* Committee of Second Lien Noteholders**" means an *ad hoc* committee of Second Lien Noteholders representing approximately 91.5 percent of the total outstanding principal amount of Second Lien Notes.

"**Aggregated Qualified Bid**" has the meaning set out in section 33.

"**Alberta/BC Lightstream Business Unit**" means the portion of the Lightstream Business related to British Columbia and Alberta (excluding the Cardium Lightstream Business Unit).

"**Approval Hearing**" has the meaning set out in section 38.

"**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are open for business in the City of Calgary.

"**Cardium Lightstream Business Unit**" means the portion of the Lightstream Business related to central Alberta.

"**CCAA**" has the meaning given to it in the recitals to these Sale Procedures.

"**CCAA Proceedings**" has the meaning given to it in the recitals to these Sale Procedures.

"**Company**" has the meaning given to it in the recitals to these Sale Procedures.

"**Confidentiality Agreement**" means a confidentiality agreement in favour of the Company executed by a Prospective Bidder, in form and substance satisfactory to the Company, which shall enure to the benefit of any Successful Bidder.

"**Court**" has the meaning given to it in the recitals to these Sale Procedures.

"**Credit Agreement**" means the Third Amended and Restated Credit Agreement dated May 29, 2012, as amended by a consent and first amending agreement made as of July 2, 2015, and as further amended by a second amending agreement made as of December 2, 2015, as amended, restated, supplemented, replaced or otherwise modified from time to time.

"**Credit Bid**" means any offer to acquire the Lightstream Property submitted by the Credit Bid Party in the form of a Sale Proposal, pursuant to which the consideration offered includes an exchange for, and in full and final satisfaction of, all of the Second Lien Notes Debt, as it may be amended or supplemented from time to time, subject to section 29.

"**Credit Bid Party**" means, the Second Lien Notes Trustee, acting on the direction of the Majority Noteholders under the Second Lien Indenture, or its agent.

"**Data Room**" means a confidential virtual data room which contains documents furnished by the Company and a physical data room providing access to relevant technical information.

"**Definitive Agreements**" means all Definitive Sale Agreements.

"**Definitive Sale Agreement**" has the meaning set out in section 7.

"**Deposit**" has the meaning set out in section 22(l).

"**Filing Date**" means the date the Company obtained protection from its creditors under the CCAA, being September 26, 2016.

"**First Lien Agent**" means The Toronto-Dominion Bank, as administrative agent for the First Lien Lenders.

"**First Lien Debt**" means, as at closing, all amounts owing by Lightstream to the First Lien Lenders under the Credit Agreement, including, without limitation, the aggregate outstanding principal amount (which, as at the date hereof is $370,920,485), together with all swap indebtedness, outstanding letters of credit and all accrued interest, fees, costs, expenses and other charges.

"**First Lien Lenders**" means the syndicate of lenders under the Credit Agreement.

"**Form of Purchase Agreement** " means the form of purchase and sale agreement to be developed by the Company in consultation with the Monitor, the Sale Advisor, the First Lien Lenders and the *Ad Hoc* Committee of Second Lien Noteholders and provided to those Qualified Phase II Bidders that submitted a Qualified Indication of Interest.

"**Indication of Interest**" has the meaning set out in section 13.

"**Initial Order**" has the meaning given to it in the recitals to these Sale Procedures.

"**Lightstream**" has the meaning given to it in the recitals to these Sale Procedures.

"**Lightstream Business**" means the business of the Company.

"**Lightstream Entity**" has the meaning given to it in the recitals to these Sale Procedures.

"**Lightstream Property**" means all property, assets and undertakings of the Company, including, without limitation, all of the Parcels.

"**LTS**" has the meaning given to it in the recitals to these Sale Procedures.

"**Majority Noteholders**" means Second Lien Noteholders holding more than fifty percent (50%) of the total outstanding principal amount of the aggregate Second Lien Notes.

"**Monitor**" means FTI Consulting Canada Inc., in its capacity as monitor in the CCAA Proceedings and not in its personal or corporate capacity.

"**Outside Closing Date**" means December 31, 2016.

"**Parcels**" means any one or more of the (i) property, assets and undertakings of the Company related to the Saskatchewan Lightstream Business Unit, (ii) the property, assets and undertakings of the Company related to the Cardium Lightstream Business Unit, or (iii) the property, assets and undertakings of the Company related to the Alberta/BC Lightstream Business Unit.

"**Phase I Bid Deadline**" has the meaning set out in section 14.

"**Phase II Bid Deadline**" has the meaning set out in section 21.

"**Process Letter**" means a letter from the Sale Advisor to Qualified Phase I Bidders outlining, among other things, the Sale Process and the Sale Procedures timelines.

"**Prospective Bidders**" has the meaning set out in section 2(a).

"**Purchase Price**" has the meaning set out in section 15(b)(i).

"**Qualified Bid**" and "**Qualified Bids**" have the meaning set out in section 23.

"**Qualified Bidder**" has the meaning set out in section 23 and for greater certainty, includes all Qualified Parcel Bidders and "**Qualified Bidders**" means more than one of them.

"**Qualified Consideration**" means consideration sufficient to repay immediately on closing (a) in full and in cash (A) the First Lien Debt and (B) so long as the Credit Bid has not been terminated in accordance with its terms, the Second Lien Notes Debt, and (b) in full and in cash or through an assumption of liabilities (i) any claims ranking senior in priority thereto that are or would be payable in the CCAA Proceedings, and (ii) any amounts owing by the Company in respect of goods and services provided to the Company on or after the Filing Date and prior to closing of the Successful Bid, and (c) any other amounts incurred by the Company in compliance with the Initial Order or any other Orders granted in the CCAA Proceedings.

"**Qualified Consideration Requirement**" means the requirement that any Sale, whether on its own, or in combination with one or more non-overlapping Sale Proposal for different Parcels, provides for consideration of at least the Qualified Consideration.

"**Qualified Indication of Interest**" has the meaning set out in section 15.

"**Qualified Phase I Bidder**" has the meaning set out in section 9 and "**Qualified Phase I Bidders**" means all of them.

"**Qualified Phase II Bidder**" has the meaning set out in section 20, and "**Qualified Phase II Bidders**" means all of them.

"**Qualified Parcel Bid**" means a Qualified Bid for Parcel, and "**Qualified Parcel Bid**" means more than one of them.

"**Qualified Parcel Bidder**" has the meaning set out in section 24.

"**Qualified Purchase Bid**" has the meaning set out in section 22.

"**Representative**" means, with respect to a particular person, any director, officer, employee, agent, consultant, advisor or other representative of such person, including legal counsel, accountants and financial advisors.

"**Sale**" "means the acquisition of all of the Lightstream Property or any of the Parcels.

"**Sale Advisor**" means means TD Securities Inc., in its capacity as sale advisor to the Company.

"**Sale Proposal**" has the meaning set out in section 15(b).

"**Saskatchewan Lightstream Business Unit**" means the portion of the Lightstream Business related to Saskatchewan.

"**Second Forbearance Agreement**" means the Second Forbearance Agreement dated as of September 15, 2016, between each Lightstream Entity and the First Lien Lenders.

"**Second Lien Note Indenture**" means that indenture dated as of July 2, 2015 among LTS, as issuer, and 1863359 Alberta Ltd., 1863360 Alberta Ltd., Bakken Resources Partnership and LTS Resources Partnership, as guarantors, and the Second Lien Notes Trustee.

"**Second Lien Noteholders**" means holders of Second Lien Notes.

"**Second Lien Notes Debt**" means all amounts owed under the Second Lien Notes, including all outstanding principal, accrued and unpaid interest, premiums, make-whole, fees, costs and expenses (which, for clarity, shall be in an amount not less than U.S.$650 million in respect of principal, U.S.$48.2 million in respect of the make-whole, and all other accrued interest, fees, costs, expenses and other amounts owing in respect of the Second Lien Notes), as valued by the Company, in consultation with the Monitor, or the Court on or before the Phase1 Bid Deadline.

"**Second Lien Notes Trustee**" means the trustee under the indenture dated as of July 2, 2015 pursuant to which the Second Lien Notes were issued by Lightstream.

"**Second Lien Notes**" means the 9.875% second lien secured notes due June 15, 2019 and issued by Lightstream pursuant to an indenture dated as of July 2, 2015.

"**Secured Debt**" means, collectively, (i) the First Lien Debt and (ii) so long as the Credit Bid has not been terminated in accordance with its terms, the Second Lien Notes Debt.

"**Secured Debt Repayment Requirement**" means the requirement that any Sale, whether on its own, or in combination with one or more non-overlapping Sale Proposal for different Parcels, provides for cash consideration sufficient to repay to the First Lien Lenders, and if the Credit Bid has not been terminated in accordance with its terms, the Second Lien Noteholders, in full and in cash and immediately on closing, the Secured Debt.

"**Sale Procedures**" has the meaning given to it in the recitals to these Sale Procedures.

"**Sale Process**" has the meaning set out in section 2.

"**Successful Bid(s)**" has the meaning set out in section 19, section 32, section 33 and section 34.

"**Successful Bidder**" has the meaning set out in section 19, section 32, section 33 and section 34.

"**Support Agreement**" means the amended and restated restructuring support agreement between the Company and members of the *Ad Hoc* Committee of Second Lien Noteholders dated August 26, 2016, as may be further amended from time to time.

"**Teaser**" has the meaning given to it section 5.

"**Unsecured Noteholders**" means holders of Unsecured Notes.

"**Unsecured Notes**" means the 8.625% unsecured notes due February 1, 2020 and issued by Lightstream pursuant to an indenture dated as of January 30, 2012 as supplemented by the supplemental indenture dated as of February 25, 2015.

SCHEDULE "A"

TO THE COMPANY:

Lightstream Resources Ltd.
2800-525 8th Avenue SW
Calgary, Alberta T2P 1G1
Canada

Attention: Peter Scott and Annie Belecki

Telephone: (403) 775-9771/(403) 234-4169
Fax: (403) 218-6075
Email: pscott@lightstreamres.com / abelecki@lightstreamres.com

TO THE SALE ADVISOR:

TD Securities Inc.
36th Floor, 421-7th Avenue S.W.
Calgary, Alberta T2P 4K9
Canada

Attention: Ruben Contreras and Michael Charron
Telephone: (403) 503-4853 / (403) 299-8505
Email: Ruben.Contreras@tdsecuriites.com / Michael.Charron@tdsecurities.com

WITH COPY TO:

Blake, Cassels & Graydon LLP
3500-855 2nd Street SW
Calgary, Alberta T2P 4J8
Canada

Attention: Kelly Bourassa and Milly Chow

Telephone: (403) 260-9697/(416)-863-2594
Fax: (403) 260-9700/416-863-2653
Email: kelly.bourassa@blakes.com / milly.chow@blakes.com

WITH A COPY TO:

FTI Consulting Canada Inc.
in its capacity as Court-Appointed Monitor of Lightstream Resources Inc., et al.
Ernst & Young Tower
440 2nd Avenue SW, Suite 720
Calgary, Alberta T2P 5E9
Canada

Attention: Deryck Helkaa, Senior Managing Director

Telephone: (403) 545-6031
Facsimile: (403) 444-6699
Email: Deryck.Helkaa@fticonsulting.com

TAB 4

Court File No.
CV-13-10383-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	MONDAY, THE 23RD
	)	
JUSTICE MORAWETZ	)	DAY OF DECEMBER, 2013

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

INITIAL ORDER

THIS APPLICATION, made by the Applicant, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of David M. Petroff sworn December 23, 2013 and the Exhibits thereto (the "**Petroff Affidavit**"), the Pre-Filing Report of FTI Consulting Canada Inc. in its capacity as the Proposed Monitor (as defined in the Petroff Affidavit), dated December 21, 2013, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicant, FTI Consulting Canada Inc., as Proposed Monitor, the Ad Hoc Committee (as defined in the Petroff Affidavit), and Global Resource Fund, no one appearing for any other person although duly served as appears from the affidavit of service of Evan Cobb sworn December 23, 2013 and on reading the consent of FTI Consulting Canada Inc. to act as the Monitor (in such capacity, the "**Monitor**"),

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

4. THIS COURT ORDERS that the Applicant shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"). Subject to further Order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property. The Applicant shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, directors, counsel and such other persons, including counsel to the Special Committee (as defined in the Petroff Affidavit) (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. THIS COURT ORDERS that the Applicant shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies

and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings or in respect of the Applicant's public listing requirements, at their standard rates and charges.

6. THIS COURT ORDERS that, except as otherwise provided to the contrary herein or in the Support Agreement, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicant following the date of this Order.

7. THIS COURT ORDERS that the Applicant shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

8. THIS COURT ORDERS that until a real property lease is disclaimed in accordance with the CCAA, the Applicant shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("Rent"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

9. THIS COURT ORDERS that, except as specifically permitted herein, the Applicant is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business. Notwithstanding the foregoing, the Applicant is authorized and directed until further order of this Court to pay any monthly interest amounts that may become due and owing to Global Resource Fund under the Renvest Facility (as such term is defined in the Petroff Affidavit).

RESTRUCTURING

10. THIS COURT ORDERS that the Applicant shall, subject to such requirements as are imposed by the CCAA and the terms of the Support Agreement, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations;

(b) terminate the employment of such of its employees as it deems appropriate;

(c) retain a solicitation agent and an election agent (the "Solicitation/Election Agent") and permit it to obtain proxies and/or voting information and subscription election forms from registered and beneficial holders of the Notes (as defined in the Petroff Affidavit) in respect of the Plan and any amendments thereto; and

(d) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the "Restructuring").

11. THIS COURT ORDERS that the Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further Order of this Court upon application by the Applicant on at least two (2) days notice to such landlord and any such secured creditors. If the Applicant disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

12. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicant of the basis on which it is taking possession and to gain

possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

SUPPORT AGREEMENT AND BACKSTOP AGREEMENT

13. THIS COURT ORDERS that the Applicant is authorized and empowered to take all steps and actions in respect of, and to comply with all of its obligations pursuant to, the Support Agreement and the Backstop Agreement (each as defined in the Petroff Affidavit) and its various obligations thereunder, and that nothing in this Order shall be construed as waiving or modifying any of the rights, commitments or obligations of Jaguar, its Subsidiaries, the Consenting Noteholders (as defined in the Petroff Affidavit) and the Backstop Parties (as defined in the Petroff Affidavit) under the Support Agreement and the Backstop Agreement, as applicable.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

14. THIS COURT ORDERS that until and including January 22, 2014, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

15. THIS COURT ORDERS that during the Stay Period, no Proceeding shall be commenced or continued: (i) against or in respect of any of the Applicant's direct or indirect subsidiaries (each a "Subsidiary" and, collectively, the "Subsidiaries") with respect to any guarantee, contribution or indemnity obligation, liability or claim in respect of, or that relates to, any agreement involving the Applicant, or the obligations, liabilities and claims of, against or affecting the Applicant or the Business (collectively, the "Applicant Related Liabilities"); (ii) against or in respect of any of a Subsidiary's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Subsidiary Property") with respect to any Applicant Related Liabilities (the matters referred to in (i) and (ii) being, collectively, the "Applicant Related Proceedings Against

Subsidiaries"), except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Applicant Related Proceedings Against Subsidiaries currently under way by any Person are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

17. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any Person against or in respect of any Subsidiary or Subsidiary Property in respect of any Applicant Related Liabilities are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Subsidiary to carry on any business which the Subsidiary is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

18. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

19. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written

agreements with the Applicant or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

20. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

21. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

22. THIS COURT ORDERS that the Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

23. THIS COURT ORDERS that the directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of $150,000, as security for the indemnity provided in paragraph 22 of this Order. The Directors' Charge shall have the priority set out in paragraphs 37 and 40 herein.

24. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 22 of this Order.

APPOINTMENT OF MONITOR

25. THIS COURT ORDERS that FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

26. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicant's receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) advise the Applicant in its preparation of the Applicant's cash flow statements;

(d) advise the Applicant on any amendments to the Plan;

(e) assist the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' meetings for voting on the Plan;

(f) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicant, to the extent that is necessary to adequately assess the Applicant's business and financial affairs or to perform its duties arising under this Order;

(g) assist the Solicitation/Election Agent to obtain proxies and/or voting information and subscription election forms from registered and beneficial holders of the Notes in respect of the Plan and any amendments thereto;

(h) assist the Applicant, to the extent required by the Applicant, with its restructuring activities;

(i) assist the Applicant, to the extent required by the Applicant, with any matters relating to any foreign proceedings commenced in relation to the Applicant, including retaining independent legal counsel, agents, experts, accountants or such other persons as the Monitor deems necessary or advisable respecting the exercise of this power;

(j) engage in discussions with the Ad Hoc Committee and the Applicant's secured creditors, independent of the Applicant and, to the extent that any written reports with respect to these proceedings are delivered by the Monitor (or its advisors) to the Ad Hoc Committee (or its advisors), copies of those written reports shall be delivered by the Monitor (or its advisors) to Global Resource Fund (or its advisors) as soon as

reasonably practicable following delivery to the Ad Hoc Committee;

(k) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(l) perform such other duties as are required by this Order or by this Court from time to time.

27. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

28. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property (or any Subsidiary Property) that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property (or any Subsidiary Property) within the meaning of any Environmental Legislation, unless it is actually in possession.

29. THIS COURT ORDERS that the Monitor shall provide any creditor of the Applicant with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is

confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

30. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

31. THIS COURT ORDERS that the Monitor, domestic and foreign counsel to the Monitor, domestic and foreign counsel to the Applicant, counsel to the Special Committee (as defined in the Petroff Affidavit) domestic and foreign counsel to the Ad Hoc Committee and counsel to Global Resource Fund shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to or after the date of this Order, by the Applicant as part of the costs of these proceedings; and (ii) the Financial Advisors (as defined in the Petroff Affidavit) shall be paid their reasonable fees and disbursements, in each case in accordance with the terms of the FA Engagement Letters (as defined in the Petroff Affidavit), whether incurred prior to or after the date of this Order. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, domestic and foreign counsel for the Monitor, domestic and foreign counsel for the Applicant, domestic and foreign counsel for the Ad Hoc Committee and counsel to the Special Committee weekly, or on such basis as otherwise agreed by the Applicant and the applicable payee and, in addition, the Applicant is hereby authorized to pay to the Monitor and counsel for the Monitor retainers in the amounts of $75,000 and $40,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

32. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

33. THIS COURT ORDERS that the Monitor, domestic and foreign counsel to the Monitor, the Applicant's domestic and foreign counsel, counsel to the Special Committee, domestic and foreign counsel to the Ad Hoc Committee and the Financial Advisors shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which

charge shall not exceed an aggregate amount of $5,000,000, as security for their professional fees and disbursements incurred at their standard rates and charges, and in the case of the Financial Advisors, professional fees and disbursements incurred pursuant to the terms of the FA Engagement Letters, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall consist of two separate charges (the Primary Administration Charge and the Subordinate Administration Charge (each as defined below)) with the priorities set out in paragraphs 37 and 40 hereof.

APPROVAL OF FINANCIAL ADVISORS' ENGAGEMENT

34. THIS COURT ORDERS that the Applicant is authorized to continue the engagement of the Financial Advisors on the terms and conditions set out in the FA Engagement Letters.

35. THIS COURT ORDERS that the FA Engagement Letters be and are hereby ratified and confirmed and the Applicant is authorized to perform its obligations thereunder.

36. THIS COURT ORDERS that any claims of the Financial Advisors under the FA Engagement Letters shall be treated as unaffected in any Plan.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

37. THIS COURT ORDERS that the priorities of the Directors' Charge, the Primary Administration Charge, the Renvest Security (as defined below) and the Subordinated Administration Charge, as among them, shall be as follows:

> First – Administration Charge (to the maximum amount of $500,000) (the "**Primary Administration Charge**");
>
> Second - Directors' Charge (to the maximum amount of $150,000);
>
> Third – Renvest Security; and
>
> Fourth – the Administration Charge (to a maximum of $4,500,000) (the "**Subordinated Administration Charge**").

38. THIS COURT ORDERS that notwithstanding anything to the contrary herein, each of the Financial Advisors shall only be entitled to the benefit of the Primary Administration Charge with

respect to their respective monthly work fees as set out in the terms and conditions of their respective FA Engagement Letters.

39. THIS COURT ORDERS that the filing, registration or perfection of the Directors' Charge, or the Administration Charge (collectively, the "Charges") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

40. THIS COURT ORDERS that each of the Directors' Charge and the Administration Charge (all as constituted and defined herein) shall constitute a charge on the Property and, except as provided in Paragraph 37, with respect to the Subordinated Administration Charge, such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person, with the exception of any Encumbrances ranking in priority to the security granted by the Applicant to secure the obligations under the Renvest Facility prior to the date hereof (the "Renvest Security").

41. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge, or the Renvest Security unless the Applicant also obtains the prior written consent of the Monitor, and the beneficiaries of the Directors' Charge and the Administration Charge, and (if such Encumbrances rank in priority to, or *pari passu* with, the Renvest Security) Global Resource Fund, or further Order of this Court.

42. THIS COURT ORDERS that the Directors' Charge and the Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with

respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Applicant pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

43. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicant's interest in such real property leases.

SERVICE AND NOTICE

44. THIS COURT ORDERS that the Monitor shall (i) as soon as practicable after the granting of this Order, publish in the Globe and Mail (National Edition) and the Wall Street Journal a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder. The list included in subparagraph (C) above shall not include the names, addresses or estimated amounts of the claims of those creditors who are individuals or any personal information in respect of an individual.

45. THIS COURT ORDERS that the Applicant and the Monitor be at liberty to serve this

Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

46. THIS COURT ORDERS that the Applicant, the Monitor, the Ad Hoc Committee, Global Resource Fund and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its website at:

http://cfcanada.fticonsulting.com/jaguar.

47. THIS COURT ORDERS that all written reports delivered by the Applicant (or its advisors) to the Ad Hoc Committee (or its advisors) with respect to these proceedings shall also be delivered by the Applicant (or its advisors) to Global Resource Fund (or its advisors) as soon as reasonably practicable following delivery to the Ad Hoc Committee.

SEALING OF CONFIDENTIAL EXHIBITS

48. THIS COURT ORDERS that Confidential Exhibits "A" and "B" be and are hereby sealed pending further Order of the Court and shall not form part of the public record.

GENERAL

49. THIS COURT ORDERS that the Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

50. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.

51. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal,

regulatory or administrative body having jurisdiction in Canada, the United States, Brazil or elsewhere to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

52. THIS COURT ORDERS that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

53. THIS COURT ORDERS that any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to the Applicant, the Monitor, Global Resource Fund, the Ad Hoc Committee and any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

54. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

DEC 23 2013

NB

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)

Court File No:
CV-13-10383-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

INITIAL ORDER

Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 CANADA

Tony Reyes LSUC#: 28218V
Tel: 416.216.4825
Email: tony.reyes@nortonrosefulbright.com

Evan Cobb LSUC#: 55787N
Tel: 416.216.1929
Email: evan.cobb@nortonrosefulbright.com

Fax: 416.216.3930

Lawyers for the Applicant,
Jaguar Mining Inc.

TAB 5

Court File No. _____

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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. (the "Applicant")

Applicant

AFFIDAVIT OF DAVID M. PETROFF
(sworn December 23, 2013)

I, DAVID M. PETROFF, of the City of Toronto, MAKE OATH AND SAY:

1. I am the Chief Executive Officer of Jaguar Mining Inc. ("**Jaguar**"). I have held that position since September 10, 2012. As such, I have personal knowledge of the matters to which I hereinafter depose, except where otherwise stated. In preparing this affidavit I have also consulted, where necessary, with other members of Jaguar's management team or the management teams of its wholly-owned subsidiaries (together with Jaguar, the "**Jaguar Group**"). Where I have relied upon other sources of information, I have stated the source of that information and believe such information to be true.

2. I swear this affidavit in support of an application by Jaguar for an Order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.

C-36, as amended (the "**CCAA**"). Jaguar's subsidiaries are not applicants in these proceedings, but Jaguar requests that its subsidiaries have the benefit of certain provisions of the Initial Order.

3. This affidavit is also sworn in support of a motion by Jaguar for:

(a) an order (the "**Claims Procedure Order**") establishing a process for the identification and determination of claims against Jaguar and its present and former directors and officers; and

(b) an order (the "**Meeting Order**") authorizing Jaguar to file a plan of compromise and arrangement and to convene a meeting of its affected creditors to consider and vote on the plan of compromise and arrangement.

4. If this Court grants the Initial Order, Jaguar is requesting that this Court hear the motion for the Claims Procedure Order and the Meeting Order immediately following the granting of the Initial Order.

5. The principal objective of these proceedings is to effect a recapitalization and financing transaction (the "**Recapitalization**") on an expedited basis to provide a stronger 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. In particular, the Recapitalization would result in a reduction of over $268 million of debt and new liquidity upon exit of approximately $50 million.

6. Jaguar must move forward with the Recapitalization as efficiently and

expeditiously as possible to avoid a looming liquidity crisis. The Notes (as defined below) are Jaguar's primary unsecured liabilities affected by the Recapitalization and any other affected unsecured liabilities of Jaguar, a holding company with no active business operations, are limited and identifiable. Jaguar has the support of Noteholders (as defined below) representing approximately 93% of the outstanding principal amount of Notes to proceed with the Recapitalization on the proposed, expedited time frame.

7. References to "$" or "dollars" herein are to U.S. dollars, for ease of reference. The revenues of the Jaguar Group are in U.S. dollars and Brazilian reais. The expenditures of the Jaguar Group are in U.S. dollars, Brazilian reais, and Canadian dollars.

I. INTRODUCTION

8. Jaguar is the public parent corporation of other corporations in the Jaguar Group that carry on active gold mining and exploration in Brazil. Jaguar itself does not carry on active gold mining operations.

9. Based on reduced gold prices and the Jaguar Group's current level of operating expenditures, the Jaguar Group is expected to cease to have sufficient cash resources to continue operations in the first quarter of 2014.

10. Jaguar has committed an event of default under its 4.5% convertible note indenture dated September 15, 2009 as a result of the non-payment of approximately $3.7 million of interest as of December 2, 2013. As a result of this event of default certain remedies have become available, including the possible acceleration of the

C. Review of the Plan by the Board of Directors and the Special Committee

92. An independent committee comprised of three members of the Board of Directors of Jaguar (the "**Special Committee**") was established by the Board of Directors to consider strategic matters relating to Jaguar. The Special Committee received advice from its independent legal counsel, from Jaguar's counsel and Jaguar's financial advisor. The Special Committee reviewed and considered the Plan and has determined, in consultation with legal and financial advisors, that the Plan is fair, reasonable and in the best interests of Jaguar. The Special Committee has unanimously recommended that the Board of Directors of Jaguar approve the steps necessary to implement the Plan.

93. After careful consideration, and after considering the advice of Jaguar's financial and legal advisors, the Board of Directors of Jaguar unanimously approved and authorized Jaguar's application under the CCAA to implement the Plan.

94. I am unaware of any person who, in their capacity as a member of the Board of Directors, would receive any collateral benefit as a result of the Plan, aside from the releases contained therein.

D. Stakeholder Support

95. As of the date of this affidavit, the Plan is supported by holders of 2014 Notes representing approximately 96% of the outstanding obligations under the 2014 Notes and holders of 2016 Notes representing approximately 89% of the outstanding

obligations under the 2016 Notes, which majorities have executed a support agreement with Jaguar and its Subsidiaries dated as of November 13, 2013 (as amended), or a consent agreement thereto (collectively, the "**Support Agreement**"). A copy of the Support Agreement, redacted for confidentiality reasons, is attached as Exhibit "M" hereto.

96. As stated above, the Support Agreement provides certain termination rights to Consenting Noteholders if the Plan is not implemented by the Outside Date of February 28, 2014.

97. Consenting Noteholders that executed the Support Agreement (including consent agreements thereto) on or prior to November 26, 2013 (or such other date as agreed to by Jaguar, the Monitor and the Majority Consenting Noteholders) are eligible for additional New Common Shares under the Plan, in settlement of their Notes, as detailed above.

98. Aside from the Consenting Noteholders, the only parties' whose legal rights are affected by the Plan are:

(a) the small minority of Noteholders that are not Consenting Noteholders;

(b) the general unsecured creditors of Jaguar as of the filing date, if any;

(c) the plaintiffs in the litigation commenced by Daniel Titcomb, which is in large part based upon claimed losses in respect of equity shares of Jaguar held by the plaintiffs; and

TAB 6

Court File No. CV-15-000011169-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	**THURSDAY, THE 25TH**
	)	
JUSTICE NEWBOULD	)	**DAY OF FEBRUARY, 2016**

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 ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALOMGA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY, AND ESSAR STEEL ALGOMA INC. USA

Applicants

ORDER

THIS MOTION pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") made by the Ad Hoc Committee of Essar Algoma Noteholders (the "**Ad Hoc Committee**"), with the support of Wilmington Trust, National Association, in its capacity as trustee (the "**Trustee**") pursuant to an indenture dated November 14, 2014 (the "**Indenture**") pursuant to which Essar Steel Algoma Inc. issued certain 9.50% senior secured notes due November 15, 2019 (the "**Senior Secured Notes**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON HEARING the submissions of counsel for the Applicants, the Ad Hoc Committee, the Trustee, the Monitor and such other counsel as were present and wished to be heard,

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that any payment, consideration or other distribution to be made, directly or indirectly, in respect of the Senior Secured Notes (a "**Distribution**") in connection with these CCAA proceedings ~~or any other proceedings in respect of the Applicants, including, without limitation, proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended~~ shall be made exclusively to the Trustee for further distribution pursuant to the terms of this Order unless, prior to the making of any such Distribution, the Applicants have paid in full all outstanding Trustee Expenses and Ad Hoc Committee Expenses (each as defined herein).

3. **THIS COURT ORDERS** that any Distribution made to the Trustee in accordance with paragraph 2 of this Order shall be paid out by the Trustee in the following order:

(a) First, to the Trustee for amounts due to it under Section 7.7 of the Indenture (the "**Trustee Expenses**");

(b) Second, to counsel to the Ad Hoc Committee, Goodmans LLP, Paul, Weiss, Rifkind, Wharton & Garrison LLP and Young Conaway Stargatt & Taylor, LLP, for their respective reasonable fees and expenses incurred in connection with any matter relating to the Applicants, whether incurred prior to or following the granting of the Amended and Restated Initial Order dated as of November 9, 2015 (the "**Ad Hoc Committee Expenses**"); and

(c) Third, to holders of the Senior Secured Notes for amounts due and unpaid in respect of or pursuant to the Senior Secured Notes or the Indenture.

4. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States (including the United States Bankruptcy Court for the District of Delaware) or any other

jurisdiction to give effect to this Order and to assist the Trustee, the Applicants and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Trustee, the Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Trustee, the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

FEB 25 2016

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 ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

Court File No: CV-15-000011169-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

ORDER

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

L. Joseph Latham LSUC# 32326A
E-mail: jlatham@goodmans.ca

Robert J. Chadwick LSUC# 35165K
E-mail: rchadwick@goodmans.ca

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Ad Hoc Committee of Essar Algoma Noteholders

TAB 7

2009 CarswellOnt 3028
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 3028, [2009] O.J. No. 2166, 177 A.C.W.S. (3d) 634, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: April 20, 2009
Judgment: May 27, 2009 *
Docket: 09-CL-7950

Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees
Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Alan Mersky, Derrick Tay for Applicants
Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for the Nortel Terminated Canadian Employees Owed Termination and Severance Pay
M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits Gurantee Fund
Leanne Williams for Flextronics Telecom Systems Ltd.
Jay Carfagnini, Chris Armstrong for Monitor, Ernst & Young Inc.
Gail Misra for Communication, Energy and Paperworkers Union of Canada
J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services
Mark Zigler, S. Philpott for Certain Former Employees of Nortel
G.H. Finlayson for Informal Nortel Noteholders Group
A. Kauffman for Export Development Canada
Alex MacFarlane for Unsecured Creditors' Committee (U.S.)

Subject: Insolvency

MOTIONS regarding appointment of counsel in proceedings under *Companies' Creditors Arrangement Act.*

***Morawetz J.*:**

1 On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

2 This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

3 The proposed representative counsel are:

(i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.

(ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.

(iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.

(iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

4 At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

5 Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

6 The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

7 The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.

8 The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

9 These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?

(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 - Representative Counsel and Funding Orders

10 The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

11 Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

12 In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

13 In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

14 I am in agreement with these general submissions.

15 The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

16 In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 - Who Should be Appointed as Representative Counsel?

17 The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

18 The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

> (a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:
>
> (b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and
>
> (c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

19 Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

20 Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

21 J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

(a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

22 Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.

23 The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay, retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

24 Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

25 Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

26 Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

27 As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

28 At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

29 Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

30 Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

31 Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

32 Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");

(b) Retirement Allowance Payment ("RAP"); and

(c) Layoff and Severance Payments

33 The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;

(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and

(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

34 The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

35 At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;

(b) the Health Care Plan;

(c) the Pension Plan and Health Care Plan as a survivor of a former employee;

(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;

(e) severance and termination pay ; and

(f) TRA payments.

36 The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

37 With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

38 Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

39 The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

40 They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

41 In the NS factum at paragraphs 44 - 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

42 The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

43 The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

44 Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's

claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

45 Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

46 Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

47 KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

48 KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

49 KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 - 21.

50 KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

51 Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.

52 With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

53 To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary

emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

54 It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

55 A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

56 In the responding factum at paragraphs 28 - 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

57 The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

58 In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

59 Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

60 Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

61 In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

62 Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *Stelco Inc., Re*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Stelco Inc., Re*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Canadian Airlines Corp., Re* and articulated the following factors to be considered in the assessment of the "commonality of interest".

> In summary, the case has established the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

Stelco Inc., Re (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), para 31.

63 I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

64 As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

65 The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.

66 The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.

67 I would ask that counsel prepare a form of order for my consideration.

Order accordingly.

Footnotes

* Additional reasons at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3530 (Ont. S.C.J. [Commercial List]).

TAB 8

2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, [2015] O.J. No. 247, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

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

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

Morawetz R.S.J.

Heard: January 15, 2015
Judgment: January 16, 2015
Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz for Target Corporation
Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")
Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust
Susan Philpott for Proposed Employee Representative Counsel, for Employees of the Applicants

***Morawetz R.S.J.*:**

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility

provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

a) Should the stay be extended to the Partnerships?

b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

d) Should the Court approve protections for employees?

e) Is it appropriate to allow payment of certain pre-filing amounts?

f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund, Re*, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or

arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Priszm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./ Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative

Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Nortel Networks Corp., Re*, 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Nortel Networks (KERP)]*, and *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]). In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.), I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

Application granted.

TAB 9

I.I.C. Ct. Filing 311195886001

Metcalfe & Mansfield Alternative Investments II Corp — Doc. No. 08-CL-7440
35. **— Order, April 15, 2008**

Re Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 4446372 Canada Inc. and 6932819 Canada Inc., Court File No. 08-CL-7440 (Superior Court of Justice, Commercial List, Toronto, Ontario)

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985 C. C-36, as Amended and In the Matter of a Plan of Compromise and Arrangement Involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & 1viansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 4446372 Canada Inc. and 6932819 Canada Inc., Trustees of the Conduits Listed in Schedule "A" Hereto — Between: The Investors Represented on The-Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper Listed in Schedule "B" Hereto Applicants — and — Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 4446372 Canada Inc. and 6932819 Canada Inc., Trustees of the Conduits Listed in Schedule "A" Hereto Respondents

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

THE HONOURABLE	)	*TUESDAY, THE 15h DAY*
	)	
MR. JUSTICE CAMPBELL	)	*OF APRIL, 2008*

Order (Re Appointment of Representative Counsel)

THIS MOTION MADE by the Ad Hoc Retail Holders Committee (the "*AHRHC*") of Holders of Non-Bank Sponsored Asset-Backed Commercial Paper ("*ABCP*") for an order appointing representative counsel, in these proceedings was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the AHRHC dated the 15th day of April, 2008 and the affidavits of Eliezer Karp, Henry Juroviesky and Edwin Cohen, affirmed the 11th day of April, 2008 and affirmed/sworn on the 13th day of April, 2008 (the "*Karp Affidavit*", the "*Juroviesky Affidavit*" and the "*Cohen Affidavit*") filed, and on hearing the submissions of counsel for the Committee.

