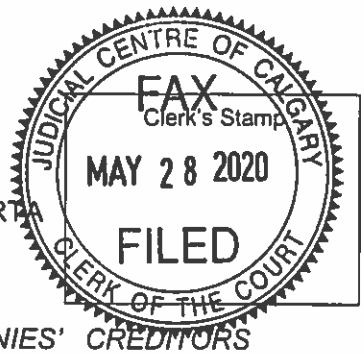


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|---|---|
| COURT FILE NUMBER | 2001-05630 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| APPLICANTS | IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED<br><br>AND IN THE 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 DIAVIK DIAMOND MINES (2012) INC.** |
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**BENCH BRIEF OF DIAVIK DIAMOND MINES (2012) INC.**

**IN RESPONSE TO THE STAY EXTENSION, SISP APPROVAL, STALKING HORSE APPROVAL, INTERIM FINANCING APPROVAL, AND RELATED APPLICATIONS TO BE HEARD BY THE HONOURABLE MADAM JUSTICE K.M. EIDSVIK**

**May 29, 2020 at 9:15 a.m.**

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## I. INTRODUCTION

1. The Applicants[1] apply for orders, including approval of DIP Financing, a Stalking Horse Bid, and SISP (collectively, the "**Dominion Application**"), all of which are propounded by and overwhelmingly to the benefit of its ultimate sole equity holder. DDMI's response to the Dominion Application is in the nature of seeking rational and minimally intrusive amendments to the SARIO and SISP for reasons including that the proposed transaction structure and path forward continue to fail to address the ongoing failure of Dominion to meet its obligations under the Diavik JVA and the prejudice that will be visited upon DDMI unless the amendments it seeks are granted. DDMI's proposed amendments to the Second Amended and Restated Initial Order (the "**SARIO**") (attached hereto as Schedule "**A**") and proposed amendments to the sales and investment solicitation process (the "**SISP**") (attached hereto as Schedule "**B**"). All capitalized terms used in this brief and not otherwise defined have the meaning used in the SARIO and SISP.

2. In its decision of May 15, 2020, this Honourable Court: (i) categorized DDMI's ongoing payment of Dominion's share of production costs at the Diavik Mine as financing of Dominion's operations at the Diavik Mine; and (ii) indicated that DDMI is, in effect, Dominion's "DIP Lender".[2]

3. Dominion seeks the continuation of this arrangement without providing assurance or protection to ensure that DDMI will be paid. In particular, a *pro forma* DIP budget cash-flow statement has been provided for the period through to October 31, 2020 (the "**Forecast Period**"). During the Forecast Period, Dominion proposes to borrow $85.2 million[3] by way of DIP Financing and to spend $110.7 million. The majority of the forecasted spending is to be on Dominion's Ekati Mine in addition to a bloated $34.4 million on account of CCAA professional fees. Dominion is not intending to pay DDMI, even though Dominion's share of the Diavik Mine's Costs are projected to be approximately $57,712,000 over the Forecast Period.[4]

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[1] Being 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. (collectively, "**Dominion**" or, alternately the "**Applicants**").

[2] *In Re Dominion Diamond Mines ULC et al.* (May 15, 2020), Calgary, 2001-05630, (ABQB) at 5:19 – 5:25 and 5:33 – 6:18 ("***May 15 Decision***"). **[TAB 1]**.

[3] All amounts are in Canadian dollars, unless otherwise indicated.

[4] Affidavit #2 of Thomas Croese (the "**Croese #2 Affidavit**") at para 21; Confidential Exhibit "A" to the Croese #2 Affidavit (see the combined value of cells G48 – K48).

4. In its review of the evidence before it at the time of the May 15 Decision, this Court observed that "[t]he 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".[5] Despite the concerns then raised by the Court, nothing has since changed.

5. Dominion's economic motivation for not spending any money on the Diavik Mine is easily explained: the Washington Group's Stalking Horse Bid ascribes no value to the Diavik Mine, as evidenced in part by the fact that the amount of cash that the Washington Group proposes to pay is exactly the same whether the Diavik Mine is included in the purchase or not. It thus makes economic sense, when viewed through the lens of Dominion's ultimate shareholder, for it to refuse to include as its dip proposal sufficient monies to fund its subsidiary to meet its post-filing CCAA obligations to the Diavik Mine under the JVA.[6]

6. At the same time, Dominion, continues to assert that diamonds produced at the Diavik Mine must be turned over to it; even though it is paying nothing towards the mine's production costs and contributing nothing to the JVA's agreed budget (which production costs include paying the 1,124 employees at the Diavik Mine and ensuring ongoing compliance with occupational health and safety regulations and protection of the environment).[7]

7. Not surprisingly, Dominion's first lien lenders join in supporting Dominion. The first lien lenders have issued $105 million of letters of credit ("**LoC**") in favour of DDMI to cover Dominion's share of mine closure costs that, if not renewed on or before September 25, 2020, are liable to be drawn in their entirety. Any amounts that can be recovered by the first lien lenders from DDMI's security, including Dominion's share of production at the Diavik Mine, will serve as a useful hedge against the very real possibility that the Washington Group's highly conditional "stalking horse bid" at lease in connection with the Diavik Mine will not close, that there will be no other bids received in the process, and that all stakeholders will find themselves on November 1, 2020 in a situation where there is no buyer for the Diavik Mine and no viable solution on the table.

8. In preference to DDMI's asserting, as it is rightfully entitled to do, that the stay of proceedings in this case as it pertains to the Diavik Mine should not continue, DDMI instead seeks

[5] *May 15 Decision*, *supra* at 5:2 – 5:4 **[TAB 1]**.

[6] Alternately, the Diavik JVA.

[7] Affidavit of Thomas Croese sworn on April 30, 2020, at paras. 43-46 ("**April 30 Affidavit**").

measured and non-prejudicial amendments to the terms of the proposed Second Amended and Restated Initial Order (the "**SARIO**") and to the sales and investment solicitation process (the "**SISP**") designed to ameliorate the prejudice that will being visited upon it if the Dominion Application is granted as presented.

9. In evaluating Dominion's application for court approval of a stalking horse bid sales process, consideration must also be given to the transfer-related provisions of the JVA. The Washington Group should not be permitted, under the guise of a stalking horse bid, to circumvent the contractual obligations owed to DDMI by its subsidiary, Dominion.[8]

## II. BACKGROUND

10. For the purpose of DDMI's response to the Dominion Application, the following salient sections from the transaction documents are highlighted:

### A. Stalking Horse Credit Bid

#### *(i) Purchase Price – All Assets*

11. The purchase price for all assets is (i) an amount equal in cash to US $126.1 million, (ii) plus up to US $5 million in respect of any incremental amount outstanding under the Interim (DIP) Facility with respect to Advances and accrued and unpaid interest after September 30, 2020, (iii) minus the amount, if any, by which the aggregate amount of the Advances and accrued and unpaid interest under the Interim (DIP) Facility that is outstanding as of the closing is less than US$55 million, (iv) plus the assumption of the Core Liabilities and certain other assumed liabilities.[9] Core Liabilities are defined as:

> "The "Core Liabilities" proposed to be assumed by the Washington Group (ie not paid in cash) shall be:
>
> - DDM's obligation to collateralize or refinance outstanding letters of credit issued under DDM's revolving credit facility to secure closure costs (including reclamation) pursuant to the Diavik Joint Venture Agreement and Closure Security Agreement as of closing;

[8] See *infra* at section II.D. of this brief.

[9] Term Sheet for "Stalking Horse" Acquisition Agreement (the "**Term Sheet**") at pg. 3 **[TAB 2]**.

- DDM's obligations under its pension plan, including with respect to the windup deficit; and

- DDM's obligations under the Diavik Joint Venture Agreement with respect to all accrued and unpaid capital calls, plus accrued interest, any pending (but not yet due) capital calls, each as of closing.

The Core Liabilities described above do not include the other liabilities that Buyer will assume pursuant to the Purchase Agreement at closing.[10]

### *(ii) Conditions to Closing*

#### a. Rio Condition

12. The proposed Stalking Horse Credit Bid contains a provision entitled the "Rio Condition" which provides as follows:

> Closing of the transaction contemplated by the Stalking Horse Term Sheet is subject to various conditions, including but not limited to (a) approval by this Court of the SISP and Interim Financing Term Sheet; (b) an agreement acceptable to the Stalking Horse Bidder with Diavik Diamond Mines (2012) Inc. ("**DDMI**") (a subsidiary of Rio Tinto plc. and Dominion Diamond's joint venture partner with respect to the Diavik Mine) and GNWT in relation to the timing and quantum of capital calls and reclamation liabilities at Diavik Mine (the "**Rio Condition**");[11]

#### b. Ex-Rio Toggle Transaction

13. The Stalking Horse Credit Bid contains a condition entitled the "Ex-Rio Toggle" which provides as follows:

> If the Rio Condition is not satisfied or waived by July 21, 2020, the parties will proceed with the transaction contemplated by the Stalking Horse Term Sheet but the Stalking Horse Bidder will not acquire or assume any rights or obligations with respect to the Diavik Mine Joint Venture (all of which would become excluded assets and excluded liabilities) (the "**Ex-Rio Toggle**") and Dominion may dispose of Dominion Diamond's participation interest to DDMI or another party.
>
> If the Ex-Rio Toggle occurs, then (a) the Cash Purchase Price would be as specified in the Stalking Horse Term Sheet, without reduction; (b) the Excluded Assets would include Dominion Diamond's interest in the Diavik Joint Venture and any diamonds distributed by the Diavik Joint Venture to Dominion Diamond after the date of the commencement of these CCAA proceedings and prior to closing; (c) the Stalking Horse Bidder would not assume Core Liabilities with respect to the Diavik Joint Venture, including obligations for collateralizing or refinancing

[10] Term Sheet at pgs. 3-4 **[TAB 2]**

[11] Term Sheet at pg. 7 **[TAB 2]**.

> outstanding letters of credit and obligations with respect to capital calls; and (d) the aggregate amount of equity required to be committed in order to satisfy the Financing Condition would be reduced to at least US$70 million, less 50% of any debt raised.[12]

14. The Stalking Horse Bid Term Sheet is highly conditional and contains other material conditions not consistent with the general nature and accepted purposes of stalking horse bid transactions. These conditions include the following introductory statement in the Stalking Horse Bid Term Sheet:

> This Term Sheet is not intended and does not create any binding legal obligation on the part of either [the Washington Group and its wholly-owned subsidiary]. No legal obligation to negotiate, enter into or consummate any transaction will exist, unless and until definitive and binding transaction documentation regarding the proposed transaction has been entered into by the parties, which is subject to board approval by [the Washington Group and its wholly-owned subsidiary], satisfactory completion of confirmatory due diligence, and negotiation of final documentation. The terms and conditions set forth in this Term Sheet are not intended to be comprehensive and if, in the course of [the Washington Group] due diligence review or development of the proposed acquisition structure, or in the course of negotiations, [the Washington Group and its wholly-owned subsidiary] determine that additional terms and conditions, or modification to the terms and conditions set out herein, are necessary, then the parties reserve the right to address such matters.[13]

15. In addition to the foregoing, upon execution of the purchase agreement, the Washington Group's obligations to complete the transaction include:

- an agreement with GNWT and the sureties with respect to collateralization of reclamation obligations of Buyer under environmental agreement, permits, licenses and subleases to be transferred (the "**Surety Condition**")

- Buyer shall not be subject to any mandatory governmental regulations, advisories or restrictions related to COVID-19 which would prevent or materially restrict: (i) Buyer from conducting operations at the Ekati Mine; or (ii) Buyer's ability to reasonably transport, sort and conduct diamond tenders, with the precise standard to be negotiated as part of the Purchase Agreement negotiations

- an agreement acceptable to Buyer with Diavik Diamond Mines (2012) Inc. ("**DDMI**") and GNWT in relation to the timing and quantum of capital calls and reclamation liabilities at Diavik (the "**Rio Condition**")

[12] Term Sheet at pg. 8 **[TAB 2]**.

[13] Term Sheet at pg. 1 **[TAB 2]**.

- Buyer shall have arranged third party equity and debt commitments on terms acceptable to it provided that the aggregate amount of third party equity committed shall be at least US$140 million, less 50% of any debt raised (the "**Financing Condition**")[14]

**B. Diavik Mine Closure Obligations – The Closure Security Agreement**

16. DDMI is a signatory to the Environmental Agreement, dated March 8, 2020 (the "**Environmental Agreement**"), together with the Government of the Northwest Territories and the Minister of Indian Affairs and Northern Development ("**GoC**"), as amended from time to time. Under section 15.1 of the Environmental Agreement, a Security Deposit was consented to by DDMI in its capacity as Manager of the Diavik Mine (the "**EA Security Deposit**").[15]

17. As described in paragraph 61 of the affidavit of Kristal Kaye, sworn April 21, 2020 ("**April 21 Kaye Affidavit**"), Dominion's outstanding share of the closure costs and reclamation labilities for the Diavik Mine is governed by the Closure Security Agreement between DDMI and Dominion, dated December 13, 2019 ("**CSA**").

18. Pursuant to the CSA, as of March 11, 2020, Dominion had delivered six letters of credit with a total value of CDN $105 million, with a further CDN $35 million to be posted on January 1, 2021, to cover its proportionate share of the closure and reclamation costs for the Diavik Mine. As is also noted in the recitals to the CSA, "the Diavik diamond mine is projected to cease commercial production of Products in 2025 and the Manager has begun planning for Total Closure Activities and the windup of Operations".

19. As at December 31, 2019, the total closure obligations related to the closure and reclamation of the Diavik Mine were estimated to be $365.3 million. Pursuant to the JVA, Dominion's share of the closure obligations is 40%.[16]

20. The Diavik Mine is projected to cease commercial operation in 2025. Closure and reclamation works are already progressively performed and will accelerate in coming years as the end of commercial operation nears. The CSA was entered into in this context. Accordingly, the parties agreed that, instead of Dominion funding its closure obligations, Dominion would provide

[14] Term Sheet at pgs. 6-7 **[TAB 2]**.

[15] Croese #2 Affidavit at para. 23.

[16] *Ibid*. at para. 26.

security by way of letters of credit issued in favour of DDMI. Accordingly, DDMI holds, as beneficiary, letters of in the aggregate amount of $105 million.[17]

21. The draw conditions of the LoCs are:

(a) Partial drawings are permitted in the event that Dominion does not pay ongoing closure costs. Monthly cash calls that are not being paid by Dominion include such costs.

(b) The entire amount of each of the LoCs can be drawn if the provider of a LoC does not extend their respective LoC beyond the current expiry date of October 25, 2020.

22. The LoCs are all set to expire on October 25, 2020 and if the same are not renewed on or before September 25, 2020, then DDMI is entitled to draw the full amount thereunder and to hold the proceeds in trust for the benefit of DDMI in relation to unfunded reclamation obligations in accordance with the terms and conditions of the CSA.[18]

### C. Cover Payments

23. Dominion has agreed, and this Court has ordered, that DDMI is entitled to make cover payments. Since the date of the Court order approving the ability of DDMI to make cover payments, the following cover payments have been made[19]:

| Date of Payment | Cover Payment Amount | Date of Cash Call |
|---|---|---|
| May 21, 2020 | $16,000,000.00 | April 15, 2020 |
| May 21, 2020 | $17,600,000.00 | May 1, 2020 |

[17] *Ibid*. at paras. 25, 27.

[18] *Ibid*. at paras. 29-31.

[19] *Ibid.* at paras. 9-16 and Exhibits “1” and “2”.

24. At present, it is anticipated that the following amounts will be invoiced to Dominion over the Forecast Period[20]:

| Date | Invoice Amount |
|---|---|
| June 1 – October 30, 2020 | $57.7 million |

25. During the Forecast Period, Dominion is projected to default in making $57.7 million of joint venture payments to DDMI (which is in addition to the $12 million May #2 Cash Call for which no Cover Payment has yet been made).[21]

### D. JVA Transfer Restrictions

26. The JVA contains certain restrictions that apply to any potential Transfer (as defined in the JVA and set out below) of Dominion's Participating Interest or a change in control of Dominion, and further provides DDMI with certain pre-emptive rights in relation to any Transfer. Section 1.29 of the JVA defines the term "Transfer", as follows:

> **1.29** "Transfer" means sell, grant, assign, encumber, pledge or otherwise commit or dispose of.[22]

27. A Participant is entitled to Transfer all or any part of its Participating Interest, solely as provided in Section 15.2 of the JVA. The key restrictions in Section 15.2 are that:

(a) notice is given to the other Participants and, except as described in sub-paragraph (c) below, the transferee has as of the effective date of the Transfer, committed in writing to be bound by the JVA to the same extent as the transferring participant;

(b) no Transfer shall relieve the transferring Participant of any liability, whether accruing before or after such transfer, which arises out of Operations (as defined in the JVA) conducted prior to such Transfer; and,

(c) if the Transfer is the grant of a security interest by encumbrance of the Participating Interest of a Participant to secure a loan or other indebtedness, such security interest shall be subordinate to the terms of the JVA and the rights and interests

[20] *Ibid*. at para. 20.

[21] *Ibid*. at para. 21.