1. *THIS COURT ORDERS* that all parties entitled to notice of this motion have been served with notice of this motion and that the time for service is hereby abridged such that service effected on the parties served with notice of this motion shall be good and sufficient notice of this motion.

2. *THIS COURT ORDERS* that (a) Juroviesky and Ricci LLP ("JR") and (b) Shibley Righton LLP ("SR") are appointed in these proceedings to represent the Ad Hoc Retail Holders Committee (collectively JR and SR are referred to herein as "Representative Counsel") but nothing in this paragraph shall impair the right, if any, of any individual holder of ABCP to retain and Instruct counsel in these proceedings on his, her or its own behalf.

3. *THIS COURT ORDERS* that, subject to further order of the Court, the Representative Counsel shall represent the interest of all persons, Family trusts, or personal holding corporations that purchased ABCP from a retail brokerage and shall advise those

on whose behalf they are hereby appointed in all aspects of these proceedings, without any obligation to consult with or seek individual instructions from those on whose behalf they have been appointed to represent unless otherwise ordered by the Court.

4. *THIS COURT ORDERS* that the Representative Counsel shall not be liable jointly or severally for any act or omission in respect of their appointment or the fulfillment of their duties in carrying out the provisions of this Order, and that no action or other proceedings shall be commenced against either of the Representative Counsel relating to their acting as such, except with prior leave of this Court, on at least 7 day's notice to the Representative Counsel, as may be applicable, and upon further Order in respect of security for costs, to be given by the plaintiff for the costs, on a substantial indemnity basis, of the Representative Counsel in connection with any such action or proceeding.

5. *THIS COURT ORDERS* that the Representative Counsel may from time to time apply to this Court for advice and directions in respect of their appointment or the fulfillment of their duties in carrying out the provisions of this Order, upon notice to the Applicants, to the CCAA Parties (as defined in the Initial Order in the instant matter) and to other interested parties, unless otherwise ordered by the Court.

6. *THIS COURT ORDERS* that the Representative Counsel shall be given notice of all motions to which holders of ABCP are entitled in these proceedings and that they shall be entitled to represent those on whose behalf they are hereby appointed in all such proceedings.

7. *THIS COURT ORDERS* that Diane Urquhart be appointed as the Financial Analyst for the AHRHC and that she be paid her reasonable fees and disbursements by the CCAA parties from and after March 25th, 2008.

8. *THIS COURT ORDERS* that the paragraphs 32 and 34 of the Order of this Honorable Court dated March 17, 2008 are hereby amended effective March 25th, 2008 and are deemed from and after that time to include Representative Counsel as appointed herein among the parties who shall be paid their reasonable fees and disbursements in connection with these proceedings, in each case at their standard rates and charges, from and after March 25, 2008 and among those who benefit from the Professionals charge as defined therein.

Schedule "A" Conduit Trusts

APOLLO TRUST

APSLEY TRUST

ARIA TRUST

AURORA TRUST

COMET TRUST

ENCORI/TRUST

GEMINI TRUST

IRONSTONE TRUST

MNIAI-I TRUST

NEWSHORE CANADIAN TRUST

OPUS TRUST

PLANET TRUST

ROCKET TRUST

SELKIRK FUNDING TRUST

SILVERSTONE TRUST

SLATE TRUST

STRUCTURED ASSET TRUST

STRUCTURED INVESTMENT TRUST III

SYMPHONY TRUST

WHITEHALL TRUST

Schedule "B" Applicants

ATB FINANCIAL

CAISSE DE DEPOT ET PLACEMENT DU QUEBEC

CANACCORD CAPITAL CORPORATION

CANADA MORTGAGE AND HOUSING CORPORATION

CREDIT UNION CENTRAL ALBERTA LIMITED

CREDIT UNION CENTRAL OF BRITISH COLUMBIA

CREDIT UNION CENTRAL OF ONTARIO

DESJARDINS GROUP

MAGNA INTERNATIONAL INC.

NATIONAL BANK FINANCIAL INC., NATIONAL BANK OF CANADA

NAV CANADA

NORTH WATER CAPITAL MANAGEMENT INC.

PUBLIC SECTOR PENSION PLAN INVESTMENT BOARD

UNIVERSITY OF ALBERTA

TAB 10

Court File No. 08-CL-7440

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & 1VIANSFIELD ALTERNATIVE INVESTMENTS HI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

B E T W E E N:

THE INVESTORS REPRESENTED ON THE-PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO

Applicants

- and -

METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATTVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

Respondents

NOTICE OF MOTION

THE MOVING PARTY, Ad Hoc Committee (the "**Ad Hoc Retail Holders Committee**") of Holders of Non-Bank Sponsored Asset-Backed Commercial Paper will make a motion to a judge of the Ontario Superior Court of justice presiding over the Commercial List on the 15th day of April, 2008 at 10:00 o'clock in the forenoon, or as soon thereafter as the motion can be heard at 393 University Avenue, Toronto, Ontario.

THE MOTION IS FOR:

1. The entry of an Order in the form annexed to this Motion Record; and

2. Such further or other Order as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

1. The reasons set out in the Affidavit of Eliezer Karp, dated the 11th day of April, 2008.

2. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Affidavit of Eliezer Karp, dated the 11th day of April, 2008; and

2. Such further and other material as counsel may advise and this Honourable Court permit.

April 11, 2008

SHIBLEY RIGHTON LLP
Barristers & Solicitors
Suite 700 – 250 University Avenue
Toronto, ON M5H 3E5

Arthur O. Jacques (LSUC No. 12437M)
Tel: (416) 214-5213
Fax: (416) 214-5413
Email: arthur.Jacques@shibleyrighton.com

Thomas McRae (LSUC No. 32375U)
Tel: (416) 214-5206
Fax: (416) 214-5400
Email: thomas.mcrae@shibleyrighton.com
Co-Counsel for the Ad Hoc Retail Creditors Committee (Brian Hunter et al)

JUROVIESKY & RICCI LLP
Barristers & Solicitors
Suite 904 – 4950 Yonge Street
Toronto, ON M2N 6K1

Henry Juroviesky (LSUC No. 532233S)
Tel: (416) 481-0718
Fax: (416) 481-1792
Email: hjuroviesky@jruslaw.com

Eliezer Karp (LSUC No. 54317P)
Tel: (416) 481-0718
Fax: (416) 418-1792
Email: ekarp@jruslaw.com
Co-Counsel for Ad Hoc Retail Creditors Committee (Brian Hunter et al)

TO: **GOODMANS LLP**
250 Yonge Street.. Suite 2400
Toronto ON M7B 2M6

Benjamin Z.arnett
Gale Rubenstein

Tel: 416.979.2211
Fax: 416.979.1234

Solicitors for the Applicants

AND TO: **THE SERVICE LIST ATTACHED**

SCHEDULE"A"

Conduit Trusts

APOLLO TRUST

APSLEY TRUST

ARIA TRUST

AURURA TRUST

COMET TRUST

ENCORE TRUST

GEMINI TRUST

IRONSTONE TRUST

MMAI-I TRUST

NEWSHORE CANADIAN TRUST

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SLATE TRUST

STRUCTURED ASSET TRUST

STRUCTURED INVESTMENT TRUST III

SYMPHONY TRUST

WHITEHALL TRUST

SCHEDULE "B"

Applicants

ATB FINANCIAL

CAISSE DE DEPOT ET PLACEMENT DU QUEBEC

CANACCORD CAPITAL CORPORATION

CANADA MORTGAGE AND HOUSING CORPORATION

CREDI"I' UNION CENTRAL ALBERTA LIMITED

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NAV CANADA

NORTHWATER CAPITAL MANAGEMENT INC.

PUBLIC SECTOR PENSION PLAN INVESTMENT BOARD

UNIVERSITY OF ALBERTA

IN THE MATTER OF THE COMPANIES/CREDITORS ARRANGEMENT ACT5, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., *et al.*

Court File No. 08-CL-7440

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST
Proceeding Commenced at Toronto

NOTICE OF MOTION

SHIBLEY RIGHTON LLP
Barristers & Solicitors
Suite 700 – 250 University Avenue
Toronto, ON M5H 3E5
Arthur O. Jacques (LSUC No. 12437M)
Tel: (416) 214-5213
Fax: (416) 214-5413
Email: arthur.Jacques@shibleyrighton.com
Thomas McRae (LSUC No. 32375U)
Tel: (416) 214-5206
Fax: (416) 214-5400
Email: thomas.mcrae@shibleyrighton.com
Co-Counsel for the Ad Hoc Retail Creditors Committee
(Brian Hunter et al)

JUROVIESKY & RICCI LLP
Barristers & Solicitors
Suite 904 – 4950 Yonge Street
Toronto, ON M2N 6K1
Henry Juroviesky (LSUC No. 532233S)
Tel: (416) 481-0718
Fax: (416) 481-1792
Email: hjuroviesky@jruslaw.com
Eli Karp (LSUC No. 54317P)
Tel: (416) 481-0718
Fax: (416) 418-1792
Email: ekarp@jruslaw.com
Co-Counsel for Ad Hoc Retail Creditors Committee
(Brian Hunter et al)

Court File No. 08-CL-7440

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & 1VIANSFIELD ALTERNATIVE INVESTMENTS HI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

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Respondents

AFFIDAVIT OF ELIEZER KARP

(Affirmed April 11, 2008)

[Motion by the Ad Hoc Retail Holders Committee of Non-Bank Sponsored Asset-Backed Commercial Paper to seek appointment of Representative Counsel and Financial Advisors]

I, **ELIEZER KARP**, of the City of Toronto, Province of Ontario, AFFIRM AND SAY:

1. I am a solicitor with the law firm of Juroviesky and Ricci LLP (JR), Barristers and Solicitors.

Background: Position of Holders to be represented

2. I, together with Henry Juroviesky of JR along with our co-counsel, Arthur Jacques of Shibley Righton LLP (SR), are solicitors for the Ad Hoc Retail Holders Committee of Holders (variously "AHRHC" or Committee) of Non-Bank Sponsored Asset-Backed Commercial Paper ("ABCP") and Blackmore Partners Inc. of Toronto, Ontario and Chicago, Illinois ("Blackmore") in its role as financial consultant and Diane Urquhart, in her role as an independent financial analyst and advisor and as such have knowledge of the matters to which I hereinafter depose.

Purpose

3 This Affidavit (the "Affidavit") is respectfully submitted in support of the motion by the Committee to appropriately seek appointment of representative counsel and its financial consultants and advisors.

Brian Hunter

4. I, along with Henry Juroviesky, a Partner at JR, and our co- counsel, Arthur O. Jacques of Shibley Righton LLP (SR), have been involved since late March with respect to providing advice, analysis and assistance to Mr. Brian Hunter, P. Eng., a petroleum engineer, who resides in the City of Calgary, in the Province of Alberta, and his Ad Hoc Retail Holders Committee. Mr. Hunter is the holder of approximately $660,000 of frozen non-bank third party asset-backed commercial paper, and is the leader of the AHRHC.

Precipitous Financial Events/The Freeze

5. In August, the market for Non Bank Sponsored ABCP froze, in reaction to the deteriorating global credit markets, and rumours as to ABCP exposure to US Sub-prime mortgage backed securities. Upon that occurrence, a group of large institutional investors holding Billions of Dollars (CDN) of ABCP negotiated a standstill agreement from major creditors, known as the Montreal Accord, to prevent a forced sale of the assets in the affected trusts underlying the ABCP.

6. Since August, when the ABCP market froze, Brian Hunter, the founder and leader of the Committee, has been negotiating with various stakeholders in the Montreal Accord and other relevant Parties to attempt to minimize the negative impact on the Retail Holders of the frozen ABCP arising from the loss of liquidity in their investments. A substantial number of the AHRHC have all or most of their life savings tied up in the frozen paper, and are at risk of losing their entire net worth if an acceptable solution is not found for this group. In addition, the Retail Holders are obviously impacted by the stay of proceedings pursuant to the Initial Order dated March 17, 2008 by this Honourable Court.

Formation of /Composition of Ad Hoc Retail Holders Committee

7. Our Ad Hoc Committee of Retail Holders is comprised of retail investors (holding their ABCP both personally and/or through private holding companies and/or family trusts) and that reside throughout most provinces in Canada. The aggregate amount of their holdings is approximately $200,000,000, or more[1]. It is noteworthy that the 1800 retail investors in the ABCP were not members of nor represented at the Pan-Canadian Investors Committee, the sponsors and authors of the proposed Plan of Arrangement. Mr. Crawford, publicly noted at the Toronto, Information Meeting, that he had only just learned of the large numbers of Individual Retail Noteholders. To date there has been no formal representation of this sensitive retail investment group. Brian Hunter has retained JR and SR, and its advisors on behalf of the group to provide him and the Committee with legal advice. In addition, JR has received more than 150 additional acknowledgements and expressions of interest from members of this group. A good

[1] To date Brian Hunter has personally retained our firm. Furthermore, to date we have received hundreds of emails from Holders acknowledging and encouraging our representation. In addition that of Mr. Hunter, we have received approximately 10 additional modest financial retainers all of which are disproportionate to the overall task at hand.

deal of Committee Members who are holders of the Frozen ABCP are infirm, elderly and/or not financially sophisticated. Due to the complexities of the issues surrounding the frozen ABCP, and the manner underlying how it was sold, some members of the group have to date, unfortunately not fully appreciated the nature of their holdings in the ABCP, nor do they have the consummate skills or sophistication to understand significant components of the Information Circular composed by the Pan-Canadian Committee, that has been previously mailed or distributed to all ABCP holders. We are further concerned that certain holders have only just received copies of the Information Circular, or report that they have not received them at all.

Outstanding Administrative Issues that Require Independent Representation and Advice

8. It is noteworthy that the public announcements have been inserted in the Globe & Mail as late as today by the Pan-Canadian Investors Committee informing all Noteholders, including retail and institutional, that if they have not yet received the information packages they are to contact the Court appointed Monitor or access the subject material on the designated website. The materials related to the overall information package are in excess of 400 pages. A number of the retail holders do not have the skills nor the appropriate hardware to download the materials from the website. Our offices have requested and received approximately 50 of these packages for distribution to clients that have not received the materials directly from either the Monitor or their respective brokers.

Reaction of Federal Government

9. Yesterday there were proceedings in Ottawa of the Standing Committee of Finance of the House of Commons (see www.parl.gc.ca). The Committee was chaired by Rob Merrifield, M.P. Our proposed financial analyst, Diane Urquhart, a former Head of Research at two Schedule 1 Banks, was invited to attend as a witness before the Standing Committee and gave expert testimony. The Standing Committee of Finance is obviously aware of the existing administrative proceeding in Ontario involving the CCAA process and through appropriate separation of powers defers at this stage to the Commercial Court.

Advice Necessary

10. It is essential that the Ad Hoc Retail Holders receive appropriate and meaningful advice, ***inter alia***, to the following relevant considerations in order for them to make an informed and independent decision as to the desirability of the Plan that has been brought forward to date and any other alternatives that they may have:

- Information and advice regarding the April 9th, Canaccord Press Release, regarding a proposed offer, conditional on certain non disclosed events and contractual terms (which should soon be disclosed) to be made to some but not all of its Retail Clients.

- Provide independent legal and financial advice with respect to available options under the Plan, and otherwise, so that they may make an informed and non-biased opinion without intimidation.

- Some Retail Holders are unfortunately afraid to speak out in opposition to the CCAA plan, and have expressed concerns about their personal safety.

- Appropriate legal advice as to the fact that some Retail Holders, if not all, were of the view when they purchased these flawed products, that the investment term of the ABCP was to be short in nature and *fully guaranteed* by, *inter alia*, Schedule 1 banks or foreign banks.

- Advice relating to the fact that under the Proposed CCAA Plan there will be a rescheduling of the proposed new notes received thereunder with rescheduled maturity dates of up to 9 years. Further advice and cogent understanding that there is no certainty nor empirical projections as to viability of an interim secondary market that may take place or the value that the restructured notes may hold if a market becomes available.

- Additional advice arising from the comments by Chairman Crawford that if the Plan is not approved all Noteholders will receive "*damn little*". No liquidation analysis has been disclosed to the Retail Holders to date.

Knowledge Base

11. As a result of the collective involvement of both of our firms and our financial advisors since our initial retainer in late March, we have assiduously invested time, energy, and resources on a "round the clock basis" obtaining familiarity and understanding of the following:

- An understanding of the patterns of the previous sale process to the Retail Holders.
- Some familiarity with the assets and liabilities of the various Trusts and conduits that issued the ABCP.
- The various types of liquidity support systems entered into by the respective conduits and the complex credit default swap contracts and derivative contracts entered into by special purpose vehicles underlying the ABCP.
- The legal options and remedies that would accrue to the noteholders if the proposed Plan were to be approved.
- The potential hazards/ risks/ rewards to litigation by the ABCP noteholders should the proposed Plan not be approved.
- The circumstances surrounding the freeze in the ABCP market in early August and the global credit crisis.
- The composition and makeup of the noteholders in the various conduits that are part of the CCAA proceedings.
- The divergent interests of competing classes of ABCP noteholders including, *inter* alia, retail, corporate, institutional and institutional holders.
- Various leverage points and legal weaknesses inherent in the proposed Plan of Compromise and Arrangement.

Continuing Financial Consulting/Continuing Financial Analysis

12. Upon being retained by the AHRHC, JR recognized the importance of retaining a financial analyst to provide expert advice to the Committee and its counsel with regard to the value of the underlying assets in the frozen ABCP conduits and an estimate as to the value of the

structured notes under the proposed Plan. To that end JR retained Diane Urquhart as our financial expert, analyst and advisor. Diane Urquhart (as previously referred to in paragraph 8 above) has provided essential expert financial analysis and advice relating to the value of the assets in the underlying trusts, understanding the enormously complex financial documentation relating to the restructuring. She has also performed projections and estimations as to the value of the notes on a secondary market should one arise.

13. JR and its co-counsel SR further recognized that to maximize the value of the frozen notes held by the Committee, it would be wise to seek alternative buyers for the notes held by the Committee members. To that end JR retained Blackmore Partners Inc. as its consultants to seek buyers from hedge and private equity funds for the notes of its Committee members, either under a proposed restructuring or immediately. Blackmore Partners is a cross-border financial consulting firm with extensive affiliations in the hedge fund and private equity markets. They have generated expressions of interest from certain Hedge Funds interested in Purchasing the Notes held by the group. Following the public announcement by JR of such potential buyers, Canaccord announced its conditional buy-back offer.

Canaccord Proposed Offer

14. As of the date of this Affidavit, I have not seen the details of the proposed Canaccord offer, and consequently, I have not provided advice to my clients or the group as to my view of its efficacy. Accordingly, the group continues to require our continuing legal representation, continuing through the vote up until and including the date that the beneficiaries of the Plan receive the funds offered therein assuming the offer is consummated. Fairness and equity direct that there be a level playing field in terms of information for all parties. The outstanding amounts of indebtedness are beyond the comprehension of our retail purchaser group, and candidly some smaller institutions.

15. Furthermore, our offices, along with co-counsel continue to negotiate with the Committee for details underlying the Plan, and as of yet these have not been forthcoming.

16. There are also members of the AHRHC that have purchased their ABCP from Credential Securities, and accordingly, are not beneficiaries of the Canaccord offer. Accordingly, our offices along with co-counsel continue to negotiate with the Committee and its counsel for a deal for such persons as well.

17. Although we recognize the unique challenges that face our group of Retail Purchasers of Frozen ABCP, we recognize the prodigious efforts of Mr. Purdy Crawford, as Chairman of the Pan-Canadian Investor Group and his offers of assistance in these matters.

18. Mr. Simon Jegher (a former VP Finance of Bell Canada Enterprises) informed us earlier today by telephone that Mr. Purdy Crawford publicly commented at the Montreal Quebec Information Meeting on Monday March 29, that he would support a proposal that we receive appropriate funding in the circumstances. We note that an earlier approval was obtained from this Honourable Court by Miller Thomson, Barristers and Solicitors, as representative of their own ad hoc committee of institutional investors for a similar representation order.

19. It is our intention and mandate to be cooperative but on a fully informed independent basis.

AFFIRMED BEFORE ME at the)
City of Toronto, in the)
Province of Ontario)
this 11th day of April, 2008)
)
)

A Commissioner, etc.

ELIEZER KARP

IN THE MATTER OF THE COMPANIES/CREDITORS ARRANGEMENT ACT5, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., *et al.*

Court File No. 08-CL-7440

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST
Proceeding Commenced at Toronto

AFFIDAVIT OF ELIEZER KARP
(Affirmed April 11, 2008)

SHIBLEY RIGHTON LLP
Barristers & Solicitors
Suite 700 – 250 University Avenue
Toronto, ON M5H 3E5
Arthur O. Jacques (LSUC No. 12437M)
Tel: (416) 214-5213
Fax: (416) 214-5413
Email: arthur.Jacques@shibleyrighton.com
Thomas McRae (LSUC No. 32375U)
Tel: (416) 214-5206
Fax: (416) 214-5400
Email: thomas.mcrae@shibleyrighton.com
Co-Counsel for the Ad Hoc Retail Creditors Committee
(Brian Hunter et al)
JUROVIESKY & RICCI LLP
Barristers & Solicitors
Suite 904 – 4950 Yonge Street
Toronto, ON M2N 6K1
Henry Juroviesky (LSUC No. 532233S)
Tel: (416) 481-0718
Fax: (416) 481-1792
Email: hjuroviesky@jruslaw.com
Eli Karp (LSUC No. 54317P)
Tel: (416) 481-0718
Fax: (416) 418-1792
Email: ekarp@jruslaw.com
Co-Counsel for Ad Hoc Retail Creditors Committee
(Brian Hunter et al)

Court File No. 08-CL-7440

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & 1VIANSFIELD ALTERNATIVE INVESTMENTS HI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

B E T W E E N:

THE INVESTORS REPRESENTED ON THE-PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO

Applicants

- and -

METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATTVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

Respondents

AFFIDAVIT OF HENRY JUROVIESKY

(Affirmed April 13, 2008)

[Motion by the Ad Hoc Retail Holders Committee of Non-Bank Sponsored Asset-Backed Commercial Paper to seek appointment of Representative Counsel and Financial Advisors]

I, **HENRY JUROVIESKY**, of the City of Toronto, Province of Ontario, AFFIRM AND SAY:

1. I am the managing and founding partner of the law firm of Juroviesky and Ricci LLP (JR), Barristers and Solicitors.

2. I am a Certified Public Accountant in the State of Maryland, in the United States of America. I am a graduate of the University of Pennsylvania Law School. I graduated in 1996 with a Juris Doctor degree in legal studies. I was subsequently called to the Bar of the District of Columbia and the State of Maryland in 1996. At the commencement of my legal career I was employed by the United States Government, Department of the Treasury where my work involved analysis related to the taxation of Insurance Company products. My duties as an attorney for the United States Government were directed in the fields of financial instruments and products, including *inter alia* the valuation of complex financial transactions and instruments including hybrid, debt/equity securities, derivatives and synthetic assets.

3. I moved to Canada in 2000. My wife is a Canadian. Articling was waived for me and I completed the Bar Admission Course under the aegis of the Law Society of Upper Canada. I was called to the Bar in the Province of Ontario in January 2007. As of the date hereof I am a member in good standing of the Law Society of Upper Canada.

4. My firm consists of four lawyers that are qualified to practice in the Province of Ontario together with one foreign legal representative being Jonathane Ricci. Mr. Ricci is a member of the Bar of the State of Michigan.

5. JR concentrates its professional services in the areas of class actions, mergers and acquisitions, corporate law, litigation and international taxation. Examples of class actions

currently supervised by our firm are Corless et al vs. KPMG (overtime litigation), Ebert et al vs. Nestle' Canada et al (chocolate litigation and price fixing), and Bain et al vs.General Motors et al (conspiracy to fix prices of cars in Canada). We are not experienced in complex corporate insolvency and financial restructuring matters.

6. In late March 2008 we were contacted by Brian Hunter (Hunter) of Calgary, Alberta, and Diane Urquhart of Mississauga, Ontario, with respect to all of the complicated and unfolding issues relating to the ABCP. Hunter retained our firm on March 25th, 2008 in writing with respect to representing himself as well as parties within his ever expanding group of retail holders of ABCP. Annexed hereto as Exhibit A are e-mails of even date addressed to me and my co-counsel Arthur Jacques, from Brian Hunter relating to his professional background and the circumstances under which he has been involved in organizing approximately 500 retail holders of the ABCP.

7. After we were retained, Hunter, on March 28th, 2008, requested that additional professional assistance in the form of restructuring and insolvency counsel involving financial institutions and paper was essential for him and his retail constituency. At his suggestion we contacted Arthur Jacques, LLB, LLM (Business Law), a senior partner of Shibley Righton LLP of Toronto, Ontario. We now understand that Mr. Jacques has had extensive involvement in some of Canada's most extensive restructurings including *United Cooperatives of Ontario* (one of the first "modern restructurings"), involvement in the collapse of various Canadian Trust Companies and Credit Unions respectively, the liquidation, *inter alia*, of *Canadian Commercial Bank*, the liquidation of miscellaneous Canadian Insurance Companies such as *Pitts Insurance*, *Canadian Great Lakes*, *Confederation Life Insurance Company* as well as involvement in both private and judicial receiverships, the CCAA arrangements involved in *Olympia & York Developments Limited*, *Cadillac Fairview Corporation*, *Bramalea Corp.*, and Campeau Corp., *Stelco* and *Air Canada*. From time to time Mr. Jacques has acted for some of Canada's Schedule 1 Banks as well as Schedule 2 Banks. In addition, he has had cross-border restructuring experience and has testified before the *Levin Committee on Correspondent Banking and Money Laundering* in front of the United States Senate. He has had occasional calls in certain common

law provinces of Canada and given expert testimony before Federal Courts in the USA on Canadian restructuring issues. He has lectured and published.

8. The purpose of our professional engagement of Shibley Righton as co-counsel was not to double team the professional retainer, but was rather to have effective divisions of labour and complementary professional expertise with which to adequately and appropriately service Hunter and his comprehensive group.

9. One of the purposes of this Affidavit is to supplement the earlier Affidavit of my colleague, Eliezer Karp of my firm. I understand that Mr. Jacques over the weekend has had discussions with one of the senior restructuring counsel at Goodmans, Ms. Gale Rubenstein, who has sought out certain clarifications and greater definition than what is contained in the Affidavit of my colleague Mr. Karp. My Affidavit in part and the draft order now attached to the motion materials is intended to clarify certain issues relating to the request for a representative order.

Executive Summary

10. Our firm represents Hunter who holds $660,000 of frozen ABCP. He is a professional engineer and resides in Calgary, Alberta. I have been in touch with Hunter on a daily basis by telephone and in constant contact by email. On all occasions Hunter has been candid and forthright in all respects. I am aware that Hunter has had an ongoing dialogue with Mr. Purdy Crawford, chairman of the Pan-Canadian Investor Committee.

11. Hunter retained our firm in March, 2008 on the recommendation of Diane Urquhart ("Urquhart"), the former Head of Investment Research at one of Canada's Schedule 1 Banks. Urquhart was referred to in the initial Affidavit of my colleague, Mr. Karp, at paragraph * of his Affidavit.

12. Hunter, since the inception of the freeze associated with the ABCP Paper last summer, has been involved extensively on a volunteer basis, in yeomen attempts to understand his own financial dilemma and that of other Retail investors, who received their paper through Canaccord

et al. Attached herewith as Exhibit A are two emails of even date addressed to Arthur Jacques, our Co-Counsel. As indicated in the Hunter note, he became aware of the ABCP issue last August. Subsequent thereto, he has been contacted by over 300 individuals (representing an aggregate of 500 accounts) comprising individuals and small holding companies. The aggregate amount outstanding to all Retail Investors and now in default is approximately $400,000,000. The affected parties of holders of ABCP have sought out leadership in Hunter and he has courageously responded accordingly. Since his initial involvement he has taken on the management of organizing the individuals so affected in an attempt to coordinate information and promote equitable resolution under the circumstances. Although we have been modestly financially retained by Hunter, no one individual has the extraordinary financial resources to fully support and fund the extensive representative legal and financial services that are required to adequately bring this matter to successful resolution. Hunter has informed me that the various 300 holders reside throughout Canada. Attached hereto as Exhibit B is an Affidavit of Edwin Cohen (Cohen). Cohen was alerted the other day by a media reference to Mr. Jacques whom he has known since 1971. Cohen's family members are holders of approximately $14,000 of ABCP. Cohen who is a sophisticated investor, was completely unaware that his family's funds were placed in structured products. Cohen has expressed his opinion that he has extreme difficulty in understanding the materials previously circulated contained in the CCAA Information Circular outlining, *inter alia*, the proposed Plan of Arrangement. Cohen has no ability to evaluate the proposal nor come to any conclusion on an informed and unrepresented individual basis.

13. While our offices are pleased with the announcement of the proposed Canaccord programs as of the date of this Affidavit, we have not received any significant salient terms of this relief program. We also note that there is a cut off provision of $1,000,000 with respect to individual purchasers and unfortunately, certain individual members within our proposed representative Ad Hoc group will sustain significant losses.

14. Since the inception of the ABCP crisis until our offices were retained, our clients had not received any offers to redeem their notes. At the time that our offices were retained, there was no firm Secondary Market for the (proposed) restructured notes, and independent published

estimates of the potential value of those notes on a secondary market, were a market to form, were in the range of 50-60 cents.

15. Accordingly, our clients were concerned that should the proposed restructuring occur they would be left holding restructured notes worth approximately half of their par value, with no opportunity to sue for damages, as a result of the proposed omnibus release.

16. Given our extensive time and effort already expended in this file, our collective experience on this matter has been, that, given the diverse interests of the relevant players, and complexities of the underlying factual and technical issues, that facts, circumstances and underlying legal positions change on a daily basis, and thus ongoing professional representation is necessary and required to protect our clients' interests. Accordingly, this request for a Representation Order is made in good faith, and for no improper purpose.

AFFIRMED BEFORE ME at the)
City of Toronto, in the)
Province of Ontario)
this 13th day of April, 2008)
)
)

Eli Karp
A Commissioner, etc.

HENRY JUROVIESKY

THIS IS EXHIBIT "A" REFERRED TO IN THE AFFIDAVIT OF HENRY JUROVIESKY SWORN BEFORE ME THIS 13TH DAY OF APRIL, 2008.

"E KARP"

A COMMISSIONER FOR TAKING AFFIDAVITS

Arthur Jacques

From: Brian Hunter [hunter@windyfield.com]
Sent: Sunday, April 13, 2008 7:55 PM
To: Arthur Jacques
Subject: Fw:

Sent from Verizon CrackBerry Device

-----Original Message-----
From: "Brian Hunter" <hunter@windyfield.com>

Date: Sun, 13 Apr 2008 23:53:59
To:hjuroviesky@jruslaw.com

I first became aware of the ABCP issue on August 16 2007 when contacted by my CCI broker Rob Watson. I initiated contact with CCI management through VP Katherine Young on August 23 2007.

Through this process I have been contacted and contacted by over 300 individuals representing over 500 individuals and small holding companies trapped in the ABCP mess. I initiated contact through getting my name, phone number, email address and facebook forum link published on the national press. Pulled my skirt over my head in front of the entire country so to speak by publishing contact info and how much cash I had tied up in the fiasco. Folks in similar circumstance found my contact info and contacted me looking for assistance for them and their families to recover their life savings. I found out through these contacts that most retail holders of the paper are seniors or others who had been risk averse and placed their saving in these notes to keep it safe.

The affected people I spoke with were looking for some leadership and had common cause with me in getting our savings returned. My job in the oil business is project management, so I took on the management of organizing the individual group looking after their interests and promoting resolution that met their unique needs compared to the institutions running the restructuring committee..

Brian Hunter
Sent from Verizon CrackBerry Device

Arthur Jacques

From: Brian Hunter [hunter@windyfield.com]
Sent: Sunday, April 13, 2008 12:20 PM
To: Arthur Jacques
Cc: hjuroviesky@jruslaw.com; elikarp@fido.blackberry.com
Subject: RE: ABCP

Arthur,

Should be available on cell at 7:00 edt... 303 968 8886 ...
I am traveling today. no access to my files...

A quick CV is :
Born in Calgary 1954 Educated at U of Calgary 1970's , Registered Professional engineer Alberta, 20 years working in gas utilities (ATCO predecessors, NOVA) computers, surface facilities, reservoir engineering, well operations. Last 10 years co-principle in 2 startup oil and gas companies.... Vice President of both Brigus Resources 1997 to 2003 and Montane Resources
2003 to present... Duties, play development, project management of dilling completion, seismic, land acquisition, business development... you name it as small company (4 in office one guy in field) we do it....

Got involved in ABCP by selling equities in what I thought was a down trending market in Jan 2006, told Broker (Rob Watson CCI) wanted it in cash equivalent to keep powder dry for opportunities. Money put in Manulife Note for 1 year, then rolled into ABCP in Jan 2007, I had no idea what this was other than safe money market broker said same as other NO risk (dont believe he knew either)
Got call mid August from Watson, cash not cash anymore, he acknowledged investment was supposed to be cash equivalent and that this should not be happening.
Consulted my brother in law, FMC legal counsel re suing CCI, he told me couldn't act as ALL major firms conflicted by banks and that besides it did not make sense to sue for the $658k as CCI would wear me down.
Worked with Watson to understand what this [redacted] was, took a month to find out it was derivative based crap, had never heard of Credit default swaps CDS) or Colleralized Debt Obligations (CDO) but started to learn.
Then started communicating with Crawford, and doing further research an what this [redacted] was and how it was going to be fixed (saw it did not look good).
Discussed with CCI management to little satisfaction, traded emails with Mark Carney in december..... kept learning more and trying to get some response other than pats on head from committee. In February, learned from Watson that Maybank had told CCI IA's that "the sun would rise April 1, when the new notes will trade, just like every other day ... and we (CCI) will NOT be making our clients whole...' this [redacted] me off as one can imagine so I immediately started the process of moving my investments (ex the ABCP Stuff) to RBC friends care.
I consulted legal counsel again and suggestion was class action and try and get media on side hand wringing was not going to be effective. I set out to do both, initiated media contact with National Post and G&M getting stories re novelty of Facebook site, met investor advocates Urquhart/Elford/Kivenko through facebook and media and started to organize retail noteholders. It grew from there with Crawford and Kresse finally starting to respond.....

On class action had lined up Siskinds in London Ont to file actions in various jurisdictions as soon as restructuring announced.... of course they backed off when CCAA filed and legal waiver came apparent.... Then onto meeting Henry through Urquharts... and thats where you guys come in....

Hope that helps.... as Grateful Deads Jerry Garcia and Robert Hunter (no relation) once wrote....
'...
what a long strange trip its been...'

Only will have Blackberry access for a few days ....
fyi...

Brian

------- Original Message -------
From : Arthur
Jacques[mailto:arthur.jacques@shibleyrighton.com]
Sent : 4/13/2008 9:24:31 AM
To : hunter@windyfield.com
Cc : ;hjuroviesky@jruslaw.com
elikarp@fido.blackberry.com
Subject : RE: ABCP

Brian;

I have been working all weekend with exchanges with Goodman's.

Henry/Eli and I are meeting from 7;00pm Toronto time this evening at my office.

please standby as we will need to access you this evening as we re preparing additional material for you. If you have different telephone nos for the

evening please advise.

please (1) send us your CV and (2) prepare in draft form a Summary detailing how you got involved , how , why when and with who and the depth of your yeoman efforts

Arthur

THIS IS EXHIBIT "B" REFERRED TO IN THE AFFIDAVIT OF HENRY JUROVIESKY SWORN BEFORE ME THIS 13TH DAY OF APRIL, 2008.

"E KHOP"

A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No. 08-CL-7440

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND/ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

BETWEEN:

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO

Applicants

- and -

METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

Respondents

AFFIDAVIT OF EDWIN COHEN

(Sworn April 13, 2008)

I, **EDWIN COHEN**, of the City of Toronto, Province of Ontario, MAKE OATH AND SAY as follows:

1. I am an investor and proprietor in the financial sector. I am a graduate of the University of Manitoba with a Bachelor of Commerce degree. I have done post-graduate studies at Columbia University in Finance and Economics. Although originally from Winnipeg, Manitoba, I have been in Toronto, Ontario since 1964.

2. My immediate family have investments as holders of ABCP paper. We originally had funds on deposit at Canaccord. My family's investment pattern historically has been to put excess funds into the money market and this has meant to us Banker's Acceptances, Treasury Bills (Government of Canada) or tripple A rated short-term corporate money market instruments.

3. At the time of acquisition we did not appreciate that our funds were placed in structured product in the aggregate amount of $14,000.00.

4. Although I am an experienced investor in both equity and corporate debt, the documents that have been presented to me require an interpretation in excess of my ability to appreciate its contents and direction and to make an intelligent and informed decision.

5. As retail investors, we wish to make a fully informed decision, in respect of the subject restructuring, it is thus, our desire, and we feel our right, to have counsel advocating the interests of retail investors and an unbiased resource to which we can address our inquiries that are particular to the situation of retail investors.

SWORN BEFORE ME at the)

City of Toronto, in the)

Province of Ontario)

this 13th day of April, 2008)

Thomas McRae
A Commissioner, etc.

Edwin Cohen
EDWIN COHEN

IN THE MATTER OF THE COMPANIES/CREDITORS ARRANGEMENT ACT5, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., *et al.*

Court File No. 08-CL-7440

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST
Proceeding Commenced at Toronto

AFFIDAVIT OF EDWIN COHEN
(Sworn April 13, 2008)

SHIBLEY RIGHTON LLP
Barristers & Solicitors
Suite 700 – 250 University Avenue
Toronto, ON M5H 3E5
Arthur O. Jacques (LSUC No. 12437M)
Tel: (416) 214-5213
Fax: (416) 214-5413
Email: arthur.Jacques@shibleyrighton.com
Thomas McRae (LSUC No. 32375U)
Tel: (416) 214-5206
Fax: (416) 214-5400
Email: thomas.mcrae@shibleyrighton.com
Co-Counsel for the Ad Hoc Retail Creditors Committee
(Brian Hunter et al)

JUROVIESKY & RICCI LLP
Barristers & Solicitors
Suite 904 – 4950 Yonge Street
Toronto, ON M2N 6K1
Henry Juroviesky (LSUC No. 532233S)
Tel: (416) 481-0718
Fax: (416) 481-1792
Email: hjuroviesky@jruslaw.com
Eliezer Karp (LSUC No. 54317P)
Tel: (416) 481-0718
Fax: (416) 418-1792
Email: ekarp@jruslaw.com
Co-Counsel for Ad Hoc Retail Creditors Committee
(Brian Hunter et al)

IN THE MATTER OF THE COMPANIES/CREDITORS ARRANGEMENT ACT5, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., *et al.*

Court File No. 08-CL-7440

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST
Proceeding Commenced at Toronto

AFFIDAVIT OF HENRY JUROVIESKY
(Affirmed April 13, 2008)

SHIBLEY RIGHTON LLP
Barristers & Solicitors
Suite 700 – 250 University Avenue
Toronto, ON M5H 3E5
Arthur O. Jacques (LSUC No. 12437M)
Tel: (416) 214-5213
Fax: (416) 214-5413
Email: arthur.Jacques@shibleyrighton.com
Thomas McRae (LSUC No. 32375U)
Tel: (416) 214-5206
Fax: (416) 214-5400
Email: thomas.mcrae@shibleyrighton.com
Co-Counsel for the Ad Hoc Retail Creditors Committee
(Brian Hunter et al)

JUROVIESKY & RICCI LLP
Barristers & Solicitors
Suite 904 – 4950 Yonge Street
Toronto, ON M2N 6K1
Henry Juroviesky (LSUC No. 532233S)
Tel: (416) 481-0718
Fax: (416) 481-1792
Email: hjuroviesky@jruslaw.com
Eliezer Karp (LSUC No. 54317P)
Tel: (416) 481-0718
Fax: (416) 418-1792
Email: ekarp@jruslaw.com
Co-Counsel for Ad Hoc Retail Creditors Committee
(Brian Hunter et al)

Court File No. 08-CL-7440

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	TUESDAY, THE 15th DAY
	)	
MR. JUSTICE CAMPBELL	)	OF APRIL, 2008

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & 1VIANSFIELD ALTERNATIVE INVESTMENTS HI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

B E T W E E N:

THE INVESTORS REPRESENTED ON THE-PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO

Applicants

- and -

METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATTVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

Respondents

O R D E R
(RE APPOINTMENT OF REPRESENI'A'I'IVE COUNSEL)

THIS MOTION MADE by the Ad Hoc Retail Holders Committee (the "**AHRHC**") of Holders of Non-Bank Sponsored Asset-Backed Commercial Paper ("**ABCP**") for an order appointing representative counsel, in these proceedings was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Ad Hoc Committee dated the 15th day of April, 2008 and the affidavits of Eliezer Karp, Henry Juroviesky and Edwin Cohen, affirmed the 11th day of April, 2008 and affirmed/sworn on the 13th day of April, 2008 (the "**Karp Affidavit**", the "**Juroviesky Affidavit**" and the "**Cohen Affidavit**") filed, and on hearing the submissions of counsel for the Committee.

1. **THIS COURT ORDERS** that all parties entitled to notice of this motion have been served with notice of this motion and that the time for service is hereby abridged such that service effected on the parties served with notice of this motion shall be good and sufficient notice of this motion.

2. **THIS COURT ORDERS** that (a) Juroviesky and Ricci LLP ("JR") and (b) Shibley Righton LLP ("SR") are appointed in these proceedings to represent the Ad Hoc Retail Holders Committee (collectively JR and SR are referred to herein as "Representative Counsel") but nothing in this paragraph shall impair the right, if any, of any individual holder of ABCP to retain and instruct counsel in these proceedings on his, her or its own behalf.

3. **THIS COURT ORDERS** that, subject to further order of the Court, the Representative Counsel shall represent the interest of all persons, trusts, or corporations holding the affected ABCP for personal purposes and not in connection with trade or business, and shall advise those on whose behalf they are hereby appointed in all aspects of these proceedings, without any obligation to consult with or seek individual instructions from those on whose behalf they have been appointed to represent unless otherwise ordered by the Court.

4. **THIS COURT ORDERS** that the Representative Counsel shall not be liable jointly or severally for any act or omission in respect of their appointment or the fulfillment of their duties in carrying out the provisions of this Order, and that no action or other proceedings shall be commenced against either the Representative Counsel relating to their acting as such, except with prior leave of this Court, on at least 7 day's notice to the Representative Counsel, as may be applicable, and upon further Order in respect of

security for costs, to be given by the plaintiff for the costs, on a substantial indemnity basis, of the Representative Counsel in connection with any such action or proceeding.

5. **THIS COURT ORDERS** that the Representative Counsel may from time to time apply to this Court for advice and directions in respect of their appointment or the fulfillment of their duties in carrying out the provisions of this Order, upon notice to the Applicants, to the CCAA Parties (as defined in the Initial Order in the instant matter) and to other interested parties, unless otherwise ordered by the Court.

6. **THIS COURT ORDERS** that the Representative Counsel shall be given notice of all motions to which holders of ABCP are entitled in these proceedings and that they shall be entitled to represent those on whose behalf they are hereby appointed in all such proceedings.

7. **THIS COURT ORDERS** that the Representative Counsel as appointed by the Order of this Court of even date herewith, shall be paid their reasonable fees and disbursements in connection with these proceedings, in each case at their standard rates and charges, from and after March 25, 2008, by the CCAA Parties as part of the costs of these proceedings, subject to a series by series allocation (the "Allocation"). The Allocation shall be reviewed and approved by the Monitor and will be based, in first instance, on the face values at scheduled maturity of the outstanding Affected ABCP in respect of each series. The Allocation will, at all times and for all purposes, be conditional on the Monitor's confirmation that there is sufficient cash held or deposited during these proceedings in the trust accounts of the Respondents ("Cash on Hand") in respect of a series to pay that series' portion of the Allocation, failing which the Allocation will be adjusted by the Monitor as necessary to ensure payment of the total amount of the said fees and disbursements. The CCAA Parties are hereby directed to pay their portion, pursuant to the Allocation, of the accounts of counsel to Representative Counsel to the AHRHC forthwith after such accounts are presented and in any event no later than ten (10) days after such accounts are presented and, in addition, each of the CCAA Parties is hereby authorized and directed to pay forthwith its portion, pursuant to the Allocation, of a retainer in the aggregate amount of $518,000.00 to be held by the Monitor as security for the payment of the foregoing respective fees and disbursements of the Representative co-counsel to the AHRHC as applicable and as are outstanding from time to time.

8. THIS COURT ORDERS that the Representative Counsel and their Financial Analyst and Consultant shall be entitled to the benefit of and are hereby granted a charge (the "Professionals Charge"), on the Cash on Hand, which charge shall be allocated on a series by series basis in accordance with the allocation and shall not exceed in the aggregate in respect of all Conduits the amount of $10,000,000.00

as security for their reasonable fees and disbursements described in paragraph 32 of the Initial Order incurred at their standard rates and charges. The Professionals Charge shall have the priority set out in paragraphs 40 and 41 of such the Initial Order hereunder and any subsequent enforcement thereof shall be administered by the Monitor in accordance with the Allocation.

9. THIS COURT ORDERS that with respect to the payment of fees and expenses described in paragraph 7 hereof, the payees shall be entitled to the benefit of and are hereby granted a charge not to exceed in the aggregate in respect of all Conduits the amount of $10,000,000.00 (the "Administration Charge") on the Cash on Hand, which charge shall be allocated by the Monitor on a series by series basis in accordance with the Administrative agreements to the extent the related fees and expenses are payable thereunder, as security for payment by the CCAA Parties of such fees and expenses. The Administration Charge shall have the priority set out in paragraphs 40 and 41 of the Initial Order and any subsequent enforcement thereof shall be administered by the Monitor.

SCHEDULE "A"

Conduit Trusts

APOLLO TRUST

APSLEY TRUST

ARIA TRUST

AURORA TRUST

COMET TRUST

ENCORI/ TRUST

GEMINI TRUST

IRONSTONE TRUS T

MNIAI-I TRUST

NEWSHORE CANADIAN TRUST

OPUS TRUST

PLANET TRUST

ROCKET TRUST

SELKIRK FUNDING TRUST

SILVERSTONE TRUST

SLATE TRUST

STRUC'T'URED ASSET TRUST

STRUCTURED INVESTMENT TRUST III

SYMPHONY TRUST

WHITEHALL TRUST

SCHEDULE "B"

Applicants

ATB FINANCIAL

CAISSE DE DEPOT' ET PLACEMENT DU QUEBEC

CANACCORD CAPITAL CORPORATION

CANADA MORTGAGE AND HOUSING CORPORATION

CREDIT UNION CENTRAL ALBERTA LIMITED

CREDIT UNION CENTRAL OF BRITISH COLUMBIA

CREDIT UNION CENTRAL OF ONTARIO

DESJARDINS GROUP

MAGNA INTERNATIONAL INC.

NATIONAL BANK FINANCIAL INC., NATIONAL BANK OF CANADA

NAV CANADA

NORTHWATER CAPITAL MANAGEMENT INC.

PUBLIC SECTOR PENSION PLAN INVESTMENT BOARD

UNIVERSITY OF ALBERTA

IN THE MATTER OF THE COMPANIES/CREDITORS ARRANGEMENT ACT5, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., *et al.*

Court File No. 08-CL-7440

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST
Proceeding Commenced at Toronto

ORDER

SHIBLEY RIGHTON LLP
Barristers & Solicitors
Suite 700 – 250 University Avenue
Toronto, ON M5H 3E5
Arthur O. Jacques (LSUC No. 12437M)
Tel: (416) 214-5213
Fax: (416) 214-5413
Email: arthur.Jacques@shibleyrighton.com
Thomas McRae (LSUC No. 32375U)
Tel: (416) 214-5206
Fax: (416) 214-5400
Email: thomas.mcrae@shibleyrighton.com
Co-Counsel for the Ad Hoc Retail Creditors Committee
(Brian Hunter et al)

JUROVIESKY & RICCI LLP
Barristers & Solicitors
Suite 904 – 4950 Yonge Street
Toronto, ON M2N 6K1
Henry Juroviesky (LSUC No. 532233S)
Tel: (416) 481-0718
Fax: (416) 481-1792
Email: hjuroviesky@jruslaw.com
Eliezer Karp (LSUC No. 54317P)
Tel: (416) 481-0718
Fax: (416) 418-1792
Email: ekarp@jruslaw.com
Co-Counsel for Ad Hoc Retail Creditors Committee
(Brian Hunter et al)

TAB 11

2013 BCSC 2043
British Columbia Supreme Court

League Assets Corp., Re

2013 CarswellBC 3408, 2013 BCSC 2043, [2013] B.C.W.L.D. 9463,
[2013] B.C.W.L.D. 9464, 234 A.C.W.S. (3d) 837, 7 C.B.R. (6th) 74

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

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, As Amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, As Amended

In the Matter of A Plan of Compromise and Arrangement of League Assets Corp. and Those Parties Listed on Schedule "A" Petitioners

Fitzpatrick J.

Heard: October 25, 2013
Judgment: November 8, 2013
Docket: Vancouver S137743

Counsel: D.E. Gruber, T.M. Tomchak, R. Morse, T.C. Louman-Gardiner for Petitioners
J.R. Sandrelli, T.R.M. Jeffries for PricewaterhouseCoopers Inc. as Monitor
C.D. Brousson for Quest Mortgage Corp., Quest Capital Management Corp.
K.E. Siddall for BCMP Mortgage Investment Corporation and Interior Savings Credit Union
Geoffrey Thompson, R.B. Dawkins for TCC Mortgage Holdings Inc. FCC Mortgage Associates Inc., Citizens Bank of Canada, First Calgary Financial Credit Union Limited, Firm Capital Mortgage Fund Inc.
A. Frydenlund for Canadian Western Bank
S.H. Stephens for Romspen Investment Corporation
D.B. Hyndman for Business Development Bank of Canada
William C. Kaplan, Q.C., H. Sevenoaks, for Timbercreek Mortgage Investment Corporation
W.E.J. Skelly for Ad Hoc Committee of Convertible Promissory Noteholders of League Opportunity Fund Ltd.
H. Ferris for Export Development Canada, Bank of Montreal and Churchill Real Estate Inc.
G.J. Gehlen for Whil Concepts Inc., NWM Private Equity LP and NWM Balanced Mortgage Fund (Proposed DIP Lenders)
P.J. Reardon for Maxium Financial Services
D.K. Fitzpatrick for Roynat Inc.
J. Grieve for Proposed Representative / Investors

***Fitzpatrick J.*:**

Introduction

1 This proceeding was recently commenced, on October 17, 2013, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). On October 18, 2013, an Initial Order (the "Initial Order") was granted by Madam Justice Brown of this court. That Initial Order included an Administration Charge of $750,000 and a Directors' Charge of $500,000. PricewaterhouseCoopers Inc. was appointed as Monitor (the "Monitor").

2 The organization of the petitioner group of companies (the "League Group") is exceedingly complex, as I will describe in more detail below. In broad terms, there is a complicated corporate structure comprised of real estate investment trusts, limited partnerships and corporations involved in the development and/or management of various real estate projects in British Columbia, Alberta, Ontario and Quebec. The assets of the League Group include certain securities and income producing and development properties which have been said to have an "implied" equity of over $210 million. Liabilities of the League Group are in excess of $410 million, including claims from approximately 3,200 investors who paid approximately $352 million for various interests.

3 The comeback hearing has been scheduled for November 18, 2013. Following the granting of the Initial Order, various secured creditors on individual projects have consolidated their opposition to these proceedings. It is expected that they will raise substantial issues at the comeback hearing.

4 In the meantime, the League Group has brought this application for debtor in possession or "DIP" financing, given its contention that it urgently needs interim funding until the comeback hearing. The Monitor has also brought an application to appoint representative counsel for the investor group.

5 On October 25, 2013, I heard both applications and granted both orders, although on somewhat different terms than those sought. I indicated at that time that my reasons would follow. These are those reasons.

Background

6 Emanuel Arruda and Adam Gant started the League Group in 2005 with two projects. Further properties were acquired on the same basis as before, namely using traditional bank financing and individual investor contributions.

7 At present, the majority of the League Group entities are owned by IGW Assets Limited Partnership ("LALP"). The general partner of this limited partnership is owned by two numbered companies, which are owned or controlled by Mr. Arruda and Mr. Gant's family trusts respectively.

8 The League Group, which has sought and obtained protection under the *CCAA* and related entities, and their general business activities can be generally summarized as follows:

a) IGW Real Estate Investment Trust ("IGW REIT"): IGW REIT does business mainly through the IGW REIT Limited Partnership ("IGW LP") which undertakes certain project development directly or through separate limited partnerships located in B.C., Alberta, Quebec and Ontario. IGW REIT has issued various notes totalling approximately $10 million. In addition, there are numerous unsecured loans outstanding and outstanding mortgages in respect of various projects;

b) LALP project specific limited partnerships: LALP also operates another set of such limited partnerships designed for short term investments, located in B.C., Alberta and Ontario. Each project general partner is owned by LALP with investors buying units in the limited partnership. Some of the project entities are said to be solvent and not financially tied to the filing petitioners (such as through guarantees) and are therefore not filing parties themselves;

c) League Assets Corp. ("LAC"): LAC owns various general partners of a number of limited partnerships which are involved in various projects, the main ones being Redux Duncan, Colwood Development and Fort St. John, all located in B.C. There are other entities owned by LAC with diverse, but it seems mostly inactive, operations. As with LALP, a number of LAC related entities (and hence projects) are said to be solvent and not financially tied to the filing petitioners. They are therefore not filing parties themselves;

d) "Other" project limited partnerships: these have a similar structure to that of LAC and LALP, save that Mr. Gant and Mr. Arruda own the general partners for the project specific limited partnerships in B.C., Quebec and Ontario. This is said to be an oversight and in any event, these "other" limited partnerships are managed within the League Group, with LAC providing management services for these projects;

e) League Opportunity Fund ("LOF"): LOF is wholly owned by LALP. It is a vehicle for investors and it has issued promissory notes of approximately $13.5 million. The money was loaned by LOF to other members of the League Group. IGW LP(majority owned by IGW REIT) and LAC have guaranteed these notes;

f) investment and wealth management: there are a number of entities within the League Group's investment division which relate to investment and wealth management, including the Harris Fraser Group Limited which was recently acquired in July 2013; and

g) asset management: LAC is retained by IGW REIT, IGW LP and various project limited partnerships to provide asset management, for which it charges fees.

9 The causes of the League Group's financial difficulties have been attributed to a number of factors. Firstly, the 2008 worldwide financial crisis caused a number of delays to certain projects; reduced demand resulted in increased borrowing costs in the long term. Secondly, the recovery from the financial downturn has resulted in many investors seeking to redeem their investments with the League Group to look for higher risk/higher return investments. Thirdly, financing difficulties have been experienced on some projects, such as Redux Duncan and Colwood Development. Generally speaking, Mr. Gant states that the League Group has outgrown both its current corporate structure, which is too complex, and also its project by project funding model.

10 The League Group currently has approximately 105 employees in various roles in Victoria, Vancouver, Toronto and Calgary. The fairly recent acquisition of the Harris Group is adding a further 20 employees in Hong Kong.

11 There has been substantial evidence introduced in Mr. Gant's affidavits regarding the value of the various assets and projects and the secured debt against them. Aside from some Marketable Securities, there are 17 income producing properties and four development properties, for a total of 21 properties.

12 There are 34 mortgage lenders and some have charges on multiple properties. Exhibit "E" to Mr. Gant's affidavit #2 sets out a summary of the various properties or projects, including the appraised values ($395.6 million), the outstanding mortgage debt ($184.6 million) and the "implied equity" in those properties or projects. I will revisit the reliability of this document in further detail below, but it will suffice at this stage to refer to the indicated "implied equity" in the Marketable Securities ($5.8 million), Income Producing Properties ($76.2 million) and Development Properties ($128.9), for a total of approximately $211 million.

13 Unsecured creditors include the note holders in the various project limited partnerships and IGW REIT, inter-corporate debt primarily between IGW LP and other members of the League Group, trade creditors (mostly relating to Colwood Development) and professional service firms (although some of them recently obtained security for their debts just before the filing).

14 Mr. Gant indicates that government remittances are substantially up to date, including those owed to Canada Revenue Agency and the British Columbia government. Income taxes are paid in full for 2012. All of these amounts continue to be paid in the ordinary course of business. However, property taxes are substantially in arrears.

15 Finally, the investor group is comprised mostly of individuals and Mr. Gant believes that some of them have invested a significant portion of their net worth in the League Group. There are also some institutional investors. As of September 2013, IGW REIT ceased making distributions to its investors.

16 Mr. Gant states that the League Group has already taken steps to attempt a restructuring but has been hampered by the lack of funds. He states that any restructuring would likely involve: simplifying the corporate structure, divesting underperforming projects, seeking a stable and comprehensive funding for the various projects, changing the IGW loan process and finally, a potential public offering to increase equity and reduce credit requirements.

Secured Creditor's Objections

17 It quickly became apparent during this hearing that a substantial number of the secured creditors were opposed to these proceedings generally and also specifically opposed to the relief sought on these applications. The secured creditors appearing on these applications included BCMP Mortgage Investment Corporation, Interior Savings Credit Union, Firm Capital Mortgage Fund Inc., Citizens Bank of Canada, First Calgary Financial Credit Union Limited, Canadian Western Bank, Romspen Investment Corporation, Business Development Bank of Canada, Timbercreek Mortgage Investment Corporation, Export Development Canada, Bank of Montreal, Churchill Real Estate Inc., Maxium Financial Services and Roynat Inc.

18 I will not address the complaints or arguments of each individual secured creditor. Many of the arguments are interrelated. Those arguments can be generally summarized in the broad categories as follows:

a) Service/notice: despite the preamble to the Initial Order stating that the court was advised "that the secured creditors and others who are likely to be affected by the charges created herein were given notice", many of the secured creditors state that they did not receive any notice of that hearing or that notice was sent directly to the general offices of the secured creditors which inevitably meant that it was not addressed by them after the hearing had taken place.

No evidence was before me concerning service/notice to the secured creditors. It is apparent that many of the secured creditors intend to argue at the comeback hearing that the Initial Order was granted on an *ex parte* basis and is therefore subject to being set aside for material non-disclosure, including that there was no true urgency in hearing the matter on an *ex parte* basis. It is now generally agreed that the comeback hearing will be heard on a *de novo* basis with the League Group having the onus of justifying to the court the continuation of the provisions in the Initial Order in accordance with the *CCAA*, s. 11.02(3).

b) Statutory Prerequisites: it is argued that individual entities within the League Group do not meet the definition of "debtor company" in s. 2 of the *CCAA* (i.e. they are not "insolvent") and therefore, those entities do not qualify to file for protection under s. 3. I note, however, that this particular issue was addressed before Brown J. prior to the granting of the Initial Order.

In addition, at least one secured creditor intends to argue that the Initial Order should be set aside because the plan of arrangement was doomed to fail (see for example, *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, [1990] B.C.J. No. 2384 (B.C. C.A.));

c) The Enforcing Mortgagees: The secured creditors argue that there was no justification for two of the secured creditors, being TCC Mortgage Holdings Inc. ("TCC") and Quest Mortgage Corp. ("Quest"), being exempted from the stay under the Initial Order (para. 18).

TCC had commenced foreclosure proceedings in May 2013 in respect of the Redux Duncan property. An Order Nisi of foreclosure was granted in August 2013 with the redemption period due to expire in January 2014. Apparently, TCC had brought an application for the appointment of a receiver about the time that the Initial Order was granted. In addition, Quest's mortgages over the Colwood Development property were in default and demands for payment were served in early October 2013. The time for enforcement of those demands would have expired just before the granting of the Initial Order. It is my understanding that Quest has now also commenced a foreclosure proceeding against the Colwood Development.

Unfortunately, the exclusion of these "Enforcing Mortgagees" has engendered a response by the other secured creditors who, not surprisingly, wish to be treated in the same fashion. The fact that they are being treated differently has given rise to the other secured creditors taking the position that these proceedings are, unfairly, affecting only them in terms of their ability to enforce their security. In addition, it is only their security which is being primed by the various charges granted in these proceedings, since the security of the Enforcing Mortgagees has been exempted from the Administration Charge and the Directors' Charge and it is also proposed to be exempted from any DIP Lender's Charge or Representative Counsel Charge.

In many *CCAA* proceedings, foreclosing mortgagees are stayed in a variety of circumstances including when they have already begun enforcement proceedings. Although it was described as an"Enforcing Mortgagee" in the Initial Order, Quest had not yet commenced any foreclosure proceeding or at best, had only recently filed the action. Reasons for the exclusion of these parties were said to be not only that there were monetary defaults under their security, but also to avoid arguments by them as to the appropriateness of this *CCAA* proceeding, based on well-known British Columbia authorities such as *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (B.C. C.A.). Accordingly, while the League Group may have avoided that argument from the Enforcing Mortgagees, the decision to exempt them has resulted in the other secured creditors now being resolved to make those same arguments, in addition to arguing that the League Group was not acting in good faith by agreeing to that exemption.

My only preliminary comment on the issue at this point is that while the court strives to achieve fairness in the proceedings, the task of the court in imposing the stay is in part to ensure that it is "appropriate": *CCAA*, s. 11.02(3)(a). As Deschamps J. stated in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), appropriateness in part extends to treating stakeholders "as advantageously and fairly as the circumstances permit": para. 70. Often there are good reasons to depart from a blanket stay affecting various stakeholders, as is evidenced from the provisions of the model order. Typical examples would include payment of employees and critical suppliers. However, in respect of stakeholders having what seems to be a commonality of interest (and commonality of potential prejudice), I would expect that there would be cogent and compelling evidence to support an order that treated them differently.

d) The "White Boxes" Entities: The secured creditors also make certain arguments in respect of certain members of the League Group who are *not* part of the petitioning group. I have already referred to the extremely complex structure of the League Group. The organizational chart includes various entities marked in yellow which are part of the League Group and who are also petitioning debtors. Many other entities are identified in what have been called the "white boxes" on the organization chart which include those entities that were not part of the petitioning debtor group. I have already referred to some of these "white box" entities above, but it is said by Mr. Gant that they also generally include firstly, shell companies where there are no assets and secondly, entities where the sole liability is to investors and as such, they are not insolvent.

The secured creditors argue that the exclusion of these "white box" entities is suspicious in that there has been inadequate disclosure of the financial circumstances relating to them. In particular, the suggestion has been made that there may be sufficient income or assets in those other entities to support the operations of the League Group in these proceedings without the necessity of priming charges which prejudice their security. If these entities are indeed solvent, then this argument would appear to be diametrically opposed to the other argument of some secured creditors (discussed above) that only *insolvent* entities should be petitioning debtors.

Despite these objections, and for the purposes of these applications, I am satisfied that the materials generally disclose the circumstances relating to these "white box" entities and why these entities have not been included in the *CCAA*filing. I do, however, appreciate that the stakeholders, including the secured creditors, may require further information about these "white box" entities beyond what is contained in Mr. Gant's affidavits. I expect that the League Group, possibly with the assistance of the Monitor, can provide reasonable and relevant material to them so that they might explore this matter. At present, I simply acknowledge that this may be the basis for arguments to be advanced by the secured creditors at the comeback hearing in respect of whether the League Group is operating in a *bona fide* manner.

e) Conflicts: Last, but not least, the secured creditors have raised a number of conflicts on the part of counsel involved in these proceedings. It is clear to me that these conflicts have significantly coloured the perceived fairness of these proceedings from the outset. The original counsel for the League Group (who has since withdrawn) disclosed, after the Initial Order was granted, that she has also acted in the past for Quest. Some of the secured creditors intend to argue at the comeback hearing that there was material nondisclosure of this conflict to Brown J. and that this relationship between the law firm and Quest may have affected the League Group's decision to exclude Quest from the stay.

In addition, in the days following the granting of the Initial Order and in the face of the League Group's application for DIP financing, it was disclosed that the law firm acting for the Monitor (who ceased to act at the end of this hearing) had also undertaken to act for the DIP Lenders in respect of the preparation of financing documents. The explanation is that the DIP Lenders urgently required counsel to address the League Group's pressing need for this DIP financing. Although screens were put in place between the individual lawyers at the law firm, it has unfortunately resulted in the perception that the Monitor's support of the DIP financing, or at least the legal advice relating to the Monitor's support, has been influenced by that relationship. This turn of events was extremely unfortunate, particularly in light of the unquestioned duties of the Monitor as an officer of this court and its overriding duty to act fairly in respect of all stakeholders, whether they are in support of or opposed to the DIP financing.

Finally, current counsel for the League Group has disclosed that his law firm is an unsecured creditor. I am not aware of any objections arising from this fact. However, it does appear that the law firm was giving legal advice to the DIP Lenders at one point.

19 I am advised that all of the issues above may be raised at the comeback hearing. In addition, the secured creditors raised these issues on this application arguing that, in these circumstances, the court should be extremely reluctant to authorize DIP financing and grant a DIP charge or any other charge based on the substantial attacks that will be made on the Initial Order and on the continuation of this proceeding. It is no doubt the strategy of the secured creditors at this time to attempt to inject sufficient uncertainty into these proceedings such that any DIP lender will be reluctant to advance monies to the League Group.

20 It not my intention or role at this time to revisit the basis upon which the Initial Order was granted. Presumably, the Initial Order was granted having regard to the statutory requirements under the *CCAA* and based on well-known principles applicable on such applications, including those set out in *Century Services Inc.* at paras.15-18, 57-71. I appreciate that the issues raised by the secured creditors are significant and if substantiated, may have serious consequences. Nevertheless, I am not convinced that these arguments are sufficient to dissuade the court from granting interim relief at this time, simply to see the League Group through to the comeback hearing, some 24 days away at the time of this hearing.

21 Accordingly, it is my intention to proceed to hear and decide these applications before me based on the Initial Order being extant and based on the updated and current circumstances of the League Group. I have specifically rejected the suggestion of one of the secured creditors to grant these orders on a "without prejudice" basis.

DIP Financing

22 In its application materials, the League Group sought approval of a DIP facility in the amount of $31.5 million from Whil Concepts Inc., NWM Private Equity LP and NWM Balanced Mortgage Fund (whom I will collectively call the "DIP Lenders"). This proposed facility was not only for what was said to be operating funding for the next 13 weeks ($5 million), but for other purposes such as payment of tax arrears ($3.5 million), mortgage payments for 13 weeks($5 million) and to payout one of the existing mortgage lenders, TCC ($18 million).

23 Despite this, the League Group only sought a DIP Lender's Charge of $1.6 million which was said to be the amount of emergency funding that was urgently needed to get to the comeback hearing on November 18. The DIP Lenders supported this restricted charge, based on their submissions that they had no intention of funding, save and except with a DIP Lender's Charge. I understand that given the urgency, and despite the objections of the secured creditors, the DIP Lenders are prepared to immediately fund this amount and in doing so, waive the following conditions: that advances would only be made after expiry of the appeal period and that certain administrative matters, such as insurance, be in place.

24 The test for DIP funding is now mandated by the *CCAA*, s. 11.2:

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

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

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)*(b)*, if any.

25 In accordance with the *CCAA*, s. 11.2(1), the League Group has filed a cash flow forecast to the date of the comeback hearing.

26 As a preliminary matter, no one has challenged the adequacy of the efforts by the League Group to obtain satisfactory interim financing. Nor is there any challenge to the appropriateness of the business terms arranged with the DIP Lenders, including the term, interest rate and level of various fees for monitoring the commitment itself and professionals. The Monitor comments favourably on the process by which the DIP financing was sought by the League Group and the reasonableness of the terms proposed by the DIP Lenders.

27 It is proposed that the DIP Lender's Charge would rank after the Administration Charge but before the Directors' Charge and any Representative Counsel Charge.

28 Notice of this application for DIP financing has been given to secured creditors likely to be affected, as required by the *CCAA*, s. 11.2(1). The secured creditors attending on this application object to the financing for a variety of reasons (as discussed above), and also on the basis that this funding is not urgent, there is an insufficient evidentiary basis for the relief sought and that they will be prejudiced by the DIP Lender's Charge ranking ahead of their security.

29 I will address each of the factors identified in *CCAA*, s.11.2(4).

(a) The period during which the League Group is expected to be subject to proceedings under the CCAA

30 The DIP financing that is sought today is simply to allow the League Group to continue its operations until the comeback hearing on November 18 by allowing it to make certain core payments.

(b) How the League Group's business and financial affairs are to be managed during the proceedings

31 Mr. Gant states in his affidavit that the League Group has been working closely with the Monitor regarding its financial affairs, including reviewing all payments made by the League Group. The Monitor similarly says that it has been working cooperatively with the League Group in terms of preparing the cash flow forecast and other financial documentation.

32 In addition, the League Group had already made certain efforts to reduce operating expenses in anticipation of the *CCAA* filing.

(c) Whether the League Group's management has the confidence of its major creditors

33 Not surprisingly, most of the counsel for the secured creditors appearing on this application voiced their clients' lack of confidence in the League Group's management. However, these types of bald assertions, without more, and without evidence, do little to provide the court with a satisfactory basis upon which to assess this factor. In addition, the position of the secured creditors must be considered in the context of other evidence that suggests that they are fully secured and that payments owed to them by the League Group are current: *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]) at para. 49(c).

34 Counsel for certain noteholders of LOF raised the matter of governance of the League Group during his submissions. While supporting the application for DIP financing, it appears that those stakeholders are considering whether an application for a chief restructuring officer (CRO) might be appropriate in the circumstances. I do not wish or need to predict what might happen at the comeback hearing or any later court application but presumably, if an application for such relief is brought, it will be based on evidence as to the willingness and/or ability of the current management of the League Group to proceed with its restructuring efforts.

(d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made by the League Group

35 Substantial arguments were advanced, by a number of the secured creditors, that the DIP funding was not necessary or urgent. With respect, I disagree.

36 The cash flow forecast indicates that in the period leading up to November 18, approximately $1.6 million will be required in respect of corporate operating expenses. A large portion of that amount, $1.1 million, will be required for payroll, with the first payroll of approximately $550,000 due the very date of the hearing and the second payroll being due on November 8, 2013. The cash flow forecast indicates proposed payments of $339,000 for "project funding" which I am advised relates to supporting certain income producing properties which are operating on a negative cash flow basis. Notwithstanding that the evidence on the project operating expenditures is somewhat thin, in my view, it is reasonable to expect that the League Group has some ongoing operations in the specific projects that require support in this interim period. Again, I would emphasize that it is the overarching intention of the League Group to conduct business in the ordinary course, at least in the initial period of the restructuring until a longer term strategy can be formulated.

37 The anticipated cash receipts of approximately $1.9 million over this time frame are clearly not sufficient to fund the anticipated costs of approximately $3.5 million. Nor is the timing of some of those receipts during the week of October 28 certain in terms of making the payroll as soon as possible after it was due on October 25.

38 Finally, the cash flow forecast anticipates restructuring and financing costs of $1.45 million until the comeback hearing. There are strenuous objections to payment of these amounts; however, it cannot be argued that professionals who are assisting in the restructuring of these proceedings should be denied payment of their reasonable remuneration on an ongoing basis, if such payments are possible: *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para. 66. The amounts are large but not unusual given the complexity of these proceedings and the issues raised. These professionals should not be required to

simply rely on a court ordered charge to protect their outstanding fees. The Administration Charge in any event would not have been sufficient to cover the amounts expected to be incurred to the date of the comeback hearing.

39 Further, if they wish, the stakeholders will have the opportunity to review all professional fees at the end of this matter. In particular, paragraph 34 of the Initial Order provides that the Monitor and its legal counsel will pass their accounts before this court. Paragraphs 6 and 7 of the Initial Order provide for the payment of *reasonable* fees and disbursements to the League Group's counsel.