[22] The JVA is attached to the April 30 Affidavit, *supra*, as Confidential Exhibit "1".

of the other Participants thereunder. Upon any enforcement of rights in the security interest the acquiring third party shall be deemed to have assumed the position of the encumbering Participant with respect to JVA and the other Participants, and it shall comply with and be bound by JVA.

28. Section 15.3 of the JVA stipulates that, unless otherwise provided for in Section 15.4 of the JVA, if a Participant desires to Transfer: (a) all or any part of its Participating Interest; or, (b) a Control Interest in the Participant, the other Participants shall have pre-emptive rights to acquire such interests. Specifically, Section 15.3(a) of the JVA provides that the transferring Participant may proceed by way of a right of first refusal or right of first offer mechanism. The non-transferring Participant will have a 30 day period (the "30 Day Election Period") in which to elect to acquire the offered interest. If the non-transferring Participant does not elect to acquire the offered interest, the transferring Participant is required to Transfer the offered interest within 90 days following the expiration of the 30 Day Election Period. If the Transfer does not occur within that time frame, the 30 Day Election Period shall be deemed to have been revived pursuant to Section 15.3(c) of the JVA.

29. There are a number of limited exceptions available to a transferring Participant. The key exceptions include that the restrictions on Transfers will not apply to:

(a) a Transfer by a Participant of all or any part of its Participating Interest to an Affiliate in which the Participant has a Control Interest;

(b) incorporation of a Participant, or reorganization of a Participant by which the surviving entity possesses substantially all of the stock, or all of the property rights and interests, and as a result of which incorporation or reorganization it will be subject to substantially all of the liabilities and obligations of that Participant;

(c) a merger involving a Participant by which the resulting entity possesses all of the stock or all of the property rights and interests, and will be subject to substantially all of the liabilities and obligations of that Participant, provided that the value of that Participant's Participating Interest does not equal or exceed 50% of the Net Worth of such entity; or

(d) the Transfer of a Control Interest by an Affiliate to the Participant or to another Affiliate.

## III. ARGUMENT

### A. Stalking Horse Bids

**Attributes and Function of a Stalking Horse Bid**

30. Stalking horse bids or agreements, which find their genesis in US bankruptcy proceedings, are now known to the CCAA and are "used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties".[23] Such bids are designed to provide assurances to all stakeholders - including creditors, employees, joint venture participants, and regulatory authorities - that whatever the outcome of the sales process, there will be a purchaser of the undertaking who will assume and continue operations in the event that a higher bid is not accepted.[24]

31. It is one of the fundamental attributes of these bids that the "stalking horse" has "undertaken considerable due diligence in determining the value of the debtor corporation and that other potential bidders can rely, to an extent, on the value attached by that bidder based on that due diligence."[25] Properly structured, the bid advances many of the CCAA's core objectives.[26] However, there is no such proposal before the Court in this proceeding. To the contrary, what purports to be a stalking horse bid in this case affords none of the certainty which such bids are intended to provide and shows little indication that the expected diligence has been completed.

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[23] *Re Danier Leather Inc.*, 2016 ONSC 1044, 2016 CarswellOnt 2414 at para. 20 citing to *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7 ("***Danier Leather***") **[TAB 3]**.

[24] *Re Mustang GP Ltd.*, 2015 ONSC 6562 at para. 40 ("***Mustang***") **[TAB 4]**.

[25] Janis Sarra, "Financing Insolvency Restructurings in the Wake of the Financial Crisis: Stalking Horses, Rogue White Knights and Circling Vultures" (2011) 29:3 Penn State Intl L Rev 581 at 594 (HeinOnline) **[TAB 5]**.

[26] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 40 ("**Callidus Captial**") **[TAB 6]**:

> "These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (citations omitted)."

32. The uncertainty attendant upon the inclusion of the Rio Condition, coupled with Dominion's proposed revisions to the May 15th Order to allow Dominion to continue receiving its proportionate share of production – notwithstanding its ongoing failure to pay post-filing obligations to DDMI – creates a situation in which DDMI is being forced to supply goods and services to Dominion post-filing without Dominion's making adequate provision therefor. As this Court held in its reasons of May 15th, what is in effect occurring is that DDMI is a DIP financer; albeit on a non-consensual basis.[27] The introduction of what is a stalking horse bid in name only in no way modifies this finding.

33. The striking conditionality of the Stalking Horse Credit Bid defeats any reasonable attempt to set a "baseline price".[28] Against the backdrop of a mine in its final years of production and for which substantial closure liabilities exist, the Rio Condition to which the Stalking Horse Term Sheet is subject requires that "an agreement acceptable to the Stalking Horse Bidder" must be negotiated with DDMI and GNWT in respect of capital calls requirements and reclamation liabilities.

34. Further, such negotiations are to proceed on the basis of a Term Sheet which explicitly states that its terms and conditions "are not intended to be comprehensive" and which provides for the possibility that further due diligence may result in material changes to the Sheet's terms and conditions, or other modifications. Simply put, the Term Sheet presumes that Dominion's owner: (a) must undertake due diligence on the assets it previously purchased; and (b) is prepared to undertake complex and potentially contentious negotiations without a reliable understanding of the value of its investment. This is implausible.

35. The Court should assess the likelihood that the Rio Condition will not be met – especially in a proposed timeframe of less than two months during a period of unprecedented economic uncertainty – together with the likelihood that the Ex-Rio Toggle process will be engaged. If the Ex-Rio Toggle process is engaged, then the interests, rights, and obligations in the Diavik Mine are deemed excluded assets and liabilities "and Dominion may dispose of Dominion Diamond's participation interest to DDMI or another party".[29]

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[27] *May 15 Decision*, *supra* at 5:33 – 5:41 **[TAB 1]**.

[28] *Danier Leather*, *supra* at para. 20 **[TAB 3]**.

[29] Term Sheet at pg. 8 **[TAB 2]**.

**Test for Court Authorization of a Sales Process under the CCAA**

36. The four-part test for a court to authorize a sales process – including stalking horse bids – under the Act was first and authoritatively set out in the *Nortel* proceedings (the "***Nortel* factors**").[30] In applying the *Nortel* factors, the presiding justice should be mindful that they were intended to guide the court "in the exercise of its general statutory discretion".[31] That discretionary authority must also be exercised – and the *Nortel* factors must applied – with regard to three "baseline considerations" to ensure the CCAA's overarching remedial objectives are advanced.[32]

37. The Supreme Court has recently reiterated that these considerations are "(1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (citations omitted)."[33] It is against the backdrop of these fundamental considerations – in particular, the requirements of good faith and due diligence - that the court can carefully probe the merits of a proposed sales process and that the significant deficiencies in this so-called stalking horse bid become evident.

38. Given the lack of due diligence admitted in the Term Sheet itself, the resulting failure to set down a baseline price for the debtor company in order to further the CCAA proceedings, and the marked uncertainty arising from the bid's conditionality, the Stalking Horse Credit Bid is anything but; it is in reality a thinly disguised opportunity for the owner of Dominion to try to acquire the Ekati mine with a free option to try to grind DDMI through the inclusion of the Rio Condition; there is little for the Washington Group to lose; it can try to drive an improvident a bargain with DDMI and if DDMI doesn't accede to demands to renegotiate the Diavik JVA, then the Washington Group can walk from the Diavik Mine and, under the proposed construct, leave DDMI exposed for over $57 million. Moreover, while the Term Sheet – and, in particular, the Ex-Rio Toggle – are of great potential benefit to Dominion and the Washington Group, it offers none of the reassurance to stakeholders, including DDMI, which is one of the fundamental purposes of a properly drafted stalking horse bid.

---

[30] *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467, [2009] O.J. No. 3169 ("**Nortel**") at para. 49 **[TAB 7]**.

[31] *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 ("**Brainhunter**") at para. 13. The presiding justice in *Brainhunter* - Morawetz J., as he then was – had of course authored the Nortel factors **[TAB 8]**.

[32] *Callidus Capital*, supra at paras. 40-41. **[TAB 6]**.

[33] *Ibid*. at para. 49 **[TAB 6]**.

**Prejudice to DDMI**

39. The flaws inherent in the Stalking Horse Bid result in material risk to DDMI. If there is no qualifying bid for the Diavik Interest, DDMI will likely have made $57.7 million in Cover Payments for the purposes of satisfying Dominion.[34] Under the imprimatur of a court-approved sales process, Dominion expects to force DDMI to fund post-filing operations without providing adequate security therefor.

40. The probability which the Stalking Horse Bid assigns to a prospective buyer's meeting both the Surety Condition and the Rio Condition is effectively the same as the value it assigns to a mine fast approaching its date of closure: nil. The Stalking Horse Bid does not set a "baseline price" for the Diavik Mine, it simply assumes it has no monetary value beyond the assumption of the closure obligations. The Stalking Horse Bid's abnormal conditionality is comprehensible if the overriding objective of the Stalking Horse Bidder is to divest itself of an unwanted asset unless it can force amendments favourable to the parent company upon DDMI and GNWT.

## B. SARIO Amendments

### *(i) Stay Variation*

41. The cash flow for the Forecast Period confirms that Dominion will not sell the Dominion Products, including diamonds, over the next five months. In other words, this is a debtor company that did not generate operating revenue when this case commenced, does not currently generate operating revenue, and does not project generating operating revenue at any time prior to the estimated conclusion of this case. In the event that any of these circumstances change, the Applicants would be free to pay the Cover Payment Indebtedness.

42. This is also a debtor company that has made the deliberate and advertent decision to selectively pay certain post-filing obligations while not paying other post-filing obligations. Dominion's actions, in the circumstances where it is admittedly insolvent, constitute preferential payments. The post-filing obligations that are not being satisfied all relate to the Diavik Mine. In doing so, Dominion effectively forces its joint venture partner, DDMI, to extend financing to it through JVA Cover Payments. Dominion's insistence that the Dominion Products be delivered to

[34] This number assumes DDMI makes all of Dominion's projected Cover Payments for the whole of the Forecast Period, see Croese #2 Affidavit at para. 21.

it, in circumstances where it has both no intention of paying its obligations associated with the Dominion Products and no capacity to monetize the Dominion Products, is a remarkable position for a debtor who is burdened with the obligation of demonstrating that it has acted, and is acting, with good faith and due diligence.[35]

43. The current market value of Dominion's interest in the Diavik Mine, in the eyes of the Washington Group, is $0, or less. The significance of this simple and uncontested fact cannot be overstated. In Dominion, DDMI has a contractual counterparty who has committed - and intends to continue committing - uncontested defaults under the JVA, and which expects DDMI to content itself with the prospect of the supposed security of Dominion's JV Interests, which in the eyes of both Dominion and its ultimate shareholder is valueless.

44. It would be manifestly unfair for DDMI to fund the whole of the Diavik JVA Cover Payments if Dominion can require delivery of DDMI's only secured asset of value – and the only one which is fungible - being the Dominion Products. On these facts, DDMI would be well justified in opposing the extension of the Stay Period, treating Diavik's JVA defaults as an enforcing secured creditor, and, therefore, in immediately liquidating its priority collateral. That is not the path which DDMI has chosen to pursue at this time. DDMI proposal would see it only monetize the Dominion Products in the event that the SISP Procedures fail to generate a transaction for the Diavik Interest and, even then, DDMI still offers Dominion a thirty day redemption period to satisfy the Cover Payment Indebtedness. This is a fair and practical solution which preserves DDMI's rights, avoids interference with Dominion's restructuring process (including the SISP Procedures), and which should be supported by all stakeholder groups.

45. The proposed amendments to the SARIO alleviate the risk to DDMI. Far from constituting an "amendment" to the Diavik JVA, these measured modifications are entirely consistent with the Diavik JVA. Both the text of the JVA itself and the common-sense commercial bargain between the parties which underlies it have never permitted Dominion to cease to pay Diavik JVA obligations and take delivery of the Dominion Products through the operation of a CCAA stay of proceedings.

[35] *Callidus Capital*, *supra* at para. 49 **[TAB 6]**.

46. To the contrary, the Diavik JVA expressly contemplates a grant of security and the abridgment of time periods associated with enforcement in the event of an insolvency filing by Dominion, and only the intervening CCAA stay has undone this agreement of the parties. This happens, of course, in every insolvency case in relation to *pre-filing* defaults committed by the debtor. The unique – indeed, bizarre - aspect of the instant case is that Dominion seeks to utilize the say of proceedings to shield itself from the consequence of ***post-filing defaults*** which it is forcing DDMI to fund. The inherent and untenable unfairness of this position would be rectified by the SARIO and SISP amendments.

***(ii) Sale of Diamonds***

47. The SARIO Amendments sought by DDMI contemplate that, upon certain triggering events and Dominion's subsequent failure to satisfy the Cover Payment indebtedness, DDMI shall be entitled to dispose of Dominion's share of the stored Diavik Mine diamonds. DDMI would then account to each of Dominion and the Monitor in respect of proceeds received from the disposition of those assets. Specifically, DDMI seeks the authorization to issue a demand for the repayment (the "**Demand**") of all indebtedness, liabilities and obligations owing by Dominion to DDMI in respect of the Cover Payments on the earlier of:

(a) the date that the within CCAA proceedings are terminated;

(b) the date that the Interim Lenders take any action to enforce the Interim Lenders' Charge;

(c) July 22, 2020, but only in the event that there is no Phase 1 Qualified Bid for the Diavik Interest (as such terms are defined in the SISP Procedures);

(d) August 8, 2020, but only in the event that there is no Phase 2 Qualified Bid for the Diavik Interest (as such terms are defined in the SISP Procedures);

(e) August 27, 2020, but only in the event there is no sale approval motion filed in respect of a transaction involving the Diavik Interest; and,

(f) November 1, 2020,

(each a "**Triggering Event**").

Unless Dominion satisfies the Demand by making an indefeasible cash payment of the then-outstanding Cover Payment indebtedness within thirty days of delivery of the Demand, DDMI would then be entitled to dispose of the Dominion diamonds in a commercially reasonable manner in order to satisfy the Cover Payment indebtedness.

**SARIO Amendments Consistent with PPSA and JVA**

48. The ability to sell diamonds sought by DDMI is consistent with rights afforded to secured creditors under the applicable personal property legislation and supported by the broad discretion this Court has under the CCAA. Section 63(2) ("**Section 63**") of the *Personal Property Security Act* (Northwest Territories)[36] ("**NWT PPSA**") creates a broad jurisdiction to grant orders preserving the rights of secured parties, and their interests in the subject collateral. This is precisely the relief that DDMI seeks in relation to the Dominion Products. Section 63 states:

> **63(1)** "secured party" defined
> In this section, "secured party" includes a receiver.
>
> **63(2) Powers of Court**
> On application by a debtor, a creditor of a debtor, a secured party, a Sheriff or any person with an interest in the collateral, the Supreme Court may
>
> (a) make any order, including a binding declaration of a right and injunctive relief, that is necessary to ensure compliance with this Part or sections 17, 36, 37, 37.1 and 38;
>
> (b) give directions to any person regarding the exercise of rights or the discharge of obligations under this Part or sections 17, 36, 37, 37.1 and 38;
>
> (c) relieve a person from compliance with the requirements of this Part or sections 17, 36, 37, 37.1 and 38;
>
> (d) stay enforcement of rights provided in this Part or sections 17, 36, 37, 37.1 and 38;
>
> (e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.[37]

49. Comparable provisions of this legislation have been considered by Canadian appellate courts on multiple occasions. In *Equirex Leasing Corp.*[38], the Ontario Court of Appeal recently

[36] SNWT 1994, c. 8 at section 63(2) ("**NWT PPSA**") **[TAB 9]**.

[37] NWT PPSA at section 63 **[TAB 9]**.

[38] *Equirex Leasing Corp. v. Medcap Real Estate Holdings Inc.*, 2019 ONCA 152 at para. 15 **[TAB 10]**.

considered the equivalent provision of the *Personal Property Security Act* (Ontario)[39] ("**ON PPSA**") and stated that: "Section 67 of the PPSA gives the court broad remedial powers to enforce a secured party's rights."

50. Section 63 of *The Personal Property Security Act, 1993* (Saskatchewan)[40] ("**SK PPSA**") is similarly analogous to Section 63 of the NWT PPSA. In considering section 63(e) of the SK PPSA, which provides that the Court may make "any order that is necessary to ensure protection of the interest of any person in the collateral",[41] the Saskatchewan Court of Appeal held that "the object of [section 63(e)] is to leave the Court with ***sufficient discretionary power to act effectively when necessary to ensure the protection of the interest of any person in the collateral*** (emphasis added)"[42]

51. The relief sought by DDMI is also consistent with the JVA. Upon payment of a Cover Payment by DDMI, the Diavik JVA grants DDMI a security interest in, *inter alia*, all Products. DDMI's security interest is first-ranking pursuant to the Intercreditor Agreements.[43] Indeed, section 9.4(c) of the JVA provides that, *inter alia*:

> "… Upon default being made in the payment of the [Cover Payment] indebtedness referred to in Section 9.4(b) [of the JVA] when due the Non Defaulting Participant may exercise any or all of the rights and remedies available to it at common law, by statute or hereunder. Without limiting the generality of the foregoing, to the extent permitted by applicable law each Participant grants to the Non Defaulting Participant a power of sale as to any property that is subject to the mortgage and security interest granted hereunder, such power to be exercised in the manner provided by applicable law or otherwise in a commercially reasonable manner and upon reasonable notice …"[44]

---

[39] RSO 1990, c. P.10.