40 Without the proposed DIP funding, the League Group readily admits that it will be unable to continue. The Monitor states:

> ... If the financing is not approved, the current liquidity situation is such that League will not be able to fund payroll on Friday, October 25th, which will require an immediate cessation of operations and the accompanying liquidation of its assets in a forced and distressed manner.

41 I am satisfied that the DIP financing sought on this application is urgently needed in order to fund operations within these proceedings until the comeback hearing. Accordingly, I agree that such funding will enhance the prospects of an arrangement by the League Group to its creditors.

(e) The nature and value of the League Group's property

42 As I have stated numerous times, many of the secured creditors oppose the continuation of this proceeding and wish to take steps to realize on their security.

43 Most of the assets owned by the League Group are complex real estate holdings including income producing properties and development properties, some of which are not yet completed.

44 The Monitor points out what might be said to be fairly obvious; namely, that such a realization scenario is not in the interests of the creditors, including even these secured creditors, or the numerous other stakeholders in these proceedings:

> A forced and distressed liquidation is clearly not in the interests of the creditors or Investors, nor is it in the interests of many of the mortgage lenders who do not enjoy first mortgage security and whose security is spread across multiple properties and assets. Such lenders will then be compelled to deal with complicated scenarios where their recovery on one property will determine the extent to which they must rely on another property for the recovery of their loans. If a liquidation of League's assets is to occur, it is imperative that such a liquidation should occur on an orderly and controlled basis.

45 In addition, as pointed out by counsel for the League Group, the nature of the assets is such that even if the secured creditors were to take steps to realize on their security, they would inevitably be incurring some of the same types of expenses, including professional fees, as are currently being proposed to be paid in accordance with the cash flow forecast: *Pacific Shores Resort & Spa Ltd.* at para. 49(f).

(f) Whether any creditor would be materially prejudiced as a result of the DIP Lender's Charge

46 The issue of material prejudice to the secured creditors was largely focused on the evidence as to the value of the secured assets and the "implied equity" which was calculated based on certain mortgage amounts stated to be outstanding.

47 Again, I do not intend to focus on each individual secured creditor. Many of the secured creditors take issue with what has been described as the appraised value of the various projects over which they hold security and also with what is calculated to be the mortgage debt outstanding on those projects.

48 The League Group and the Monitor do not dispute that this calculation of $210.9 million of "implied equity" is not a certain calculation. In particular, the Monitor emphasizes that it has only, to this time, performed a "high level review" of the calculation of equity in the various projects. The Monitor notes:

a) Marketable Securities: those amounts are based on recent trading prices of units in the Partners REIT, which are publicly traded;

b) The Income Producing Properties: the ascribed values of these properties are supported by appraisals, although it is apparent that some of those appraisals are dated. In addition, the Monitor notes that most of the appraisals have been prepared for financing purposes which in their experience, tend to be higher than values recoverable in the market. Nevertheless, the Monitor concludes that there appears to be "significant positive equity available in these properties"; and

c) The Development Properties: the values ascribed are based on book values which represent the monies the League Group has spent to date to develop the properties. Again, based on the Monitor's experience, if the development is not completed, the recovery for these projects will be substantially less than the costs incurred to date. With respect to the Colwood Development specifically, the Monitor is of the view that even if the League Group completes the project, it is unlikely that the project costs will be fully recovered. Accordingly, the Monitor states that the $129.9 million "implied" equity in the development properties is overstated, although it is unclear at this time to what degree.

49 I agree that the exact financial position of the League Group in the income producing and development properties is unknown to some extent. These proceedings have only begun and the Monitor is no doubt continuing its investigation and analysis of the various projects. I anticipate that the equity position in these properties will be further clarified in the near future and that this further information can be communicated to the stakeholders. The Monitor points to the fact that after the granting of the Initial Order, the mortgage lenders needed "time and a better understanding of League's complexity and possible restructuring plan to consider supporting this refinancing".

50 In the meantime, despite the shortcomings in the financial calculations, there appears to be substantial equity in those properties. Most of the secured creditors appearing on the application did not have any more reliable information towards a calculation of the equity in the projects. When asked about their own specific secured positions, most were not able to state convincingly or conclusively that their loans were in jeopardy, although some submissions were made that certain loan positions were "on the bubble". Even if any of the secured creditors are in or close to a deficit position, the intention of the League Group is to continue funding the mortgage payments, subject to obtaining further DIP financing to do so. In that event, any further prejudice will be lessened. None of the secured creditors were able to say that their loans were subject to any financial defaults, although I am assuming that given the *CCAA* filing, there are likely to be many non-financial defaults in accordance with the usual security documentation.

51 As I noted in *Pacific Shores Resort & Spa Ltd.* atpara. 49(f), material prejudice to secured creditors is only one factor to be considered in equal measure with the others listed in the *CCAA*, s. 11.2(4).

52 On the basis of the evidence presented, I am satisfied that at the very least, the secured creditors will suffer some prejudice in terms of delays in realization of their security in the event of a failure to restructure by the League Group. Beyond that, I am not satisfied that there is *material* prejudice to the secured creditors given the asset/debt levels disclosed to date. Further prejudice may arise in the event that the "implied equity" amounts are reduced or perhaps eliminated.

53 Based on the current values disclosed, it is, as Mr. Gant suggests, really the unsecured creditors and the investor group who are facing the material prejudice at this time and any prejudice to the secured creditors must also be considered in light of that material prejudice. As I have noted above, there are also a substantial number of employees.

54 In light of the concerns expressed by the secured creditors, the League Group, with the support of the Monitor, has proposed certain allocation provisions in the order authorizing DIP financing, should an allocation issue arise in the future. In accordance with these provisions, costs that may be specifically attributed to a certain asset shall be allocated to that asset. Costs that are not attributable to any asset are to be allocated as follows: firstly, to unencumbered or not fully encumbered assets and secondly, to assets generally based on a *pro rata* allocation based on the actual value of an asset.

55 I agree that this allocation provision should alleviate many of the secured creditors concerns as to how the DIP Lender's Charge may be borne. It remains to be seen, of course, whether any allocation issues will in fact arise as that will be dependent on the success of the restructuring.

(g) The Monitor's report

56 The Monitor's first report to the court is dated October 23, 2013. The Monitor supports the proposed DIP financing and the granting of a DIP Lender's Charge, having reviewed the financial terms of the DIP Lenders and being satisfied that those are reasonable terms and the bestavailable in the marketplace.

57 The Monitor is also satisfied that the restriction of the DIP Lender's Charge to $1.6 million will allow for the minimum cash requirements for the League Group to meet its operating and restructuring obligations until the time of the comeback hearing.

58 Finally, the Monitor has expressed the view that it supports both the DIP Lender's Charge and the Representative Counsel Charge referred to below to a total of $1.85 million notwithstanding that those charges would prime the existing secured creditors, other than the Enforcing Mortgagees. The Monitor states that it is sensitive to concerns being raised by the mortgage lenders as a result of the priming but that it supports the priming on the basis that there appears to be equity in the properties such that it is unlikely the mortgage lenders will ultimately be impacted by these priority charges.

59 As the Monitor notes, it is usual in these types of cases that a DIP Lender will advance monies into those proceedings only where the loans are supported by a court ordered priority charge over existing charge holders. All of the parties who submitted offers to the League Group to provide DIP financing required such a priority charge. In *Timminco Ltd., Re*, 2012 ONSC 948 (Ont. S.C.J. [Commercial List]), aff'd 2012 ONCA 552 (Ont. C.A.), Mr. Justice Morawetz stated:

> [49] In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders ...

60 The same considerations discussed in *Timminco Ltd.* are at play here. It is unreasonable to expect that any DIP lender would advance the required DIP financing, save and except with a charge having priority over existing creditors. As stated by the League Group and as confirmed by the Monitor, this DIP financing is necessary and urgently required to continue the operations of the League Group for a very short period of time until the comeback hearing. Failure to obtain that financing will result in a liquidation scenario - one which, given the different stakeholder groups and the complexity of the assets, will no doubt result in a multiplicity of realization proceedings at great cost. In that liquidation scenario, there will likely be prejudice to those who are said, at this time, to be the stakeholders who have significant equity in the assets.

61 It is a fundamental objective of the *CCAA* to avoid such an outcome if at all possible.

62 In conclusion, the DIP financing is urgently required by the League Group and is necessary to fund the operations for a very short period of time to the comeback hearing. The order approving the DIP facility is granted. However, in my view, there is no need to approve any DIP facility beyond the $1.6 million financing needed to the time of the comeback hearing. The League Group is at liberty to bring a further application in respect of any further DIP financing.

Representative Counsel

63 The Monitor applies for the appointment of Fasken Martineau DuMoulin LLP ("Faskens") as representative counsel for the investor group. In addition, the Monitor seeks an order that Faskens be granted a charge in the amount of $250,000 in respect of its fees and disbursements. The proposed ranking of that charge is that it will stand in priority to all of the security and charges (including the Director's Charge) but be subordinate to the Administration Charge, the DIP Lender's Charge and the security of the Enforcing Mortgagees.

64 As noted above, the investor group has been identified as comprising approximately 3,200 individuals and some institutional investors who have supplied approximately $352 million to the League Group to fund its real estate properties and business operations. Generally speaking, these investors have contributed funds in the form of secured notes, unsecured notes and equity to IGW REIT, LOF and to individual project limited partnerships, either directly or through an RRS Peligible investment vehicle. I understand that the various investment vehicles have different conversion, redemption or retraction features.

65 The Monitor advises that while there are certain common attributes amongst the investor group, there are other circumstances relating to the various investments that would suggest that some individuals or sub-groups may have positions that may differ from others within the overall group. For example, it may be such that different project specific investments have equity, while others do not.

66 The Monitor has already fielded over 100 enquiries from various investors. On October 23, 2013, the Monitor scheduled and held a conference call for the purpose of informing investors of the *CCAA*proceedings and the anticipated process and also to answer any questions. I am advised that over 460 investors participated in that call. At that time, the investors were introduced to counsel from Faskens and the concept of a representative counsel was discussed.

67 If representative counsel is to be appointed, there is no opposition to the appointment of Faskens given their extensive experience in insolvency matters and in particular, matters involving large and disparate stakeholder groups where representative counsel were appointed, such as in the Eron Mortgage Corporation proceedings.

68 The Monitor states that it is unlikely that many of the individual investors will either have the financial wherewithal or means to engage legal counsel to provide for their meaningful participation in these insolvency proceedings. In addition, if a number of separate law firms are retained by investors, a multiplicity of representation by those having a commonality of interest will add to the cost and therefore the complexity of the proceedings. Finally, the Monitor notes that these investors are the stakeholders to be "most keenly affected by this restructuring" and representation of their interests may be beneficial so as to ensure that all stakeholders have adequate input into the course of these proceedings.

69 I am satisfied that the Monitor is not in a position to assist any further in alerting the investors to these proceedings, organizing the investor group and advising them of issues that may affect them either as a group or individually.

70 The statutory jurisdiction upon which such representative charges are considered is found in the *CCAA*, s. 11, which provides that the court may make any order that it considers "appropriate" in the circumstances:

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

71 The appropriateness of such orders has been considered numerous times by the Ontario Superior Court of Justice (Commercial List): see *Nortel Networks Corp., Re* (2009), 53 C.B.R. (5th) 196, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]), *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List]), *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 (Ont. S.C.J. [Commercial List]), and *TBS Acquireco Inc., Re*, 2013 ONSC 4663 (Ont. S.C.J. [Commercial List]) and by this court: *Catalyst Paper Corp., Re*, 2012 BCSC 451 (B.C. S.C.).

72 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 1328 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) summarized many of the factors that have been considered in granting these types of order:

> [21] Factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.

73 The stakeholder groups for which representative counsel were appointed in *Nortel Networks Corp.*, *Fraser Papers Inc.*, *Canwest Global Communications Corp.* and *Canwest Publishing Inc.* were current and former employees of the debtors. In those cases, the Ontario court noted the particular vulnerability of certain of those stakeholders. The vulnerability of the investor group here has not yet been fully investigated, but the Monitor and Mr. Gant certainly suggest that similar concerns arise in relation to the individuals who have invested a significant portion of their net worth in the League Group. In addition, the indications of equity in the League Group's assets would also suggest that their interests in these proceedings are real and not merely illusory.

74 In *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]), Mr. Justice D.M. Brown appointed representative counsel in those *CCAA* proceedings for some 1,200 clients who were investors in one of the debtor companies (para. 38). Representative counsel were also appointed in the Eron Mortgage Corporation proceedings for certain investor groups: see *Eron Mortgage Corp., Re* (1998), [1999] 4 W.W.R. 375 (B.C. S.C.) at para. 3.

75 I am satisfied that the appointment of representative counsel in this case is appropriate for the reasons stated by the Monitor. As matters stand, the investor group is a significant one and it is important that they be properly represented so that they can take appropriate positions in these insolvency proceedings. From a timing perspective, it is somewhat imperative that the investors obtain some legal representation in respect of the comeback hearing which, as I have alluded to, is expected to be highly contentious principally from the perspective of the secured creditors.

76 At this point in time, the investor group has a sufficient "commonality of interest" that can be best served by one counsel: *Nortel Networks Corp.* at paras. 62-63, *Fraser Papers Inc.* at paras. 11-12. The appointment of representative counsel will allow their positions to be advanced in an efficient manner, to the benefit of all stakeholders. Separate representation may be required at a later time once Faskens has had an opportunity to investigate the claims of the investors and determine what positions might be advanced in these proceedings. That matter can be addressed if and when it arises.

77 The statutory jurisdiction to order that the fees and disbursements of any representative counsel be secured by a charge is found in the *CCAA*, s. 11.52(1)(c):

> **Court may order security or charge to cover certain costs**
>
> **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
>
> . . .

(*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.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

78 Having forecast to the secured creditors my conclusions with respect to the DIP financing, I encouraged the parties to discuss what interim accommodations could be agreed upon in order that representative counsel could be retained for the investors in the short period of time leading up to the comeback hearing.

79 As a result of those discussions, it was generally agreed and subsequently ordered that Faskens would be appointed as representative counsel with authorized fees of $125,000. The League Group was authorized to pay a retainer of $75,000. It was also recognized that a charge would be necessary in order to allow for Faskens' "effective participation" in the proceedings and a Representative Counsel Charge was ordered to the extent of $50,000, with priority save and except with respect to the Administration Charge, the DIP Lender's Charge and the security of the Enforcing Mortgagees.

80 This modest cost for representative counsel at this stage is fair and reasonable and is intended to benefit the proceedings generally. Therefore, the Representative Counsel Charge is properly borne by stakeholders based on the proposed priority: *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para. 54.

81 It is anticipated that the Representative Counsel will have met at least to some degree with the investor group prior to the comeback hearing and will be in a position to report to the court on what efforts have been made to organize the group. It is also hoped that by then, the Representative Counsel will have assessed the investor group's interests so as to be able to advise, if possible, what issues might be raised by the investor group. Finally, it is anticipated that Faskens will make efforts to determine whether it is possible to raise retainer funds within the investor group itself for any representation beyond the comeback hearing, rather than securing further amounts from the League Group.

Disposition

82 The Initial Order is amended and restated on the terms proposed with respect to the DIP financing and the DIP Lender's Charge, save and except that the authorized credit facility shall not exceed $1.6 million. The League Group and the DIP Lenders are to file a copy of the amended commitment letter in this court once that is signed.

83 The order is granted appointing Faskens as Representative Counsel for the investor group on the terms proposed. The authorized fees for the Representative Counsel will be $125,000, to be secured by a retainer of $75,000 paid by the League Group and a Representative Counsel Charge of $50,000 with the indicated priority.

84 The remainder of the applications, including the applications of FCC Mortgage Associates Inc. and Export Development Canada, are adjourned to November 18, 2013 to be heard at the same time as the comeback hearing.

Order accordingly.

TAB 12

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

***Pepall J.*:**

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act* [1] ("CCAA") proceeding on October 6, 2009. [2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated

non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

> (a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable. [3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest. [4]
>
> (b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.
>
> (c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.
>
> (d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better

offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc., Re* [5] . On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Canwest Global Communications Corp., Re*[6] and *Lehndorff General Partner Ltd., Re*[7].

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in

bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Philip Services Corp., Re* [8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups." [9] Similarly, in *Anvil Range Mining Corp., Re* [10] , the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors." [11]

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Anvil Range Mining Corp., Re*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(D) DIP Financing

41 The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Canwest Global Communications Corp., Re* [12] , I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable

compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> 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 the 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.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

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

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp., Re* [14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp., Re* [15], I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc., Re* [16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act* [17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)* [18]. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Canwest Global Communications Corp., Re* [19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain.

With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended.

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

9 Ibid at para. 16.

10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

11 Ibid at para. 34.

12 Supra, note 7 at paras. 31-35.

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

16 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).

17 R.S.O. 1990, c. C.43, as amended.

18 [2002] 2 S.C.R. 522 (S.C.C.).

19 Supra, note 7 at para. 52.

TAB 13

2010 QCCS 1176
Cour supérieure du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 2675, 2010 QCCS 1176, [2010] Q.J. No. 1723,
190 A.C.W.S. (3d) 354, 76 C.B.R. (5th) 215, EYB 2010-171694

In the matter of plan of arrangement and compromise of : White Birch Paper Holding Company, White Birch Paper Company, Stadacona General Partner Inc., Black Spruce Paper Inc., F.F. Soucy General Partner Inc., 3120772 Nova Scotia Company, Arrimage de gros Cacouna inc. and Papier Masson ltée (Debtors) v. Ernst & Young Inc. (Monitor) and Dune Capital LP, Dune Capital International Ltd and WTA Dune Limited (Petitioners)

Robert Mongeon, J.C.S.

Heard: March 18, 2010
Judgment: March 25, 2010
Docket: C.S. Montréal 500-11-038474-108

Counsel: Me Sylvain Rigaud for the Monitor
Me Jean Fontaine, Me Matthew Liben for Debtors
Me Denis Ferland, Me Christian Lachance, Me Marie-Paule Jeansonne for Petitioner Dune Capital
Me Marc Duchesne, Me Mathieu Lévesque for the Petitioners
Me Martin Desrosiers for the Interim Finance Parties

***Mongeon J.C.S.*:**

1 Dune Capital LP, Dune Capital International Ltd and WTA Dune Limited (collectively « Dune ») are lenders under that certain Second Amended and Restated Second Term Loan Credit Agreement among White Birch Paper Holding company, White Birch Paper Company (two of the Debtors herein) as borrowers, and several lenders from time to time parties thereto. Credit Suisse Securities (USA) LLC is the Sole Lead Arranger, sole Bookrunner, Syndication Agent and Documentation Agent, while Credit Suisse Cayman Islands Branch is the US collateral Agent and Administrative Agent.[1] Crédit Suisse Toronto Branch (C.S. Toronto) is the Canadian Collateral Agent and Administrative Agent. This Second Lien Term Loan is dated April 8, 2005 and was amended and restated on January 27, 2006 and on May 2007.

2 This loan is for a total amount of US100 000 000,00$

3 Dune is a « Majority Lender » under the said Second Lien Term Loan, to the extent of US$61.5 million.

4 Dune is therefore an important secured creditor of the Debtors.

5 On February 24, 2010, I granted the Debtors' Motion for the Issuance of an Initial Order pursuant to Sections 11 and following of the Companies' Creditors Arrangement Act (the « CCAA »).

6 The Initial Order provides for the usual terms and conditions, as well as Interim financing in the amount of US$140 million together with the usual Interim Financing Charge, ranking immediately after the Administration Charge the D&O Charge, but ahead of all other mortgages, hypothecs and other secured debts of the Debtors, including any secured debts under the Second Lien Term Loan.

7 Dune's first contention is that its position as a secured lender of US$61.5 million is most definitely affected by the Initial Order and Interim Financing Charge.

8 Dune alleges that it was not notified of the Originating Motion and claims that the Debtors did not respect both the letter and spirit of section 11.2(1) CCAA which reads as follows:

> **11.2 (1) Interim financing - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge - in an amount that the court considers appropriate - in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.**
>
> **(emphasis added)**

9 This is a serious allegation. The whole substance of the CCAA is based upon the principle of having and maintaining a « level playing field' among the various stakeholders involved in a restructuring process, especially when the restructuring will seriously affect the rights of lenders, suppliers and other creditors of a company seeking the protection of the CCAA. As a result, Dune takes the position that the Interim Financing Agreement should be rescinded or, alternatively limited to US$115 million. Conclusions [D], [E], [F] and [G] of its Amended Motion dated march 18, 2010 read as follows:

> . . .
>
> [D] **RESCIND (1) the interim financing agreement provided in the Initial Order, (ii) paragraphs 28 to 36 of the Initial Order and (iii) all references to the Interim Financing, DIP, Interim Financing Documents, Interim Lenders Expenses and Interim Financing Charge in the Initial Order;**
>
> **ALTERNATIVELY, but without prejudice to the foregoing:**
>
> **AMEND para 28 of the Initial Order as follows:**
>
> **ORDERS that, notwithstanding any other provision of this Order but subject to paragraph 38, the Petitioners and the Partnership be and are hereby authorized to borrow from the interim Lenders such amounts from time to time as the Petitioners and Partnerships may consider necessary or desirable, up to a maximum combined principal amount of USD$[. . .]115 million, on the terms and conditions set forth in the Interim Financing Credit Agreement, attached hereto in draft form as Exhibit P-3 (subject to such amendments and modifications as the parties may agree with, provided such amendments or modifications are approved by the Monitor and do not conflict with the provisions of this Order) and in the Interim Financing Documents (as defined hereinafter), to fund firstly, full repayment of all amounts outstanding under the Revolving ABL Financing and thereafter, the ongoing expenditures of the Petitioners and Partnerships and to pay such other amounts as are permitted by the terms of this Order, the Interim Financing Credit Agreement and the Interim Financing Documents (as defined hereinafter).**
>
> [E] **ORDER a further hearing on or before April 23, 2010 as to the appropriateness to authorize further credit on the Interim Financing;**
>
> [F] **REDUCE the Interim Financing Charge to the aggregate amount of $115 million and AMEND paragraph 32 of the Initial Order accordingly;**
>
> [G] **ORDER the payment of the interests under the Interim Financing Agreement on the same basis than the First Lien Agreement;**

10 Dune seeks this conclusion not only because it allegedly did not get proper prior notice and was deprived from its right to make representations prior to the issuance of the Initial Order and DIP Loan but also because, over the last several months, it has allegedly been denied access to important information which, as a result, has allegedly deprived it from the possibility of entering into forbearance and/or waiver agreements with the Debtors, with respect to the latter's obligations. Furthermore, Dune complains that throughout the period of September 2009 until February 2010, the Second Lien Lenders have been left out of restructuring discussions between the First Lien Lenders and the Debtors to a point where the proposed restructuring will be detrimental to Dune's position. In other words, Dune was not given the opportunity to adequately protect its position in the current process.

11 For a better understanding of Dune's position and to avoid any risk of misinterpreting its representation of the facts, I reproduce below the most important excerpts of Dune's Amended Motion:

. . .

19. **On September 22, 2009, for the first time, WB requested a comprehensive forbearance of its obligations to pay interest due on September, 30, 2009 under the Second Lien Agreement. WB also requested that such forbearance be executed by no later than September 29, 2009.**

20. **On September 25, 2009, the Majority Lenders (i.e. Dune) called CS Toronto (i.e. Crédit Suisse Toronto), in its capacity as Administrative Agent under the Second Lien Agreement, to obtain a copy of the Register of the lenders, as defined at Section 10.5(d) of the Second Lien Agreement (the "Register"), in order to organize the Second Lien Agreement lenders in connection with the Debtors' request for a forbearance. CS Toronto then requested a written request prior to providing any information, including the Register.**

21. **The Majority Lenders' US counsel then sent to CS Toronto a written request to obtain the Register, the whole as appears from a copy of a letter dated September 25, 2009 communicated in support hereof as Exhibit R-1.**

22. **As appears from Exhibit R-1, the Majority Lenders' US counsel also emphasized, given the deadline of September 29, 2009 imposed by the Debtors to conclude a forbearance, that "[a]*ny delay on the part of the Administrative Agent in producing the Register could seriously prejudice the Second Lien Lenders' ability to consider the Borrower's proposal and further compromise the Second Lien Lenders' substantial rights under the Agreement*".**

23. **On September 29, 2009, the day of the deadline imposed by the Debtors to execute the forbearance, the Majority Lenders' US counsel wrote to WB, WB Holding and CS Toronto's US counsel to advise them that despite several requests to obtain the Register, it never obtained it, the whole as appears from a copy of a letter dated September 29, 2009 communicated in support hereof as Exhibit R-2.**

24. **In Exhibit R-2, the Majority Lenders' US counsel also noted the following :**

> **As a result of the Agent's refusal to comply with this simple request, the Second Lien Lenders have been deprived of any meaningful opportunity to consider the Borrower's last-minute request for a comprehensive waiver/forbearance of its interest payment obligations. In contrast, we understand that the Agent has been in substantial contact with the first Lien Lenders for weeks (including an organized lender call last week) regarding the Borrower's proposed restructuring - a consideration yet to be extended to the Second Lien Lenders - and that the First Lien Lenders have already retained counsel and financial advisors in connection therewith. Given that the First Lien Lenders have hired both counsel and financial advisors, the Second Lien Lenders anticipate having to do so as well. While the First Lien Lenders have been actively involved in discussions concerning the proposed restructuring, the Second Lien Lenders have been deliberately excluded from any such discussions and denied even the most fundamental information**

necessary for the Second Lien Lenders to confer with one another. Engaging with the First Lien Lenders while stonewalling the Second Lien Lenders is not only improper but wholly inconsistent with a party acting in good faith to exact considerable concessions from the Second Lien Lenders in an effort to avoid an Event of Default.

We hereby again request a copy of the Register immediately. Any further delay on the part of the Borrower or Agent may further and substantially prejudice the Second Lien Lenders' substantial rights under the Agreement. Any and all rights the Second Lien Lenders may have in connection with the Borrower's or Agent's actions or inactions to date or in the future are hereby expressly reserved.

[our emphasis]

25. **On September 30, 2009, the Majority Lenders' US counsel wrote to CS Toronto's US counsel the following :**

On our call yesterday afternoon, we learned for the first time that your client, Credit Suisse (i.e., the Second Lien Lenders' Agent in connection with the above-referenced Agreement), has withheld from the Second Lien Lenders potentially material information regarding the Borrower or the Borrower's proposed restructuring discussions with the First Lien Lenders. During our call, we requested all material information provided to the First Lien Lenders that is relevant to the Borrower's current financial condition and proposed restructuring. In response, you proposed to put us in touch with Borrower's counsel so that we can seek such information directly from them. While we appreciate your assistance (albeit belatedly) in putting us in touch with counsel for the Borrower, we remind you that your client remains the Agent for the Second Lien Lenders. Accordingly, the Second Lien Lenders reiterate their demand that the Agent turn over all relevant information relating to the Borrower's current financial condition and proposed restructuring. We further request that the Agent provide us with a detailed description of the actions it has taken - if any - in the last 90 days to protect the rights of the Second Lien Lenders and provide us with proposals for how to maximize Second Lien Lenders' recovery going forward.

[our emphasis]

the whole as appears from a copy of a letter dated September 30, 2009 communicated in support hereof as Exhibit R-3.

26. **On the same day, but after the Majority Lenders' US counsel sent Exhibit R-3, CS Toronto and CS Cayman advised the Second Lien Agreement lenders that they immediately respectively resigned as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement, the whole as appears from a copy of a letter dated September 30, 2009 communicated in support hereof as Exhibit R-4.**

27. **In Exhibit R-4, CS Toronto and CS Cayman also specified that they had already advised WB of their resignation.**

28. **However, CS Toronto and CS Cayman did not resign as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the First Lien Agreement.**

29. **On October 1, 2009, CS Toronto and CS Cayman's US counsel advised the Majority Lenders' US counsel that its clients resigned as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement, the whole as appears from a copy of a letter dated October 1, 2009 communicated in support hereof as Exhibit R-5.**

30. **On the same day, the Majority Lenders' US counsel advised CS Toronto and CS Cayman's counsel that they could not resign immediately as Administrative Agent, Canadian Collateral Agent and US**

Collateral Agent given that the Second Lien Agreement provides, at Section 9.9, that the agent must give a "30 days' notice to the Lenders and the Borrower" (our emphasis) of its resignation, the whole as appears from a copy of a letter dated October 1, 2009 communicated in support hereof as Exhibit R-6.

31. **On October 7, 2009, the Majority Lenders' US counsel with the support of two other lenders under the Second Lien Agreement, namely Caspian Capital Partners, L.P. and Caspian Select Credit Master Fund, Ltd., sent to CS USA and CS Toronto a notice of default dealing with WB's failure to make the interest payment due on September 30, 2009 under the Second Lien Agreement, the whole as appears from a copy of a letter dated October 7, 2009 communicated in support hereof as Exhibit R-7.**

32. **On October 8, 2009, CS Toronto notified WB and WB Holding of (i) its resignation as Administrative Agent and Canadian Collateral Agent under the Second Lien Agreement and (ii) the resignation of CS Cayman as US Collateral Agent under the Second Lien Agreement as follows:**

> **As you are aware, we have notified you pursuant to that certain letter dated as of September 30, 2009 of our resignation as Administrative Agent and as Canadian Collateral Agent under the Second Lien Credit Agreement, and of the resignation of Credit Suisse, Cayman Islands Branch, as US Collateral Agent under the Second Lien Credit Agreement, which resignations will be effective on October 30, 2009.**
>
> **[our emphasis]**

the whole as appears from a copy of a letter dated October 8, 2009 communicated in support hereof as Exhibit R-8.

33. **Afterwards the Majority Lenders, through their US counsel, for some time tried to conclude a forbearance agreement with the Debtors. However, such agreement never materialized given that the Debtors systematically refused to assume (i) the fees of Wells as Administrative Agent under the Second Lien Agreement and (ii) the Majority Lenders' legal fees. In a nutshell, the Debtors wanted the Majority Lenders to agree to forbear certain defaults, but were not ready to grant any consideration whatsoever to the Second Lien Agreement lenders.**

34. **During the last week of December 2009, the Majority Lenders reached out to CS Toronto on two occasions via phone so as to confirm the contact information for audit confirmations. The Majority Lenders did not get any response from CS Toronto.**

35. **On January 5, 2010, the Majority Lenders spoke with a representative of CS Toronto, namely Edith Chan, who informed them that CS Toronto was no longer the Administrative Agent under the Second Lien Agreement and that it could not comment or help out with any of the Majority Lenders' requests.**

36. **On January 26, 2010, the Majority Lenders contacted a representative from WB, namely Ed Sherrick, to confirm their year-end position, but were told that he could not help them.**

37. **On February 24, 2010, the Debtors served and presented their Petition for an Initial Order. As appears from the Notice of Presentation to said petition (the "Notice of Presentation"), neither the Majority Lenders nor any lenders under the Second Lien Agreement were served. However, as appears from, *inter alia*, paras. 23 and 32 herein and Exhibits R-2 and R-8, the Debtors clearly knew (i) that the Majority Lenders were represented by counsel and (ii) that CS Toronto and CS Cayman had resigned as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement as of October 30, 2009.**

38. **Although Credit Suisse, CS USA and CS Toronto received the Notice of Presentation, they never, verbally or otherwise, notified the Majority Lenders of the presentation of the Petition for an Initial Order.**

39. **On February 24, 2010, this Court issued the Initial Order which provided for an Interim Financing of up to a maximum combined principal amount of USD$140 million (para. 28 of the Initial Order). The Administrative Agent and Canadian Collateral Agent under the Interim Financing Agreement is also CS Toronto as mentioned above, the whole as appears from a copy of said Interim Financing Credit Agreement communicated in support hereof as Exhibit R-9.**

40. **After midday on February 24, 2010, the Majority Lenders learned, through the newswires, that the Debtors filed their Petition for an Initial Order. The Majority Lenders learned the Initial Order had been entered when it was posted by the proposed Monitor several hours later.**

41. **On March 4, 2010, the Majority Lenders' Canadian counsel wrote to the Debtors' Canadian counsel to advise it that the Majority Lenders never received proper notice of the Petition for an Initial Order, the whole as appears from a copy of a letter dated March 4, 2010 communicated in support hereof as Exhibit R-10.**

42. **In Exhibit R-10, the Majority Lenders' Canadian counsel also requested, *inter alia*, the following:**

(i) **a copy of the Register or other confirmation of each of the Lenders' loan position as of year-end 2009;**

(ii) **an unconditional undertaking from the Debtors to pay for the legal fees that the Majority Lenders will incur to intervene in the *CCAA* Proceedings and the relevant proceedings in the United States, as required to protect their position, the whole as provided for, *inter alia*, at Section 10.4(b) of the Second Lien Agreement; and**

(iii) **the acceptance by the Debtors to the appointment of Wells or any of its affiliates, branches or subsidiaries as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement, as well as an undertaking that the Debtors will do everything that is required to render effective such appointment.**

43. **On March 5, 2010, the Debtors' Canadian counsel answered to the Majority Lenders' Canadian counsel. In a nutshell, the position of the Debtors' Canadian counsel was that:**

(i) **the Majority Lenders received proper notice given that CS Toronto, the Administrative Agent under the Second Lien Agreement, received notice, despite CS Toronto's resignation, given that the latter would still act as a *de facto* agent;**

(ii) **the Majority Lenders did not need to obtain notice of the Interim Financing given that only the "*secured creditors who are likely to be affected by the security*" need notification and the Majority Lenders are not such creditors;**

(iii) **it would not disclose the Register or other confirmation of each of the lenders' loan position and that the Majority Lenders should seek such information from other parties;**

(iv) **the Debtors will not pay for the legal fees that the Majority Lenders will incur to intervene in the *CCAA* Proceedings and the relevant proceedings in the United States; and**

(v) **the Debtors would not contest the appointment of Wells as Administrative Agent, Canadian Collateral Agent and US Collateral Agent, but will not pay the fees and costs of Wells;**

the whole as appears from a copy of a letter dated March 5, 2010 communicated in support hereof as Exhibit R-11.

44. **On March 11, the Majority Lenders' Canadian counsel wrote to the Debtors' Canadian counsel to respond to the latter's letter, the whole as appears from a copy of a letter dated March 11, 2010 communicated in support hereof as Exhibit R-12. In said letter, the Majority Lenders expressed their disagreement with the position expressed by the Debtors in the March 5 letter. In addition, the Majority Lenders advised the Debtors of the conclusion they would be seeking in the present Motion.**

12 In summary, the foregoing raises the following issues:

• the refusal to furnish copy of the Register to Dune;

• the consequences of not including Dune in the restructuring discussions in September/October 2009;

• the consequences of the resignation of CS Toronto as Canadian Administrative Agent and its replacement by Wells Fargo Inc;

• the payment of fees, disbursements and other charges including fees of legal advisors for both Dune and Wells Fargo Inc.;

• the lack of Notice of presentation of the Motion of Issuance of the Initial Order;

• Access to certain financial information.

13 These facts give rise to the following additional conclusions:

[H] **ORDER the Debtors to pay for the legal fees of the Majority Lenders, both before and after the issuance of the Initial Order, to intervene in the *CCAA* Proceedings and the relevant proceedings in the United States, as is required to protect their position, the whole as provided for, *inter alia*, at Section 10.4(b) of the Second Lien Agreement;**

[I] **APPOINT Wells or any sub-agent of its choosing as Administrative Agent, Canadian Collateral Agent and US collateral agent under the Second Lien Agreement;**

[J] **ORDER the Debtors to pay all the fees and disbursements, both before and after the issuance of the Initial Order, including legal fees, of Wells as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement as provided for in said agreement;**

[K] **AMEND para. 51 of the Initial Order as follows**:

DECLARE that, as security for the reasonable fees, charges and disbursements incurred both before and after the making of this Order in respect of these proceedings, the Plan and the Restructuring, the Petitioners' and Partnerships' legal and financial advisors, the Monitor, [. . .]the Monitor's legal counsel, Wells Fargo, the Majority Lenders' (namely Dune Capital LP, Dune Capital International Ltd. and WTA Dune Limited) legal counsel and Wells Fargo's legal counsel be entitled to the benefit of and are hereby granted a hypothec on, mortgage of, lien on, and security interest in the Property to the extent of the aggregate amount of $3,000,000 (the "Administration Charge") having the priority established by paragraphs 52 and 53 hereof.