[40] *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 at section 63 ("**SK PPSA**") **[TAB 11]**.

[41] SK PPSA, *supra* at s. 63(e) **[TAB 11]**.

[42] *Rocky Meadows Transport Ltd. v Double D Construction Ltd.*, 2000 SKCA 19 at para. 5 (page 3) **[TAB 12]**.

[43] True copies of the Intercreditor Agreements are attached as Exhibits "A" and "B" to the Supplemental Affidavit of Thomas Croese, sworn on May 7, 2020 ("**Supplemental Croese Affidavit**").

As set out in paragraph 13 of the Supplemental Croese Affidavit, pursuant to the Intercreditor Agreements, each of the Agent (on behalf of the Credit Agreement Lenders) and the Trustee (on behalf of the noteholders under the Trust Indenture) entered into the Diavik Credit Agreement Subordination Agreement and the Diavik trust Indenture Subordination Agreement (collectively, the "**Subordination Agreements**"), respectively. The Subordination Agreements provide, inter alia, for the full subordination of the Agent's and Trustee's security to DDMI's security in respect of Cover Payments, pursuant to the JVA.

[44] Confidential Exhibit "1" to the April 30 Affidavit.

52. DDMI's security interest has been registered and is governed by the NWT PPSA. The modifications sought by DDMI would merely ensure that DDMI obtains adequate protection for that security, in relation to expenditures which are (i) necessitated by these proceedings and (ii) equivalent to compelled interim financing.

**SARIO Amendments are Commercially Reasonable**

53. DDMI's proposed modifications to the SARIO are justified as they are necessary to ensure protection of its interests in the Cover Payment collateral, and in particular, the diamonds produced at the Diavik Mine. Permitting DDMI to hold the diamonds is commercially reasonable and will create no prejudice for Dominion particularly in light of Dominion's admitted and continuing inability to market any diamonds at this time[45], and its ongoing refusal to pay its share of the Diavik Mine's Costs. It is also consistent with the underlying security agreement - the JVA - which specifically provides that DDMI shall have a first-ranking priority over Dominion's Participating Interest - as defined in the JVA, including produced diamonds - as security for Cover Payments.

54. Further, the ability to sell the diamonds upon the occurrence of a "Triggering Event" is necessary in order to protect DDMI's security interest and is consistent with the terms of the JVA. The incorporation of triggering events prior to sale ensures that DDMI will only be entitled to realize upon the retained collateral in circumstances where that collateral is potentially endangered or DDMI will otherwise be prejudiced. It is again important to note that the Stalking Horse Credit Bid effectively assigns zero value to Dominion's interest in the Diavik Mine.

55. The net result is that, as in the decisions considering legislative provisions equivalent to Section 63 of the NWT PPSA in other jurisdictions, the requested intervention of this Honourable Court is commercially reasonable, is not prejudicial, and accords with DDMI's existing rights under the JVA. The NWT PPSA clearly contemplates a broad, remedial jurisdiction when a court acts to protect a secured party's interest in collateral. That jurisdiction may be invoked by way of application, without requiring separate proceedings.[46] The relief sought in respect of the

[45] Affidavit of Kristal Kaye sworn April 21, 2020, at paras. 12-17; Affidavit of Kristal Kaye sworn May 6, 2020, at paras. 11-13.

[46] *CPC Networks Corp. v Eagle Eye Investments Inc.*, 2012 SKCA 118 at para. 27 ("Section 63 of the PPSA expands the authority of the Court of Queen's Bench to hear matters in chambers without an action being commenced beforehand …"). It is appropriate to grant relief under the NWT PPSA within these CCAA proceedings **[TAB 13]**.

diamonds is therefore: (i) within the jurisdiction of the Court; and, (ii) justified in the circumstances, and should be granted.

56. Finally, it is worth noting that the mere fact the Initial Order (granted *ex parte* as it relates to DDMI) contained template language relating to the stay of proceedings, it does not serve as the "last word" on the scope of a CCAA Initial Order. The Alberta Template CCAA Initial Order Explanatory Order states as follows in relation to the usage of the template:

> The CCAA Initial Order is not meant to be the last word in either draftsmanship or applicability to each situation. Rather, consistent with the philosophy applied to the Alberta Template Receivership Order, the CCAA Initial Order is meant to serve as a starting point from which any additions, amendments or deletions can be black-lined and brought to the attention of the Justice from whom the order is sought.
>
> …
>
> The CCAA Initial Order is not intended to apply universally to every CCAA proceeding, nor is it intended to raise any sort of onus that will require counsel to meet some legal or evidentiary burden in order to depart from the template. Rather, it is intended as a practical help to the bench and bar, to ensure both are acquainted with typical tents of an initial CCAA order, so that departures from such terms can be quickly highlighted.[47]

### *(iii) Cover Payments*

57. DDMI understands that its right to make Diavik JVA Cover Payments, which was originally ordered by this Honourable Court on May 15, 2020, is not subject to dispute.

### *(iv) DIP Lender Rights*

58. At paragraphs 24(c), (d) and 26 of the SARIO, DDMI seeks amendments that allow it to receive the same information and reporting that is provided to the Interim Lender. As was previously recognized by this Honourable Court, DDMI is, in effect, acting as a DIP lender to Dominion. It is making monetary advances so as to allow Dominion to satisfy post-filing operational expenses and, in doing so, obtains a security interest. Absent the advance of credit,

[47] Alberta Template CCAA Initial Order Explanatory Notes, Alberta Template Orders Committee, Calgary/Edmonton, Alberta, Last Revised January 2019 **[TAB 14]**.

Dominion would have no ability to satisfy such obligations. It is reasonable for DDMI to receive the same financing reporting information and associated rights in the circumstances.

### *(v) SISP Clarification*

59. The SISP Procedures contemplate the marketing and potential disposition of Dominion's interest in the Diavik Mine. The Diavik JVA is the governing document for the Joint Venture relationship with the Diavik Mine and any purchaser of the Diavik Mine will have to comply with the provisions of the Diavik JVA. This provides clarity and consistency for all bidders in the SISP Procedures.

### *(vi) Priority Rankings*

60. DDMI seeks changes at paragraph 56 of the SARIO relating to the priority of the Encumbrances on the Diavik Mine. DDMI is receiving no benefit of any type from any of the KERP Charge, the Break-Up Fee and Expense Charge, the Interim Lenders' Charge and the Financial Advisor Charge. Dominion employees do not operate the Diavik Mine and the Interim Lender has not made a binding offer for Dominion's interest in the Diavik Mine. There is no basis for the beneficiaries of these Encumbrances to have security on Dominion's interest in the Diavik Mine, even if that security purports to rank subordinate to the Diavik JVA Security.

61. The change to the language at paragraph 56(a) that the KERP Charge, the Break-Up Fee and Expense Charge, the Interim Lenders' Charge and the Financial Advisor Charge shall not attach to, charge or encumber Dominion Diamond's interest in the Diavik JVA (and the respective rights of the parties thereunder), Dominion Diamond's Participating Interest, Net Profit Royalty and interest in the Assets (as such terms are defined in the Diavik JVA) or the Dominion Products, of the SARIO makes the language consistent with subordination agreements already in place between DDMI and other secured creditors and ensures the Dominion Products are not subject to any contest in the event of enforcement. Given its de-facto status as a debtor in possession lender, and much as the Interim Lender seeks to do with the "Variance" provision of the SARIO, DDMI should not be at risk of having the priority arrangement altered.

## C. SISP Amendments

### *(i) Confidential Information Memorandum (CIM) and Virtual Data Room (VDR)*

62. The Applicants will be providing confidential information to third-parties in relation to the Diavik Mine. DDMI recognizes, notwithstanding the strict confidentiality terms of the Diavik JVA, that the provision of such information is necessary in Dominion's present circumstances. As DDMI is not only a creditor, but also a Participant in the JVA, the Diavik Mine's Manager, and a supplier to Dominion, it is reasonable for DDMI to know who this information has been provided to and to have the benefit of the NDA in respect of such information.

### *(ii) Cover Payment Indebtedness*

63. At paragraph 35 of the SISP, DDMI seeks additions that confirm that Cover Payment Indebtedness will be satisfied as part of a transaction involving the Diavik Interest. The proposed change at paragraph 35 of the SISP pertains to the priority claim (as confirmed by the SARIO) of the Cover Payment Indebtedness. In the event of a transaction that involves the Diavik Mine (and regardless of whether the transaction also involves the Ekati Mine) the Cover Payment Indebtedness must be satisfied in cash or on terms acceptable to DDMI. The Stalking Horse Bidder's right to credit bid is subordinate to the JVA Security. Sales processes in which junior ranking secured creditors advance credit bids frequently impose requirements that there be sufficient cash consideration to retire senior ranking indebtedness and the proposed amendment simply offers that confirmation.

64. Section 11.3 of the CCAA permits a court to authorize an assignment of an agreement notwithstanding the existence of any restriction or limitation contained in the agreement. The discretion that the Court is afforded in relation to contractual assignment rights is subject to a requirement that monetary defaults be remedied, as found at section 11.3(4) of the statute:

> The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement – other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation – will be remedied on or before the day fixed by the court.[48]

[48] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 at section 11.3(4) **[TAB 15]**.

65. The requirement in relation to monetary defaults is absolute. The Court cannot order the assignment absent the curing of the defaults by a defined date.

66. Section 11.3 of the CCAA balances the interests of the company in CCAA proceedings, its stakeholders and counterparties to contracts being assigned. On the one hand, section 11.3 limits the ability of a counterparty to prevent an assignment based on anti-assignment clauses, or to terminate assigned contracts based on pre-filing non-monetary defaults, thereby protecting the integrity of the estate and valuable contracts, and the interests of purchasers from estates. On the other hand, section 11.3 requires that monetary defaults be cured, thus protecting the interests of counterparties. By explicitly preserving and providing for the payment of monetary claims under the contracts, section 11.3 recognizes and affirms the general principle underlying provincial laws (including section 20 of the Judicature Act) relating to the assignment of contractual rights. If the assignee wishes to acquire the benefit of the contract utilizing the CCAA process, it must rectify all of the monetary defaults owing thereunder.

67. The Cover Payment Indebtedness that is currently due, and that will continue to accrue due over the course of this case, is a monetary obligation owing pursuant to the Diavik JVA. In order for the Diavik JVA to be assigned the entirety of the Cover Payment Indebtedness will have to be satisfied or DDMI will have to consent to alternative terms. The addition of language that specifies this in the SISP Procedures will provide clarity and certainty to the SISP Procedures as they relate to the Diavik Interest.

68. The main point for DDMI's proposed amendments in relation to the Diavik Mine is with "Core Liabilities". If the Diavik Interest is acquired by the Stalking Horse Bidder, all Diavik operational liabilities are stated assumed as "Core Liabilities". Other bidders must pay. Absent treatment of the Core Liabilities in a manner that is supported by DDMI, there will not be a transaction in respect of the Diavik Interest and all bidders, including the Stalking Horse Bidder, must be subject to this requirement. Once this is recognized, material terms of the SISP Procedures that relate to the marketing and sale of the Diavik Interest should not be subject to amendment, waiver or modification without the consent of DDMI.

### *(iii) The Diavik Joint Venture*

69. The balance of the changes to the SISP Procedures reflect that, while the SISP Procedures contemplate a potential single bid, Dominion is marketing two separate assets (one being the Ekati Mine and the other being the Diavik Mine), and the significant stakeholder status of DDMI in relation to Diavik. The Ekati Mine, which is managed by Dominion, does not engage the same issues as the Diavik Mine, which is subject to the Diavik JVA. DDMI does not seek to interfere with or participate in the Ekati marketing process and does not seek to bid for Dominion's interest in the Diavik Mine or the Ekati Mine under the SISP procedures. However, to ensure both a fair process and operational certainty at the Diavik Mine, the SISP Procedures must account for the Diavik JVA and the importance of DDMI as it relates to the Diavik Mine.

70. The separation of the Ekati Mine and the Diavik Mine is reflected in the Stalking Horse Bid. This is not a standard stalking horse process where transactional certainty is created through a binding bid for all assets that that is free of material conditions. The Stalking Horse Bidder has not submitted a binding bid and contemplates being able to avoid closing by the exercise of diligence and financing conditions. The Stalking Horse Bid contemplates two bid scenarios, one in which the Diavik Interest is acquired and one in which it is not. Other bidders will necessarily follow the Stalking Horse Bidder in regards to this optionality. There is a very real prospect that there will not be a transaction for the Diavik Interest in the SISP Procedures.

## IV. RELIEF REQUESTED

71. DDMI respectfully requests that this Honourable Court grant the amendments DDMI seeks to the SARIO and SISP.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of May, 2020**

**McCarthy Tétrault LLP**

Per: *"McCarthy Tétrault LLP"*
Sean F. Collins / Walker W. MacLeod / Sean Kelly / Pantelis Kyriakakis
Counsel for Diavik Diamond Mines (2012) Inc.

## V. INDEX OF AUTHORITIES AND MATERIALS

1. *In Re Dominion Diamond Mines ULC et al.* (May 15, 2020), Calgary, 2001-05630, (ABQB);
2. Term Sheet for "Stalking Horse" Acquisition Agreement;
3. *Re Danier Leather Inc.*, 2016 ONSC 1044, 2016 CarswellOnt 2414;
4. *Re Mustang GP Ltd.*, 2015 ONSC 6562;
5. Janis Sarra, "Financing Insolvency Restructurings in the Wake of the Financial Crisis: Stalking Horses, Rogue White Knights and Circling Vultures" (2011) 29:3 Penn State Intl L Rev 581 at 594 (HeinOnline);
6. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10;
7. *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467, [2009] O.J. No. 3169;
8. *Re Brainhunter Inc.*, 2009 CarswellOnt 8207;
9. *Personal Property Security Act* (Northwest Territories), 1994, c. 8;
10. *Equirex Leasing Corp. v. Medcap Real Estate Holdings Inc.*, 2019 ONCA 152;
11. *The Personal Property Security Act* (Saskatchewan), 1993, SS 1993, c P-6.2;
12. *Rocky Meadows Transport Ltd. v Double D Construction Ltd.*, 2000 SKCA 19;
13. *CPC Networks Corp. v Eagle Eye Investments Inc.*, 2012 SKCA 118;
14. Alberta Template CCAA Initial Order Explanatory Notes, Alberta Template Orders Committee, Calgary/Edmonton, Alberta, Last Revised January 2019; and
15. *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.

**SCHEDULE "A"**
**PROPOSED AMENDMENTS TO THE SARIO**

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**<br><br>**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 | **SECOND AMENDED AND RESTATED INITIAL ORDER** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **BLAKE, CASSELS & GRAYDON LLP**<br>Barristers and Solicitors<br>3500 Bankers Hall East<br>855 – 2nd Street SW<br>Calgary, Alberta T2P 4J8<br><br>Attention: Peter L. Rubin / Peter Bychawski / Claire Hildebrand / Morgan Crilly<br>Telephone No.: 604.631.3315 / 604.631.4218 / 604.631.3331 / 403.260.9657<br>Email: peter.rubin@blakes.com / peter.bychawski@blakes.com / claire.hildebrand@blakes.com / morgan.crilly@blakes.com<br><br>Fax No.: 604.631.3309<br><br>File: 00180245/000013 |

**DATE ON WHICH ORDER WAS PRONOUNCED:** May 29, 2020

**LOCATION OF HEARING:** Calgary

**NAME OF JUDGE WHO MADE THIS ORDER:** The Hon. Madam Justice K. Eidsvik

**UPON** the application of Dominion Diamond Mines ULC ("**Dominion Diamond**"), Dominion Diamond Delaware Company, LLC, Dominion Diamond Canada ULC, Washington Diamond Investments, LLC, Dominion Diamond Holdings, LLC, and Dominion Finco Inc. (collectively, the "**Applicants**"); **AND UPON** having read the Applicants' Notice of Application, filed, the Affidavit of Brendan Bell, sworn May 21, 2020, filed, the Affidavit of Patrick Merrin, sworn May 11, 2020; (the "**Merrin Affidavit**"), filed, the Affidavit of John Startin, sworn May 21, 2020 (the "**Startin Affidavit**"), filed, and the Affidavit of Service of [ ]●, filed; **AND UPON** having read the Affidavit of Thomas Croese, sworn May ●, 2020, filed; **AND UPON** being advised 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 Monitor, counsel for Diavik Diamond Mines (2012) Inc. ("**DDMI**"), and any other counsel present; **AND UPON** reading the Fourth Report of FTI Consulting Canada Inc. (the "**Monitor**"), filed;

**IT IS HEREBY ORDERED AND DECLARED THAT:**

**SERVICE**

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Affidavit of Kristal Kaye sworn April 21, 2020, in the within proceedings (the "**Kaye Affidavit**")

**APPLICATION**

2. The Applicants are companies to which the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") applies.

**PLAN OF ARRANGEMENT**

3. The Applicants 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 (the "**Plan**").

**POSSESSION OF PROPERTY AND OPERATIONS**

4. The Applicants shall:

(a) subject to DDMI's rights in respect of the Dominion Products (as defined herein) as set forth at paragraph 16 of this Order, 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; and

(d) be entitled to continue to utilize the central cash management system currently in place as described in the Affidavit of Kristal Kaye sworn April 21, 2020 or replace it with another substantially similar central cash management system (the "**Cash Management System**") 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 Applicants 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 hereinafter defined) other than the Applicant, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

5. To the extent permitted by law, the Applicants shall be entitled but not required to make, in each case in accordance with the Definitive Documents (as defined below), the

following advances or payments of 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;

(b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order; and

(c) with the consent of the Monitor, obligations owing for goods and services supplied to the Applicants prior to the date of this Order if, in the opinion of the Applicants after consultation with the Monitor, the supplier or vendor of such goods or services is necessary for the operation or preservation of the Business or Property, provided that such payments shall not exceed $5,000,000 in the aggregate without prior authorization by this Court.

6. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay, in each case in accordance with the Definitive Documents, all reasonable expenses incurred by the Applicants 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 Applicants following the date of this Order.

7. The Applicants 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 that are required to be

deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan, and

(iii) 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 in connection with the sale of goods and services by the Applicants, 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 that are attributable to or in respect of the carrying on of the Business by the Applicants.

8. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants 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 from time to time for the period commencing from and including the date of this Order, but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicants 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 to any of their creditors as of the date of this Order, provided however that the Applicants are authorized, to pay interest accruing under the Existing Credit Facility in the ordinary course in accordance with the DIP Budget (as such terms are defined in the Interim Financing Term Sheet);

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

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

**RESTRUCTURING**

10. The Applicants shall, subject in each case to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents, have the right to:

(a) permanently or temporarily cease, downsize or shut down any portion of their business or operations and to dispose of redundant or non-material assets not exceeding $250,000 in any one transaction or $2,000,000 in the aggregate, 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 (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 and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicants deem appropriate, in accordance with section 32 of the CCAA; 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 Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

11. The Applicants shall provide each of the relevant landlords with notice of the Applicants'' 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'' 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 by further order of this Court upon application by the Applicants on at least two (2) days'' notice to such landlord and any such secured creditors. If the Applicants 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'' claim to the fixtures in dispute.

12. 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 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 in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants 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 OR THE PROPERTY**

13. ~~Until~~Subject to paragraph 16 of this Order, until and including August 31, 2020, 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 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 affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

14. 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 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 to carry on any business that the Applicants 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;

(d) prevent the registration of a claim for lien; ~~or~~

(e) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment~~.~~; or

(f) prevent DDMI from making Diavik JVA Cover Payments in accordance with the terms of the Diavik JVA or recovering indebtedness, liabilities and obligations owing by Dominion Diamond to DDMI in respect of Diavik JVA Cover Payments in accordance with paragraph 16 of this Order;

15. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their 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. Subject to paragraph 35 of this Order, nothing in this Order shall prevent the Interim Lenders (as defined below) from providing any notice or taking or declining to take any action permitted by the Interim Financing Term Sheet.

**NO INTERFERENCE WITH RIGHTS**

16. During the Stay Period, no person 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, except with the written consent of the Applicants and the Monitor, or leave of this Court. provided, however, that DDMI, in its capacity as manager under the Diavik JVA, be and is hereby authorized to hold the entirety of the Dominion Diamond share of production from the Diavik Mine (the "**Dominion Products**") at either the Diavik Production Splitting Facility in Yellowknife, Northwest Territories (the "**Yellowknife Facility**") or the Rio Tinto Cleaning and Sorting Facility in Antwerp, Belgium (the "**Antwerp Facility**"), in trust, and subject to the following conditions:

(a) DDMI shall segregate the Dominion Products from DDMI's share of production from the Diavik Mine pursuant to and in accordance with the Agreement to establish a Protocol for Diamond Splitting Production, dated January 7, 2003, as amended, modified, supplemented or restated from time to time;

(b) DDMI shall provide adequate safeguarding of, and insurance coverage for, the Dominion Products;

(c) DDMI shall provide each of Dominion Diamond and the Monitor with reporting and records on the Dominion Products as may be requested by Dominion Diamond or the Monitor;

(d) DDMI shall permit Dominion Diamond and the Monitor to attend at the Yellowknife Facility and the Antwerp Facility and audit or inspect the Dominion Products, on terms agreed to by each of Dominion Diamond, DDMI and the Monitor or as otherwise ordered by this Honourable Court; and

(e) DDMI shall be entitled to issue a demand (the "**Demand**") for all indebtedness, liabilities and obligations owing by Dominion Diamond to DDMI in respect of Diavik JVA Cover Payments (the "**Cover Payment Indebtedness**") on the earlier of:

(i) the date that the within CCAA proceedings are terminated;

(ii) the date that the Interim Lenders take any action to enforce the Interim Lenders' Charge, whether pursuant to the Interim Financing Term Sheet, the Definitive Documents or at law generally;

(iii) July 22, 2020, but only in the event that there is no Phase 1 Qualified Bid for the Diavik Interest (as such terms are defined in the SISP Procedures);

(iv) August 8, 2020, but only in the event that there is no Phase 2 Qualified Bid for the Diavik Interest (as such terms are defined in the SISP Procedures);

(v) August 27, 2020, but only in the event there is no Approval Motion filed in respect of a transaction involving the Diavik Interest; and

(vi) November 1, 2020;

and, unless Dominion Diamond satisfies the Demand by making an indefeasible cash payment of the then Cover Payment Indebtedness within thirty (30) days of delivery of the Demand, DDMI shall be entitled to dispose of the Dominion Products in a commercially reasonable manner in order to satisfy the Cover

Payment Indebtedness. DDMI is expressly empowered and authorized to take all necessary and desirable action to effect the disposition of the of the Dominion Products provided, however, that DDMI shall account to each of Dominion Diamond and the Monitor in respect of proceeds received from the disposition of the Dominion Products.

**CONTINUATION OF SERVICES**

17. 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, 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 Applicants

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 exercising any other remedy provided under such agreements or arrangements. The Applicants 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 in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

**NON-DEROGATION OF RIGHTS**

18. 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, nor shall any person, other than the Interim Lenders where applicable and solely in accordance with the Definitive Documents, 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.

**PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

19. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 15 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 of this Order and that relates to any obligations of the Applicants 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, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

**DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

20. 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.

21. 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 $4,000,000, as security for the indemnity provided in paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs ~~54~~55 and ~~56~~57 herein.

22. 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 20 of this Order.

**APPOINTMENT OF MONITOR**

23. 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 and the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants 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.

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

(a) monitor the Applicants' 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;

(c) assist the Applicants, to the extent required by the Applicants, the Interim Lenders or DDMI, in their dissemination to the Interim Lenders, DDMI and their counsel on a periodic basis of financial and other information as agreed to between the Applicants and the Interim Lenders or DDMI which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lenders or DDMI;

(d) advise the Applicants in the preparation of the Applicants'' cash flow statements and reporting required by the Interim Lenders or DDMI, which information shall be reviewed with the Monitor and delivered to the Interim Lenders or DDMI and their counsel on a periodic basis or as otherwise agreed to by the Interim Lenders or DDMI;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) 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 to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Applicants or to perform its duties arising under this Order;

(h) 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;

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

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

25. 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 or regulation. 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 within the meaning of any federal or provincial environmental legislation.

26. The Monitor shall provide any creditor of the Applicants and each of the Interim Lenders and DDMI with information provided by the Applicants 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 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 may agree.

27. 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.

28. The Monitor, counsel to the Monitor, and counsel to the Applicants shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a bi-weekly basis.

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

30. The Monitor, counsel to the Monitor, if any, and the Applicants' counsel, 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 $3,500,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor 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 ~~54~~55 and ~~56~~57 hereof.

**INTERIM FINANCING AND INTERIM LENDER'S CHARGE**

31. The Applicants are hereby authorized and empowered to obtain and borrow under a credit facility (the "**Interim Facility**") pursuant to the Interim Financing Term Sheet dated as of May 21, 2020 (the "**Interim Financing Term Sheet**") among, the Applicants, Washington Diamond Lending, LLC and the other lenders party thereto (collectively in such capacity, the "**Interim Lenders**"), and the other parties thereto, in order to finance the Applicants' working capital requirements and other general corporate purposes and permitted capital expenditures set forth in the Interim Financing Term Sheet, provided that borrowings under such credit facility shall not exceed the principal amount of US$60 million unless permitted by further order of this Court and agreed to by the Interim Lenders.

32. The Interim Facility shall be on the terms and subject to the conditions set forth in the Interim Financing Term Sheet, filed, as such Interim Financing Term Sheet may be amended in accordance with its terms with the consent of the Monitor.

33. The Applicants are hereby authorized and empowered to execute and deliver the Interim Financing Term Sheet and such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Interim Financing Term Sheet or as may be reasonably required by the Interim Lenders pursuant to the terms thereof, and the Applicants are hereby authorized and directed, to pay and perform all of their indebtedness, interest, fees, liabilities, and obligations to the Interim Lenders under and pursuant to the Interim Financing Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order or any other Order granted by this Court in these CCAA proceedings.

34. The Interim Lenders shall be entitled to the benefits of and are hereby granted a charge (the "**Interim Lenders' Charge**") on the Property other than the Excluded Assets (as defined in the Interim Financing Term Sheet) to secure all Interim Financing Obligations (as defined in the Interim Financing Term Sheet), which Interim Lenders' Charge shall be in the aggregate amount of the Interim Financing Obligations outstanding at any given time under the Definitive Documents. The Interim Lenders' Charge shall not

secure any obligation existing before the date this Order is made. The Interim Lenders' Charge shall have the priority set out in paragraphs ~~54~~55 and ~~56~~57 hereof.

35. Notwithstanding any other provision of this Order:

(a) the Interim Lenders may take such steps from time to time as they may deem necessary or appropriate to file, register, record or perfect the Interim Lenders' Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lenders' Charge, the Interim Lenders may (i) immediately cease making advances to the Applicants and set off and/or consolidate any amounts owing by the Interim Lenders to the Applicants against the obligations of the Applicants to the Interim Lenders under the Interim Financing Term Sheet, the Definitive Documents or the Interim Lenders' Charge and make demand, accelerate payment, and give other notices; (ii) upon five (5) days' notice to the Applicants and the Monitor, apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and (iii) with leave of the Court, exercise any other rights and remedies against the Applicants ~~or~~, the Property under or pursuant to the Interim Financing Term Sheet, Definitive Documents, and Interim Lenders' Charge; and

(c) the foregoing rights and remedies of the Interim Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

36. The Interim Lenders shall be treated as unaffected in any Plan filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any Interim Financing Obligations.

37. This Order is subject to provisional execution and, if any of the provisions of this Order in connection with the Definitive Documents or the Interim Lenders' Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (each, a "**Variation**") whether by subsequent order of this Court or any other court on or pending an appeal from this Order, such Variation shall not in any way impair, limit

or lessen the priority, protections, rights or remedies of the Interim Lenders under this Order (as made prior to the Variation) or the Definitive Documents, with respect to any advances made prior to the Interim Lenders being given written notice of the Variation and the Interim Lenders shall be entitled to rely on this Order as issued (including, without limitation, the Interim Lenders' Charge) for all advances so made.

**SISP PROCEDURES, STALKING HORSE TERM SHEET, AND BREAK-UP FEE AND EXPENSE CHARGE**

38. Capitalized terms utilized in paragraphs 38 to ~~45~~46 of this Order that are not otherwise defined in this Order shall have the meanings ascribed to them in the Procedures for the Sale and Investment Solicitation Process (the "**SISP Procedures**") in the form attached as **Schedule "A"** hereto.

39. The SISP Procedures (subject to any amendments thereto that may be made in accordance therewith) are hereby approved.

40. The Applicants, the Monitor and their respective advisors (including the SISP Advisor) are hereby authorized and directed to carry out the SISP Procedures and to take such steps and execute such documentation as may be necessary or incidental to the SISP Procedures.

41. Each of the Applicants, the SISP Advisor, the Monitor, and the Stalking Horse Bidder (solely in its capacity as the Stalking Horse Bidder) and their respective affiliates, partners, directors, employees, advisors (including the SISP Advisor), agents, shareholders and controlling persons shall have no liability with respect to any losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of the SISP Procedures or the conduct thereof, except to the extent of such losses, claims, damages or liabilities resulting from the gross negligence or willful misconduct of any of the foregoing in performing their obligations under the SISP Procedures (as determined by this Court).

42. Subject to approval by the Monitor, Washington Diamond Investments, LLC, Dominion Diamond Holdings, LLC and Dominion Diamond Mines ULC, as vendors (collectively, the "**Dominion Vendors**"), are hereby authorized to negotiate and finalize a definitive stalking horse agreement of purchase and sale (the "**Stalking Horse Bid**") among the Dominion Vendors, as sellers, and the Stalking Horse Bidder, as purchaser,

substantially in accordance with the terms of the stalking horse term sheet attached as Exhibit ~~"~~"B" to the Startin Affidavit (the "**Stalking Horse Term Sheet**"). The Stalking Horse Bid submitted by the Stalking Horse Bidder, on the terms set out in the Stalking Horse Term Sheet and to be memorialized in the Stalking Horse Bid, is hereby approved as the Stalking Horse Bid pursuant to and for purposes of the SISP Procedures, provided that nothing herein approves the sale to and the vesting of any assets or property in the Stalking Horse Bidder pursuant to the Stalking Horse Term Sheet or the Stalking Horse Bid and that the approval of the sale and vesting of such assets and property shall be considered by this Court on a subsequent motion made to this Court if the Stalking Horse Bidder is the Successful Bidder pursuant to the SISP Procedures.

43. The Dominion Vendors' obligation to pay the Break-Up Fee and Expense Reimbursement pursuant to and in accordance with the Stalking Horse Term Sheet is hereby approved.

44. The Stalking Horse Bidder shall be entitled to the benefit of and is hereby granted a charge (the "**Break-Up Fee and Expense Charge**") on the Property as security for the payment of the Break-Up Fee and Expense Reimbursement by the Dominion Vendors pursuant to and in accordance with the Stalking Horse Term Sheet or, following its execution, the Stalking Horse Bid. The Break-Up Fee and Expense Charge shall have the priority set out in paragraphs ~~54~~55 and ~~56~~57 hereof.

~~45.~~ Nothing in this Order shall affect the rights of DDMI under the Diavik JVA and, for greater certainty: (a) all of the rights and remedies of DDMI under the Diavik JVA be and are hereby fully reserved; (b) the SISP Procedures and the matters contemplated therein shall not prejudice the rights of DDMI under the Diavik JVA; and (iii) the SISP Procedures and the matters contemplated therein shall not in any way shall diminish the obligations of Dominion Diamond under the Diavik JVA. Without limiting the generality of the foregoing, any Successful Bid and each step taken toward the satisfaction or waiver of conditions associated with any Successful Bid (including, for greater certainty, the Stalking Horse Bid) must comply with the provisions of the Diavik JVA. The Applicants, the SISP Advisor and the Monitor shall provide such information as reasonably requested by DDMI, from time to time, to confirm the SISP Procedures are being conducted in a manner that is consistent with this paragraph 45.

46. ~~45.~~ Pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Applicants, the SISP Advisor and the Monitor may disclose personal information of identifiable individuals to Potential Bidders and their advisors in connection with the SISP Procedures, but only to the extent desirable or required to carry out the SISP Procedures. Each Potential Bidder (and their respective advisors) to whom any such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information solely to its evaluation of a transaction in respect of the Applicants and the Property, and if it does not complete such a transaction, shall return all such information to the Applicants, or in the alternative destroy all such information. The Successful Bidder shall be entitled to continue to use the personal information provided to it in a manner that is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants, or ensure that all other personal information is destroyed.

**KERP AND THE KERP CHARGE**

47. ~~46.~~ The Key Employee Retention Plan (the "**KERP**") as described in the Merrin Affidavit, is hereby approved.

48. ~~47.~~ The Applicants are hereby authorized and directed to enter into the KERP with those employees (the "**Key Employees**") listed in Confidential Exhibit ~~"~~"A" to the Merrin Affidavit (the "**Confidential Merrin Affidavit Exhibit**").

49. ~~48.~~ The Applicants are hereby authorized and directed to pay a lump sum payment (the "**Incentive Bonus**") to each of the Key Employees in the amount set out in the Confidential Merrin Affidavit Exhibit, to be paid as follows:

(a) the first one-third of the Incentive Bonus shall be paid to each Key Employee on the earlier of June 6, 2020 and their last day of employment (if the Key Employee is terminated without cause); and

(b) the remaining two-thirds of the Incentive Bonus shall be paid to each Key Employee on the earlier of November 6, 2020, their last day of employment (if the Key Employee is terminated without cause) and the closing of any restructuring transaction.

50. ~~49.~~ Payments to Key Employees under the KERP will only be made if, at the date the relevant payment of the Incentive Bonus is due, as described in paragraph ~~48,~~49, the Key Employee has fulfilled his or her employment obligations and has not voluntarily resigned or been terminated for cause.

51. ~~50.~~ The Key Employees shall be entitled to the benefit of and are hereby granted a charge (the "**KERP Charge**") on the Property as security for the amounts payable to the Key Employees pursuant to the KERP, which charge shall not exceed an aggregate amount of $580,000. The KERP Charge shall have the priority set out in paragraphs ~~54~~55 and ~~56~~57 hereof.