[L] **ORDER the Debtors to provide the following financial information by no later than 5:00 p.m. on March 23, 2010**

(i) **the Debtors' financial statements for the fourth quarter of 2009;**

(ii) **the Debtors' annual financial statements for the 2009 fiscal year;**

(iii) **financial statements for each of WB and WB Holding subsidiaries (quarterly and annual for the past 5 yrs);**

(iv) **the Debtors' company budget for 2010;**

(v) **all of the sources and uses of the Interim Financing;**

(vi) **fees paid to-date to advisors and lawyers, broken down between the Debtors, [. . .] First Lien Agreement lenders, agents, Interim Lenders and others;**

(vii) **unpaid fees, if any, to advisors and lawyers, broken down between the Debtors and First Lien Agreement lenders;**

(viii) **weekly report, on an ongoing basis, of fees paid or to be paid to advisors and lawyers, broken down between the Debtors and First Lien Agreement lenders;**

(ix) **the Debtors' most current working capital balances;**

(x) **weekly update of the Debtors' 13-week Cash Flow forecasts;**

(xi) **an accounting of all of the management fees paid by the Debtors to Brant Paper, Inc. for the last five years and weekly updates, on an ongoing basis, of same; [...]**

(xii) **the quarterly and annual financial statements for SP Newsprint Co. for the last five (5) years;**

(xiii) **all information provided to Interim Lenders, as and when such information is provided, whether verbally, in writing, by electronic access, by Intralink or otherwise; and**

(xiv) **all drawing notices by the Debtors under the Interim Financing Ageement.**

[M] **THE WHOLE with costs against any contesting party.**

14 I shall deal, firstly with Dune's request to rescind and/or amend the DIP Financing and DIP Financing Charge.

15 Confronted with Dune's allegation that it was not advised of, nor served with the Motion, the Debtors strongly object.

16 The Debtors take the position that Crédit Suisse Toronto, as Canadian Administrative Agent, continues to act as « *de facto* » Agent for the Second Lien Lenders until they are replaced as per the terms of the Second Lien Loan Agreement (CS-1). As a result, by effecting service upon C.S. Toronto, service of the Originating Motion was completed in accordance with the Law. The Debtors further add that the name of Crédit Suisse Toronto still appears as the holder of the security resulting from the publication of the Second Lien Term Loan Agreement. Consequently, inasmuch as the name of the holder of the security remains unchanged at the Registre des droits personnels et réels mobiliers (see Exhibit I), service upon Crédit Suisse Toronto remains valid.

17 The Debtors further add that in any event, neither Dune nor any other Second Lien Lender had to be served, because the DIP loan and DIP charge were not likely to affect their security by reason of the other prior ranking charges affecting the fixed assets upon which Dune's security is granted.

18 As for C.S. Toronto, although this entity was represented by counsel at both hearings (February 24 and March 18, 2010) before me, it had no explanation to offer either on the question of service of the Originating Motion, or on the question of what it did (or did not do) with the notice, once it was received. What seems to be clear, however, is that C.S. Toronto did not see appropriate to forward the notice of Originating Motion to its former principals, the Second Lien Lenders in general and Dune in particular. Such behaviour is surprising, given the serious consequences.

19 Dune submits that the DIP should not have been granted without proper notice and representations on its part. Dune adds that if, nonetheless, the granting of a DIP was in order, it should have been limited to an amount necessary to « keep the lights on », as stated by Blair J. in Re: *Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) and by Gascon J. in *Boutiques San Francisco Incorporées, Re* (C.S. Que.).

20 However, Dune does not raise any additional argument to rescind the DIP, save the fact that it did not get notice. Dune adds, however, that the Debtors' argument suggesting that notice was in any event not called for because of the fact that Dune's security had no value and, consequently, that Dune's rights were unaffected by the DIP, is ill-founded.

21 Dune further argues that it is currently not in a position to assess the appropriateness of the DIP nor is it in a position to determine the value of its security without the financial information which, as at March 18, 2010 was still unavailable to it. During the hearing of Dune's Motion on March 18, I was informed that Dune had reached an agreement in principle with the Debtors with respect to the financial information to be furnished. This agreement will be ratified once it is reduced to writing and forwarded to me.

22 It appears, therefore, that Dune does not wish to see a DIP charge of US$140 million rank ahead of its own security but having been deprived of financial information, it cannot really assess the Debtors' financial position. In other words, Dune is still in the process of analysing the financial situation of the Debtors.

23 For the foregoing facts, I draw the following conclusions:

> a) the Debtors did not give notice to Dune, a « secured creditor likely to be affected by the security or charge « contemplated » in section 11.2(1) CCAA.
>
> b) Notice to Crédit Suisse Toronto was insufficient within the context of this particular matter, in that the Debtors knew that the latter had resigned and, by virtue of section 9.9[2] of the Second Lien Term Loan Agreement, one of the Lenders (if appointed by Dune as Successor Administrating Agent) or all the Lenders were successor(s) to C.S. Toronto.
>
> c) Crédit Suisse Toronto, although it had resigned its function as Administrative Agent, should, if not legally obliged to do so but at least as a basic courtesy, have forwarded the said Notice to the lenders instead of ignoring it. In so doing, CS Toronto should have realized that it was putting its former principals in a delicate situation.
>
> d) Dune did not take any steps to ensure that the Second Lien Lenders would be adequately represented, following the resignation of Crédit Suisse Toronto. Dune had an obligation to cause a successor agent to be appointed among the Second Lien Lenders and if it was unable to find one willing to accept the function, it should have appointed itself. Dune's inaction most certainly did not help establishing a proper channel of communications between the Debtors and the Second Lien Lenders. Moreover, by insisting upon an undertaking of the Debtors to pay its fees and disbursements as well as those of Wells before any successor agent was appointed, given the precarious financial position of the Debtors already in default of paying interest under the First and Second Lien Loans, was a sure way to cause severe disruptions in communications.

24 Finally, I cannot avoid mentioning that both counsel for the Debtors and counsel for the DIP Lender and CS Toronto should have informed me of the problem at the hearing of February 24. Instead, they chose to ask the Court for a declaration that proper and sufficient notice had been given to all interested stakeholders although both knew that service had been effected upon the Second Lien Lenders through an Agent which had resigned and without ensuring that such agent was taking or, alternatively, had not taken steps to forward the notice to the said Lenders. As for the argument that there was in any event no need to serve notice to the Second Lien Lenders because they were supposedly not affected by the DIP loan and charge, this is rather specious in the absence of a complete and thorough evaluation of all the assets and liabilities of the Debtors. To rely strictly upon the calculation of fixed assets calculated on the basis of cost less accumulated depreciation is, to say the least, not the

most sophisticated way to determine a *value* of said assets. In other words, I am far from being convinced that the rights of the Second Lien Lenders are not likely to be affected by the DIP Loan.

25 Once, as I am convinced, it appears evident that the Second Lien Lenders, in general and Dune in particular, have not been notified as they had a right to be, what should be done to try to correct the situation?

26 Dune argues that it should be allowed to attend a new hearing where the whole issue of the opportunity of granting a DIP loan and corresponding super-priority should be debated « *de novo* ». Given the above-noted facts, I agree with Dune's submission.

27 In order to ensure the protection of the rights of all concerned, this debate took place on March 18, 2010. The Monitor was examined and cross-examined on the contents of his two Reports [3] . A representative of the Debtors, Mr Jay Epstein also testified and was cross-examined. Finally, a representative of Dune, Mr. Andrew M. Cohen was cross-examined on the contents of his Affidavit of March 12, 2010.

28 I am now in a position to re-consider the whole question of whether a DIP Loan and corresponding super-priority should be varied, modified, rescinded or maintained on the same basis as it was authorized on February 24, 2010.

29 Firstly, the CCAA now clearly identifies the principal criteria to be considered by this Court when a DIP Loan and Corresponding charge are required. Section 11.2(4) CCAA reads as follows:

> **11.2(4) Factors to be considered - In deciding whether to make an order, the court is to consider, among other things,**
>
> a) **the period during which the company is expected to be subject to proceedings under this Act;**
>
> b) **how the company's business and financial affairs are to be managed during the proceedings;**
>
> c) **whether the company's management has the confidence of its major creditors,**
>
> d) **whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;**
>
> e) **the nature and value of the company's property;**
>
> f) **whether any creditor would be materially prejudiced as a result of the security or charge; and**
>
> g) **the monitor's report referred to in paragraph 23(1)(b), if any.**

30 After hearing the Monitor and the representative of the Debtors, I am satisfied that a DIP Loan and corresponding charge are required to ensure that the business enterprise of the Debtors will continue to operate as a going concern while it undergoes restructuring.

31 I am also satisfied that the Debtors are likely to be subject to proceedings under the CCAA for several months and the Court's duty is to ensure that the Debtors will enjoy enough cash flow to go through with the restructuring.

32 I also believe that the DIP Loan will not only enhance the prospects of a viable compromise but I also believe that without this loan, the Debtors will not be able to survive.

33 Even if certain creditors will be materially affected by the DIP loan, -and that may include the Petitioners herein -, I have to look at the broader picture as it is presented to me by the Monitor, and conclude that the compromise which Dune may have to accept is outweighed by the positive effects of the DIP Loan on the total business enterprise of the Debtors.

34 The only discordant note is that of the Petitioners herein, who suggest that they might do better with the recuperation of their investment if the Debtors go bankrupt.

35 The above cited criteria appear to have been taken into account by the Monitor in its first two reports. It should be added that the Court need not consider all of the said criteria nor is it compelled to read an affirmative conclusion on all seven criteria. This list is neither mandatory nor limitative. One thing is sure: the Monitor has adequately demonstrated that the Debtors need the US$140 million in Interim Financing and without this money, there is a strong likelyhood that the Debtors would not survive for long, jeopardizing the livelyhood of more than a thousand employees.

36 In addition, although the amount of US$140 million is mentioned in terms of the total DIP Loan, a substantial portion, thereof, does not seriously affect the financial position of Dune.

37 The Monitor has clearly outlined the projected use and allocation of the US$140 million in its Report dated March 17, 2000[4]:

> 20. **The process used to seek out a lender for the Interim Financing, the negotiations thereof, the financing needs and the significant terms of the credit negotiated with the Black Diamond Group are all described in the report of the Monitor, dated February 23, 2010. The contents of this report, as regards these issues, are still relevant.**
>
> 21. **As indicated earlier in this Report, the Interim Financing was authorized by the Initial Order, and by a provisional order made in the U.S. Court (Appendix B). The credit agreement and related guarantees, security and pledge agreements necessary to document the Interim Financing were executed on March 1, 2010.**
>
> 22. **Contemporaneously with the execution of these documents, WB Group received a first draw against the delayed draw term loan, of US$86.5 million. The proceeds from this first draw were used to repay the indebtedness to General Electric Capital Corporation (US$51.2 million), to pay interest accrued on the GE indebtedness (US$330,000) and to pay the fees provided for in the agreement that were payable at closing[5] (US$7.1 million). The balance of the funds, or US$27.8 million, was retained to enhance the cash on hand in anticipation of having to fund negative cash flow, as provided in the WB Group's cash flow projections.**
>
> 23. **An additional draw of US$6.5 million was made on March 8, 2010, and these funds were retained to enhance the cash on hand in anticipation of having to fund negative cash flow. The two draws made to date represent total borrowings under the Interim Financing of US$93 million.**

38 The Monitor further adds the following to justify the balance of unused funds (as at March 18, 2010):

> 27. **In view of the favourable variance in results as compared with the projections prepared by WB Group concurrently with the inception of the restructuring process (Appendix D), and the fact that to date, two draws were made, a portion of which was used to enhance the cash position in anticipation of having to fund negative cash flow, WB Group's cash on hand currently stands at approximately US$61.4 million, as at March 12, 2010.**
>
> 28. **We consider that the amount of cash reserves is reasonable in the circumstances, for the following reasons:**
>
> > 28.1 **As indicated in paragraph Erreur ! Source du renvoi introuvable. above, we consider that the favourable variance between the projected and actual cash flow, to date, is attributable in large part to timing differences. The reversal of these timing differences, when they occur, could cause a substantial drawdown of US$39.5 million in the cash reserves.**
> >
> > 28.2 **The activities of WB Group are subject to large variations in the cash balances, from one day to the next, due to the size of the transactions with some of the customers and suppliers. For example, over a two day period in the week ended March 5, 2010, the cash position decreased by approximately $13.5 million.**
> >
> > 28.3 **There are restrictions in the Interim Financing credit agreement, regarding the amounts that can be borrowed, and the advance notice period to effect a draw. Under the Interim Financing credit agreement,**

WB Group must notify the lender 10 days in advance, when it intends to draw funds under the Interim Financing credit facility. In view of the long delay and the need to have cash immediately available to pay for goods and services or to provide deposits to suppliers, WB Group must retain a large cash reserve, to enable it to continue making payments if there is a temporary slowdown in cash receipts from customers. Based on WB Group's cash flow projections (Appendix D), 10 days' worth of disbursements could represent between US$15 million and US$43 million, and average US$28 million.

28.4 The Interim Financing credit facility is structured as a term loan, while the funding needs of the WB Group are periodic or temporary. Since the funds cannot be drawn again if there is a repayment under the term loan, the excess funds have to be retained as a cash reserve, if the excess fund situation is expected to be temporary. In the present case, the majority of the funds were drawn very early on in the process, before management of WB Group could ascertain that favourable variances would occur as compared with the projections. This led to the excess funds situation, and the excess funds cannot be returned as management of WB Group expects that the excess funds situation is only temporary.

29. **Management provided us with an updated cash flow projection for WB Group, for the 13 weeks ending June 4, 2010, and these cash flow projections are attached to this report as Appendix F [6] . The opening cash position, on these cash flow projections, represents the actual cash on hand as of March 5, 2010, and the projection for the week of March 6-12, 2010 reflects the actual draw of $6.5 million against the credit facility. The remainder of the amounts presented for the week of March 12, 2010 represent a projection, as the projections have not yet been updated to reflect the actual results for the week ended March 12, 2010. The actual results for that week will still present a favourable variance, since the projection reflects cash on hand of US$53.5 million, while the actual cash on hand was US$61.4 million. As indicated earlier herein, we consider these variances are, for the most part, a timing difference.**

30. **These projections (Appendix F) suggest that WB Group will need to make further draws against the credit facility in the near future, in order to maintain cash reserves sufficient to support the on-going operations. The projections (Appendix F) suggest that notwithstanding the fact that WB Group currently has a large cash balance, additional funds will be required as early as late March 2010, and that the term loan will be fully drawn (i.e. borrowings of $122 million, taking into consideration the reserves and carved out amounts) by the end of April 2010. The projections (Appendix F) indicate that based on the expected receipts and disbursements activity, the cash reserves of WB Group would be completely depleted at the end of April 2010 without additional drawings under the Interim Financing credit facility and that even with the additional borrowings, the cash reserves will decrease to US$18.5 million by June 4, 2010.**

31. **The projections (Appendix F) suggest that during the projection period, the gross carrying value of accounts receivable and inventories is expected to vary from US$155.9 million (as at March 5, 2010) to US$169.2 million as at June 4, 2010. As such, the projections (Appendix F) suggest that some of the cash flow is necessary to finance an increase in accounts receivable and inventories, of approximately US$13.3 million.**

32. **In view of the above comments, the Monitor still believes that the Interim Financing is warranted and required, in an amount and on terms consistent with that described in the Monitor's report dated February 23, 2010.**

39 In contrast, Dune is not really concerned with the viability of the Debtors. It has only one interest: its own, as it is reflected in a comment outlined by the Monitor at paragraph 8 of his Report of March 17, 2010:

8. On March 15, 2010, a statement was filed by the Dune Group in the proceedings under the Code in respect of Bear Island, in view of the hearing scheduled to take place on March 22, 2010. The statement filed in the context of the proceedings in the U.S. Court in this respect is attached as Appendix C. In the said statement, at paragraph 11 thereof, the Dune Group states that:

The Majority Second Lien Lenders do not oppose the Debtor's request to use cash collateral or obtain the DIP Loan. Moreover, the Majority Second Lien Lenders do not object to this Court's grant of adequate protection to the First Lien Lenders. The Majority Second Lien Lenders simply demand additional adequate protection for their own interests.

In essence, the statement seeks the disclosure of additional information, an increased level of "adequate protection" and/or the payment of fees and expenses incurred and to be incurred by the lenders under the Second Term Loan, and in consequence seeking modifications to the interim financing credit agreement.

40 On balance and having reconsidered the whole question of the DIP financing and DIP Charge as requested by Dune, I conclude that there is no reason to vary or change the Initial Order of February 24, 2010 on this issue.

41 Accordingly, conclusions [D], [E], [F] and [G] of Dune's Motion must be dismissed.

42 Dune also seeks the payment of its professional fees, costs and expenses during the Stay period.

43 During the hearing of March 18, 2010, I questioned the legal basis upon which Dune relies to seek these reliefs. In my opinion and with respect for the contrary view, I must say that I found none, nor was I presented with one.

44 Dune argues that theses fees, costs and expenses are due under the terms and conditions of the Second Lien Term Loan. That may be so but inasmuch as the Stay Order of February 24, 2010, suspends the Debtors' obligation to pay principal and interest under the said Loan Agreement, it follows that incidental additional costs due by the Debtors under the same Agreement are also suspended.

45 Otherwise, there would be little or no interest in seeking and obtaining protection under the CCAA.[7]

46 Sections 11, 11.01 and 11.02 CCAA are quite clear. The only exception to this general rule is the protection of rights of suppliers under Section 11.02 when payment for goods and services provided after the Stay Order, or requiring the further advance of money or credit. Clearly, the fees, costs and expenses of Dune do not fall within this exception. Dune does not ask for payment for goods and/or services sold, delivered or rendered after the Initial Order. It is asking for the payment of a pre-filing obligation, i.e. to pay for certain expenses incurred or to be incurred by Dune for its own benefit and advantage, including but without limitation, the costs of acting against the interests of the Debtors and for the sole interests of Dune.

47 These requests of Dune simply cannot be granted.

48 In addition, Dune is seeking an Order appointing Wells Fargo (« Wells ») as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Loan Agreement, together with an Order for the payment of the professional fees costs and expenses of Wells.

49 This demand cannot be granted unless all of the parties thereto consent.

50 At this point, the consent of all concerned is not available. Some of the Second Lien Lenders are not before me. In addition, the Debtors, although they have no objection to the appointment of Wells, are not prepared to consent to all of the conditions of said proposed appointment, namely the payment of costs fees and expenses of Wells. Furthermore, the Second Lien Loan Agreement contains specific provisions governing the appointment of a successor to Crédit Suisse Toronto, which provisions must, and shall, govern such appointment in the absence of proper consent. These provisions read as follows (page 106 of Exhibit CS-1):

> 9.9 **Successor Agents. (a) The Administrative Agent, the US Collateral Agent and the Canadian Collateral Agent may resign as Administrative Agent, US collateral Agent or Canadian collateral Agent, respectively, upon 30 days' notice to the Lenders and the Borrower. If the Administrative Agent, US Collateral Agent or Canadian Collateral Agent shall resign as Administrative Agent, US Collateral Agent or Canadian Collateral**

> **Agent, as applicable, under this Agreement and the other Loan Documents, then the Majority Lenders shall appoint from among the Lenders a successor agent for the Lenders, which successor agent shall (unless an Event of Default shall have occurred and be continuing) be subject to approval by the Borrower (which approval shall not be unreasonably withheld or delayed), whereupon such successor agent shall succeed to the rights, powers and duties of the Administrative Agent, the US Collateral Agent or the Canadian collateral Agent, as applicable, and the term « Administrative Agent », « US Collateral Agent » or « Canadian Collateral Agent », as applicable, shall mean such successor agent effective upon such appointment and approval, and the former Agent's rights powers and duties as Administrative Agent, US Collateral Agent or Canadian collateral Agent, as applicable, shall be terminated, without any other or further act or deed on the part of such former Agent or any of the parties to this Agreement or nay holders of the Loans. If no successor agent has accepted appointment as Administrative Agent, US a Agent or Canadian Collateral Agent, as applicable, by the date that is 30 days following a retiring Agent's notice of resignation, the retiring Agent's resignation shall nevertheless thereupon become effective, and the Lenders shall assume and perform all of the duties of the Administrative Agent, US collateral Agent or Canadian collateral Agent, as applicable, hereunder until such time, if any, as the Majority Lenders appoint a successor agent as provided for above. (emphasis added)**

51 My understanding of the above citation is that in the event of resignation of the Administrative Agent, such resignation must be preceded by a 30-day notice and then, the « Majority Lenders » under the said Second Lien Loan Agreement, namely Dune, shall appoint a successor *from among the Lenders* a successor agent. Wells is not a Lender and cannot be so appointed unless *all parties consent, including all Lenders.* If the majority Lenders (i.e. Dune) does not appoint either itself or another Lender, then all of the Lenders, acting together are obliged to perform all the duties of the Administrative Agent.

52 In the context of CCAA proceedings and once again, in the absence of a consent of *all parties concerned*, I have no reason to substitute my decision to the clear and unambiguous contractual dispositions cited above. It is up to Dune as a « Majority Lender » to act and not for me to impose Wells to parties who are not prepared to agree to all the terms and conditions of its appointment.

53 As for the payment of fees, expenses and costs of the Administrative Agent, its successor and/or replacement, be it Wells, Dune, another Lender or anyone else, my comments are the same as those expressed previously on the same issue.

54 In the end result, this Motion is dismissed, but without costs, except for the ratification of the forthcoming agreement of the parties with respect to the production of documents and financial information.

Motion dismissed.

Footnotes

1 See Exhibit CS-1

2 This section is cited in part below. It provides for the replacement of the Administrative Agent, once the latter resigns. The procedure is clearly outlined and there is no apparent reason not to follow it.

3 A first pre-filing preliminary Report was filed at the hearing of February 24, 2010 and a second Report was filed in the context of the hearing of the present Motion

4 Report of the Monitor - March 17, 2010. This is, in fact, the second Report filed. A first Report identified as a preliminary pre-filing Report was filed at the hearing of February 24, 2010.

5 These are the fees described in the Monitor's report dated February 23, 2010, as the arranger's fee of 2.5% of the committed funds, the initial fee of 2.5% of the committed funds and the administrative fee of US$100,000 payable at closing. These fees are described in paragraphs 41.4.2, 41.4.3 and 41.4.7 of the said report.

6 Management has also provided us with an updated cash flow projection for WB Canada, for the 13 week period ending June 4, 2010, extracted from the above-mentioned projection for the WB Group, and prepared on the same basis. This cash flow projection is attached as Appendix G.

7 See Janis Sarra, .Rescue! The Companies' Creditors Arrangement Act, Thorson Carswell 2007, pages 33 and 34.

A Stay Order . . . . Allow[s] the debtor respite from litigation and enforcement of various contractual obligations during the proceeding . . . . Furthermore, a Stay Order . . . [has] the ability to suspend actions against the Debtor while discussions towards a restructuring.are continuing, to avoid a race of the swiftest creditors that would deplete the debtors' assets. , . . .

TAB 14

Action No.: 2001-05630
E-File Name: CVQ20DOMINION
Appeal No.:_____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 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.

P R O C E E D I N G S

Calgary, Alberta
May 15, 2020

Transcript Management Services
Suite 1901-N, 601 – 5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392
Email: TMS.Calgary@csadm.just.gov.ab.ca

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M. Crilly (remote appearance)	For Dominion Diamond Mines UCL, Dominion Diamond Delaware Co. LLC, Dominion Diamond Canada ULC, Washington Diamond Investments LLC, Dominion Diamond Holdings LLC, Dominion Finco Inc.
B. O'Neill (remote appearance)	For Washington Group
B. Wiffen (remote appearance)	For Washington Group
R.B. Gerard (remote appearance)	For Washington Group
M.I. Buttery, QC (remote appearance)	For the Government of the Northwest Territories
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K. Barr (remote appearance)	For Aviva Insurance Corp.
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W.W. MacLeod (remote appearance)	For Diavik Diamond Mines (2012) Inc.
J. Schultz (remote appearance)	For Procan Mining
D.S. Nishimura (remote appearance)	For M. Quinlan

K. Slaguero Court Clerk
R. Neale Court Clerk

THE COURT: Good morning, everyone.

UNIDENTIFIED SPEAKER: Good morning, My Lady.

THE COURT: Justice Eidsvik here. How is everyone today? Week 8 of the pandemic. All right. Well, nice to see you all.

I have a list somewhere of all of the people. I don't have enough screens. I didn't think that I would get to this point, but I actually -- I'm missing -- I might have to get another screen. I have things up all over the place. Anyways, I have a list of everyone that's participating here today. Let me just pull that up. Okay. Just hold on a second. And I see Mr. Rubin here. And maybe I can just get a few of the main parties.

Mr. Collins, are you -- you around?

MR. COLLINS: Yes, I am, My Lady. Good morning.

THE COURT: Okay. Good morning.

And, Mr. Simard, you're around. And let me just --

MR. SIMARD: Yes, I'm here. I'm here, My Lady. Good morning.

THE COURT: Okay. Thank you. I've lost my email. Too many things. There we are. Okay. Now, I have a long list here of people that were supposed to (INDISCERNIBLE), but it's sort of hard to know if everybody is online. But I have Brendan McNeill (sic) and Mr. Wiffen, Goodmans; Mr. Helkaa and Tom Powell with FTI Consulting; Ms. Buttery and Lance Williams from Cassels Brock, Northwest Territories; Mr. Astritis and Mr. Andrew Raven for the Public Service Clients (sic) of Canada; Mr. Schultz, Dentons, for Procan Mining; Mr. Wasserman and Michael De Lellis with Oslers, counsel for Credit Suisse; Sam Alberts, Dentons, counsel for the Wilmington Trust; Tony DeMarinis, Torys, counsel for the ad hoc group of bondholders. John Salmas, Dentons, counsel for the trustee; Mr. Levitin, Cahill, Gordon & Reindel, counsel for the first lien debt; Mr. Gerard, Gerard & Associates, counsel for Washington Group; Christa Lee Nicholson, Mr. Simard, Mr. Barr, Mr. Salmas, Ms. Paplawski, and Mr. Kashuba, Mr. Warner, Mr. Collins, Mr. MacLeod, Mr. Nishimura.

Okay. Did I catch anybody? Is there anybody else that's not been listed there for the record? No? Okay.

All right. So today we have a couple of things on tap. One, I'm going to give you some brief reasons with respect to the cover payment issue. I was wanting to write something out, but in terms of time and the volume of material, it just wasn't possible. And then there's the application with respect to fees that I'll come to afterwards, and I'll also hear if there's any other issues that we need to discuss afterwards. So let me start with outlining my brief musings and decision with respect to the cover issue if that's all right with the parties.

UNIDENTIFIED SPEAKER: Yes. Thank you, My Lady.

Decision

THE COURT: Okay. Start with that. Okay. I'm going to be reading from another screen, so if I'm not looking directly into this one, you'll know why. Okay.

The applicants, Dominion Mines -- Dominion Diamond Mines ULC, which I'll refer to as "Dominion," were granted protection under the *Companies' Creditors Arrangement Act* on April 22nd, 2020, with a comeback stay extension hearing held on May 1st, 2020. Diavik Mines 2012 Inc., which I'll refer to as "DDMI," raised an issue during the stay extension hearing. This issue was adjourned to be heard on May 8th, 2020.

DDMI argues that it is providing Dominion post-filing goods and services for which Dominion is not paying, and it seeks (a) a modification of the stay of proceedings, "the stay," contained in the initial order issued on April 22, 2020, to permit DDMI to make cover payments as defined in and contemplated under section 9.4 of the JVA on an ongoing basis and in accordance with the terms and conditions therein and (b) authorization to allow DDMI to securely store a portion of Dominion's share of production from the Diavik Mine and the Diavik product splitting facility in Yellowknife, Northwest Territories, which I'll refer to as the "PSF," for the Rio Tinto's groups' cleaning and sorting facility in Antwerp to hold in accordance with the JVA and associated agreements until such time that Dominion pays the indebtedness owing on account of the cover payments made by DDMI.

Dominion agrees that the initial order can be modified to allow the -- to allow cover payments to be made by DDMI as contemplated in section 9.4 of the JVA. However, it does not agree that DDMI should be able to remain in possession of Dominion's share of production until such time as the indebtedness owing on account of the cover payments is paid. Instead, Dominion says that DDMI already has security as agreed in the JVA and that should not be modified. The ability to enforce that security is stayed like for all -- all other

creditors, and this should not be modified.

Secured creditors Suisse -- Credit Suisse and the bondholders agree with Dominion. Credit Suisse argues that the Court should not have jurisdiction to change the credit arrangement nor should it. The JVA contemplates what should happen in an insolvency situation and that this is the model that the Court should follow.

The Northwest Territories Government did not want to get involved between the competing commercial positions but asked this Court to keep in mind the people of the North potentially affected by this dispute. Counsel pointed out that in fact they are the most at risk in terms of the employment and operations of the Diavik Mine.

Positions

And I have set this out only briefly, so you know, because I heard argument for several hours on this. The positions set out are quite polar opposites.

On the one hand, DDMI feels that it should be able to have the diamonds produced during the period when it is covering all of the costs of the Diavik Mine and in particular 40 percent share as security, more specifically that they should not be delivered to Dominion pursuant to the normal protocols. Section 11.01 of the CCAA should apply to treat DDMI as a supplier and allow them to be paid because they are a supplier of goods and services. Notably, 85 percent of the costs to operate the Diavik Mine need to be paid even if it went into a care and maintenance mode. Dominion presently has no more credit from the first secured credit -- creditors, and the second lien is a term debt. DDMI in these circumstances is forced to step up in a pay -- and pay Dominion's cover payment.

On the other hand, Dominion and its other secured creditors argue that Dominion has not asked the Diavik Mine be kept going and that this decision is solely in the control of DDMI. To the extent that it insists on continuing operating in light of the pandemic issues, then DDMI can choose to cover the share of the payments that Dominion owes, and it has specific remedies under the JVA which gives DDMI security in the assets of the whole Diavik Mine in priority to all other creditors. However, it does not have the ability to stop delivery of the diamonds. This is not a supplier situation but, rather, one of a joint ownership wherein the terms between them have been negotiated and should not be interfered with.

Discussion

It is interesting to note that in this situation that paragraphs 5 and 6 of the ARIO -- that's the order -- dated May 1, 2020, allows the monitor to make payments for both pre- and

post-filing goods and services that were necessary for the operation or preservation of Dominion's property and business. The cash flow statements allow mainly for payments to keep the Ekati Mine in care and maintenance operation but, interestingly, none for the Diavik Mine, which Dominion is a 40 percent owner. Also, paragraph 17(b) of the ARIO requires suppliers to continue to provide certain services; however, it allows that it must be paid -- they must be paid.

DDMI's evidence from Mr. Croese was to the effect that overall it was the right decision to keep the Diavik Mine operational. In part, he noted that the cost to be in care and maintenance mode would still be 85 percent of the full operational costs. If these costs to operate are not made, then there would be (INDISCERNIBLE) consequences to the Diavik Mine and its employees.

Dominion has taken issue with some of the decisions made by the manager, including whether it should stay open or not, as noted in Ms. Kaye's affidavit of May 8th. Nonetheless, despite these concerns, one way or another significant expenses need to be attended to whether the Diavik Mine stays open or not.

Although I agree that (INDISCERNIBLE) DDMI controls the decision of the manager of the Diavik Mine, I don't agree that it's fair to say that the cover payment is a (INDISCERNIBLE) choice of DDMI to make. The diamond mine has certain expenses regardless of whether it's fully operational or not. Because of the JVA, the manager may make Dominion's 40 percent cover call and certain consequences as rise -- arise as set out in section 9.4 of the JVA if Diamond doesn't make -- sorry -- if Dominion doesn't make those payments.

There is security allowed over Dominion's share of the Diavik Mine assets as defined. As outlined in Mr. Croese's affidavit, these assets include the diamonds. There's usually also the ability to move to sell these assets on notice, which is waived in the event of insolvency, were it not for the stay in place. In light of this, DDMI asks that Dominion's share of the diamonds should not be delivered. It is not asking that they be sold but held as security.

Taking a step back, in my view, Dominion has certain obligations that need to be considered not only in the Ekati Mine but also in the Diavik Mine as joint owner. If DDMI choose not to cover the -- if -- if DDMI chose not to cover the costs, then what? Dominion would have to seek financing to ensure that at least the care and maintenance operations of the Diavik Mine, like the Ekati Mine, were covered, that is, 85 percent of the present costs being incurred at the least. It would need financing to do that. In effect, by DDMI covering Dominion's cover costs, it is financing Dominion. Generally, if a party steps in to interim finance in CCAA situations, a DIP, a security in priority to other claims, will be sought. In fact, that's what's happening here – what’s being looked into. The appropriateness of this

financing is then reviewed. Here, security is already in place in the JVA, but DDMI seeks clarity that Dominion's share of the diamonds stay put in light of the fact that its usual remedies to potentially sell the Diavik assets is stayed.

In my view, this situation is more akin to a DIP problem than a supply of services problem. This joint venture does not fit squarely in a supply situation since not only is Dominion not necessarily asking for the products supplied, it questions the mine continue -- continued operation to get the supply. I also agree that the supply of diamonds is distinct from the payment obligation.

Having said that, keeping the operation running in the Diavik Mine is important, and in that sense, financing to do this is directly keeping in business operation. This is crucial for many stakeholders and the reorganization that's being contemplated. I am cognizant that security and priority to other secured lenders, especially in situations where the parties already have contextual rights and obligations which include contemplation of insolvency, is to be allowed sparingly or possible not at all. And I reviewed all of the cases that counsel put forward, including, with respect to this point, the *Agro Pacific* and *Re Allarco Entertainment* cases.

Section 11.02 of the CCAA and section 63 of the Northwest Territories *Personal Property Security Act* also need to be considered in terms of reviewing extension terms that are necessary to allow the restructuring to be done in a reasonable fashion. This legislation allows the Court jurisdiction, which is not unlimited, to create terms of the stay which it considers necessary.

I have considered whether in fact DDMI is seeking a change to the terms of the JVA as submitted by Dominion and the secured creditors. All agree that DDMI is in a first position in terms of the Diavik Mine assets. I agree with DDMI that the Diavik Mine assets as defined in the JVA include the diamonds that are produced. However, as a result of the stay as it presently stands, their security over the Dominion share of the diamonds is unclear. By insisting on a part of the JVA that allows for the delivery of these diamonds, it is in effect asking that the security that DDMI would normally have over the diamonds be dissipated, recalling that absent the stay DDMI would have had the right to sell them. In my view, a balance needs to be made.

Based on the cash flow statements, Dominion's aggregate share of Diavik Mines cash calls to July 17, 2020, 13 weeks, according to the monitor's assessment, would be $56 million. It is not clear that the value of the diamonds -- what the value of the diamonds would be. The April 22 diamond delivery production was 91,430 carats and the May 24 cass (phonetic) is 150 carats. No exact value was provided. I did see values discussed, but they are dated in the material. I do note, however, that the overall value of the diamond sales in

2019 was 527.6 million. Since there's been no default and the cover payments owed by Dominion were up to date to that time, I order that the April 22, 2020, diamonds be delivered forthwith on May 8th, 2020. I hope that you see -- and I saw the order that I signed with respect to that.

There's also some information about the value of the security in the Diavik assets. Over the years, $3 billion has been invested in it. It has another 5 years of operational life that was contemplated in late 2019. Seven hundred and sixty million has been invested in the last 3 years. Mr. Croese indicated that a hundred million dollars in cash flow will be generated by keeping the Diavik Mine open. Also, I note that $180 million of Dominion diamonds are struck in transit in India and Belgium. Accordingly, it is presently not clear whether it's necessary to interfere with the continued delivery of the Dominion share of the diamonds in order to secure DDMI's financing Dominion's share of the cover payments, more specifically, whether the diamonds that will be slated for delivery on May 20th, June 10, July 1, and July 8, et cetera, need to be secured. I also note that in light of the COVID-19 pandemic and the inability of Dominion to use its diamonds in the normal course, not having possession of these diamonds at this point from Dominion's perspective is not prejudicial until the markets and transportation lines open up.

The CCAA process here is in early days, and the parties are busy pursuing possible interim financing and a SIS process. In any sale or investment transaction involving (INDISCERNIBLE) in trust, the aggregate amount of Diamond's indebtedness from missed cover payments may have to be paid or otherwise satisfied in priority to (INDISCERNIBLE) other secured creditors. This was pointed out again in the latest monitor's report that came in yesterday, number 3. Accordingly, it could be that the issue of the necessity of the further diamond security will become moot.

Accordingly, a final decision on these thorny issues is premature in my view. In order to balance the various interests, I will make the temporary without prejudice order as follows for today's purposes:

(1) that the stay of proceedings contained in the initial order issued on April 22, 2020, be modified to permit DDMI to make cover payments as defined and contemplated under section 9.4 of the JVA on an ongoing basis and in accordance with the terms and conditions therein;

(2) on a without prejudice basis, in light of the fact that the present stay is in place to June 1, 2020, the diamonds for the May 20 delivery shall be put into abeyance and held at the PSF in Yellowknife and continue to be held in trust by the manager. The manager shall provide accurate (INDISCERNIBLE) the diamonds being held and keep them segregated and insured. The manager or DDMI may not sell or otherwise deal with these diamonds.

This issue will be revisited upon the extension application that will be necessary to extend the June 1 stay. I expect that there will be further information at that time about the current state of affairs in terms of refinancing, the SIS process, and potentially the need for security of the Diavik Mines assets at that point in order to determine on a go-forward basis if it's appropriate to order that the next scheduled deliveries of the diamonds remain at the PSF or whether the future deliveries can resume.

So that outlines my -- outlines the -- the reasons, the very brief reasons for my decision of what we'll do with these diamonds in the near term, and once we know more for information, then I'll hear further submissions and make further decisions.

All right. Are there any questions on that issue?

Discussion

MR. RUBIN: My Lady, thank you. We will obviously work with Mr. Collins and the monitor on a form of order. I do recall there were a series of suggested additions to an order that the monitor set out in its report. I'm not sure that they're necessary in light of your order given that the order is what I'll call temporary at this stage until June 1 when we revisit it, but I think perhaps Mr. Collins and Mr. Simard and I can -- can work out the form of -- of the order.

THE COURT: Right. I did look at paragraph 30 of the monitor's second report, and the second part of my decision there that I just read incorporates most of what was suggested by the monitor, just so you know. It's just not (INDISCERNIBLE) the monitor had it like a, b, c, d (INDISCERNIBLE) paragraph.

MR. RUBIN: Very good. I'm sure we can work it out amongst us. Thank you, My Lady.

THE COURT: All right. Oh -- or sorry. Who was going to speak there?

MR. RUBIN: No. I -- unless Mr. Collins or Mr. Simard have any comments, I think that takes us to the -- the two applications of the ad hoc noteholder group and the indenture trustee.

THE COURT: Mr. Collins, did you have anything else to add or a question there?

MR. COLLINS: My Lady, I do not. Thank you very much for the

decision, and I will work, like my friend for Dominion indicates, with the company and the monitor to work out the form of order, and we'll look forward to being back before Your Ladyship on this issue and potentially with a solution at the next stay extension application.

THE COURT: Okay. Thank you.

All right. Mr. Simard, did you have any questions with respect to this?

MR. SIMARD: No, My Lady. Your -- your reasons are sufficiently clear. I think that gives us what we need to work out the form of order. Thank you.

THE COURT: Thank you.

Okay. So the next question then is the application with respect to fees. I note, to start with, that the monitor is suggesting that this -- this application may be premature in light of the fact that there's -- things are still being worked out, it's not clear how much the parties are requesting, but anyways, let me turn to the applicants so they can make their pitch to see whether or not this is something that can be decided today.

Now, I have to say at the outset that this material all came in very late. I've been extremely busy with other applications and another seminar that I presented at this week, so I haven't -- I've read through the material very quickly but really haven't had a lot of time to assess it carefully.

All right. With that, let me go -- who would like to go first? Because there's three of you that have made applications here, so...

MR. RUBIN: My Lady, might I just make this suggestion if it please the Court. It probably makes sense for Mr. Kashuba to go first since I think he delivered his application first. He is counsel to the ad hoc group. Then there is a separate application from the trustee, that is, the indenture trustee under those notes. So those are the two applications. And I believe that there is a bench brief in opposition delivered, obviously, by our -- by our client, the company, and then by the first lien lenders. So it may make sense for Mr. Kashuba to -- to go first, but just before he does, I guess one matter I did want to raise is -- and I thought I should ask whether Your Ladyship has access to CaseLines at this point in time and -- and, if you do, if you're able to let us know because that -- that might assist in -- in taking the Court to various materials. I thought I should ask at the outset.

THE COURT: Okay. No. I do have CaseLines up and running,

and in fact, I was using it in order to work on this decision. There was a couple of issues but not serious ones, but one is that the -- the material that's been uploaded in CaseLines isn't tabbed or hyperlinked, so it's a little bit difficult to move through the documents because you have to scroll through or use the find issue there, the find tool. Anyways, and the other thing is that the confidential documents have not been uploaded. I know in the one other decision case that I had with -- with this is we had a separate section called "confidential" so that the confidential material was kept separate on this, on the CaseLines matter, but that was okay. I -- I ask for some more confidential information to be sent over in a hyperlinked fashion, and I received it. And then I also have -- because they were sent over previously, I have them on my computer anyways in an 'i' drive. So between the CaseLines and my 'i' drive, I have everything. It's nicely organized on the CaseLines, so that's great, and I'm able to scroll through. And if you want to use the present tool in terms of the material, that's also good. The one good thing is I think everybody is on -- literally on the same page now in terms --

MR. RUBIN: Yeah. And so --

THE COURT: -- of the order of the material --

MR. RUBIN: -- what I will say on that --

THE COURT: -- and the -- the organization of the material, so -- and the numbering of the pages, so if you want to refer to a page number, then you can go there quite quickly, or if you want to present that page number on the screens, that also works. I would note --

MR. RUBIN: Yeah. It --

THE COURT: -- people if they -- if they want to do that, you should turn your notes off, which I will do now so that they don't show up. Apparently, that's -- I have many notes on the side. They're personal, obviously, and not for consumption.

MR. RUBIN: So, My Lady, we've had some difficulties, and -- and Mr. Simard's office has been working very hard on trying to resolve some, and one of them, you noted, which is the bench briefs that were delivered were all tabbed and hyperlinked, but when they got carried over to CaseLines, somehow the hyperlink is lost, so we'll continue to, and -- and through the -- the significant efforts of Mr. Simard's office and -- and people working with him, try to fix that.

The other matter I just would reference from a procedural perspective is we've also

discovered some difficulties with the present feature; sometimes it works, sometimes it does not work, and it depends on -- it's something to do with the way the documents were downloaded. So in that regard, might I suggest this: If you are able to on CaseLines -- and everyone else who's listening might want to do this as well, but if you hit the find tab at the top --

THE COURT: M-hm.

MR. RUBIN: It's next to the --

THE COURT: M-hm.

MR. RUBIN: -- home button.

THE COURT: Right.

MR. RUBIN: If you go into find, there's -- four or five from the left, there's a page direction button and an auto direction button.

THE COURT: Right.

MR. RUBIN: And so if you're able to click the page direction to on and the auto direction to on, what that will then do is allow any party to go to a particular page, and then they hit the button which is on this same tab here which is direct others to page, and I'll do it right now, and if I hit "direct others to page," I am directing everybody to our bench brief and --

THE COURT: Oh. It worked.

MR. RUBIN: And so, yeah, what we've discovered is that -- that feature works. The present feature does not always work, but it's -- it's a workaround for the time being in case there are issues. So again, I apologize. Did not mean to monopolize it. I just wanted to deal with some procedural matters at the outset.

THE COURT: Right. Well, I thank everyone for working with this. This is an uphill training -- the curve -- the training curve of all of us is huge as we all try to learn to deal with digital documents on screens, and I mean, I am -- you know, we all have different levels of ability. My ability is up there, but -- may be better than some but way less than others, so -- but I thank everyone for their patience and their -- patience, I guess, in trying to make this work, and we'll see -- see how this works.

I mean, the other thing is -- is that I was -- I did note over the last couple days that, you know, I get notices. Little bell goes on when anything is uploaded, and in any event, I was working away on this decision, so I -- whenever anything was uploaded, it would automatically come onto my screen, so that was tremendous. I noticed people were also sending over emails, that will no longer be necessary. And please don't send me anymore hard copies. I'm not in Calgary, so to the extent that hard copies and material are going to the courthouse, they literally are gathering dust. So for me anyways -- I know that other judges are still different levels and need the hard copies still, but for me, you do not need to send me hard copies of courtesy copies.

Of course, at this point, everybody still has to file either by email or by sending a courier over to -- a runner over to the courthouse and needs to file a paper copy for the -- the official record. One day we'll hopefully not need to do that, but at this point, the official record will have to be filed on paper. So we're getting there, but we're not all the way.

All right. So having said all those interim issues, I agree we'll leave it to Mr. Kashuba to present next his -- his application, and I'll just -- and I'll leave you to either direct me to a page, or I can pull up your brief directly, whichever you --

MR. RUBIN: And I think I've directed you to Mr. Kashuba's brief of law, and then I will turn it over -- turn it over to Mr. Kashuba.

THE COURT: Awesome. I see that. Okay.

MR. KASHUBA: Thank you, My Lady. Thank you, Mr. Rubin. And agreed, the CaseLines form seems like it has a lot of potential. It will be something I'm sure we will all master just in time to see each other in person again.

THE COURT: But listen, even when we see each other in person, this is not a waste because then it will save everybody's arms from dragging over boxes of hard copy material, and hopefully you can come over just with your computer, and we will continue to look at the documents digitally, but it would be nice to see you all in the same courtroom. That might be a while off, quite frankly, but (INDISCERNIBLE).

Submissions by Mr. Kashuba

MR. KASHUBA: Very true, My Lady. As Mr. Rubin mentioned, Kashuba, initial 'K', for the record with Torys LLP. We're counsel to the ad hoc steering committee of bondholders. As referenced last Friday, that global bondholder group is secured over all of the properties with Dominion Diamond and is second position only behind the first lien. They're a major creditor in these proceedings to the tune of

approximately $800 million dollars Canadian.

Now, My Lady, the application before you this morning is the note committee's motion for payment of their out-of-pocket legal and financial advisor expenses. Now, the ad hoc bondholder committee is ready, prepared, and anxious to proceed today. As we have previously advised, we are of the position that it is critical to have this matter dealt with sooner rather than later. And to be clear, the present request by the bondholders is that their expenses be covered by the petitioner only up to the date upon which interim financing's approved by the Court, so a further application may be made after, but for the purposes of today, we're seeking an order that those fees be paid up till the DIP financing being approved.

Now, as My Lady is aware, the three direct clients that is Torys is acting for includes DDJ Capital Management, Barings LLC, and Brigade Capital Management. They're collectively owed $420 million, give or take, Canadian. Between these three bondholders, this is 53 percent of the total bond debt, and they're in close and continual discussions with certain other bondholders, most namely Western Asset Management, that comprise another 15 to 20 percent of the main bondholder debt, so this is 70 percent of the total note value, just for context.

Now, an ad hoc committee such as my client group in this case, they commonly play central roles in all large Canadian and US restructurings whenever public notes or bonds are involved. We'd submit that these committees are uniquely positioned to represent the shareholder interests because of their decision-making authority, their expertise, and their resources.

Now, as mentioned, the bonds are secured over all of the company's property. It's important to keep in mind and it's our submission that not more than $150 million US of first lien debt ranks ahead of the company's property overall. We would suggest that the actual exposure is probably less than $150 million given that about half of the face amount is of letters of credit, and there's information before the Court that the Washington Group is guaranteed some of this exposure. We have $150 million ahead of the bonds by virtue of the first lien, and we would suggest that it's likely less.

THE COURT: Okay. So that's the Credit Suisse amounts that you're talking about, right? Okay.

MR. KASHUBA: That's correct, My Lady.

THE COURT: Okay.

MR. KASHUBA: And we -- we share a security package with Credit Suisse, so it's the same security over all of the company's property.

Now, as we advised in respect to the commencement of the CCAA proceedings, My Lady, our clients were not served with direct notice of the application for the initial order. Following that order being granted on April 22nd, the bondholders promptly began to organize. Our office was retained just over 2 weeks ago, and we've been working day and night with the primary stakeholders to review and prepare application materials. The bonds obtained legal counsel. They retained a financial advisor, which is Houlihan Lokey. And they've been coordinating amongst themselves, which is no small task.

Now, in the company's brief, Ms. Kaye, at their affidavit, goes to great lengths to suggest that an attempt was made to have certain of the bondholders enter into non-disclosure agreements as far back as 5 days prior to the application for that initial order. My Lady, this is a red herring. The bondholders did not have notice of the initial CC double application -- CCAA application. They -- if they were contacted, it was to sign NDAs. They moved as quickly as possible but did not have notice of that first application. They were not represented at that application. And we find this somewhat puzzling given that my clients are by far the largest creditor and stakeholder from a monetary perspective. They have concerns about the governance of the company. They are in a process of negotiating a DIP financing proposal. Now, My Lady, this was suggested last week, and it was confirmed in Ms. Kaye's affidavit that was just filed with the Court, so we do have a DIP financing proposal. A decision's not been made to my knowledge, but there is ongoing negotiations with Evercore and with the company. And lastly, my clients are, as advised, considering a potential offer.

So the bondholders approached the company seeking to have their fees paid. This is done as soon as the bondholder group retained counsel, and in the circumstances, we would suggest that it was and is a reasonable request. It would go a long way to establishing some trust between the bondholders and the company, especially when my clients are seriously concerned that their $800 million investment's at risk.

So the relief sought today, we are here to request that the company reimburse the ad hoc bondholders for their reasonable out-of-pocket legal and financial advisor expenses. It's a contractual entitlement to these costs, and more importantly, there are equitable grounds to the relief that we're seeking. We have limited this relief on our own instance for a period of -- only seeking up to a DIP approval date subject to the court order. There's no success fee payment being sought to fall under that charge. Whereas many of the financial advisors, included -- including Houlihan Lokey, have these success fee payments, that is not something that we're seeking to have reimbursed.

And when will we be back before this Court? Obviously, there will be a stay extension application coming up in the next couple of weeks, and the monitor's current report states that the company may seek a DIP financing approval order as soon as May 22nd, so it could be next Friday or shortly after. The noteholder committee, my clients, are taking this approach because it accepts the appropriateness of court oversight and control on this issue. There's natural limitations and discipline, the -- that fees have to be reasonable, and we are happy to speak about an estimate. The monitor's report indicated that no estimate of fees was provided. They're going to be reasonable; they're going to be detailed, and we are happy to have that further discussion if that is something that would be beneficial.

As a corollary to the why -- why this certain relief, why is the relief needed now, we are a major player in these proceedings. We need protection, and we have a reasonable request. We're not here to preempt any issues, and I want to make it clear that the bondholders are not here to advocate for some sort of unnecessary or avoidable position. By looking at the company's cash flow forecasts, they have sufficient funds to pay the costs for the period that we have requested, and this is a critical time, My Lady, for effective representation.

Now, in the first lien lenders' materials, they suggested that this application, this relief, should be put to the end. We submit that this flies directly against the overarching purpose of the payment order that we're seeking and payment orders in -- in general. Now, effective representation is needed now, not at the end of the proceedings, and without payment assurances, representation --

THE COURT: Well, Mr. Kashuba -- Mr. Kashuba, I think it's not a matter of, you know, whether you can get paid. I think they're just saying, Why does it have to be paid immediately? And I mean, the -- the monitor is busy dealing with all kinds of payments that have already been approved, but he has to deal with them -- right? -- under the order.

MR. KASHUBA: So, My Lady, one thing -- I guess is question is, well, what have -- what's been happening so far, who's been (INDISCERNIBLE). Thus far, my clients have been willing to be a part of a temporary bridge solution, they've taken the high road, and they've taken it upon themselves to fund their investors. And my client is an intermediary here, and we're not the actual investors in the notes. They are an intermediary, an agent through which the notes act, and they've been incurring the fees with the hope and the reliance on those fees being ultimately ordered to be paid by the company. That's the temporary solution, but it's not sustainable. My -- my client does not have an ability to compel their clients to contribute. We cannot force a collection of these fees, and it puts in an administrative impractical, if not impossible, situation.

THE COURT: Well, I don't quite understand that part. Like, if

your clients want to be represented, then they have to pay, like, so I don't quite understand you saying, Well, they can't be compelled to pay. If they want services, they have to pay, don't you think?

MR. KASHUBA: There's a few points I'd like to raise in that response that, My Lady, and I understand from a first impression and an objective perspective, yes, you pay to play, but in this case, this is a bondholder committee that they -- the three of them that we are acting for, DDJ, Brigade, and Barings, they have hundreds of investors within those management -- those funds that they mange. They're 53 percent of the total noteholder value, but what about the other 47 percent that they're speaking for? There's no guarantee that those other bondholders are going to be paying for the fees that the three primary bondholders are -- are incurring. I -- I'd submit it's inequitable to force our group of three bondholder committee to cover the fees for everyone.

And there are precedents and a number of cases in Canada where the bond -- ad hoc bondholder committee fees were agreed to be paid in advance of the proceedings and -- and the other cases where it's a consent order that's occurred prior to -- prior to too far into the proceedings. There's not a lot of case law on it, but this is something that is done usual course in Canadian and US proceedings. And the one decision -- and there's not a lot of case law, we submit, on this particular issue, but in the *Re Homburg* decision, it was very specifically stated that requests of this kind should be made now, not after the fact. These requests being made further down the road into the proceedings will cut into distributions.

THE COURT: Okay. So which one is that? Which decision is that?

MR. KASHUBA: That's the *Homburg* decision. It's --

THE COURT: Do you have that (INDISCERNIBLE) brief? As I've said, like, I read through your material very quickly.

MR. KASHUBA: Yes. That's tab 1 to our brief, and it's a 2011 decision of the Quebec court.

THE COURT: Tab 1 of your brief is the *Canwest* case.

MR. KASHUBA: Oh. Sorry, My Lady.

THE COURT: Okay.

MR. KASHUBA: Okay. (INDISCERNIBLE) it was referenced in

the *Canwest* and beyond tab 5 (INDISCERNIBLE) paper. And again, it wasn't a case that was on all fours by any means with the present situation, but it did deal with the timing of such a request. We'd submit that pushing -- pushing the matter to the end of the proceedings or later on in the proceedings, it -- it creates a situation where our client continues to incur those fees without -- without any certainty that they will be paid.

Now, maybe My Lady, it would help to use an analogy to describe how these bond funds, the -- the investment funds are set up. Now, for example, consider the situation of a mutual fund company. The mutual fund makes large investments. They also act as an intermediary for thousands of investors. Now, what if the fund is drawn into litigation or some sort of proceeding that impacts their investors? Now, do they have to go back to each of their investors in that case and ask for some pro rata payment to be made towards the fees of a financial advisor and legal counsel? How do they determine who pays what? There's no ability to force the individual investors to pay. Now, they could ask, but what -- what's going to happen with those investors? Some will say no. And the administrative task is almost insurmountable. It's -- there's almost no question that they will bear an -- an improper and inequitable share of that burden. They do not have the ability to go back and make a wholesale change to the structure and process under which those funds are set up.

THE COURT: Okay. Well, in this situation, as you've pointed out, like, ahead of you is the $150 million Credit Suisse, right?

MR. KASHUBA: Yes, My Lady.

THE COURT: And you have the contractual right to be paid fees, set that out, right?

MR. KASHUBA: Yes.

THE COURT: So it's just a matter that -- and you're saying, well, Credit Suisse will likely be whole, but you're just -- you know, are you then suggesting that your fees will not be paid in this restructuring if it's not ordered ahead of time? Like --

MR. KASHUBA: That is a potential case here, My Lady.

THE COURT: How do we know that right now? I mean, and that's -- isn't that sort of what the monitor is saying?

MR. KASHUBA: To the extent, yes, that it might be too early. We don't have an estimate of what those fees are. But we can say here without question we do

not know if our engagement will continue without funding from the company. These are -- just point out they're American funds. They -- they do expect that these sort of fees be paid, and of course, we're restructuring. It might be the case that they are no longer involved if they do not have an order that the company pay, and that's -- that's the information I've been advised of, and that's what our submission is today.

And just since My Lady referenced the Credit Suisse and the first lien, they -- they don't have an issue with fees, My Lady. If fees need to be sought from the other members of the syndicate, that is a simple request. It's not a large group. Further, the first liens are -- if you can take a look at the company's cash flows, the first liens are getting their interest payments. Interest goes a long way of paying at least some of these fee,s and I'd submit more than just the fees, there's probably funds left over after the interest is accounted for. And if the first lien does get out, they're going to have their interest and all their fees paid, and we'd submit that it borders on the realm of unreasonableness to suggest that the first liens are not going to get out based on the value of the diamonds in inventory, the submissions that were made at DDMI's application on the Ekati and Diavik Mines. We would submit that if it's not crystal clear, we -- we are very certain that the first liens will get out. It would take a tremendous, remarkable series of events for that to not happen.

THE COURT: All right. So you're saying they don't need this protection but you do.

MR. KASHUBA: We do, My Lady. Now, My Lady, if it pleases the Court, I'll turn to 11.52 of the CCAA as there are some -- some arguments that have been raised by my friends in -- in opposition to our application.

THE COURT: All right.

MR. KASHUBA: Now, 11.52(c) of the CCAA is one of the sections that we are relying on. The application does not rest solely on this -- this section though, My Lady. This is a court of equity, and the Court has the inherent jurisdiction to grant the application that we're seeking. And when we're speaking of equity, we would submit that facilitating the committee's representation would correct an imbalance here. It would preserve the integrity of the process, and it would create a more constructive climate of dialogue. Now, the bondholders here, My Lady, we -- they're not just representing the interests of the particular noteholders. They're also a very key part of the negotiation of the DIP. Their involvement has created a more constructive climate for this restructuring, and they are very interested in advancing an offer in the course of any sort of sale investment solicitation process. The -- an order that the fees be paid brings them to the table, and I -- I would submit that it makes more clear that they have value to add, and that value isn't -- it isn't something that they have their -- over their head held, the concern they'll never have

their fees paid. Even though the application does not rest solely on 11.52, the provision does provide some statutory support.

Now, you'll see in my friend Mr. Rubin's brief on behalf of the company that the standard of necessity has not been met in their submission. Necessity is -- is harped on by the company, and we would submit that those arguments, while we appreciate them, they rest on false facts. Now, there's a lot of emphasis here, My Lady, placed on the fact that the committee members are large and sophisticated clients, and these are large funds. They're sophisticated. That brings some issues, and it brings a misperception that they are just willing and able to cough up the money to pay for the fees without a question asked. This submission chooses to ignore the critical fact that they are only intermediaries. These aren't the bonds themselves. These are investment managers of the bonds. They hold the notes on behalf of hundreds of clients for the ultimate beneficial owners of the notes.

Now, the management and advisory role of our clients is described in our materials, but as we mentioned, as investment company intermediaries, they do not have practical means to collect and recover these fees and these out-of-pocket expenses. They can't compel the payments. They are doing -- they're presently acting and working with our office and with Houlihan Lokey to -- to bridge to a later point where they have clarity on how those fees are going to be paid, but it is an unsustainable situation.

THE COURT: You're not -- you're not asking for an expert to be retained by your group. Like, somebody else was, right?

MR. KASHUBA: No, My Lady. We do have Houlihan Lokey, which is a well-known financial advisory firm, but it would be them and the Torys LLP legal fees incurred and reported on on a reasonable basis.

THE COURT: So you are asking for another -- for another expert to be -- need to be paid.

MR. KASHUBA: That would be a financial advisor, yes, My Lady. I would submit that both fees and both roles are important here. The nature of the non-disclosure agreements that the company entered into with my clients, it necessarily has most of the information coming to legal counsel and to the financial advisor. Based on the sensitive nature and the terms of the confidentiality agreements to -- a lot of the information doesn't even go directly to my clients. It's with Torys and with Houlihan Lokey, but if -- we're not going to say that definitely one of those advisors is more important, but we would submit that proper legal representation is definitely the starting point. The company, in their material, suggests that certain precedents included in our materials are not relevant because they involved initial CCAA orders or there's other differentiating factors. There's

not a lot of case law in Canada on these orders for the direction of payment of legal fees, but precedents that we provided --

THE COURT: Because they're not usually granted, Mr. Kashuba.

MR. KASHUBA: I wouldn't submit that, My Lady. There are many cases where we have bondholder ad hoc committee groups' fees covered by the company. And we didn't cite *Nortel* or *Air Canada*, and those are other cases where the ad hoc groups were paid by the company. We did include three precedents where those fees were -- were covered. That's *Lightstream*, *Jaguar Mining*, and, oh, *Essar Steel Algoma*. So there are -- there's ample precedents and many precedents of these fees being covered, My Lady, and not just of legal counsel but of financial advisors and in even certain cases of the indenture trustee.

Now, I think what My Lady has also hinted at is another argument that my friends have advanced, the floodgates argument.

THE COURT: Right.

MR. KASHUBA: Now, the company suggests in its materials that it does not want (a) the committee's costs because it cannot differentiate between our request and those of others. Now, My Lady, there are clear differentiating factors here, and the position's ultimately untenable. Now, we -- and for the record and I hope it's clear, we respect the importance of all stakeholders, and that includes the Government of the Northwest Territories, the Aboriginal groups that are involved, the employees, all important stakeholders.

THE COURT: All right.

MR. KASHUBA: And there's -- with that in mind, we'd suggest that (INDISCERNIBLE) overlay the common-sense recognition that there's differences amongst stakeholders and my clients are in a unique position. What makes them special? What makes them different? Well, the noteholders are by far the largest monetary creditors of the company. They're one of only two secured creditors holding security over all the company's property. As I submitted previously, all indications are that the noteholders are the fulcrum debt, and they're going to be the most affected by these proceedings. Every data point suggests that there's much more value to the diamond -- Dominion Diamond Group than just the debt owing to the first liens. In inventory values, My Lady referenced paragraph 125 of the first affidavit of Ms. Kaye. It indicated there's $180 million of diamond inventory stuck in transit. And we have -- last Friday was a good example of

submissions being made on all of the value that may rest in the Diavik Mine, and then we get into the equipment at the mines and the Ekati Mine. We'd submit that wherever the value breaks, it is most likely with my client after the first lien debt. I -- I summarized some of the unique obstacles that my clients have to funding their costs, the practical issues.

And my committee clients are doing more than just representing the noteholders' interest. As the company stated in Ms. Kaye's most recent affidavit, the committee has submitted a DIP financing proposal, and we'd submit that they thereby enhance the competitiveness of that process.

So denial of the payment application would expose my clients to the risk at least of never recovering their out-of-pocket costs because there's no mechanism for recovery.

THE COURT: Okay. This -- this is a practical question. The person who's given you instructions here, what's their background? Like, are they in -- obviously if they're running, you know, a bond holding situation they must have some background in finance and all the rest (INDISCERNIBLE).

MR. KASHUBA: Yes, My Lady, and there are representatives for each of the three investment funds that we are acting for, and there's many representatives in some cases, but there's direct points of contact, and they're all US-based financial sophisticated individuals and, again, lots of experience in the US and some in Canada as well, and they have an expectation -- and it's reasonable, we'd submit, and it's based on past cases -- that the fees of the bondholders would be paid.

To -- and it will be, I'm certain, raised, but what about the first lien's expenses? Again, they are being paid their interest. That goes a long way to cover fees, but we don't take a position on whether the first lien lender should be allowed the payment of their costs. It would make sense if the second liens are paid costs, that the first liens also be paid their out-of-pocket costs, but there are some differentiating factors between us, My Lady, and Credit Suisse and the first lien lenders, and the first point again, post-filing interest is being paid. You can see that from a look at the company's cash flows. The data points, they point to there being no serious risk of exposure to the first liens, and we'd submit that the first liens are sitting pretty. They're sitting fairly pretty. (INDISCERNIBLE) interest, and if they're not paid their costs in the interim, they're going to add those costs to their debt payout number down the road. And they don't face the same structural obstacles to funding as we do. Credit Suisse has the ability to recover directly from the first lien lending syndicate even in the implausible scenario where it does not recover from the company.

Now, we'll have to note as well, My Lady, as with respect to the first lien brief and materials, there's an impression that is being created, or at least an inference, that the relief

sought by the bondholder committee is contrary to the spirit of the letter of the intercreditor agreement. Now, My Lady, this just could not be further from the truth. On the contrary, the intercreditor agreement specifically contemplates that the noteholders may seek this sort of relief if and when the first lien lenders are receiving payments. That is the case here. The payments are the interest payments. There's nothing stopping or preventing the application here from the bondholder committee. And in any case, the intercreditor agreement does not apply to matters relating to an ad hoc committee of direct noteholders.

Now, the -- and turning to another one of the stakeholders, the position of the committee can be distinguished from every other significant noteholder -- sorry -- stakeholders in these proceedings, including the DDMI joint venture. The DDMI joint venture, also a very important stakeholder. They have first ranking security over one of the mines and also enjoy other protections not available to the committee, such as those that were sought and to the extent that they were granted from last Friday's application. They're in a different situation and important stakeholder as well but in a different position than the noteholder committee.

Now, My Lady, I appreciate that we're here today arguing about fees and being paid and covering financial advisor costs to -- to these institutional creditors, but again, it's our submission and I think that the facts bear that this isn't a case where these fees are just going to be blindly paid or they're going to be simply recovered. That's just not the case. There -- there are bigger issues at hand in these proceedings, My Lady, and it's unfortunate that we're a sideshow here to the larger act, but this is a necessary and critical request that's being made by my clients. It's not an irrational position. It's -- it's constructive and eminently reasonable at the end of the day, and this request has been tailored specifically to be as narrow as possible in the circumstances. Of course, at the outset of the proceedings, we may have thought, well, an application would be appropriate and necessary to seek payment of all fees, including the course of the proceedings, but that's not what we've done. We've only asked for the covering of fees until the interim financing is determined. Mr. Rubin suggested that could be in just a couple of weeks, maybe as early as next Friday. I'm not asking for the FA success fee.

And it's not surprising that everyone might want to say, Well, me too; if -- if the bondholders get their fees paid, why not us? My clients are the fulcrum debt here, My Lady. Of course we're the main event. That's why we're asking for this. We're hoping to do the DIP. We're hoping to do the sale process, and we want to be clear that we are of that position not to disrespect the other stakeholders, but we are in a unique set of circumstances, and we are very concerned that the value will break with our client.

Now, just to summarize, My Lady, it's -- this isn't a screen issue. It's simple and not a surprise, and it's often done. We have as compelling of circumstances here as could exist.

We are a fulcrum creditor, and fulcrum creditors routinely have their costs paid in situations such as this. We're very much engaged with the company, we have been, and we're prepared to fund the DIP and submit a real offer on the assets. We are critical of these proceedings, and the order that we're seeking is necessary to ensure our effective participation and representation in the proceedings.

I may have some further comments, My Lady, in reply to those advanced by my friends and in support of the trustee's application, but that's (sic) concludes my submissions for the time being, My Lady.

THE COURT: Okay, (INDISCERNIBLE). Thank you very much.

All right. Who would like to go next?

MR. SALMAS: My Lady, it may be appropriate the note trustee to weigh in on its application, or would you rather hear from the company (INDISCERNIBLE)?

THE COURT: No. I think the note trustee, I'd like to hear from you first.

MR. SALMAS: Okay.

THE COURT: You're Mr. Salmas.

Submissions by Mr. Salmas

MR. SALMAS: So, yes, Mr. Salmas, John Salmas, Dentons Canada, on behalf of Wilmington Trust, National Association, the note trustee under the second lien series of notes.

So the trustee, we've heard the note committee's position that they think that their application should be -- proceed today and Your Ladyship should actually render a decision in that regard, and for reasons that we can lay out more in our submissions in respect of that application, the trustee is supportive of the note committee application.

Perhaps I could just say that our role is different than the role of the committee itself. The trustee is a construct of the trust indenture. It is a fiduciary for all the noteholders, including those noteholders who are not represented in the proceedings. It is contractually required to participate in the (INDISCERNIBLE). The trustee discharges many roles separate and

apart from any roles that the committee may discharge, inclusive of being a collateral trustee, a paying agent, a transfer agent, and a registrar - all contractual obligations under the indenture itself.

And if I may say, My Lady, the indenture and the intercreditor agreements, I think as you may have seen, are all governed by the -- are both governed by the laws of the State of New York. And so in terms of ability to receive payment, the party that's contractually obligated to pay the fees of the trustee are the applicants. We have no other pot of money to seek any recovery for fees or expenses of the trustee. It's -- the contract (INDISCERNIBLE) the applicants are obliged to make those payments. And in reviewing the intercreditor arrangement with the first lien noteholder -- the first liens, it is -- it is clear that these applications, both the trustee's application and the note committee's application, is allowable under the terms of the intercreditor agreement, specifically section 6.03. And so as indicated --

THE COURT: Okay. So maybe you can bring that to me -- or send me -- if you have that. I have your brief up, I think. Or is this just your application? I have your application. You don't -- you don't have -- do you have a brief, Mr. Salmas? I have your application.

MR. SALMAS: We have a brief, My Lady. We also had filed an affidavit of Mr. Freake. I believe those materials --

THE COURT: Oh. Okay. Yes, I've got that. Okay. Yeah.

MR. SALMAS: And --

THE COURT: All right. Yeah. I -- okay. Good.

MR. SALMAS: And so the way I referenced it is the adequate -- adequate protection section, My Lady, 6.03 of the intercreditor is pages 21 and 22 of the indenture, pages 196 and 97 of the affidavit. I haven't referenced it in a CaseLine reference, but it starts at page 196 --

THE COURT: Well, what paragraph of the brief? Let's go with that. What about that?

MR. SALMAS: The --

THE COURT: 6.03 of --

MR. SALMAS: The actual section itself, My Lady, is on page 196 of the affidavit, and in terms of the brief, there's a reference to it -- my apologies -- paragraphs 23 of our -- of our brief -- our bench brief, page 8 of our bench brief.

THE COURT: All right. Paragraph 23. Right. Okay. Can you just back up and tell me what your position is compared to the bondholders' position and why you both need independent counsel and all the costs that come up here? It's not clear to me.

MR. SALMAS: So --

THE COURT: I didn't have time to read through all of this. It all arrived last night. I mean, really, honestly, like...

MR. SALMAS: Right. My Lady, I mean, I'm sorry. I took this as sort of the pitch to -- as to whether or not the application needs to proceed today or not, and I wanted to give you some thoughts in that regard, but I'm happy to also provide that distinction. As indicated, we're a creature of the contract itself, and so we are on for all the noteholders. We have a fiduciary obligation to all the noteholders, not just a select group.

THE COURT: Why do the other noteholders need separate counsel then if you're on for everybody? And we also have the monitor, by the way, who's on for everybody. He has to look over the whole process while he's helping the Court. You know, how many people do you need to be looking at the same interests?

MR. SALMAS: My Lady, the -- the entities play different roles, and they have successfully played different roles in different cases, like, for example, *Nortel* and *Algoma* that are referenced in the materials. For example, in the *Algoma* case, a very similar capital structure in which there was a one -- a first lien, a second lien, and, in that case, junior noteholders. There was an ad hoc group of holders who was a construct in that case that received funding from the estate. The trustee officer received funding from the estate. They played separate roles in that case. The ad hoc group did a lot of the tasks that a trustee couldn't do or can't do. Like, for example, we can't bring forth a DIP application. We aren't an entity that's going to be credit bidding or purchasing any assets per se, but to the extent that the totality of the notes need to be part of any transaction or restructuring process, we can bind those noteholders under the indenture. We speak for those noteholders under the indenture.