52. ~~51.~~ The Confidential Merrin Affidavit Exhibit shall, notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*, Alta Reg 124/2010, be sealed in the Court file, kept confidential, and not form part of the public record. The Confidential Merrin Affidavit Exhibit shall be placed separate and apart from all other contents of 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, and shall not be opened upon further order of this Court.

**FINANCIAL ADVISOR AGREEMENT AND FINANCIAL ADVISOR'S CHARGE**

53. ~~52.~~ The agreement dated as of April 8, 2020 between Dominion Mines and Evercore Group L.L.C. (the "**Financial Advisor**") (as amended on April 22, 2020, the "**Financial Advisor Agreement**"), as set out in Exhibit ~~"~~"E" to the Startin Affidavit, pursuant to which the Applicants have engaged the Financial Advisor to provide the services referenced therein is hereby approved, *nunc pro tunc*, including, without limitation, the payment of the Monthly Fee, Restructuring Fee, Liability Management Transaction Fee, Financing Fee, and Minimum Financing Fee contemplated thereby, and the Applicants are authorized to continue the engagement of the Financial Advisor on the terms set out in the Financial Advisor Agreement.

54. ~~53.~~ The Financial Advisor shall be entitled to the benefit of and is hereby granted a charge on the Property as security for the Monthly Fee, Restructuring Fee, Liability Management Transaction Fee, Financing Fee, and Minimum Financing Fee (in each case as defined in the Financial Advisor Agreement), as follows:

(a) the Financial Advisor shall have the benefit and protections afforded by the Administration Charge, *nunc pro nunc*, as security for the Monthly Fee and the Financial Advisor's disbursements incurred both before and after the Order granted by this Court in these proceedings on April 22, 2020; and

(b) the Financial Advisor shall have the benefit of a charge (the "**Financial Advisor Charge**") on the Property, as security for the Restructuring Fee, Liability Management Transaction Fee, Financing Fee, and Minimum Financing Fee (in each case on the terms set out in the Financial Advisor Agreement as approved by this Order). The Financial Advisor Charge shall have the priority set out in paragraphs ~~54~~55 and ~~56~~57 hereof.

**VALIDITY AND PRIORITY OF CHARGES**

55. ~~54.~~ The priorities of the Directors~~'~~' Charge, the Administration Charge, the KERP Charge, the Break-Up Fee and Expense Charge, the Interim Lenders' Charge, and the Financial Advisor Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $3,500,000);

Second – Directors~~'~~' Charge (to the maximum amount of $4,000,000);

Third – KERP Charge (to the maximum amount of $580,000);

Fourth – Break-Up Fee and Expense Charge; and

Fifth – Interim Lenders' Charge and the Financial Advisor Charge, *pari passu*.

56. ~~55.~~ 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.

57. ~~56.~~ Each of the Charges shall constitute a charge on the Property (other than, solely in the ~~the~~ case of the KERP Charge, the Break-Up Fee and Expense Charge, the Interim Lenders' Charge and the Financial Advisor Charge, the Excluded Assets) 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, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person~~;~~, provided, however, that:

(a) the KERP Charge, the Break-Up Fee and Expense Charge, the Interim Lenders' Charge and the Financial Advisor Charge shall ~~rank subordinate to any Encumbrances under Article 9 of the Diavik Joint Venture Agreement in respect of the assets owned by the Diavik Joint Venture and the Borrower~~not attach to, charge or encumber Dominion Diamond's interest in the Diavik ~~Joint Venture~~JVA (and the respective rights of the parties thereunder), Dominion Diamond's Participating Interest, Net Profit Royalty and interest in the Assets (as such terms are defined in the Diavik JVA) or the Dominion Products;

(b) the Encumbrances of the Existing Credit Facility Agent (as defined in the Interim Financing Term Sheet) in respect of the Diavik Collateral (as defined in the Interim Financing Term Sheet) shall rank senior to the Interim Lenders' Charge in respect of the Diavik Collateral;

(c) the Encumbrances of the Existing Credit Facility Agent in respect of the Interim Financing Priority Collateral (as defined in the Interim Financing Term Sheet) shall be senior to the Interim Lenders' Charge in respect of the Interim Financing Priority Collateral securing any October Advances (as defined in the Interim Financing Term Sheet) and related interest; and

(d) the Interim Lenders' Charge in respect of the Interim Facility Priority Collateral securing any October Advances and related interest shall be senior to any Encumbrances of the Existing Credit Facility Agent securing the First Lien Facility LC Obligations (as defined in the Interim Financing Term Sheet).

58. ~~57.~~ Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Applicants also obtain the prior written consent of the Monitor and the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further order of this Court.

59. ~~58.~~ The Charges, the Interim Financing Term Sheet and the other Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees and/or the Interim Lenders 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 or receivership order(s) issued pursuant to the BIA, or any bankruptcy or receivership order made in respect of the Applicants;

(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, licence, permit or other agreement (collectively, an "**Agreement**") that binds the Applicants, 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, including the Interim Financing Term Sheet and the other Definitive Documents, shall create or be deemed to constitute a breach by the Applicants 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, the Applicants entering into the Interim Financing Term Sheet, or the execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicants pursuant to this Order, including the Interim Financing Term Sheet or the Definitive Documents, 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**

60. ~~59.~~ 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, provided that any such allocation shall not affect or impair the right of the Interim Lenders to credit bid the full amount of the Interim Financing Obligations in respect of all Property in accordance with the Interim Financing Term Sheet.

**SERVICE AND NOTICE**

61. ~~60.~~ The Monitor shall (i) without delay, publish in the *Globe and Mail* and *The Northern Miner* 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 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.

62. ~~61.~~ The Monitor shall establish a case website in respect of the within proceedings at cfcanada.fticonsulting.com/Dominion (the "**Website**").

63. ~~62.~~ Any person that wishes to be served with any application and other materials in these proceedings must deliver to the Monitor by way of ordinary mail, courier, personal delivery or electronic transmission a request to be added to the service list (the "**Service List**") to be maintained by the Monitor. The Monitor shall post and maintain an up-to-date form of the Service List on the Website.

64. ~~63.~~ Any party to these proceedings may serve any court materials in these proceedings by emailing 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 shall post a copy of all prescribed materials on the Website.

65. ~~64.~~ Applicants and, where applicable, the Monitor are 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 Applicants~~'~~, creditors or other interested parties at their respective addresses as last shown on the records of the Applicants 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.

66. ~~65.~~ Any interested party (including the Applicants 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 provided, however, that the Court may only vary or amend paragraph 57 of this Order with the consent of DDMI.

**GENERAL**

67. ~~66.~~ The Applicants 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.

68. ~~67.~~ 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. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

69. ~~68.~~ 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 Business or the Property.

70. ~~69.~~ This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the

Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

71. ~~70.~~ Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order 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.

72. ~~71.~~ 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

Document comparison by Workshare Compare on Monday, May 25, 2020 8:30:44 PM

| Input: | |
|---|---|
| Document 1 ID | file://C:\Users\wmacleod\Desktop\Second ARIO Blakes Original.DOCX |
| Description | Second ARIO Blakes Original |
| Document 2 ID | PowerDocs://DOCS/20415662/2 |
| Description | DOCS-#20415662-v2-Second_ARIO_-_MT_Comments |
| Rendering set | MTStandard |

| Legend: | |
|---|---|
| Insertion | |
| ~~Deletion~~ | |
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| Style change | |
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| ~~Moved deletion~~ | |
| Inserted cell | |
| Deleted cell | |
| Moved cell | |
| Split/Merged cell | |
| Padding cell | |

| Statistics: | |
|---|---|
| | Count |
| Insertions | 129 |
| Deletions | 82 |
| Moved from | 0 |
| Moved to | 0 |
| Style change | 0 |
| Format changed | 0 |
| Total changes | 211 |

**SCHEDULE “B”**
**PROPOSED AMENDMENTS TO THE SISP**

**Procedures for the Sale and Investment Solicitation Process**

On April 22, 2020, Washington Diamond Investments, LLC, Dominion Diamond Holdings, LLC, Dominion Finco Inc., Dominion Diamond Mines ULC ("**DDM**"). Dominion Diamond Delaware Company LLC and Dominion Diamond Canada ULC (collectively, the "**Applicants**") obtained an Initial Order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act* (Canada) **("CCAA")** from the Alberta Court of Queen's Bench (the "**Court**") that, among other things, commenced the CCAA proceedings (the "**CCAA Proceedings**"), granted an initial stay of proceedings in respect of the Applicants (the "**Stay**") and appointed FTI Consulting Canada Inc. as monitor (the "**Monitor**"). On May 1, 2020, the Applicants obtained an amended and restated version of the Initial Order from the Court (the "**Amended and Restated Initial Order**") that, among other things, extended the Stay. On May ~~12,~~29, 2020, the Applicants obtained a further amended and restated version of the Initial Order from the Court (the "**Second Amended and Restated Initial Order**") that, among other things, approved the DIP (as defined below) and approved the Sale and Investment Solicitation Process (the "**SISP**") set forth herein to determine whether a Successful Bid (as defined below) can be obtained.

For greater certainty, any provision of this SISP which affords discretion to the Applicants including without limitation in connection with the granting by the Applicants of any consent, waiver or approval - requires that the Applicants exercise such discretion in a commercially reasonable manner and with prior consultation with the SISP Advisor (as defined below), the Agent Advisors (as defined below), on behalf of the First Lien Lenders (as defined below), DDMI (as defined below) and the Monitor. Any consent or approval to be provided by the Stalking Horse Bidder (as defined below), the SISP Advisor, the Agent, on behalf of the First Lien Lenders, the Applicants and/or DDMI and/or the Monitor must be in writing (including by way of e-mail) and any approval required pursuant to the terms hereof is in addition to, and not in substitution for, any other approvals required by the CCAA or as otherwise required at law in order to implement a Successful Bid. Notwithstanding the forgoing or any other provision of the SISP (i) the Agent Advisors shall only be consulted to the extent that the Agent confirms that neither it nor any First Lien Lender intends to participate in the SISP as a bidder and (ii) nothing herein shall oblige or permit the SISP Advisor, the Monitor or the Applicants to disclose to the Agent Advisors the identity of any Potential Bidder, Phase I Qualified Bidder, or Phase 2 Qualified Bidder (other than the Stalking Horse Bidder) or any LOI, Phase 1 Qualified Bid, Binding Offer or Phase 2 Qualified Bid, prior to commencement of the Auction (all as such terms are defined below).

**Defined Terms**

1. In addition:
   (a) "**Agent**" means Credit Suisse AG, Cayman Islands Branch, as the administrative agent and collateral agent, under the Existing Credit Agreement1;
   (b) "**Agent Advisors**" shall mean Osier, Hoskin & Harcourt LLP, Cahill Gordon & Reindel LLP and RPA Advisors, or any one of them;
   (c) "**Business Day**" means a day, other than a Saturday or Sunday, on which banks are open for business in Calgary, Alberta;
   (d) "**Cover Payments**" has the same meaning as in the Diavik JVA;
   (e) "**CSA**" means the Closure Security Agreement dated December 13, 2019 between DDMI and DDM;
   (f) "**DIP**" means the Interim Facility provided to Dominion Diamond Mines ULC and certain of its affiliates by Washington Diamond Lending, LLC (the "**Washington Interim**

1 References herein to the Agent mean the Agent, on behalf of the First Lien Lenders.

**Lender**") and the Agent and/or one or more First Lien Lenders (in their capacity as lenders under the DIP, the "**First Lien Interim Lenders**") as approved by the Second Amended and Restated Initial Order;

(g) ~~(e)~~ "~~**Diavik Interest**" means the Applicants' right, title and interest in and to the Diavik Diamond Mine located in Lac de Gras, Northwest Territories and operated by DDM's joint venture partner,~~**DDMI**" means Diavik Diamond Mines (2012) Inc.;

(h) "**Diavik Diamond Mine**" means the Diavik Diamond mine located in Lac de Gras, Northwest Territories;

(i) "**Diavik Interest**" means DDM's Participating Interest (as such term is defined in the Diavik JVA) under and pursuant to the Diavik JVA including the Dominion Products;

(j) "**Diavik JVA**" means the joint venture agreement between DDM and DDMI dated March 23, 1995, as amended, pursuant to which DDM currently holds a forty (40%) percent Participating Interest and DDMI currently holds a sixty (60%) percent Participating Interest in the Diavik Diamond Mine;

(k) "**Dominion Products**" has the meaning ascribed to it in the Second Amended and Restated Initial Order;

(l) ~~(f)~~ "**Existing Credit Agreement**" means the Revolving Credit Agreement dated as of November 1, 2017 by and among Dominion Diamond Mines ULC, as borrower, Washington Diamond Investments, LLC, a Delaware limited liability company, the Agent, and each of the other parties and lenders party thereto (the "**First Lien Lenders**"), as amended, restated, supplemented or otherwise modified from time to time.

(m) ~~(g)~~ "**Non-Diavik Assets**" means the Applicants' right, title and interest in all Property other than the Diavik Interest (including, for the avoidance of doubt the Applicants' right, title, and interest in the Ekati Diamond Mine located in Lac de Gras, Northwest Territories, which is operated by DDM);

(n) ~~(h)~~ "**SISP Advisor**" means Evercore Group LLC, as retained by the Applicants to conduct the SISP.

**Sale and Investment Solicitation Process Procedures**

*Opportunity*

2. The SISP is intended to solicit interest in, and opportunities for, (i) a sale or partial sales of (A) all, substantially all, or certain of the assets, property and undertakings (collectively, the "**Property**") of the Applicants and certain of their subsidiaries (together with the Applicants, the "**Dominion Diamond Group**"); (B) the Diavik Interest; or (C) the Non-Diavik Assets or (ii) for an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Dominion Diamond Group or its business. Bids considered pursuant to the SISP may include one or more of an investment, restructuring, recapitalization, refinancing or other form of reorganization of the business and affairs of the Dominion Diamond Group as a going concern or a sale (or partial sales) of all, substantially all, or certain of the Property of the Dominion Diamond Group, or a combination thereof (the "**Opportunity**").

3. The Applicants have received a bid from Washington Diamond Investment Holdings ~~11,~~ LLC (the "**Stalking Horse Bidder**") which constitutes a qualified bid for all purposes and at all times under this SISP (the "**Stalking Horse Bid**"), and which Stalking Horse Bid shall serve as the "stalking horse" bid for purposes of this SISP. Notwithstanding the receipt of the Stalking Horse Bid, all interested parties are encouraged to submit bids based on any form of Opportunity that they may elect to advance pursuant to the SISP, including as a Sale Proposal or an Investment Proposal (each as defined below). A copy of the Stalking Horse Bid is available to all Phase 1 Qualified Bidders (as defined below).

4. The SISP set forth herein describes the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Dominion Diamond Group and its Property, including a copy of the Stalking Horse Bid, the manner in which bidders may participate in the SISP, the requirement of and the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder (as defined below), and the approval thereof by the Court. The Monitor shall oversee the SISP and in particular shall oversee the SISP Advisor in connection therewith. The Applicants are required to assist and support the efforts of the SISP Advisor and the Monitor as provided for herein. In the event that there is disagreement as to the interpretation or application of the SISP, the Court will have exclusive jurisdiction to hear and resolve such dispute.
5. Certain bid protections (i.e. break fee and expense reimbursement) have been approved in respect of the Stalking Horse Bid, subject to the conditions set forth therein, by the Court pursuant to the Second Amended and Restated Interim Order. No other bidder may request or receive any form of bid protection as part of any offer made pursuant to the S1SP.

The key dates pursuant to the SISP are as follows (capitalized terms in the chart below have the meaning ascribed in the SISP):

| **EVENT** | **DATE** |
|---|---|
| **SISP Advisor to distribute Teaser Letter to Potential Bidders** | **As soon as practical** |
| **SISP Advisor to prepare and have available to Potential Bidders the CIM and VDR** | **As soon as practical** |
| **Phase 1 Bid Deadline (for delivery of non-binding LOIs by Phase 1 Qualified Bidders in accordance with the requirement of paragraph 14 of the SISP)** | **By June 26, 2020** |
| **SISP Advisor to notify each Phase 1 Qualified Bidder in writing as to whether ~~is~~its bid constituted a Phase 1 Successful Bid** | **Within five (5) Business Days of the Phase 1 Bid Deadline, or at such later time as the Applicants, Advisor, the Agent Advisors and the Monitor, deem appropriate** |
| **Sale Approval hearing in respect of the Stalking Horse Bid in the event that no other Phase 1 Successful Bids are received** | **By July 13, 2020** |
| **Phase 2 Bid Deadline (for delivery of definitive offers by Phase 2 Qualified Bidders in accordance with the requirement of paragraph 22 of the SISP)** | **By August 7, 2020** |
| **Auction Commencement Date (if needed)** | **August 10, 2020** |
| **Deadline for selection of final Successful Bid** | **August 14, 2020 or at such later date as the Applicants, in consultation with the SISP** |

| | |
|---|---|
| | **Advisor, the Agent Advisors and the Monitor, deem appropriate** |
| **Deadline for completion of definitive documentation in respect of Successful Bid** | **August 18, 2020** |
| **Deadline for filing of Approval Motion in respect of Successful Bid** | **August 26, 2020** |
| **Anticipated Deadline for closing of the Stalking Horse Bid in the event that no other Phase 1 Successful Bids are received** | **August 31, 2020** |
| **Anticipated Deadline for closing of Successful Bid being the Target Closing Date** | **September 9, 2020 or such earlier date as is achievable** |
| **Outside Date by which the Successful Bid must close** | **October 31, 2020** |

*Solicitation of Interest: Notice of the SISP*

6. As soon as reasonably practicable after the granting of the Second Amended and Restated Initial Order:
   (a) the SISP Advisor shall cause a notice of the SISP and such other relevant information which the SISP Advisor, in consultation with the Applicants and the Monitor, considers appropriate to be published in the *Globe & Mail* and such other publications as the SISP Advisor may consider appropriate; and
   (b) the Dominion Diamond Group shall issue a press release setting out the notice and such other relevant information regarding the Opportunity as it may consider appropriate, with Canada Newswire designating dissemination in Canada.
7. The SISP Advisor shall prepare and distribute a summary describing the Opportunity (a "**Teaser Letter**"), outlining the SISP and inviting recipients of the Teaser Letter to express their interest pursuant to the SISP, for distribution to potential bidders as soon as practical.
8. A confidential virtual data room (the "**VDR**") in relation to the Opportunity will be made available by the SISP Advisor to Potential Bidders that have executed the NDA (as defined below). The VDR will be available as soon as practical. Following the completion of "Phase 1", but prior to the completion of "Phase 2", additional information may be added to the VDR to enable Phase 2 Qualified Bidders to complete any confirmatory due diligence in respect of the Dominion Diamond Group and the Opportunity. The Applicants may establish separate VDRs (including "clean rooms"), if the Applicants and the SISP Advisor reasonably determine that doing so would further the Dominion Diamond Group and any Potential Bidders' compliance with applicable antitrust and competition laws, or would prevent the distribution of commercially sensitive competitive information.

**PHASE 1: NON-BINDING LOIs**

*Phase I Qualified Bidders and Delivery of Confidential Information Memorandum*

9. In order to participate in the SISP, an interested party must deliver to the SISP Advisor at the address specified in Appendix "A" hereto (including by email), and prior to the distribution of any confidential information by the SISP Advisor to such interested party (including access to the VDR), an executed non-disclosure agreement in form and substance satisfactory to the Applicants (an "**NDA**"), which shall inure to the benefit of any Successful Bidder (as defined below) that closes a transaction contemplated by the Successful Bid (as defined below). DDM shall advise DDMI if it has entered into any NDA in respect of the Diavik Interest and the names of the parties with which it has entered into any such NDAs. Any NDA in respect of the Diavik Interest shall also inure to the benefit of DDMI and copies thereof shall be provided to DDMI. Pursuant to the terms of the NDA to be signed by a potential bidder (each potential bidder who has executed an NDA with the Applicants, a "**Potential Bidder**") each Potential Bidder will be prohibited from communicating with any other Potential Bidder regarding the Opportunity during the term of the SISP, without the express written consent of the Applicants. Prior to the Applicants' executing an NDA with any potential bidder, any potential bidder may be required to provide evidence, reasonably satisfactory to the Applicants of its financial wherewithal to complete a transaction in respect of the Opportunity (either with existing capital or with capital reasonably anticipated to be raised prior to closing) and/or to disclose details of their ownership. For the avoidance of doubt, a party who has executed an NDA or a joinder with a Potential Bidder for the purpose of providing financing to a Potential Bidder in connection with the Opportunity (such party a "**Financing Party**") shall not be deemed a Potential Bidder for purposes of the SISP, provided that such Financing Party undertakes to inform the Applicants in the event that it elects to act as a Potential Bidder.

10. A Potential Bidder that has executed an NDA and provided any additional information required pursuant to paragraph 9, will be deemed a "**Phase 1 Qualified Bidder**" and will be promptly notified of such classification by the SISP Advisor. For the avoidance of doubt, the Stalking Horse Bidder is a Phase 1 Qualified Bidder.

11. The SISP Advisor, with the assistance of the Applicants, will prepare and send to each Phase **1** Qualified Bidder (including the Stalking Horse Bidder) and DDMI a confidential information memorandum providing additional information considered relevant to the Opportunity (a "CIM") and provide an unredacted copy of the Staking Horse Bid as soon as practicable. The SISP Advisor, the Applicants, the Monitor and their respective advisors make no representation or warranty as to the information contained in the CIM or otherwise made available pursuant to the SISP.

12. The SISP Advisor shall provide any person deemed to be a Phase I Qualified Bidder (including the Stalking Horse Bidder) and DDMI with access to the VDR. The SISP Advisor, the Applicants and the Monitor and their respective advisors make no representation or warranty as to the information contained in the VDR. The VDR shall contain a template letter of intent (the "**Template LOI**") and a proposed Purchase and Sale Agreement, based on the Stalking Horse Bid ("**Template PSA**").

13. If a Phase I Qualified Bidder (other than the Stalking Horse Bidder) wishes to submit a bid, it must deliver a non-binding letter of intent (an "~~**LOP**~~**LOI**") (each such LOI, provided in accordance with paragraph 14 below, a "**Phase 1 Qualified Bid**"), to the SISP Advisor, with a copy to the Monitor, at the addresses specified in **Appendix "A"** hereto (including by email) so as to be received by the SISP Advisor and the Monitor not later than 5:00 p.m. (Mountain Standard Time) on June 26, 2020, or such other date or time as may be agreed by the Applicants with the consent of the Monitor (the "**Phase 1 Bid Deadline**"). To the extent possible, the Phase 1 Qualified Bid should follow the format as set out in the Template LOI.

14. An LOI submitted by a Phase 1 Qualified Bidder will only be considered a "**Phase 1 Qualified Bid**" by the Applicants, the Monitor and the SISP Advisor, if the LOI complies at a minimum with the following:

(a) it has been duly executed by all required parties;

(b) it is received by the Phase **I** Bid Deadline;

(c) it provides written evidence, satisfactory to the Applicants, of the ability to consummate the transaction within the timeframe contemplated by the SISP and to satisfy any obligations or liabilities to be assumed on closing of the transaction, including, without limitation, a specific indication of the sources of capital;

(d) it identifies all proposed material conditions to closing including, without limitation, any internal, regulatory or other approvals and any form of agreement or other document required from a government body, stakeholder or other third party, and an estimate of the anticipated timeframe and any anticipated impediments for obtaining such approvals;

(e) it (i) identifies the Phase 1 Qualified ~~Phase 1~~ Bidder and representatives thereof who are authorized to appear and act on behalf of the Phase 1 Qualified ~~Phase 1~~ Bidder for all purposes regarding the contemplated transaction, and (ii) fully discloses the identity of each entity or person that will be sponsoring, participating in or benefiting from the transaction contemplated by the ~~L01~~LOI;

(f) an outline of any additional due diligence required to be conducted in order to submit a binding offer;

(g) it clearly indicates:

(i) the Phase 1 Qualified Bidder is seeking to acquire (A) all or substantially all of the Property, (B) the Diavik Interest or (C) the Non-Diavik Assets, whether through an asset purchase, a share purchase or a combination thereof (either one being, a "**Sale Proposal**") or some other portion of the Property (a "**Partial Sale Proposal**"); or

(ii) whether the Phase 1 Qualified Bidder is offering to make an investment in, restructure, recapitalize, reorganize or refinance the Dominion Diamond Group or its business (an "**Investment Proposal**");~~ and~~

(iii) that the Sale Proposal or Investment Proposal, as the case may be, will at a minimum and on closing, provide cash proceeds which are equal to the aggregate total of: (A) the amount of cash payable under the Stalking Horse Bid if it does not provide for a credit bid or, if the Stalking Horse Bid does provide for a credit bid, the amount of cash payable thereunder together with the amount of obligations being credit bid thereunder, *plus* (B) the amount of the expense reimbursement and break fee (if any) payable to the Stalking Horse Bidder, *plus* (C) a minimum overbid amount of US$1 million (the amounts set forth in this paragraph 14(g)(iii), the "**Minimum Purchase Price**"); provided, however, the Applicants may deem this criterion satisfied if the Sale Proposals, Partial Sale Proposals or the Investment Proposals, together with one or more other non-overlapping Sale Proposal, Partial Sale Proposal or Investment Proposal, in the aggregate, meet the Minimum Purchase Price (such bids, "**Aggregated Bids**") (the amount of the Minimum Purchase Price shall be confirmed by the Sale Advisor with Potential Bidders); and

(iv) unless it relates to the Non-Diavik Assets only, how the transactions contemplated by the LOI comply with the applicable provisions of the Diavik JVA;

(h) it contains such other information as may be reasonably requested by the SISP Advisor, in consultation with the Applicants and the Monitor;

(i) it does not provide for any break fee or expense reimbursement, it being understood and agreed that no bidder other than the Stalking Horse Bidder shall be entitled to any bid protections;

(j) in the case of a Sale Proposal, it identifies or contains the following:

(i) the purchase price or price range in U.S. dollars and key assumptions supporting the valuation and the anticipated amount of cash payable on closing of the proposed transaction;

(ii) any contemplated purchase price adjustment;

(iii) a description of the specific assets that are expected to be subject to the transaction and any assets or obligations expected to be excluded;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume, provided that where the Diavik Interest is proposed to be sold, all Core Liabilities set forth in paragraph (c) of the definition thereof under the Stalking Horse Bid and Dominion Diamond's obligations under the CSA and any other agreement between any of Applicants and DDMI must be assumed by the Phase 1 Qualified Bidder in connection with any such sale with the exception that the Core Liabilities comprised of DDM's obligations under the Diavik JVA with respect to unpaid Cover Payments must be indefeasibly repaid in cash, in full, upon closing;

(v) information sufficient for the SISP Advisor, the Monitor and the Applicants to determine that the Phase I Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above; and

(vi) any other terms or conditions of the Sale Proposal that the Phase I Qualified Bidder believes are material to the transaction;

(k) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase I Qualified Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Dominion Diamond Group or its business in U.S. dollars;

(iii) the underlying assumptions regarding the *pro forma* capital structure;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(v) information sufficient for the S1SP Advisor and the Applicants to determine that the Phase 1 Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above;

(vi) any other terms or conditions of the Investment Proposal that the Phase I Qualified Bidder believes are material to the transaction.

15. The Applicants with the consent of the Monitor, may waive compliance with any one or more of the requirements specified herein (other than the requirement set out at paragraph 14(j)(iv) and deem any such non-compliant LOI to be a Phase 1 Qualified Bid; *provided* that the SISP Advisor shall consult with the Stalking Horse Bidder in advance and on a no-names basis regarding the general nature of any waiver being contemplated. The SISP Advisor shall consult with DDMI with respect to the requirements set out at paragraph 14(j)(iv).

*Assessment of Phase 1 Qualified Bids and Subsequent Process*

16. The SISP Advisor, in consultation with the Monitor and the Applicants, may, following the receipt of any LOI, seek clarification with respect to any of the terms or conditions of such LOI and/or request and negotiate one or more amendments to such LOI prior to determining if the LOI should be considered a Phase 1 Qualified Bid or a Phase 1 Successful Bid (as defined below).
17. Following the Phase 1 Bid Deadline, the Applicants shall determine, in accordance with the requirements of paragraph 14, the most favourable Phase 1 Qualified Bid(s), which Phase 1 Qualified Bid(s) shall be deemed a "**Phase 1 Successful Bid(s)**" and which Phase 1 Qualified Bidder(s) shall be deemed a "**Phase 2 Qualified Bidder(s)**".
18. Only Phase 2 Qualified Bidders shall be permitted to proceed to Phase 2 of the SISP. The Stalking Horse Bid constitutes a Phase 1 Successful Bid and the Stalking Horse Bidder is a Phase 2 Qualified Bidder for all purposes under the SISP (for greater certainty, subject to the requirement that the Stalking Horse Bid comply with the applicable provisions of the JVA), other than the Auction (as defined below). Notwithstanding any other provision hereof, in order to participate in the Auction, the Stalking Horse Bidder shall have waived, or confirmed satisfaction of, any financing condition contained in the Stalking Horse Bid.
19. The SISP Advisor shall notify each Phase I Qualified Bidder in writing as to whether its Phase I Qualified Bid constituted a Phase 1 Successful Bid within five (5) Business Days of the Phase 1 Bid Deadline, or at such later time as the Applicants, in consultation with the SISP Advisor and the Monitor, deem appropriate.
20. In the event that no Phase 1 Successful Bids are received (other than the Stalking Horse Bid), the Applicants, with the assistance and support of the SISP Advisor and the Monitor, shall promptly proceed to seek Court approval of the Stalking Horse Bid; *provided, however,* that the Applicants may (i) extend the Phase 1 Bid Deadline with the consent of the Monitor, the Stalking Horse Bidder, and the Agent Advisors, or (ii) seek Court approval of an amendment to, or termination of, the SISP.

**PHASE 2: FORMAL OFFERS AND REMOVAL OF CONDITIONS**

*Formal Binding Offers*

21. Any Phase 2 Qualified Bidder (other than the Stalking Horse Bidder) that wishes to make a formal offer with respect to his/her/its Sale Proposal or Investment Proposal shall submit a binding offer (a "**Binding Offer**") (a) in the case of a Sale Proposal, in the form of the Template PSA provided in the VDR, along with a marked version showing edits to the original form of Template PSA provided in the VDR, or (b) in the case of an Investment Proposal, a plan or restructuring support agreement in form and substance satisfactory to the Applicants and the Monitor (each, such binding offer submitted in accordance with paragraph 25 below, a "**Phase 2 Qualified Bid**") in each case to the SISP Advisor, with a copy to the Monitor, at the addresses specified in **Appendix "A"** hereto (including by email) so as to be received by the SISP Advisor and the Monitor not later than 5:00 p.m. (Mountain Standard Time) on August 7, 2020, or such other date or time as may be agreed by the Applicants with the consent of the Monitor (as maybe extended, the "**Phase 2 Bid Deadline**").
22. A Binding Offer will only be considered as a "**Phase 2 Qualified Bid**" by the Applicants if the binding offer:
    (a) has been received by the Phase 2 Bid Deadline;
    (b) is a Binding Offer (i) to purchase (A) all~~,~~ or substantially all~~, or a portion~~ of the Property; (B) Diavik Interest; or (C) the Non-Diavik Assets or (ii) to make an investment in, restructure, recapitalize, reorganize or refinance the Dominion

Diamond Group or its business, on terms and conditions reasonably acceptable to the Applicants;

(c) where the Diavik Interest is being purchased, all Core Liabilities set forth in paragraph (c) of the definition thereof under the Stalking Horse Bid and Dominion Diamond's obligations under the CSA and any other agreement between any of Applicants and DDMI must be assumed by the Phase 2 Qualified Bidder in connection with any such purchase with the exception that the Core Liabilities comprised of DDM's obligations under the Diavik JVA with respect to unpaid Cover Payments must be indefeasibly repaid in cash, in full, upon closing;

(d) ~~(c)~~ is not subject **to** any financing conditionality;

(e) ~~(d)~~ is unconditional, other than upon the receipt of the Approval Order (as defined below) and satisfaction of any other conditions expressly set forth in the binding offer;

(f) ~~(e)~~ includes acknowledgments and representations of the Phase 2 Qualified Bidder that it: (i) has had an opportunity to conduct any and all due diligence regarding the Opportunity prior to making its Binding Offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property of the Dominion Diamond Group in making its Binding Offer; (iii) did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Opportunity or the completeness of any information provided in connection therewith, other than as expressly set forth in the Binding Offer or other transaction document submitted with the Binding Offer; and (iv) promptly will commence any governmental or regulatory review of the proposed transaction by the applicable competition, antitrust or other applicable governmental authorities;

(g) ~~(f)~~ provides for the payments of an amount at least equal to the Minimum Purchase Price unless it is a part of a bid the qualifies as an Aggregated Bid;

(h) ~~(g)~~ the Binding Offer must be accompanied by a letter which confirms that the Binding Offer: (i) may be accepted by the Applicants by countersigning the Binding Offer, and (ii) is irrevocable and capable of acceptance until the earlier of (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date;

(i) ~~(h)~~ does not provide for any break fee or expense reimbursement, it being understood and agreed that no bidder other than the Stalking Horse Bidder shall be entitled to any bid protections;

(j) ~~(i)~~ is accompanied by a deposit in the amount of not less than 10% of the cash purchase price payable on closing or total new investment contemplated, as the case may be (the "**Deposit**"), along with acknowledgement that if the Phase 2 Qualified Bidder is selected as the Successful Bidder (as defined below), that the Deposit will be non-refundable subject to approval of the Successful Bid (as defined below) by the Court and the terms described in paragraph 35 below;

(k) ~~(j)~~ contemplates and reasonably demonstrates a capacity to consummate a closing of the transaction set out therein on or before September 9, 2020, or such earlier date as is practical for the parties to close the contemplated transaction, following the satisfaction or waiver of the conditions to closing (the "**Target Closing Date**") and in any event no later than October 31, 2020 (the "**Outside Date**");~~ and~~

(l) ~~(k)~~ contains an agreement that the Phase 2 Qualified Bidder submitting such bid, if not chosen as the Successful Bidder, shall serve, without modification to such bid, as a Backup Bidder (as defined below), in the event the Successful Bidder fails to close; *provided, however,* that, the Stalking Horse Bidder shall not be required to serve as

Backup Bidder, except to the extent the Stalking Horse Bidder or its affiliates elect to submit an overbid in the Auction; and

(m) complies with the applicable provisions of the Diavik JVA.