So the ad hoc group has abilities and speaks on behalf of their group, but until they have a fulsome organization, if they ever do, of their -- of their group, they don't speak on behalf

of the minority noteholders. So there are -- for example, in *Algoma* the transaction was brokered by the ad hoc group that required the indenture trustee to execute and negotiate documentation to effectuate the transaction in the *Algoma* case to actually assist and complete the *Algoma* reorganization. A number of the counsel that are on this case, My Lady, were on the *Algoma* case as well, so they'd be well versed with the dichotomy of the roles played by the two entities in *Algoma*. So there are a number of instances in which -- for example, in *Nortel*, Wilmington Trust -- by the way, Wilmington Trust was the trustee in the *Algoma* case as well. Wilmington Trust was also the trustee in the *Nortel* case, and Wilmington had (INDISCERNIBLE) the successful argument at the end of the day in respect of the allocation dispute in the *Nortel* decision, so it was of assistance to each of the Ontario Superior Court of Justice and the Delaware court in making a cross-border decision on the proceeds in the *Nortel* dispute.

THE COURT: Okay. Now, are you saying then in *Nortel* there was a advanced fee? Because that's basically what you're asking for, right? 'Cause you're going to -- you have the right to these fees in due course, but this -- right?

MR. SALMAS: *Nortel* was -- I just -- I wanted to mention *Nortel* from a perspective of the role and the benefit of the trustee in that case. In that case, the *Nortel* bonds were unsecured, My Lady. They weren't -- they're not the secured bonds of the nature that we have in this case, so there are some differences there. So it is true, My Lady, that the indenture trustee in *Nortel* did not receive contemporaneous payments at (INDISCERNIBLE), but it's because they were unsecured, and that was a fight as to whether or not the allocation proceeds would be distributed in a manner by which the Canadian estate was battling against the US estate and the UK estates, so there was an opportunity in that case for much less recoveries to the Canadian estate. It's a completely different fact pattern than what we --

THE COURT: Right.

MR. SALMAS: -- (INDISCERNIBLE). So I just bring it up just from a perspective of the -- the activity.

So I mean, it's not lost on us, My Lady, that the monitor's report says what it says, and we do have a temporal distinction between our application and the application that's being brought by the note committee. Our application is for fee and expense payments for the pendency of the case. Their application is for fee and expense payments for the time frame through to the DIP application, so there is at the very least a temporal difference between the two of us.

So in terms of hearing and reading, I guess, what the monitor has said in his third report,

especially in respect of the DIP disclosure, we have not been part of those DIP discussions that the parties have been having over the last couple of weeks. We have had some discussions with the parties about what has transpired in the DIP process, but we have not been an active participant. So in seeing that the monitor has indicated that there may be an application for a DIP within the next week or two, (INDISCERNIBLE) questions that the monitor has posited in respect of the trustee, and in light of your comments today, My Lady, for the -- in respect of the note committee application completely divorced from the application that's been brought -- so in respect of the trustee's application -- my apologies -- completely divorced from the note committee application, while we're ready to proceed to make further submissions about the merits of our application, based on the monitor's report, we are also prepared to adjourn the trustee's application in light of that report to deal with those issues but that our thoughts on adjourning our application is not in any way linked to an adjournment of the application of the note committee request. We actually think that that should be heard fulsomely today and Your Ladyship should consider making a dispositive decision in that regard.

THE COURT: Okay. Well, that'll be helpful. All right. Okay. All right. So let's -- let's do that.

Let me hear from -- I presume I'm back to you, Mr. Rubin.

MR. RUBIN: So, My Lady, I'm just somewhat confused. I apologize. I think -- I'm sure it's my fault. I think Mr. Kashuba did make his submissions on his application. I know he -- he was --

THE COURT: Yes, he did. Yes, he did.

MR. RUBIN: And I'm just -- just to be fair to Mr. Salmas, I'm just wondering whether -- if he has further submissions to make on the merits, I wonder if you want to hear from him first because my intention was to make submissions on the merits, including with respect to Mr. Salmas, and I don't want to -- I just want to make sure I understood his position. I apologize.

THE COURT: (INDISCERNIBLE) that's fair enough.

Mr. Salmas, why don't you continue and finish your representations on the merits.

MR. SALMAS: Okay, My Lady. Sorry. I took your initial (INDISCERNIBLE) to be to provide submissions in respect of whether or not we wanted to proceed with the applications today or -- or not. And as indicated, while we're supportive of the ad hoc group's position and their motion -- their application proceeding, we -- I think

what we've indicated is we understand what the monitor has -- has indicated in his report, and we'd like to have an opportunity to address some of those concerns with the monitor and also get some more understanding of the DIP application process and that the thinking would be that our application would be adjourned to a time frame contemporaneous with the DIP application or some other day in conjunction with that application. That was my --

THE COURT: All right.

MR. SALMAS: -- (INDISCERNIBLE).

THE COURT: So that's probably -- so Mr. Rubin was just wondering how to reply to yours, but basically, you're saying, Okay, I'm going -- we're going to have further conversations with the monitor, and we'll have a clear position possibly in a couple of weeks when this DIP comes back, and then we'll revisit it at that point. Is that what you're saying?

MR. SALMAS: That's correct vis-à-vis the trustee's application, not vis-à-vis the note committee's application.

THE COURT: You're saying I should make -- but nonetheless, I should make a decision with respect to the note -- the ad hoc groups, and you're supportive of them getting fees paid by Dominion in advance here, right?

MR. SALMAS: That's correct.

THE COURT: Okay. All right. I understand your position there.

MR. SALMAS: Thank you, Your Honour.

THE COURT: We'll -- well, I'll hear from Mr. Rubin, but I take your possession to want to adjourn it until you've had further discussion with the monitor, and the DIP process has more time to -- to be reviewed.

Okay. So, Mr. Rubin?

Submissions by Mr. Rubin

MR. RUBIN: Thank you, My Lady. I'm going to try and use CaseLines. I'm going to try to do my best, and perhaps what I'll do is direct you to my bench brief, and we'll see if this works.

THE COURT: Yes, it did. Beautiful.

MR. RUBIN: Great.

THE COURT: All right.

MR. RUBIN: Great. And I think just before -- and I will try to follow the bench brief, and I know Your Ladyship hasn't had as much time as you had in the past to review the material, so I will try to follow it.

At the outset, I guess the one comment I would like to make is -- and it relates to a comment you made, which is, well, there aren't many of these cases, and Mr. Kashuba mentioned that as well. And in my submission, the reason there aren't many of these cases is because they either proceed by consent -- and what you've seen in some of the material is there are consent initial order applications where in discussions with all of the parties it's decided that the company can and will pay the fees of the ad hoc group, and so many of the examples that they talk about are examples where there's a consent order. And in my respectful submission, the reason you don't see these kinds of applications is because of the statutory test and the high hurdle that has to be met, and I would like to take you to some of those cases because I think the cases are helpful, and I think they will help to guide the Court.

THE COURT: Okay.

MR. RUBIN: And -- and if I turn back to the brief, at paragraph 2 -- and I will -- again, I will try to follow the brief to perhaps limit the -- the amount of writing that's necessary. But at paragraph 2, we talk about the applicable statutory test, and in our submission, the ad hoc group -- well, I was going to say the trustee as well, but I'll just deal with the ad hoc group now -- does not meet the applicable test. And the test we set out further in the -- in this bench brief requires that the order be necessary to ensure the effective participation of the -- of the group in question. Necessary to ensure the effective participation.

And in our submission at paragraph 3, the application of the ad hoc group, it simply proceeds on a fundamental misconception as to the nature and purpose of these applications and when they apply.

And as Mr. Kashuba has noted -- and this is paragraph 4 -- the ad hoc group they're clearly sophisticated parties. There's substantial investments. And I think you heard Mr. Kashuba earlier, you know, talk about how -- I think his words were, you know, it's inequitable in his submission to force these three bondholders to fund the fees for the benefit perhaps of

their subsidiary holders, of their -- the people that they hold these bonds for. He talked about how it was inequitable, yet on the other hand, at the commencement of the submissions, you heard him say how important they are and that they are owed $420 million Canadian collectively, and I don't know that those two things work together. I'm not sure how on the one hand you can talk about how much money you've invested and how you have $400 million at stake for those three groups, yet you need to the company to fund you to participate. And in my submission, what that means is either they simply want someone else to pay or if they're not prepared to fund their own lawyers when they have $400 million invested, that might tell you all you need to know about whether they're actually prepared to spend money to backstop their investment. It might mean that the investment isn't worth what they thought it was because if you had $400 million invested, you might be prepared to spend money on lawyers and financial advisors out of your own pocket.

And so it's clear that they have the wherewithal. They have internal professionals and expertise. These are significant and large bondholder groups. And importantly, the evidence also demonstrates that they have retained professionals. They have retained Torys, and they have retained a financial advisor. They've already done that. And in fact, you heard Mr. Kashuba say they've been working day and night for a couple of weeks. So this is not a situation in which a group comes to the Court and says to the Court, We don't have effective participation, we can't participate, we need the company to pay for our participation, otherwise we have to sit on the sidelines. In fact, the evidence demonstrates the opposite in our submission.

Two other points I want to make before I turn back to the brief is there is -- and I appreciate being restructuring lawyers, we're not always perfectly attuned to the rules of evidence. Let me put it that way. But there is no evidence, no evidence, that this bondholder group is unable to participate if the company doesn't pay their fees of their legal and their financial advisor. There's simply no evidence of that. You've heard Mr. Kashuba say, well, maybe they'll decide not to participate or maybe they'll pull their funding or they won't pay our fees. But there's no evidence of that, so they don't meet the statutory test.

The last introductory comment relates to Mr. Kashuba's comment concerning the DIP, and I think you heard him say, We have submitted a DIP proposal, and as such, our clients are participated or enhanced the value of the estate. Again, with respect, it cannot be the case that simply because you decide to submit a DIP proposal, you get your fees paid. The company's received a number of DIP proposals. (INDISCERNIBLE) one of them. And of course, the successful DIP party, I'm going to say, almost always, if not always, has their fees paid, but that's when they're -- when they're approved as the DIP provider, otherwise you -- if the company receives five or ten or 15 DIP proposals, does that mean we have to pay the fees of everybody who submits a proposal? And so I don't think that helps my

friend.

Turning over in the -- back to the bench brief at paragraph 5, and in paragraph 5, we talk about how this is not an application about whether ad hoc group or the trustees are an important stakeholder. That -- that's not the test. There are many important stakeholders. You've heard comments from counsel for the Government of the Northwest Territories talk about how they're an important stakeholder. The issue isn't whether they're an important stakeholder.

And in my submission, it also doesn't matter that they have a contractual right to payment of their fees. Now, whether that's the trustee's right or the ad hoc group's right, what that simply demonstrates is the company has an indebtedness, a debt that's owing to them pursuant to a contract. Well, unfortunately, Dominion has many such contracts like that where we can't meet our debt obligations. That's why we're in CCAA protection, and in our submission -- this is at paragraph 5 -- you can't bootstrap your argument to say, Well, we have a contractual right. Unfortunately, there are many of those rights that are being breached in the CCAA.

Paragraph 9 of the brief, we go through a number of facts, and I'm not going to go through this section in detail, My Lady, but there's a suggestion in Mr. Hoff's affidavit that somehow they didn't receive sufficient information about how the ad hoc group was at a disadvantaged position, how they didn't have notice of the CCAA proceeding, so I just want to clarify the record on this, and this evidence is uncontradicted from Ms. Kaye.

And the first point at paragraph 10 is -- and this has to do again with sort of the suggestion that they're at a disadvantaged position or didn't have all the information that they need. What paragraph 10 discusses and references is that this ad hoc group are large, well-known, sophisticated institutions. They've invested, with others, 550 US. And in our submission, it strains credulity for these parties to suggest that these sophisticated institutions invested that amount without undertaking significant due diligence in advance of investing. So that's the pre sort of 2017 -- the 2017 period.

And then what Ms. Kaye says in paragraph 11 is in the months and years preceding the filing, there were quarterly investor calls to keep them up to date. There were -- excuse me. There were updates held in New York in September of 2019 and another one in November '19. And then at paragraph 12, she talks about how there was an investor portal whereby the ad hoc group had access to information. So the point is prior to investing, they obviously would have done their due diligence. In the months and years preceding, they had lots of information.

And then paragraph 14 talks about the -- the -- the assertion or undertone that they weren't

notified in advance of the filing and somehow they should have been. And at paragraph 15, the point that we make at paragraph 15 is -- and I think it's important for the Court to understand this -- these notes trade in the open market. They're like shares. You can go onto an exchange, and you can see what these notes are trading at. So the market is speaking as to the value of these notes, and of course, given that there's a public trading market for the notes, the company can't disclose confidential information because it affects the trading value.

And so at paragraph 15 and paragraph 16, what Ms. Kaye discusses is the fact that we went to the noteholders and said, Will you execute non-disclosure agreements with us so we can give you more information, because if you don't, we can't disclose it to you, it's not public. And this is five days before the filing. And at paragraph 16(a) Ms. Kaye says that she spoke with two of Mr. Kashuba's clients 5 days prior to the filing and said, I'd like to have strategic discussions around a restructuring and will you execute a non-disclosure? Five days before the filing. And then on April 18th, NDAs were sent out. This is paragraph 16(b). And interestingly, in paragraph 16(c), on April 20th, again 2 days before the filing, NDAs were executed with two of the largest noteholders, one of which was Mr. Kashuba's client. So we did enter into an NDA with one of the individuals, now, not the one who swore the affidavit but another one. And then on April 21st, forecasts were provided for interim or DIP financing to that one party. So the suggestion that we didn't attempt to reach out to the clients does not bear scrutiny.

What is accurate is on the bottom of page 6 of our bench brief, at paragraph 16(j), it wasn't until May 2nd -- this is paragraph 16(j). It wasn't until May 2nd that we were able to actually get NDAs signed with Barings and DDJ. Those are the two -- the two other members of the ad hoc group. The first one was prior to the filing, and Mr. Hoff who is the affiant for the ad hoc group is part of one of those two parties. So it took us 14 extra days to get an NDA signed with two of them, that is, 14 days longer than one of the members of the ad hoc group. And so our suggestion, to the extent there was any delay, it was not on our part.

So just turning to the legal issues, and I might skip ahead. Paragraph 23 of our brief.

THE COURT: Right.

MR. RUBIN: And paragraph 23, we set out what we say is the legal test, and my friend referenced paragraph 11.52(1)(c) of the CCAA, and -- and that is the -- that is the test. In our submission, it's straightforward; it's well-defined. And at paragraph 25, we actually just cut and paste the section of the Act because I think it's -- it's important to actually read the section.

THE COURT: All right.

MR. RUBIN: 11.52, what it says is:

> 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 --

And (a) and (b) are the monitor and the company's advisors. So (a) is the monitor and (b) is the financial legal advisors of the company. What's interesting is (c) is the one that applies here. (c) relates to non-debtor entities, so other stakeholders, and note the difference in -- in (c): (as read)

> 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.

My friend is right that it doesn't matter whether it's a charge or not because the case law says if you're ordering the fees to be paid, that's effectively like a charge because you're ordering the fees. So that's the statutory test: Is the court satisfied that -- that payment of their fees or security or charge is necessary for their effective participation. And in our submission, that test cannot be met. And in our submission, the wording in (c), it's deliberate and it's specific and it creates this statutory requirement for necessity for any advisors that are retained by interested parties other than the debtors.

And in our submission -- and I will take you to the cases. The cases are really actually quite helpful. Where you see these kinds of orders -- again, absent consent -- is you see them in limited circumstances. And this is at paragraph -- I'm at paragraph 29 of our brief. And at paragraph 29, where you see these types of orders are usually in the rep counsel type situations, where there's a vulnerable or disparate group of stakeholders such as in a large group of employees or pensioners or could be investors if there's a large group of them, and where the Court says that in those circumstances, they'd be unable effectively participate because there's so many of them, this large -- or perhaps they can't fund themselves or they can't organize themselves, and that's where you see these orders. And in -- in our case, this is the opposite case. We've got three ad hoc noteholder groups who by their own admission acknowledge that they're well-funded. They are organized, and they've already retained counsel and an FA.

Paragraph 31, we simply reference the fact that they -- as I mentioned, they retained

counsel. They retained an FA. They've already submitted a DIP proposal. They've attended court hearings. They've -- this is again using their language -- negotiated, settled, and executed confidentiality agreements. They've engaged in multiple discussions with Dominion and the monitor. They have effectively participated.

THE COURT: Right. And they want to be paid for all that participation.

MR. RUBIN: Absolutely. And you know what? I -- I --

THE COURT: (INDISCERNIBLE) two sides of -- you know, two sides of the (INDISCERNIBLE).

MR. RUBIN: I understand. You know, I'm -- I even suspect that all of the stakeholders in the CCAA would like to be paid by the company.

And so what I would like to do is I would like to just take you to --

THE COURT: He says also it's -- I mean, he said it's not sustainable -- let me see -- that because, you know, it's hard to collect from all these people, that kind of thing. So, yeah, they have participated. They had to because things are moving so fast right at the beginning. But he says that there's no practical means to collect these -- these fees, so -- and it's hard administratively to get them, et cetera, so if we want to have them continue to be there, we have to order them. That's sort of what they're (INDISCERNIBLE), right?

MR. RUBIN: I guess what's interesting about that is that's a submission from counsel without any evidence . You'll note, My Lady, that the underlying agreements between these three bondholder groups and any of their investors is not before the Court. There's no evidence from Mr. Hoff or the other two members that is subject to cross-examination on whether they have any ability to fund, and there simply isn't any of that evidence. There isn't even the soft evidence from Mr. Hoff that says, We may not be able to participate. That's not even in Mr. Hoff's affidavit. Now, obviously to the extent that there was that submission made, I presume there would be cross-examination on it, and there would be a request for documents, but none of that exists in this case.

And what I would like to do is I'm going to direct you to the *Homburg* case, and I'm going to try to direct you right to it. It's part of our brief. It's attached to our brief.

THE COURT: All right. Okay. Good work.

MR. RUBIN: (INDISCERNIBLE). And paragraph 49 I was going to take you to first, but I'm going to skip that because that relates to the trustee's submission, so I'll skip paragraph 49 of this case and ask you to scroll down, and I'll ask you to turn to paragraph 54 on the next page of our brief. So again, this the *Homburg* decision. And you can see here that it says that Stichting, which essentially an ad hoc type group, submits that the indentures provide for the payment of its fees and expenses, including the expenses, the whole in accordance with standard financing practices. So an argument here was made, We have a contractual right. So that's the reason I stop at paragraph 54.

And then if we turn -- if I could ask you to scroll down -- or I'll just direct you there right now.

THE COURT: Okay.

MR. RUBIN: And paragraph 84, again this is the Court saying these US concepts don't apply under the Canadian CCAA. That's an issue for the trustee, but they're adjourning their motion, I take it. But then paragraph 85, again, no reason to import those US concepts.

But the last paragraph I wanted to take you to is paragraph 95 of this decision, and paragraph 95 of the *Homburg* decision --

THE COURT: All right.

MR. RUBIN: -- (as read)

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

The point here simply is the Court is saying even if they aren't asking for a charge, you still have to analyze this pursuant to 11.52(1)(c). That's paragraph 95.

And I did promise to take you to some of the cases, and I'm going to do that by directing you to the trustee's brief. If you can just (INDISCERNIBLE) one moment. This will be easier if I'm able to direct you.

THE COURT: I have it right here. The trustee's brief, yeah.

MR. RUBIN: Okay.

THE COURT: Defendant's brief. I've got it. What page?

MR. RUBIN: Paragraph 26 of the trustee's brief.

THE COURT: Okay. I'm there.

MR. RUBIN: And so paragraph 26 of the trustee's brief says, --

THE COURT: (INDISCERNIBLE) case --

MR. RUBIN: -- While the strict -- I'm sorry?

THE COURT: Yeah. It has a list of the cases and the -- the --

MR. RUBIN: Yeah. Exactly, My Lady. (as read)

> While the strict language of 11.52 provides for security for such fees, this section has been interpreted under the general jurisdiction under section 11 to extend to an order of payment of such amounts.

And they cite a different *Homburg* decision, and I would like to take you to that decision, and if you allow me a few seconds, I think I can direct you directly to the page. So this should be paragraph 15 of the -- of the second *Homburg* decision or the other *Homburg* decision.

THE COURT: Okay.

MR. RUBIN: And if you're there, My Lady, paragraph 15?

THE COURT: Yes, I'm there. Thank you.

MR. RUBIN: Okay. Thank you. So paragraph 15: (as read)

> The Monitor indicated and it is common ground that there is presently, or will be shortly, cash available to pay professional feels. The Debtor has or shortly -- excuse me -- has or will shortly

> receive substantial funds following the purchase of its holdings in this REIT.

So the debtor company was selling an asset, and some money was coming into the estate.

> In any event, with the consent of the parties --

So this is consent.

> -- the order issued reflect that fees can only be paid out of available cash. If the Debtor was put in the position to borrow in order to advance fees of the bondholders, the Court would have been reticent to grant the Motion.

So what the Court there is saying is, Well, you don't need to borrow money because you're selling an asset; money's coming in, and with the consent of the parties, I will allow this. But the Court would have been reticent if the company had to borrow money. Paragraph 16: (as read)

> There are approximately 9,500 bondholders under the three indentures. They're mainly individuals (as opposed to corporations). They're resident in Holland. Each of the bonds is in a relatively small amount.

So there's 9,500 individuals mostly invested in small amounts. In paragraph 18: (as read)

> In the circumstances described above, there's a combination of geographic, linguistic and financial barriers impeding the bondholders from proper representation by the appropriate professionals.

This is paragraph 18. (as read)

> Though nothing might stop individual bondholders from engaging their own counsel, this is clearly unrealistic for the most part in the circumstances. Without funding, this important group of creditor -- excuse me. Without funding, this important group of creditors will be denied appropriate representation.

In my submission, that is not our case.

If I can turn down back to paragraph 25, so another page down, and so I'm going to read paragraph 25. 23 and 24 talk about how -- again, referencing 11.52 -- the Court has the power. And at paragraph 25: (as read)

> The jurisdiction to order the payment of fees in such circumstances has been recognized by the courts. In *Nortel* --

I believe you've heard my friends talk about *Nortel*.

> In *Nortel*, the Court ordered the CCAA Debtor to pay the fees of the lawyer of 3,500 employees.

Makes sense, 3,500 employees. (as read)

> In the *ABCP Commercial Paper* case --

So this is the Metcalfe asset back commercial paper case.

> -- the CCAA Debtor was ordered to pay the fees of counsel to retail purchasers.

So I went in to find out how many retail purchasers there were, and it looks to me there was about 1800 of them. And then the CCAA debtor was ordered to pay the fees of -- excuse me. (as read)

> Equally, in *Edgeworth*, the Debtor was ordered to pay counsel representing 4,000 Asian investors.

So that's *Edgeworth*. And then at paragraph 26, the last paragraph I wanted to reference in this case:

> The undersigned is aware of the decision of the Honourable Mr. Justice Clément Gascon in the matter of *Mecachrome*, where he refused to allow security for the payment of the legal fees of the board of directors, the banking syndicate and certain other groups. Mr. Justice Gascon felt that no adequate explanation had been given to justify such treatment and most significantly nothing was demonstrated to him that would indicate that the participation of these groups in the CCAA process would be jeopardized by the failure to grant them the benefit of a charge for the payment of legal fees. In the present case, it has been demonstrated to the

> undersigned that because of the large number of relatively small denomination of bonds held by foreign individuals, the advances for the fees of professional appointed to represent such bondholders is essential to effective participation in the present CCAA process.

So that is, in my submission, the one (INDISCERNIBLE) cases I wanted to take you to and gives a good summary of why you don't see a lot of these applications, because of the way the test is applied and when it should be applied.

And so the cases that are cited by my friend at their brief, again, just to remind the Court, they are either consent orders -- I think my friends referenced *Lightstream* and *Jaguar* were consent orders. *Essar Steel Algoma* was a case in which I think it was a distribution rather than a consent order, but irrespective, no analysis, no -- as to -- as to the legal test. They cite *Nortel* in this -- in their brief. Again, I've already mentioned *Nortel*, which was 3500 employees. They reference *Target Canada*, and I believe in *Target Canada*, it was something in the order of 17,000 employees, so again, same concept applies. And I referred to, obviously, the asset back paper case. The only other case I wanted to take you to My Lady, was the *League Assets*, and it will take me a few seconds to just scroll down, and then I think I can direct you right to that case to avoid you having to scroll with me, and so I am directing you -- so you should have a -- should be on the *League Assets* case.

THE COURT: Yes, I am. Thank you.

MR. RUBIN: Okay. This is a -- I've now forgotten. I think this is Mr. -- Ms. Justice Fitzpatrick, but I don't want to scroll back up because I will lose my spot.

THE COURT: All right.

MR. RUBIN: But if I could ask you to -- to look at paragraph 66, which might be on the next page. And again, this was -- again, paragraph 66 in *League Assets*, there was another application for a similar type order. And at paragraph 66, the Court talks about how the monitor had received a hundred inquiries from various investors in this, which was really a real estate development, which was obviously creating issues because we had all these unrepresented investors, and the monitor had scheduled calls. And then at paragraph 66: (as read)

> I'm advised that over 460 investors participated in one -- in one call.

And the monitor actually said, We would like to appoint Faskens as representative counsel. And at paragraph 67, there was no opposition to appointing rep counsel being Faskens. And then at paragraph 68, the monitor -- or excuse me -- Madam Justice Patrick says: (as read)

> The Monitor states it's unlikely that many of the individual investors will either have the financial wherewithal or means to engage legal counsel --

Well, we know that's not the case here. In fact, these parties have already engaged counsel. And then it says, In addition, if a number of separate law firms are retained by investors, there'd a multiplicity of representation by those having a commonality of interest, so that will make it more expensive and complex. These investors are the most keenly to be affected by the restructuring, which is a point made by Mr. Kashuba. They may be or they may not be. We don't know. But again, they are represented.

And then coming to paragraphs 72 and 73, there is a *Canwest* -- reference to a *Canwest* decision. And I do want to remind, there are actually two *Canwest* cases. There's this *Canwest* case and another *Canwest* case that Mr. Kashuba references in his argument.

THE COURT: Okay.

MR. RUBIN: I think the -- the case that Mr. Kashuba references in his argument isn't the appropriate *Canwest* case. And I'll slow down here, but the *Canwest* case that Mr. Kashuba references is a case in which the Court had to determine whether the company's financial advisor charge was appropriate, and it's in that context that that *Canwest* case is decided. This *Canwest* case, as referenced in *League Assets* by Justice Fitzpatrick, talks about the factors that the Court should consider in these types of applications, which again usually are rep counsel applications under 11.52(c), and what she says in referencing *Canwest* at paragraph 72, she sets out the factors. And what's interesting about these factors is you can see how they apply to this concept of vulnerability to the stakeholder group.

So at paragraph 72, what are those *Canwest* factors?

The vulnerability -- I'm at the top of page 75 of 379 -- the vulnerability and resources of the group sought to be represented. Well, again, in my respectful view, I -- I don't know that the $400 million of notes being held by Mr. Kashuba's clients -- I wouldn't classify them as vulnerable and lacking in resources like employees would be or pensioners.

Any (INDISCERNIBLE) under the CCAA protection. And again, remembering the

concept of any benefit to the companies is what is the benefit of there being a rep counsel order so that the company doesn't have to deal with 400 or a thousand individual investors?

What is the social benefit to be derived from the representative of that group? Again, you've got vulnerable stakeholders, employees, (INDISCERNIBLE) pensioners, individual investors. And again, is there a social benefit to ensuring that they're represented? But again, the necessity element is critical to all of this. If it's not necessary, they are represented, and none of these factors come into play .

Now, I won't dwell on that. But the point here simply is the summary in paragraph 73, which is: (as read)

> The stakeholder groups for which representative counsel were appointed in *Nortel*, *Fraser Paper*, *Canwest* and the second *Canwest*, were current and former employees of the debtors. The Court noted the particular vulnerability of those stakeholders. The vulnerability of the investor group here has not fully investigated, but the Monitor and Mr. Grant certainly suggest that similar concerns arise for these individuals.

There. I'll go away from the case law and just back to -- to my brief, but I just thought it would be helpful to -- to go to some of those cases to talk about the context of 11.52(1)(c).

THE COURT: Okay.

MR. RUBIN: There's the last sort of page and a -- page and a half of our submission, and I will again perhaps direct you to our brief. Just need to scroll back. So I should be directing you back to page 11 out of our bench brief.

THE COURT: Okay. I can go there for (INDISCERNIBLE).

MR. RUBIN: And then here are just a couple of other further considerations, some of which actually you raised in your -- in your questions of my -- my friends. Irrespective -- this is paragraph 39. Irrespective of the fact that in our submission they don't meet the -- the statutory test -- and again, it is a statutory test, and I appreciate there's perhaps some grey around the -- the edges of those statutory tests, but I think the statutory test is instructive. We say there are other issues and considerations as to why the order should not be granted in this case.

And at paragraph 40, you know, we say: (as read)

> What is to distinguish the ad hoc group from other important stakeholders - most of which do not have the financial wherewithal of the ad hoc group.

And in our submission, there isn't anything to distinguish them. Paragraph 41, we talk about the first lien lenders' expenses are not being paid. In our submission, even if they were, that actually doesn't necessarily mean that the ad hoc would be paid. And again, going back to the DIP comment, if the DIP -- if the two Ls (phonetic) were the DIP provider, it's usual to pay their fees, and people that are participating and providing that find of financing do get their fees paid. But at this point, all they've done is provided a DIP proposal.

Paragraph 42, If the ad hoc note group is paid their fees, then do all the other creditors who rank in priority get paid their fees? Well, this would include the trustee, Mr. Salmas's client, because they rank in priority under their own -- under their own indenture. The first lien lenders rank ahead of them. And then does that mean that DDMI comes in as well? Because as you may recall from last week's application, DDMI said, Well, we rank ahead of the other two on our intercreditor. So --

THE COURT: Right.

MR. RUBIN: Right. So this flows up the chain.

Paragraph 43, what if the ad hoc group's out of the money? We don't know that. If they're out of the money and their fees are being paid, then that payment of fees or those payments of fees are really coming out of the hide, so to speak, of prior ranking creditors, so that would suggest they shouldn't be paid.

On the other hand -- and I think Your Ladyship raised this question -- if the ad hoc group is "in the money" or they are the fulcrum creditor, then what that means is there will be value or money at the end of this restructuring going to the "ad hoc group," and so presumably they're able to recover their fees in some fashion at that point. Now, the trustee will get paid first contractually under their -- their note indenture, but once money is then distributed to the individual noteholders, their proportionate share of any recovery, I'm pretty sure those fees will come off the top. But my point is if they're in the money, it's just a timing issue. They'll get -- presumably, they'll get their fees paid at the end of the day. And if they're out of the money, maybe they shouldn't be paid.

And then at para 45, last couple paragraphs, you know, we are not sitting on excess cash, like in that *Homburg* decision, where we have sold assets and there's available cash. The cash flow demonstrates that while we have cash today and for the next couple of weeks, we need DIP financing, and so we will need to borrow money. And in our submission, the

order here is not necessary even on a "equitable basis." And again, I don't want to even -- I want to be careful here because I say there's a statutory test, or at least there's a statutory test that informs the judicial discretion.

I apologize that was a little bit longer than I had hoped. Maybe part of me was actually trying to use CaseLines to see if I could actually do it, but I did want to take you to some of those cases.

THE COURT: (INDISCERNIBLE) I find that these -- these hearings are taking a little longer than normal, but we're all getting more used to it also. That's good. Okay. Good. All right. Thank you.

Okay. So who's next then?

UNIDENTIFIED SPEAKER: My Lady, it might be counsel to the Credit Suisse or the first lien lenders might be the next person.

THE COURT: Right.

Submissions by Mr. Wasserman

MR. WASSERMAN: Okay. Well, thank you, My Lady. Mark Wasserman as counsel to Credit Suisse.

So I -- I'm going to try to be brief. I have a couple of other comments that I want to make. And I apologize. I am going to be one of those people that are not as technically advanced as -- as you, My Lady. I have not been able to figure out CaseLine yet, so -- but I don't intend to refer to very many materials. I just intend to refer to our brief that was filed.

THE COURT: Your brief is in there, and so -- and I've read it (INDISCERNIBLE) --

MR. WASSERMAN: Okay.

THE COURT: -- here.

MR. WASSERMAN: Maybe Mr. Rubin can pull it up for us.

THE COURT: He did that. Oh. It just got bounced onto my -- is it there for you too?

MR. WASSERMAN: I'm not even on case -- I'm not even on CaseLine. I'm going -- I'm looking at it on a different screen right now, so I apologize for that. I will be --

MR. RUBIN: I -- I did -- I did pull it up for you, Mr. Wasserman, and I will send you a bill after this hearing.

MR. WASSERMAN: Thank you. Good thing your fees are being paid, Mr. Rubin.

So --

THE COURT: (INDISCERNIBLE).

MR. WASSERMAN: And I will also just take you to the *Algoma* decision, the -- the order that was included and -- and the paragraph, and then I'll speak about some of the other cases very briefly.

I thought Mr. Rubin canvassed the law well in terms of what the state of the law is relative to these fee motions, and what I'd like to do is expand a little bit upon that but just provide some practical context to it. So in cases where Courts have made a decision on paying counsel fees for rep counsel, it's typically done in circumstances where the debtor company pursues the order because the debtor company sees the value in having rep counsel represent vulnerable creditors and/ or creditors who, if they represented them on their own -- if they -- sorry -- if they (INDISCERNIBLE) representation on their own, would cost the estate more money. So you --

THE COURT: Right.

MR. WASSERMAN: So you can imagine in a scenario like *Target*, where we were the company's counsel, or in a scenario like *League*, where we were on for the monitor, or in a scenario like *Canwest* or in a scenario like *Sears*, which is not even in this case, which had 17,000 employees, we brought forward those motions as company counsel or supported them as monitor counsel because it was a benefit to the estate because streamlining the process made sense.

THE COURT: Right.

MR. WASSERMAN: In the other cases like *Canwest*, where we're talking about fees for an ad hoc committee, or *Algoma*, where we're talking about fees paid in certain circumstances, there were specific reasons why that were done -- that was done

in the context of the case.

So lots been talked about *Algoma* here. So the situation in *Algoma* is similar and dissimilar to this situation. In *Algoma*, there were in effect three groups of large institutional creditors, each of which formed committees. There was the one 'L' group, who we acted for, which was owed about 350 some odd million dollars. There was a group what we called the nine and a half lenders, which my friends at Goodmans acted, for which were owed approximately $350 million. And then there was another group of secured lenders that was even further subordinated which the Cassels firm acted for, which I think was owed about 250 million . I may be wrong on that number, but it was something like that, a hundred and -- 200, 250 million. And the collateral package wasn't exactly the same where it was first and second on the same collateral. The one Ls had -- they really, they were called the term lenders. They had first ranking secured position on fixed assets. The nine and a half had it on current assets, and then they sat behind each other on the fixed and current assets as the case may be, and then the junior lenders sat way behind all of them.

THE COURT: Okay.

MR. WASSERMAN: The junior lenders wanted their fees paid. They actually brought a motion. It was denied in *Algoma*. The order that people are referring you to, which is at, just for reference -- I don't think you need to pull it up, but it's on tab 3 of the company's brief. It's paragraph 3(b), which I think is page 71 of the brief, and what that order does is that order says if there's a distribution to the noteholders, the trustee will get paid, and then the committee counsel will get paid. And if they didn't have that order, there's nothing in the documentation that would allow committee counsel to be paid, so they had to make that order in order to protect their fee, otherwise the noteholders that were in the committee were going to have to pay them. And those noteholders presumably gave them instructions to go and seek that order, and we, on behalf of the term lenders whose fees were being paid, consented to that order. So it's a very, very different situation, and I just wanted to make it clear to you that that's what happened in that case.

And all of the other cases that have been discussed: *Nortel*, *Canwest*, Air Canada, *Homburg*, *Jaguar*, all of which my firm and me in particular in some of those cases had a significant role on for significant stakeholders, every single one of them was done on consent. So I wanted to just speak with you about that very quickly, and then I want to raise another important point.

My friend Mr. Kashuba talks about the fact that he's the fulcrum and we are in the money, we are undoubtedly going to get taken. So I mean, just -- I did a quick Google search. DDJ has $7.5 billion of assets under management, Barings has $20 billion -- sorry -- Brigade has $20 billion and Barings, a $300 billion fund.