23. The Applicants with the consent of the Monitor may waive strict compliance with any one or more of the requirements specified above (for greater certainty, other than paragraphs 22(c) and 22(m)) and deem any such non-compliant Binding Offer to be a Phase 2 Qualified Bid.

*Selection of Successful Bid*

24. The SISP Advisor, in consultation with the Monitor and the Applicants, may, following the receipt of any Binding Offer, seek clarification with respect to any of the terms or conditions of such Binding Offer and/or request and negotiate one or more amendments to such Binding Offer prior to determining if the Binding Offer should be considered a Phase 2 Qualified Bid.

25. The Applicants with the consent of the Monitor, will (a) review and evaluate each Phase 2 Qualified Bid and (b) identify the highest or otherwise best bid (the "**Successful Bid**", and the Phase 2 Qualified Bidder making such Successful Bid, the "**Successful Bidder**") pursuant to the paragraphs below. Any Successful Bid shall be subject to approval by the Court.

26. In the event there is at least one Phase 2 Qualified Bid in addition to the Stalking Horse Bid (provided that the Stalking Horse Bidder has waived or confirmed any financing condition contained in the Stalking Horse Bid has been waived or satisfied), the Applicants shall identify the Successful Bid through an Auction (as defined below).

27. *Auction:* In the event that an Auction (the "**Auction**") is required in accordance with the terms of this SISP, it shall be conducted in accordance with the procedures set forth in this paragraph.

(a) The Auction shall commence at a time to be designated by the Applicants on August 10, 2020, at the Calgary offices of Blakes, Cassels, and Graydon LLP or such other place and time as determined by the Applicants and continue thereafter until completed, subject to such adjournments as the Applicants may consider appropriate; *provided* that if circumstances do not permit the Auction to be held in person, the Applicants shall work in good faith with the parties entitled to attend the Auction to arrange for the Auction to be held via videoconference, teleconference, or such other reasonable means as the Applicants deem appropriate. The Applicants reserve the right to cancel or postpone the Auction.

(b) The identity of each Phase 2 Qualified Bidder participating in the Auction will be disclosed, on a confidential basis, to each other Phase 2 Qualified Bidder participating in the Auction.

(c) Except as otherwise permitted in the Applicants' discretion, only the Applicants. the SISP Advisor, the Monitor, the Agent and the Phase 2 Qualified Bidders, and, in each case, their respective professionals shall be entitled to attend the Auction. Only a Phase 2 Qualified Bidder is eligible to participate in the Auction.

(d) Phase 2 Qualified Bidders shall appear at the Auction, or through a duly authorized representative.

(e) Except as otherwise set forth herein, the Applicants may waive and/or employ and announce at the Auction additional rules, including rules to facilitate the participation of parties participating in an Aggregated Bid, that are reasonable under the circumstances for conducting the Auction provided that such rules are (i) not inconsistent with the Second Amended Initial Order, the S1SP, the DIP, the CCAA, or any order of the Court entered in connection with these CCAA Proceedings, (ii) disclosed to each Phase 2 Qualified Bidder, and (iii) designed, in the Applicants' business judgment, to result in the highest and otherwise best offer.

(f) The Applicants will arrange for the actual bidding at the Auction to be transcribed or recorded. Each Phase 2 Qualified Bidder participating in the Auction shall designate a single individual to be its spokesperson during the Auction.

(g) Each Phase 2 Qualified Bidder participating in the Auction must confirm on the record, at the commencement of the Auction and again at the conclusion of the Auction, that it has not engaged in any collusion with the Applicants or any other person, without the express written consent of the Applicants, regarding the SISP, that has not been disclosed to all other Phase 2 Qualified Bidders.

(h) Prior to the Auction, the Applicants shall identify the highest and best of the Phase 2 Qualified Bids received and such Phase 2 Qualified Bid shall constitute the opening bid for the purposes of the Auction (the "Opening Bid"). Subsequent bidding will continue in minimum increments valued at not less than US$1 million cash in excess of the Opening Bid or in such amounts as to be determined by the Applicants, with the consent of the Monitor, prior to, and announced at, the Auction. For the purposes of facilitating bidding the Applicants may ascribe a monetary value to non-cash considerations, including by way of example, to different levels of conditionality to closing. Each Phase 2 Qualified Bidder (other than the Stalking Horse Bidder) shall provide evidence of its financial wherewithal and ability to consummate the transaction at the increased purchase price, if so requested by the Applicants. Further, in the event that an Aggregated Bid qualifies to participate in the Auction, modifications to the bidding requirements may be made by the Applicants to facilitate bidding by the participants in the Aggregated Bid.

(i) All Phase 2 Qualified Bidders shall have the right to, at any time, request that the Applicants announce, subject to any potential new bids, the then-current highest and best bid and, to the extent requested by any Phase 2 Qualified Bidder, use reasonable efforts to clarify any and all questions such Phase 2 Qualified Bidder may have regarding the Applicants' announcement of the then-current highest and best bid.

(j) Each participating Phase 2 Qualified Bidder shall be given reasonable opportunity to submit an overbid at the Auction to any then-existing overbids. The Auction shall continue until the bidding has concluded and there is one remaining Phase 2 Qualified Bidder that the Applicants determine has submitted the highest and otherwise best Phase 2 Qualified Bid of the Auction. At such time and upon the conclusion of the bidding, the Auction shall be closed and the final remaining Phase 2 Qualified Bidder shall be the Successful Bidder.

(k) Upon selection of a Successful Bidder, the Applicants shall require the Successful Bidder to deliver as soon as practicable an executed transaction document, which reflects its bid and any other modifications submitted and agreed to during the Auction, prior to the filing of the application material for the hearing to consider the Approval Motion (as defined below).

(l) The Applicants shall not consider any bids submitted after the conclusion of the Auction.

28. The Applicants shall have selected the final Successful Bid and the Backup Bid by no later than August 14, 2020 and the definitive documentation in respect of the Successful Bid must be finalized and executed no later than August 18, 2020, which definitive documentation shall be conditional only upon the receipt of the Approval Order and the express conditions set out therein and shall provide that the Successful Bidder shall use all reasonable efforts to close the proposed transaction by no later than the Target Closing Date, or such longer period as shall be agreed to by the Applicants with the consent of the Monitor and the Successful Bidder. In any event, the Successful Bid must be closed by no later than the Outside Date. The Applicants shall not extend or otherwise vary the Outside Date except with the written consent of the Monitor and the Agent. In the case of a Successful Bid and Backup Bid that includes the

purchase of the Diavik Interest, the Applicants shall also require the written consent of DDMI to any extension or variation of the Outside Date .

29. Notwithstanding anything in the SISP to the contrary, if an Auction is conducted, the Phase 2 Qualified Bidder with the next highest or otherwise best Phase 2 Qualified Bid at the Auction, as determined by the Applicants, will be designated as the backup bidder (the "**Backup Bidder**"); *provided* that the Stalking Horse Bidder shall not be a Backup Bidder, unless it elects to provide an overbid in the Auction. The Backup Bidder shall be required to keep its initial Phase 2 Qualified Bid (or if the Backup Bidder submitted one or more overbids at the Auction, the Backup Bidder's final overbid) (the "Backup Bid") open until the earlier of (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date.

*Approval of Successful Bid*

30. The Applicants shall apply to the Court (the "**Approval Motion**") for an order approving the Successful Bid and the Backup Bid (as applicable) and vesting title to any purchased Property in the name of the Successful Bidder or the Backup Bidder (as applicable) (the "**Approval Order**"). The Approval Motion will be held on a date to be scheduled by the Applicants and confirmed by the Court upon application by the Applicants, who shall use their best efforts to schedule the Approval Motion on or before August 31, 2020, subject to Court availability. The Approval Motion may be adjourned or rescheduled by the Applicants without further notice, by an announcement of the adjourned date at the Approval Motion or in a notice to the Service List prior to the Approval Motion. The Applicants shall consult with the Successful Bidder and the Backup Bidder regarding the application material to be filed by the Applicants for the Approval Motion, which material shall be acceptable to the Successful Bidder, acting reasonably.

31. All Phase 2 Qualified Bids (other than the Successful Bid) shall be deemed rejected on and as of the date of the closing of the Successful Bid.

*Deposits*

32. The Deposit(s):
    (a) shall, upon receipt from the Phase 2 Qualified Bidder(s), be retained by the Monitor and deposited in a trust account;
    (b) received from the Successful Bidder shall:
        (i) be applied to the purchase price to be paid by the applicable Successful Bidder whose Successful Bid is the subject of the Approval Order, upon closing of the approved transaction;
        (ii) shall otherwise be held and refundable in accordance with the terms of the definitive documentation in respect of any Successful Bid, provided that all such documentation shall provide that the Deposit shall be retained by the Applicants and forfeited by the Successful Bidder, if the Successful Bid fails to close by the Outside Date, and such failure is attributable directly to any failure or omission of the Successful Bidder to fulfil its obligations under the terms of the Successful Bid;
    (c) received from the Backup Bidder, unless it is subsequently selected as the Successful Bidder, shall be fully refunded, to the Back-Up Bidder on or before the earlier of (i) two (2) Business Days after the date of the closing to the Successful Bid; or (ii) October 31, 2020;

(d) received from the Phase 2 Qualified Bidder(s) that are not the Successful Bidder or the Back-Up Bidder shall be fully refunded, to the Phase 2 Qualified Bidder(s) that paid the Deposit(s) as soon as practical following the selection of the Successful Bidder and in any event no later than September 30, 2020.

33. Notwithstanding anything to the contrary herein, the Stalking Horse Bidder shall not be required to fund a Deposit.

**"As is, Where is"**

34. Any sale (or sales) of the Property will be on an "as is, where is" basis except for representations and warranties that are customarily provided in purchase agreements for a company subject to CCAA proceedings and any such representations and warranties provided for in the definitive documents shall not survive closing.

**Free Of Any And All Claims And Interests**

35. ~~In~~For greater certainty, other than the provisions of the Diavik JVA, in the event of a sale, to the extent permitted by law, all of the rights, title and interests of the Applicants in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "**Claims and Interests**") pursuant to section 36(6) of the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Property (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant transaction documents with a Successful Bidder which, for the avoidance of doubt, to the extent the sale includes the Diavik Interest, such transaction documents must provide for the indefeasible payment in cash in full on closing of the aggregate of all outstanding and unpaid Cover Payments and any other amounts owing by DDM to DDMI under and pursuant to the Diavik JVA unless DDMI in its sole and unfettered discretion agrees to other arrangements with the Successful Bidder.

**Credit Bidding**

36. The Washington Interim Lender shall be entitled to credit bid any outstanding DIP advances made by it as part of the closing of the Stalking Horse Bid, provided that any DIP advances made by the First Lien Interim Lenders are paid in cash by the Washington Interim Lender at closing.

37. Except as provided in paragraph 36 above, the Washington Interim Lender shall not be entitled to credit bit any outstanding DIP advances in connection with any transaction contemplated by the SISP without the consent of the Agent (such consent not to be unreasonably withheld).

38. Any other party holding a valid, enforceable, and properly perfected security interest in the Property, including the Agent on behalf of the First Lien Lenders under the Existing Credit Agreement, or any lender party thereto, may, subject in all respects to such party's compliance with the SISP and the terms thereof, credit bid the amount of debt secured by such lien as part of any transaction contemplated by the SISP; *provided, however,* that such transaction shall also provide for the indefeasible and irrevocable repayment in full in cash on the date of closing of any such transaction of any and all obligations secured by a security interest that is senior to the security interest held by the party submitting such credit bid (it being understood and agreed that, (a) with respect to the Property the Interim Lender holds a super-priority security interest, senior to all other security interests in the Property, except as expressly set forth in the DIP Term Sheet and with respect to the court-ordered charges created in favour of the Interim Lender under the Second Amended and Restated Initial Order, and (b) any obligations of the Applicants with respect to any ~~cover payments~~Cover

Payments made pursuant to, or reclamation obligations associated with, the Diavik Interest must be indefeasibly and irrevocably repaid in full in cash on the date of closing of any such transaction) to the extent any credit bid pertains to the Diavik Interest. Any credit bid by the Agent under the Existing Credit Agreement, or any lender party thereto shall provide for the indefensible and irrevocable repayment in full in cash on the date of closing of any such transaction of all Interim Financing Obligations (as defined in the DIP), including those Interim Financing Obligations attributable to October Advances (as defined in the DIP).

**Confidentiality**

39. For greater certainty other than as shall be required in connection with any Auction or Approval Motion, neither the Applicants, the Monitor, the SISP Advisor will share (i) the identity of any Potential Bidder, or Phase I Qualified Bidder (other than the Stalking Horse Bidder), or (ii) the terms of any bid, LOI, Phase 1 Qualified Bid, Sale Proposal, Investment Proposal or Phase 2 Qualified Bid (other than the Stalking Horse Bid), with any other person (other than DDMI in respect of any bid, LOI, Phase 1 Qualified Bid, Sale Proposal, Investment Proposal or Phase 2 Qualified Bid in relation to the Diavik Interest), including any other bidder (including, without limitation, the Stalking Horse Bidder) without the express written consent of such party (including by way of e-mail).

**Further Orders**

40. At any time during the SISP, the Applicants or the Monitor may apply to the Court for advice and directions with respect to any aspect of this SISP including, but not limited to, the continuation of the SISP or with respect to the discharge of its powers and duties hereunder.

**Appendix "A"**

TO THE SISP ADVISOR:

Evercore
55 East 52nd Street, 42nd floor
New York, NY 10055
Attention: John Startin
Phone: 212-453-5577
E-Mail: John.Starting@evercore.com

WITH A COPY TO:-

Attention: Andrew Frame
Phone: 212-823-6443
E-Mail: Andrew.Frame@evercore.com

WITH A COPY TO:

Attention: Nicholas Salzman
Phone: 646-259-7783
E-Mail: Nicholas.Salzman@evercore.com

TO THE MONITOR:

FTI Consulting Canada Inc.
520 5t$^{h}$ Ave SW
Calgary AB T2P 3R7
Attention: Deryck Helkaa
Phone: 403-454-6031
E-Mail: deryck.helkaa@fticonsulting.com

WITH A COPY TO:

Bennett Jones LLP
4500 Bankers Hall East
855 - 2nd Street SW
Calgary AB T2P 4K7
Attention: Chris Simard
Phone: 403-298-4485
Email: simardc@bennettjones.com

Document comparison by Workshare Compare on Thursday, May 28, 2020 12:47:40 PM

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| Description | DOCS-#20415683-v5A-DDMI_Comments_on_SISP |
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| Split/Merged cell | |
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| Statistics: | |
|---|---|
| | Count |
| Insertions | 62 |
| Deletions | 28 |
| Moved from | 0 |
| Moved to | 0 |
| Style change | 0 |
| Format changed | 0 |
| Total changes | 90 |

# TAB 1

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.

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# P R O C E E D I N G S

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Calgary, Alberta
May 15, 2020

Transcript Management Services
Suite 1901-N, 601 – 5th Street SW
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Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

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| May 15, 2020 | Morning Session |
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| The Honourable<br>Madam Justice Eidsvik (remote appearance) | Court of Queen's Bench of Alberta |
| | |
| P.L. Rubin (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. |
| 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 |
| L. Williams (remote appearance) | For the Government of the Northwest Territories |
| K. Barr (remote appearance) | For Aviva Insurance Corp. |
| C.D. Simard (remote appearance) | For the Monitor |
| M. Selnes (remote appearance) | For the Monitor |
| A. Astritis (remote appearance) | For Public Service Alliance of Canada |
| A. Raven (remote appearance) | For Public Service Alliance of Canada |
| C.L. Nicholson (remote appearance) | For PLI Cho Domco |
| M. Wasserman (remote appearance) | For Credit Suisse |
| E. Paplawski (remote appearance) | For Credit Suisse |
| M. De Lellis (remote appearance) | For Credit Suisse |
| S.J. Alberts (remote appearance) | For Wilmington Trust, National Association |
| K. Kashuba (remote appearance) | For Ad Hoc Group of Bondholders |
| T. DeMarinis (remote appearance) | For Ad Hoc Group of Bondholders |
| T.M. Warner (remote appearance) | For Dene Dyno and Dyno Canada |
| J.J. Salmas (remote appearance) | For the Trustee |
| J.H. Levitin (remote appearance) | For First Lien Debt |
| S.F. Collins (remote appearance) | For Diavik Diamond Mines (2012) Inc. |
| 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

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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.