THE COURT: So you're talking about the different bondholders that we're talking about. It's --

MR. WASSERMAN: I'm talking about the -- yeah, the fund managers. They are fund managers. Mr. Kashuba's correct. They're -- they have a number of investors. They go on roadshows. They seek investments. People invest in their funds on the basis of the return they provide to those investors, and there's management agreements that are entered into when you invest, and that management agreement gives discretion to the parties that Mr. Kashuba's taking instructions from not only to invest in particular investments but also to deal with these exact situations with respect to those investments, and there's authority for those investors typically to hire counsel to the extent that they think it's necessary to address the situation. So it's not like a scenario where it's an administrative burden to go and collect the funds. They make a management fee, and if they have to dip into their management fee because they think it's the right thing to do for their investment, that's what they do.

But at this point -- but -- but what I was really trying to get at in this case -- in this scenario is if -- if Mr. Kashuba's multibillion dollar clients believe we're in the money, we would be more than willing for somebody to write us a cheque and take our position and take us out. We're only a hundred and fifty and, by Mr. Kashuba's submission, maybe even less because we have LCs, which we do, which have not been drawn, so it's contingent on if the LC gets drawn. There was a mention of a Washington guarantee. I'm not aware of a Washington guarantee, but nonetheless, it's entirely up to Mr. Kashuba's clients or anybody else that wants to take us out. If they don't, every dollar that gets funded in this case to Mr. Rubin's firm, Mr. Simard's firm, to FTI, anybody else, potentially erodes our recovery and our collateral until somebody takes us out because right now we are the only creditor who in effect is funding this case because every dollar means that's less value that we can -- we have to recover in the event a going concern option that does see us get paid out doesn't materialize, and we have no idea if that's going to happen yet, certainly hope it will, but we just don't know.

So an -- and -- and as a result of that, there was an extensive negotiation on intercreditor arrangements, which this Court ought to respect, and which I unfortunately think were slightly mischaracterized in Mr. Kashuba's submission, so I'd like to take -- I'd like to take you to our bench brief and just walk you through the sections that we have summarized there so that you -- that -- that it could be clear to the Court what was intended in those sections. And these are standard intercreditor arrangements (INDISCERNIBLE) on every one of these first lien/second lien deals which are, you know, deals that were done -- it's called the term loan 'B' market. They're deals that are done in large part for acquisition financing where you can't get investment rate investments. And this has been a category of

investments that has come up in many deals, and I expect, My Lady, you're going to see a lot of these over the next little while, so it's a good idea to get familiar with the way these work, I think, to the extent you may not already be.

So if you look on page 1 of our brief and if you just look at section 4 -- paragraph 4 -- pardon me -- which is referencing section 2.01 of the intercreditor agreement, we -- we've highlighted or underlined the important words, but in effect, this says that any lien on the shared collateral which secures any of the senior obligations -- the senior obligations are the obligations owing to the lenders under the first lien facility -- and then the brackets are important: (which includes all unpaid principal, accrued and unpaid interest, and all accrued and unpaid liabilities and obligations) -- those liabilities and obligations include expenses and fees; we also have a contractual right to be paid -- however acquired, will always have priority and be senior in all respects to any lien on the shared collateral securing any junior obligation. Those are the same obligations that Mr. Kashuba is relying upon to get paid his fees under the terms of the indenture. So we're always in first position.

THE COURT: Right. I didn't hear him disputing that, but --

MR. WASSERMAN: Right. So I would submit to you that until we know that we're in first position and all of our fees are covered, not one dollar should be leaked out to the junior creditor as a result of that.

THE COURT: Well, he said, I think, that, Well, look, you're $150 million; I mean, there's $180 million of diamonds that are stuck in transit, so let's just deal with that; you get paid out, boom, right? Isn't that sort of what he was saying?

MR. WASSERMAN: Okay. (INDISCERNIBLE) --

THE COURT: As an example.

MR. WASSERMAN: Absolutely. I mean, we'd be happy to take those diamonds and put them in a safe and hold onto them. You know, if -- if the market opens up, the company's going to need those diamonds. They're going to sell those diamonds. That's going to potentially reduce the need for a DIP. That's going to have an impact potentially on our collateral. And frankly, it's like the used car market. Does anybody know what a diamond's going to be worth when the market opens up? I don't think so. So that's book value. That's what's on the books. Is that market value? Could be more, could be less.

THE COURT: Okay. Fair enough. Yeah.

MR. WASSERMAN: Section -- the next section I'll take you to is in

subparagraph (b) of the same paragraph 4, and that's section 6.03, and this section references a US concept, but it's important in the context of this hearing. It says, To the extent the secured parties are granted adequate protection in the form of payments in the amount of current post-petition fees and expenses -- so that means interest and expenses, which mean legal fee expenses and financial advisor's fee expenses -- or other cash payments, then the junior secured parties shall not be prohibited from seeking adequate protection in the form of those same payments.

What does adequate protection means (sic)? Adequate protection is a concept in the US that if you're going to use collateral that is pledged to -- to a secured creditor, which effectively is all of the assets of the company, you have to grant what's called adequate protection and show that the -- the secured creditor that you're seeking to use that collateral is protected, and if you can't, then you have to bring a motion asking the Court to use those assets in order to fund the case, and the secured creditor has an opportunity to oppose that motion. It's a US-based concept. However, the same thing rings true here in this case. You can't allow -- under the terms of the intercreditor agreement, it's a contractual right -- for payments to go to the junior secured parties unless it's clear that we are protected and that our fees and expenses are going to be paid. And that is nowhere from being clear at this point.

And then the last section, also important, which is section 6.10(b), and that's in 4(c) of our bench brief. This -- yeah, that --

THE COURT: Right. I'm there.

MR. WASSERMAN: Right. This provision provides that none of the senior secured parties -- that -- that -- that's our clients -- shall oppose or seek to challenge any claim by any of the junior parties -- Mr. Kashuba's clients -- for an allowance in any insolvency proceeding of junior obligations consisting of these payments that Mr. Kashuba is seeking to the extent that the value of the lien on the shared -- to the extent of the value of the lien of the junior secured parties on the shared collateral after taking into account the obligations owing to us and the senior liens.

So what does that mean? That's for their protection. That means I can't object to them seeking to secure their obligations or in this context seeking the payment of fees if it's clear that it's only in relation to assets where we know we're secured and we're going to get paid. And again, I submit to you we don't know that, and I don't think anybody does, and to the extent that people do or Mr. Kashuba's clients think we are protected, then Mr. Kashuba's clients should really just exercise the option and take us out, and they can have whatever rights they want under the circumstances.

THE COURT: Okay.

MR. WASSERMAN: So I don't propose to go through the rest of the brief, which talks through -- sorry about that. Those are my kids -- that talks to 11.5, and I think Mr. Rubin did a good job with respect to addressing those points.

We continue to believe the right outcome here is that this motion be -- and I know we're arguing it, but that it be deferred. We think that there'll be much more information before the Court in the near term and, you know, payment of fees relative to that, to the DIP motion and the SISP and how that looks is the appropriate time to have that motion. Having said that, to the extent that you do order payment of fees to Mr. Kashuba, I think we have to be in the exact same position as a result of the intercreditor arrangements and as a result of our first position under the (INDISCERNIBLE) assets.

THE COURT: Okay. And you're not really pushing, though, that your fees be paid. You're just sort of saying if I order those guys' fees, then we get our fees, right?

MR. WASSERMAN: Yeah. I'm -- I'm -- I'm saying what I think should happen here is this -- nothing -- nothing should be -- nothing should be -- this should have been adjourned. I mean, we spent a lot of time arguing this, but this -- this -- this should have been adjourned. I think Mr. Kashuba should have withdrawn his motion and had this motion heard in a -- in a few weeks. So to the extent that you make any order relative to the payment of fees I think it should be that you should not order that his fees are paid, but to the extent that you do, then we'll want to have our fees paid as well, but I am not pushing to have our fees paid unless his fees are paid. That's a fair characterization.

THE COURT: Okay. Thank you, Mr. Wasserman.

Submissions by Mr. Rubin

MR. RUBIN: My Lady, I should say I didn't address the adjournment issue. I -- in my submission, the Court should make a decision now. It'd be -- yeah. The motion is proceeded with. It's been argued. The case law is before you. The bench briefs are before you. And I say that with respect to the ad hoc motion. In my respectful view, I -- I think the Court -- the Court should make a decision on this, at least on the ad hoc portion of it. Again, it's just we spent this time, we've argued it, and again -- and I think I said this before -- as much as I like seeing everybody every Friday, if we can move past this and get the decision, I think that would be preferable at this point.

THE COURT: Okay. Thank you.

Mr. Kashuba, did you want to -- or --

Submissions by Mr. Collins

MR. COLLINS: My Lady, I'm sorry. It's Sean Collins here.

THE COURT: Mr. Collins.

MR. COLLINS: I have three brief points.

THE COURT: All right.

MR. COLLINS: Okay. One is, My Lady, in the circumstances of this case, Your Ladyship has alluded to Dominion's cash flow. If this company has any free cash flow, which it does not, DDMI would submit that it should go to paying its critical post-filing expenditures, including its employees, and not to be paying professional advisory fees. Two, if and when DDMI makes a cover payment, it's the --

THE COURT: (INDISCERNIBLE), Mr. Collins, to the -- you said to other expenses. Which ones exactly? Sorry. I was --

MR. COLLINS: I think -- I think notably, you know, there's 1124 employees at Diavik; I don't know how many at Ekati. It just would seem nonsensical to pay professional advisors when they're not paying employees.

THE COURT: All right.

MR. COLLINS: DDMI, My Lady, when they make cover payments, will be senior to both the one Ls and the two Ls, and there's --

THE COURT: (INDISCERNIBLE).

MR. COLLINS: -- another creditor arrangement there as well, and so we would just simply echo -- and DDMI is not seeking fee reimbursement. Let's be very clear about that, but like counsel to the first lien agent, DDMI would submit that if there's going to be fees paid, then it needs to be paid as well to the extent of its first lien position, My Lady. Thank you.

THE COURT: Thank you, Mr. Collins.

Submissions by Mr. Williams

MR. WILLIAMS: My Lady, before there's reply, --

THE COURT: (INDISCERNIBLE).

MR. WILLIAMS: -- if I could make some submissions for the Government?

THE COURT: Sure.

MR. WILLIAMS: I'll be very brief as --

THE COURT: (INDISCERNIBLE) you identify yourself? Sorry. Mr.?

MR. WILLIAMS: Sorry. It's Lance Williams for Government of the Northwest Territories.

THE COURT: Okay. So Ms. Buttery isn't here today?

MR. WILLIAMS: Ms. Buttery is on the line as well. We've been both appearing at the applications.

THE COURT: Okay. Good. Hello, Ms. Buttery.

All right. So (INDISCERNIBLE) --

MS. BUTTERY: Hello, My Lady.

THE COURT: It's hard to see, right? I -- I don't have everybody's face up. There's just too many people. Anyways, okay. Go ahead, Mr. Williams.

MR. WILLIAMS: And I'll be extremely brief because Mr. Rubin canvassed the case law very thoroughly. The Government of the Northwest Territories also believes that this matter is premature at this time. Obviously the company's (INDISCERNIBLE) cash flow issues. There's been no evidence of hardship on behalf of the noteholders that would meet the test required particularly when we're talking about altering priority and substantive rights.

I would also note there is no security review done at this point, so while the parties have been putting forward what their respective security positions are, those are their submissions. I understand from the monitor there's a security review in progress, but that security review isn't done, so to the extent we're talking about substantive rights here, that hasn't been confirmed by the monitor, and obviously, this is -- this has the potential to -- to alter the priority regime.

Accordingly, in our submission, it -- it's simply premature. It's not justified, and the company can't afford it, and it would be detrimental to the process. Those are all my submissions.

THE COURT: Okay. Thank you, Mr. Williams.

Submissions by Mr. Astritis

MR. ASTRITIS: My Lady, it's Andrew Astritis on behalf of the Public Service Alliance of Canada. I wonder if I might briefly make two comments.

First of all, Public Service Alliance of Canada, for reasons that have been canvassed by others, opposes the -- the motion that's been brought both on the basis that it's premature and also on the basis that there's insufficient evidence that the statutory test has been met. I did want to note on the record, however, that if this motion is granted, that PSAC reserves its rights to seek payment of legal fees should future circumstances warrant.

Those are all my submissions. Thank you.

THE COURT: Thank you, Mr. Astritis.

Anybody else?

Submissions by Mr. Salmas

MR. SALMAS: Your Honour, if I may, it's John Salmas, (INDISCERNIBLE) trustee. I just wanted to make a couple of brief submissions if I could in respect of a couple submissions made by the first liens counsel.

THE COURT: A reply, do you mean? The (INDISCERNIBLE)?

MR. SALMAS: I wasn't sure because this is, I think, in technically response to Mr. Kashuba's application, in which case I --

THE COURT: (INDISCERNIBLE).

MR. SALMAS: -- (INDISCERNIBLE) Kashuba has reply. I'm happy to wait to speak till after Mr. Kashuba speaks because that may actually address the issue that I was about to address, so I'd be happy for him to do that because it actually is his motion or his application.

THE COURT: No, but I -- no. I think it's better that you speak now, Mr. Salmas, in terms of his application so -- just so we're clear on the record what's going on. You go ahead.

MR. SALMAS: We just wanted to -- just from a clarifying perspective -- and it may -- as we had an application originally returnable today which we've adjourned, some of the points that have been made obviously are -- would be germane to our application if it's so brought in the future, and so I didn't want not speaking up on the point in today's court appearance to be held (INDISCERNIBLE) or to suggest that I was silent and wasn't able to make argument then, so if that's not the case, I don't really need to get into much detail other than to say I think Mr. Wasserman referred to a couple of the sections in the intercreditor agreement that we -- we would interpret differently than he has interpreted. I don't necessarily need to go into the details right now, just so long as I have the opportunity to do that without being -- without an argument against me for not raising it in today's application.

THE COURT: Okay. All right. I think you've been heard. All right. Anything else, Mr. Salmas? Is that good?

MR. SALMAS: Your Honour, that's it, Your Honour.

THE COURT: Okay. All right. Anybody else before I call on Mr. Kashuba?

Submissions by Mr. Warner

MR. WARNER: My Lady, Terry Warner on behalf of the Dene Dyno and Dyno Canada. We support the views expressed by Mr. Rubin on behalf of the company and just would add one minor little point. It seems just illogical that this group can fund a DIP proposal but can't seem to find a way to fund their legal fees. It just doesn't make any sense to me. We are absolutely opposed to payment of -- of the fees and expenses of the second lienholders. Thank you.

THE COURT: All right. Thank you, Mr. Warner.

Anybody else? Okay. Then let me hear from Mr. Kashuba in reply.

Submissions by Mr. Kashuba (Reply)

MR. KASHUBA: Thank you, My Lady. I -- I do have a handful of points to raise just because I need to clarify for the record (INDISCERNIBLE) on the bondholder committee. Now, as (INDISCERNIBLE) position of the trustee, My Lady, it's our (INDISCERNIBLE) maybe they're not driving the car here, but they do have an important and administrative fiduciary role. My clients and the trustee play very different, completely different roles. The trustee's administrative, and we're representatives of the intermediaries of the actual holder of the bonds.

THE COURT: Okay.

MR. KASHUBA: With respect to the comment that we submitted a DIP loan and that doesn't entitle us or anyone who submitted a DIP proposal to the payment of their fees, this is splitting hairs. It's -- it's our position it's the totality of our role. It's our exposure and contribution. On the whole, we're centrally involved and require effective representation that will be denied by the company's refusal to proceed consensually with it.

THE COURT: Although that's, I think, the biggest problem, Mr. Kashuba. You say it will be denied, but they're saying, Where's the evidence that it will be denied? I think that's what we're hearing from most people here beside the other points, but that's one of the louder points. Let me put it that way.

MR. KASHUBA: Yes. And, My Lady, Mr. Rubin said there is nothing on the record about the inability to recover costs. This is incorrect. Paragraph 2 of the Hoff affidavit explains the intermediary role of our clients, and like, I've tried to be clear today, but it's an intermediary role to the actual noteholders. They are the beneficiary holders. We are a steppingstone to DDJ, Brigade, and Barings holders who then have to speak to their, in fact, bondholders.

THE COURT: Okay. But wait a second. You said reference paragraph 2 of Mr. Hoff's affidavit. I just pulled it up.

MR. KASHUBA: Yes, paragraph 2. So DDJ --

THE COURT: (INDISCERNIBLE) manages funds and

accounts, Taft-Hartley plans, and other (INDISCERNIBLE). It is organized as a limited liability formed pursuant to the laws of the Commonwealth of Massachusetts.

MR. KASHUBA: That speaks to the intermediary role. And now if I could direct Your Ladyship to paragraph 34 of the same affidavit, and it's one sentence, so I will read it:

> The logistical challenges inherent in the nature of ad hoc committees can also give rise to relative disadvantages. Multi-party groups need to overcome issues of coordination, information flow, and sharing of costs. For investment institutions of the kind represented by the members of the Note Committee, access to funding for the benefit of their managed funds and/or accounts be a highly complex, administratively burdensome and uncertain task.

So just for the record, there is evidence before this Court as to the intermediary nature of my client's role and to the inability to recover costs. That's paragraph 34.

THE COURT: (INDISCERNIBLE) I guess that their --

MR. KASHUBA: They can ask their clients to contribute, but --

THE COURT: I guess that their point was is that, well, that's interesting comment, but, really, the -- the background or the backing to that comment isn't attached to this -- to this affidavit, right? Funding for the benefit of their managed funds and/or their accounts can be a highly complex, administratively burdensome and uncertain task. I was also hearing, though, that in some circumstances fees will be taken out of the administration charges or out of the fees that are obtained in -- in -- in managing these funds so they can use those to pay, and -- and it's not clear that that can't happen.

MR. KASHUBA: And it is, and that was the statement of the affidavit, My Lady. It's uncertain at this point. It does depend on what recoveries are and what the next steps in the proceedings are, but we -- we have suggested this was -- this isn't an application we've been waiting to make. We wanted to bring it 2 weeks ago. We brought it forward last week and are here again today. That's not to say that it's something that can wait. That's part of the process that we've been involved in, and we have tried to bring this forward as quickly as possible.

THE COURT: Right. I don't hear anybody complaining that you're bringing this, you know, too late. I don't hear -- in fact, it's the opposite. They're

saying it's premature.

MR. KASHUBA: There is a suggestion that, well, the bondholder committee has retained counsel, they have retained a financial advisor, they've been playing along. And, yes, they -- they did make those steps waiting for today's application, bridging that timeline and carrying those costs. So to say that we've done a number of steps and we've taken on a number of roles in these proceedings, we've had to to get to today's point. It's still under the assumption and the reliance of the company consensually paying for those costs or this Court's directions in that regard.

THE COURT: Except that the company has never said that they would pay your costs from what I'm hearing.

MR. KASHUBA: Yes, and the -- the (INDISCERNIBLE) --

THE COURT: (INDISCERNIBLE) and aren't these reasonable steps for your bondholders to do? Like, I mean -- right? I mean, that's what -- I -- I'm missing the link. The link, I guess, that I'm missing, Mr. Kashuba, I have to say, is this necessity issue. That's the link that I'm -- I'm missing right now. Like, your company -- your bondholders are getting involved. They are doing these things. They have retained counsel. They're all -- which is all good. And if the Court doesn't allow these fees to be paid at this point, where is the evidence -- and I agree with these -- the point that where's the evidence that all of a sudden your -- your involvement is to going to disappear?

Like, when you look at -- and this is the thing that I brought up at the very beginning of your application. Most of these other cases -- and I'm -- I'm pretty familiar with most of them. You know, *Nortel* and all these ones, they're dealing with large creditor groups often, large groups of employees, people that can't get organized or sort themselves out unless you get involved, and -- and that's why the company (INDISCERNIBLE) really comes up as an issue for one thing because it's pretty obvious that the Court needs (INDISCERNIBLE) and usually the company that's in receivership sees the needs, you know, and that it's necessary.

But here, I don't know that you convinced me, Mr. Kashuba, that it's really necessary that the Court intervenes and forces the company to pay the bondholders' fees. Like, you have a certain amount of protection for your fees in due course, you know, in your -- in your commercial paper here. I mean -- so you know, the Court is pretty reluctant to -- to jump in and because mainly if we do, then, as you've heard, there's a whole raft of people behind you that will also want it and have very good arguments that they're important stakeholders in this. It's not like this -- your clients are not important. Of course they're crucial, and they are playing a role, but I don't get the link of the necessity right now, that you've met that

test. It's a pretty high bar to --

MR. KASHUBA: Yes.

THE COURT: -- (INDISCERNIBLE).

MR. KASHUBA: And that will probably bring me to my last point, My Lady, and -- and here it's the noteholders are the clients of our clients. We're asking and what the company is asking is for our clients, the bondholder ad hoc committee, to pay the noteholders. The noteholders are the clients of our clients, and that's who we're -- that's the at risk group, those investors.

We talked about *Nortel* and *Air Canada*, *Essar Steel Algoma*. These are files where Mr. Wasserman spoke to. He's been involved with these. Yes, in all those cases, the bondholders were paid their fees on a consensual basis. What's extraordinary here is the company's decision to not enter into a reasonable payment arrangement. That's what's created the unfortunate and counterproductive state of affairs where we're here arguing for this entitlement today. And those other large cases that you mentioned, --

THE COURT: Right.

MR. KASHUBA: -- the bondholders were paid consensually.

THE COURT: Right.

MR. WASSERMAN: And if I could just add, and not after with dispute. There was a dispute. We had a big dispute with the nine and a halfs in *Algoma* before that order was entered consensually, and that order is an -- all it does is it impacts the recovery to the nine and a halfs by having the committee fees come out of it for counsel and financial advisors, so there -- it's not that the company consented or the first lien consented. They didn't. And that was the solution.

MR. KASHUBA: My Lady, that's -- that's a fair comment, but, yeah, there's a solution, but it did happen. Here, it's a different road to the same hopeful out -- state of affairs being resolved.

THE COURT: Okay.

MR. KASHUBA: Those are all the submissions, My Lady, I have in reply.

THE COURT: Thank you, Mr. Kashuba.

Okay. Mr. Simard.

Submissions by Mr. Simard

MR. SIMARD: Thank you, My Lady. Can you hear me?

THE COURT: Yes, I can. Thank you.

MR. SIMARD: Thank you. So you saw -- you saw our third report yesterday. I won't read it. I did want to respond to a couple points raised by -- by yourself and by others.

As Mr. Williams pointed out, yes, we are -- we're conducting security reviews of the first lien creditor group security as well as the second lien notes. Those are in progress but not done yet.

You made the comment toward the start of the hearing that the monitor that said that these applications are premature. We haven't -- we haven't said it or -- or not in -- in those words necessarily. That was something that was stated in Mr. Wasserman's brief. What we have said is slightly different and that is this, that on the evidence currently before the Court, the monitor doesn't support the -- the relief being sought in these applications today. But we also go on to acknowledge that, you know, more information may come in later which -- which may have -- which could be relevant to the issue of fees and the payment of fees.

And -- and we've pointed to what Mr. Wasserman has -- has also pointed to in today's hearing, which is the DIP application, which will, of course -- you know, among other things, you've heard from many parties today that there are a number of bidders for the DIP loan, including the second lien noteholders, the ad hoc group. So we'll see, when that application is brought forward, who the company has selected as its DIP provider. We will also see, based on Mr. Rubin's representations, at the same hearing very likely a SISP application. So we will see, you know, who's providing the DIP, what the amount of the DIP is, what the cash flow looks like going forward and what the sales process looks like going forward so we'll have a better sense of the overall timing of these proceedings, so that will also be useful information.

We don't object to Mr. Salmas's request for the adjournment of his motion. That's -- that's not an issue for us.

You will have seen in paragraph 9 of our third report we've set out the detailed reasons as to why the monitor finds itself unable to support the request being sought today. I don't know if you had any questions about those specific points. Many of them have been gone through by the other parties already today.

THE COURT: Right. So for the record, you're talking about you don't understand the quantum that's being requested, the impact of the relief being sought on the cash flow which has been raised.

MR. SIMARD: Yeah, and then -- and then the request -- the dual request of the trustee and the ad hoc groups -- the ad hoc committee of course, we've got a single class of creditors with two different representative parties seeking fees, and so what we've said is we currently don't see the rationale for the request from two different representative groups. We note what you've heard from others today. The applicants are not currently by agreement or -- or court order paying anyone else's fees besides its own advisors and the monitor. So, yeah, those were the other points raised in the paragraph.

THE COURT: Okay.

MR. SIMARD: I would just -- I'll just note as an administrative point Mr. Selnes, my colleague, was going to give you an update when -- when appropriate in the course of this hearing on what's happening with CaseLines. He's been more directly involved than me, and I think it's good to have that discussion while all the parties are on the line, so maybe at the end of the hearing or whenever you think appropriate, we could do that.

Decision

THE COURT: Okay. We'll come back to you then on that issue. All right.

Okay. Mr. Kashuba, I am -- I am moved by your submissions on behalf of bondholders, and I understand your concerns about the difficulty in obtaining instructions and fees in this certain circumstance, but I'm not -- I'm not convinced that you've proven to the Court, at this stage anyways, that the -- that, as I (INDISCERNIBLE) you, that the necessity -- that you've met the necessity test under section 1152 -- 11.52 of the CCAA, and on that basis, for that main reason, I'm going to deny your application at this point. Now, it -- it could be that the necessity issue can be better clarified down the road, and I would give you leave to bring this up again at a later time. So this won't be a final decision on this point, but right now I don't think it's necessary, and from what I've seen -- I hear -- and I hear there's difficulties, but nonetheless, the necessity item hasn't been met as far as I can tell.

Okay. So I know that you wanted a decision today, so that's sort of, Mr. Kashuba, in short order, without going through all the very good points that you've made, of why I don't believe it's appropriate for me to order this today. Okay?

MR. KASHUBA: Thank you, My Lady, and thanks for your indulgence in giving us the bulk of your Friday once again.

Discussion (CaseLines)

THE COURT: You're welcome.

Okay. So, Mr. Simard, then if you want to come back, and we can just deal with this CaseLines -- this CaseLines and then the document management issue that we're dealing with in light of this pandemic, and, well, it's really brought it to fore. Let's just put it that way. And you said -- sorry. I missed his name that's dealing with this mainly at your firm.

MR. SELNES: It's Mr. Selnes here, My Lady. Can you hear me?

THE COURT: Okay. Yes, I can, Mr. Selnes. Sorry.

MR. SELNES: Sorry. There's a Selnes and a Salmas in here, so hopefully that's not too confusing, but --

THE COURT: Selnes. S-E-L-N-E-S -- right? -- for the record.

MR. SELNES: That's correct.

MR. WASSERMAN: I'm sorry -- I'm sorry to interrupt, My Lady. Would you -- would it be okay if I'm excused? I have another matter that I've been delaying attending to while this proceeding has been going on.

THE COURT: Mr. Wasserman, I would excuse you if you had been following (INDISCERNIBLE), but you had not, so if you could just bear with us for another couple minutes because I think it's important --

MR. WASSERMAN: I agree. Okay. Fair enough.

THE COURT: -- (INDISCERNIBLE).

MR. WASSERMAN: I had a feeling you were going to say that, but --

THE COURT: (INDISCERNIBLE). Okay.

MR. WASSERMAN: Thank you.

THE COURT: All right. Mr. Selnes, you got to be quick. Sorry. We're --

MR. SELNES: Yes. I'll be very -- I'll be very quick here, My Lady. I think everybody has seen certain emails have come out from both FTI and Bennett Jones regarding the CaseLines accounts. What we're asking is that everybody please sign up for account as soon as possible. It is based on a link that you will receive from -- it's @noreply.caselines.com, so the first thing I think everybody needs to do is to ensure that no email filter is catching that because I think there's a possibility that -- that any of the firms' email software is seeing this as junk mail, and so I think it's important that -- and that was in that initial email that I had sent several days ago. I've outlined kind of some of the ways to -- some of the hints and tips and tricks to getting an account set up, but I think the first point is that everybody needs to ensure that they can actually receive the emails from CaseLines because that will be twofold, one of which is to get the registration link and the second is in order to get a confirmation link, and so if everybody can do that, they can then get signed up. I know we've got at least 20 or 30 people signed up already, so a lot of people are in the process of doing so.

If there is any issues that people are having technical support wise, CaseLines, the company, has been very good at answering questions. I'll note that people that I don't believe it's a long weekend in England, but the -- the company is set up out of England, so there is sometimes time shift issues there where they're 8 hours ahead from Alberta in any event. If you can't get any support from CaseLines, you can contact myself or Brandi Swift at FTI. We're the two individuals that are maintaining and updating the CaseLines account. So, people, feel free to contact us, but we'd ask that they contact CaseLines first because obviously any -- any -- trying to avoid fees being incurred to the extent possible for -- for maintaining and setting this up.

In that regard, I think people will have seen there is an uploads account, and that is where -- or an uploads file. That's where we're asking that all caseloads -- or CaseLines documents be uploaded to, the reason being is we are then subsequently going in and creating all of the different folders, such as motion materials, orders, et cetera. Ms. Swift has done an excellent job from FTI at ensuring that is mirroring the FTI website, and so we're just asking that everybody deposits their documents in the uploads folder. We will move them around from there because if multiple parties are, I guess, affecting the account, it may kind of create some issues with where things get put together in the pagination.

One of the issues that we have encountered that we're trying to resolve right now is notifications. And now, My Lady, I understand that you have seen notifications in the bell at the top indicating. The challenge with that right now is parties have to actually be in CaseLines, monitoring it, to see those notifications. What we are trying to do is to get an email automatically sent each time a document is uploaded. So for anybody with --

THE COURT: Yeah. That (INDISCERNIBLE).

MR. SELNES: Anybody who has experience with a data room on -- on a sales process, it's similar where when documents go into the data room, you get the update. CaseLines is trying to deal with that for us right now. They haven't been able to correct it, but we're hoping to get that done sooner rather than later.

And the last point just for uploading is right now what we suggest people do is at the same time they email the service list, to please upload your unfiled documents into the uploads folder. That way, parties can get immediate access to the documents. What we will subsequently be doing is the moment you get a filed cover page, please just upload the filed cover page. We can then deal with adding that. And the reason we're just for the filed cover page to be added from now on is there's a 50 cent cost per page of every document that gets uploaded. So, for example, if an unfiled version of a brief and a filed version of a brief are uploaded, it's actually going to double charge the estate for that, and so we'd just ask that that be done as the cover page.

And in that regard -- and, My Lady, I think you may be available for a training next, you had mentioned. I don't want to commit you to a time, but there had been some discussion about setting up a training session with all the parties if they wanted to jump in for an hour, and I think we're trying to coordinate that, and I can send an email out, once we've got a time coordinated with yourself, that anybody interested can join. There wouldn't be a cost to it, and it would, I think, help with some of the functionality of CaseLines.

THE COURT: Right. There is -- the program is -- is -- I mean, it's very easy to open and close documents and read them, and everything's really well organized, so that's -- that's the -- the first level. And it's very easy to do that. You don't need any training to do that. When it gets -- the documents also, you can mark them up, make notes, et cetera. And I'm going to actually try to -- in the notes, I can do a note on there and put my endorsement in that I read this morning. I can put that right into notes for all to see. So, you know, there are some extra things that you can do. This is the Cadillac of a Dropbox, right? And -- basically. I mean, there's a lot of different programs, and as I hope I mentioned, the Court is agnostic about really what we use and we are, in the court, trying to know get a SharePoint-type Dropbox set up for justice matters, civil applications,

so on and on. We're doing what we can at the court, wherein, you know, after years of pleading, finally the Court getting some -- some response in terms of getting some help here. But anyways, this is a Cadillac version. It's only useful on, you know, very complex files where you have multiple, multiple emails coming in. It's a big saving for our staff to have this stuff being uploaded directly instead of the -- the staff, so -- and there is a cost, but of course, there would be a cost for you to photocopy documents and send them over hard copy to my office too, quite frankly, and so it's practically -- I've -- we've looked at the cost. It's actually less if you use a CaseLine program. So there is a cost, but you've got to keep in mind, right, as I think you've mentioned, that you don't want to duplicate or upload excess documents because it's just a cost, just like you wouldn't want to photocopy things multiple times for no particular reason.

So, yeah, so all to say the training will be helpful to use these present things, this page direction thing that worked very well, to put in your own notes or private notes, to learn to read notes that I will try to put in for everybody to read, and I'll try to do that in the next little bit. I'm going right into another application right now, so I won't have time right this minute. But -- so thank you very much for your patience and learning this thing.

And I hope, Mr. Wasserman, next time we have this thing -- it's actually -- when we got -- when we got that email, it looked awfully daunting, but it is not actually daunting once. You have it up and running, it's pretty easy. And, Mr. Wasserman, you being the young man that you are, I'm sure you can learn. If I can learn, you can learn.

MR. WASSERMAN: I assure -- I've already set up my account while we're on this call.

THE COURT: Good. Okay. All right. (INDISCERNIBLE).

MR. SELNES: My Lady, there's one last --

THE COURT: Sorry to pick on you, Mr. Wasserman.

MR. SELNES: One last point on that, My Lady.

MR. WASSERMAN: It's -- it's absolutely fine. I totally understand. And I appreciate Mr. Salmas's explanations. They're very helpful.

THE COURT: Okay.

MR. SELNES: Oh, and My Lady, just the last point is that it had been mentioned in the monitor's report regarding the order that I think we can put forward,

and in that regard, we were hoping to seek a little direction from you into whether this would be a full replacement of service via email or if it's supplemented. And to the extent that if the order states the parties are automatically served via CaseLines and no emails are going out, I think we just wanted to make sure the parties understand they -- it's -- the onus is on them to get an account set up or if there's going to be dual service by both email and CaseLines, just what you would prefer in that regard.

THE COURT: I -- yeah. The effort -- the effort and the point of this is that the service will be happening by -- by CaseLines. It might be premature to put that in right now if we're still just where everybody's getting signed up and getting organized and all the rest, so -- but that is -- that's the point. And you know, people have the obligation to go in there, and I understand you have many, many files and many more are opening furiously with the economic climate we're living in, but nonetheless, it's pretty easy to go in there and look and (INDISCERNIBLE), you know, if you're not getting an email, or you can just say -- you can email and just say, A document has been uploaded in CaseLines. You don't even have to have an attachment. So the point in due course is to have -- you know, to have it directly into CaseLines and that's it, but just make sure that everybody's up and running before we sort of -- because we don't want to prejudice anybody, right? That's --

MR. SELNES: Understood.

THE COURT: All right.

MR. SELNES: Thanks.

THE COURT: Okay. Well, thank you, everybody, again for your patience. Things are getting more and more seamless. I think this is my 14th or 15th virtual hearing, and so slowly but surely things are coming along.

So where -- I will then wait -- we have no other hearings. I'll wait for you to contact me to the extent that you need another hearing. And then we'll arrange one, I presume. Mr. Simard, is that the way you want to proceed?

Mr. Rubin?

MR. RUBIN: Yes. I think that makes sense. Thank you, My Lady. As Mr. Simard mentioned, you know, we -- we do need to proceed with the sales process and a DIP, and so what we'll do is contact you once -- and find out some availability and once we're already on that front, so thank you for that accommodation.

THE COURT: Okay. Good. I'll just wait to hear from you then and wish you all a good long weekend. I hope it stays a little warmer than it's been.

MR. RUBIN: Thank you, My Lady.

UNIDENTIFIED SPEAKER: My Lady.

MR. SELNES: Thanks, My Lady.

UNIDENTIFIED SPEAKER: Thank you, My Lady.

UNIDENTIFIED SPEAKER: Thank you, My Lady.

THE COURT: Thank you, everyone.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Karina Salguero, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench, held in courtroom 1601, at Calgary, Alberta, on the 15th day of May, 2020, and that myself and Rena Neale were the court officials in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Sandy Voga, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Sandy Voga, Transcriber
Order Number: AL-JO-1005-4199
Dated: May 19, 2020