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PROCEEDINGS CONCLUDED

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**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

# TAB 2

**Washington Companies/Dominion Diamond Mines**
**Term Sheet for "Stalking Horse" Acquisition Agreement**

The following term sheet (the "Term Sheet") sets forth a summary of certain terms for a proposed "stalking horse" acquisition agreement (the "Purchase Agreement") to be entered into among Dominion Diamond Holdings, LLC, a Delaware limited liability company ("Dominion Holdings"), Dominion Diamond Mines ULC, a British Columbia unlimited liability company ("DDM" and, together with Dominion Holdings, "Sellers"), and a new company to be formed to effect the transactions contemplated in which an affiliate of Washington Diamond Investments Holdings II, LLC will be the manager ("Buyer"), in connection with a filing in the court of Queen's Bench of Alberta (the "Court") by the Sellers and certain of their affiliates (the "Applicants") under the *Companies Creditors' Arrangement Act* (Canada) ("CCAA"). This Term Sheet is not intended and does not create any binding legal obligation on the part of either Buyer or Sellers. No legal obligation to negotiate, enter into or consummate any transaction will exist, unless and until definitive and binding transaction documentation regarding the proposed transaction has been entered into by the parties, which is subject to board approval by Buyer and Sellers, satisfactory completion of confirmatory due diligence, and negotiation of final documentation. The terms and conditions set forth in this Term Sheet are not intended to be comprehensive and if, in the course of Buyer's due diligence review or development of the proposed acquisition structure, or in the course of negotiations, Buyer or Sellers determine that additional terms and conditions, or modification to the terms and conditions set out herein, are necessary, then the parties reserve the right to address such matters.

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| Transaction Structure: | The transaction would be structured as a sale of assets (including equity in certain subsidiaries) by Sellers and the assumption by Buyer of certain liabilities of Sellers pursuant to the CCAA. |
| Acquired Assets: | The Buyer will agree to acquire substantially all of the assets used in connection with the Sellers' business, including:<br>• all of the equity interests of Sellers in:<br>o Dominion Diamond Marketing Corporation (100% of this Canadian corporation)<br>o Dominion Diamond (India) Private Limited (100%, directly and indirectly, in this Indian company)<br>o Dominion Diamond Marketing N.V. (100%, directly and indirectly, in this Belgian company) |

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| | ○ Ekati Diamond Mine Buffer Zone (100%)<br>○ Ekati Diamond Mine Core Zone Joint Venture (88.9%)<br>○ Diavik Diamond Mine Joint Venture (40%)<br>○ Lac de Gras Joint Venture (79%)<br>○ Glowworm Lake Property (100%)<br><br>• all cash of Sellers (including all deposits and cash collateral, but excluding the Cash Purchase Price, as described below)<br>• all accounts receivable of Sellers, including intercompany receivables from Dominion Diamond (India) Private Limited and Dominion Diamond Marketing N.V.<br>• all equipment and tangible property of Sellers, including inventory, raw materials and work in process<br>• all contracts (other than disclaimed contracts) of Sellers<br>• all permits, licenses, surface leases and environmental agreements held by Sellers, to the extent assignable<br>• all rights, options, claims and causes of action<br>• all real property, fixtures and leases or other rights related to the same<br><br>If the Rio Condition (as defined below) is not satisfied, then the Acquired Assets and Assumed Liabilities will be adjusted as set forth under the "Ex-Rio Toggle Transaction" below. |
| Excluded Assets: | The following assets would not be acquired by Buyer:<br><br>• the equity interests of Dominion Holdings in Dominion Finco, Inc. and DDM<br>• the equity interests of DDM in Dominion Diamond Delaware Company LLC (or any indirect interest in Dominion Diamond Canada ULC), Dominion Diamond (Cyprus) Limited and Dominion Diamond (Luxembourg) S.a.r.l. |
| Assumption of Liabilities: | Buyer will agree to assume substantially all operating liabilities of the Sellers, including all obligations of Sellers under its operational contracts and JV agreements, to |

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| | employees and unions (as described under "Employees" below), and First Nations and aboriginal groups and The Government of the Northwest Territories ("GNWT"), subject to modifications pursuant to agreements referred to under conditions to closing. Buyer and Sellers will consider whether there are any contractual obligations in connection with the operations at the Ekati Mine that should not be assigned to Buyer.<br><br>Buyer will not assume any liabilities with respect to Seller's obligations under the first-lien revolving credit facility and the second-lien notes due in 2022, cure obligations or liabilities with respect to any contracts that are disclaimed pursuant to the CCAA proceedings or otherwise terminated or cancelled prior to closing. |
| Purchase Price: | In consideration for the Acquired Assets, Buyer will pay a Cash Purchase Price in an amount equal to US$126,107,000 million, plus up to US$5 million in respect of any incremental amount outstanding under the Interim (DIP) Facility with respect to Advances and accrued and unpaid interest after September 30, 2020, minus the amount, if any, by which the aggregate amount of the Advances and accrued and unpaid interest under the Interim (DIP) Facility that is outstanding as of the closing is less than US$55 million, plus the assumption of the Core Liabilities and certain other assumed liabilities. The Cash Purchase Price is currently anticipated to be sufficient to (1) cash collateralize super priority charges approved pursuant to the Initial Order entered on April 22, 2020, as may be modified by subsequent order and subject to Buyer's prior written consent, not to be unreasonably withheld, (2) satisfy the Interim (DIP) Facility obligations, and (3) satisfy the first lien obligations of DDM under its revolving credit facility, based on the Company's Interim (DIP) Facility dated May 21, 2020 and an assumed closing date on or before October 31, 2020.<br><br>If the Rio Condition is not satisfied, then the purchase price and Core Liabilities will be adjusted as set forth under the "Ex-Rio Toggle Transaction" below.<br><br>The "Core Liabilities" to be assumed shall be: |

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| | • DDM's obligation to collateralize or refinance outstanding letters of credit issued under DDM's revolving credit facility to secure closure costs (including reclamation) pursuant to the Diavik Joint Venture Agreement and Closure Security Agreement as of closing;<br>• DDM's obligations under its pension plan, including with respect to the windup deficit; and<br>• DDM's obligations under the Diavik Joint Venture Agreement with respect to all accrued and unpaid capital calls, plus accrued interest, any pending (but not yet due) capital calls, each as of closing.<br><br>The Core Liabilities described above do not include the other liabilities that Buyer will assume pursuant to the Purchase Agreement at closing. |
| Representations and Warranties: | Representations and warranties given by Sellers and Buyer will include fundamental representations and warranties (valid existence, due authorization, title to assets, validity of permits etc.), and, in the case of Sellers, the absence of a material adverse change or a material breach or default under material contracts and operating representations and warranties that are customarily provided in a stalking horse bid purchase agreement for a company in CCAA.<br><br>Acquisition of the assets would otherwise be on an "as-is, where-is" basis. |

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| Operation of the Business Prior to Closing: | Sellers will agree to customary operating covenants, including an agreement to continue operations at the Ekati Mine on care and maintenance only, and not to conduct activities on any other properties.<br><br>Sellers will agree not to re-start operations at the Ekati Mine without the prior written consent of Buyer, not to be unreasonably withheld.<br><br>Sellers will agree not to terminate employee furloughs or sell diamonds without the prior written consent of Buyer, not to be unreasonably withheld.<br><br>Sellers will agree not to enter into, amend or terminate any material contracts and agree to other customary restrictive covenants, each subject to Buyer's prior written consent, not to be unreasonably withheld. |
| Commercially Reasonable Efforts: | Buyer shall use commercially reasonable efforts to satisfy the Financing Condition, Rio Condition and Surety Condition, subject to certain limitations on what Buyer is required to accept.<br><br>Sellers shall be entitled to have one person participate in all substantive discussions with Rio, GNWT and sureties regarding the Rio Condition and the Surety Condition.<br><br>Sellers shall cooperate in a timely and commercially reasonable manner with Buyer in its efforts to satisfy the Financing Condition, Rio Condition and Surety Condition. |
| Employees: | Buyer approval, not to be unreasonably withheld, will be required for decisions relating to employees that are material to the business, including dealing with furloughed employees, unions and collective bargaining arrangements, and any changes to employee compensation arrangements (including changes approved by the Court as part of the CCAA process).<br><br>Subject to the foregoing, Buyer anticipates that it will offer employment to all employees of Sellers and assume all employee benefit plans, pension plans, union and collective bargaining arrangements, and other employee arrangements on their existing terms (so long as there |

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| | haven't been any changes to the foregoing that have not been shared with, and consented to by, Buyer). |
| Conditions to Closing: | The parties' obligations under the Purchase Agreement will be subject to the following conditions:<br>• an Order shall be issued by the Court approving the Sale and Investment Solicitation Process ("SISP"), in the form of SISP set forth on Exhibit B to that certain letter agreement to which this term sheet is attached and shall have become a final order<br>• a Sale Order shall be issued by the Court in form and substance satisfactory to Buyer, and shall have become a final order<br>• receipt of all required approvals to complete the transfer of the Acquired Assets to Buyer under applicable competition and foreign investment laws, if any<br>• absence of laws or court orders prohibiting the transaction<br><br>The conditions to Buyer's obligation to consummate the closing would also include:<br>• accuracy of Sellers' representations and warranties<br>• absence of a Material Adverse Change measured from the date of the Purchase Agreement<br>• receipt of all consents and other approvals required to effect the sale of assets and other transactions contemplated (to the extent that the transfer of such contracts are not effected through the CCAA process without consent separately being needed)<br>• receipt of all required permits and approvals to operate the business after the closing, including the transfer and assignment of licenses, permits, surface leases, environmental agreements, etc. to Buyer<br>• an order of the court approving Buyer or its designated affiliate as the Interim lender, in form and substance satisfactory to Buyer, must have been entered and have become a final order<br>• an agreement with GNWT and the sureties with respect to collateralization of reclamation obligations of Buyer under environmental agreement, permits, licenses and subleases to be transferred (the "Surety Condition") |

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| | • Buyer shall not be subject to any mandatory governmental regulations, advisories or restrictions related to COVID-19 which would prevent or materially restrict: (i) Buyer from conducting operations at the Ekati Mine; or (ii) Buyer's ability to reasonably transport, sort and conduct diamond tenders, with the precise standard to be negotiated as part of the Purchase Agreement negotiations.<br>• an agreement acceptable to Buyer with Diavik Diamond Mines (2012) Inc. ("DDMI") and GNWT in relation to the timing and quantum of capital calls and reclamation liabilities at Diavik (the "Rio Condition")<br>• Buyer shall have determined, acting reasonably, that upon payment of any outstanding cash calls with interest and the posting of cash collateral in respect of its portion of the reclamation liability in accordance with the existing closure security agreement or pursuant to other arrangements to be agreed that: (i) Buyer will be in full compliance with its obligations under the Diavik JV Agreement when assigned to Buyer, (ii) Buyer shall hold a 40% participating interest in the Diavik JV free and clear of any encumbrance other than as imposed by DDMI under the Diavik JV Agreement and (iii) DDMI shall agree to deliver any diamond inventory which accrued to the account of DDM under the Diavik JV Agreement which had not yet been delivered<br>• Buyer shall have arranged third party equity and debt commitments on terms acceptable to it provided that the aggregate amount of third party equity committed shall be at least US$140 million, less 50% of any debt raised (the "Financing Condition")<br><br>Notwithstanding that the Target Closing Date and Outside Date (each as defined and established under the SISP) are August 31 and October 31, 2020, respectively, the closing date for the transactions contemplated by the Purchase Agreement shall be as soon as practicable after all of the conditions to closing have been satisfied or waived. |

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| Ex-Rio Toggle Transaction: | If the Rio Condition is not satisfied or waived by July 21, 2020, the parties would proceed but Buyer will not acquire or assume any rights or obligations with respect to the Diavik Mine Joint Venture (all of which would become excluded assets and excluded liabilities) and Dominion may dispose of Dominion's participation interest to Rio or another party (if either of such scenarios occurs, the "Rio Condition" will be deemed satisfied).<br><br>If the Ex-Rio Toggle occurs, then<br>• the Cash Purchase Price would be US$126,107,000 million (plus up to US$5 million in respect of additional Interim (DIP) Facility loans, minus the amount, if any, by which the aggregate amount of the Advances and accrued and unpaid interest under the Interim (DIP) Facility that is outstanding as of the closing is less than US$55 million, as set forth above);<br>• the Excluded Assets would include DDM's interest in the Diavik Joint Venture and any diamonds distributed by the Diavik Joint Venture to DDM after the petition date<br>• Buyer would not assume Core Liabilities with respect to Diavik, including obligations for collateralizing or refinancing outstanding letters of credit and obligations with respect to capital calls; and<br>• the aggregate amount of equity required to be committed in order to satisfy the Financing Condition would be reduced to at least US$70 million, less 50% of any debt raised. |
| Termination Rights: | Each of the parties would be entitled to terminate the Purchase Agreement if:<br>• the closing does not occur on or before October 31<br>• the CCAA Court, or other court or governmental authority, takes action to restrain, enjoin or otherwise prohibit the transfer of the Acquired Assets to Buyer which is not capable of appeal<br>• Buyer is not the successful bidder chosen as a result of the SISP<br>• the CCAA Court does not approve the sale of the Acquired Assets to Buyer on the terms set out in the |

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| | Purchase Agreement or approves an alternative transaction<br><br>Buyer also would be entitled to terminate the Purchase Agreement if:<br>• certain CCAA milestones are not achieved, including if the CCAA court does not enter the SISP Order on or before May 29, 2020 or the Sale Order on or before September 9, 2020, in each case in form and substance satisfactory to Buyer<br>• an order of the court approving Buyer or its designated affiliate as the Interim lender is not entered by the CCAA court on or before May 26, 2020<br>• any unwaived or uncured event of default under the Interim Facility or if at any time an affiliate of Buyer is not the Interim Lender<br>• if the CCAA proceeding is terminated or a trustee in bankruptcy or receiver is appointed, and such trustee in bankruptcy or receiver refuses to proceed with the transactions contemplated by the Purchase Agreement<br>• Sellers breach the Purchase Agreement and fail to cure<br>• either (a) the Sellers or their affiliates request or (b) the CCAA Court approves any amendments or modifications to the SISP that adversely affects the interests of Buyer, the Interim Facility, or the Stalking Horse Transaction (which, for the avoidance of doubt, include any amendments or modifications to the Minimum Purchase Price or the Outside Date (as defined and established under the SISP), any amendments or modifications to the requirements set out for Phase 1 Qualified Bids in section 15 of the SISP or for Phase 2 Qualified Bids in section 23 of the SISP, and any amendment or modification to the terms and conditions set forth in sections 2, 3, 5, 9, 15, 17, 18, 20, 21, 23, 24-31, 35 and 36-38 of the SISP)<br><br>Sellers also would be entitled to terminate the Purchase Agreement, with the consent of the agent for the Company's first lien revolving credit facility, on or before the first business day after Phase 2 Bid Deadline (as |

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| | defined in the SISP) if Buyer does not remove or satisfy the Financing Condition on or before July 21, 2020. |
| Break-Up Fee and Expense Reimbursement: | All out-of-pocket expenses related to the Purchase Agreement and the SISP, up to the time of signing the Purchase Agreement, will be reimbursed upon signing of the Purchase Agreement, subject to a US$1.75 million cap.<br><br>If: (i) Buyer removes or satisfies the Financing Condition and Rio Condition on or prior to July 21, 2020; and (ii) the Purchase Agreement is terminated and (x) a Successful Bid (as defined in the SISP) or (y) any other sale of assets or plan in the CCAA proceeding that (I) results in a change in control, (II) provides cash on closing to the Sellers or the Applicants equal to or greater than the Minimum Purchase Price (as defined in the SISP), and (III) did not arise following the material breach of the Purchase Agreement by the Buyer (an "**Alternate Transaction**") closes:<br><br>• Buyer's reasonable SISP and Purchase Agreement third-party expenses incurred after the signing of the Purchase Agreement, subject to a cap of US$2.25 million; and<br>• a Break-Up Fee in an amount equal to 2.0% of the cash purchase price that was to be paid by the Buyer to the Sellers under the Purchase Agreement,<br><br>shall be paid to the Buyer immediately following closing of such Alternate Transaction.<br><br>Further, if an Alternate Transaction is not concluded during the SISP, but a transaction is concluded following termination of the SISP that provides cash on closing to the Sellers or the Applicants equal to or greater than the Minimum Purchase Price (as defined in the SISP), or results in a change in control, the Break-Up Fee shall also be payable to the Buyer in those circumstances. This length of the this "tail period" and other relevant terms and conditions relating to the tail period, shall be agreed upon. |

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| Limitation of Liability: | If the Purchase Agreement is terminated for Buyer breach, Sellers' sole remedy will be liquidated damages in an amount equal to 10% of the cash portion of the purchase price, which may be satisfied by Buyer by the forgiveness of amounts outstanding under the Interim Facility.<br><br>Washington Diamond Investments Holdings II, LLC or one of its creditworthy affiliates will provide a limited guaranty of Buyer's obligation to pay such liquidated damages amount if and when it becomes due under the terms of the Purchase Agreement. |
| Not a Back-Up Bid: | Buyer's bid will not be deemed to be a "Back-Up Bid" and Buyer will not be required under any circumstances to be a Back-Up Bidder. |
| Governing Law: | Alberta |
| Dispute Resolution: | Alberta Court of Queen's Bench |

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# TAB 3

2016 ONSC 1044
Ontario Superior Court of Justice

Danier Leather Inc., Re

2016 CarswellOnt 2414, 2016 ONSC 1044, 262 A.C.W.S. (3d) 573, 33 C.B.R. (6th) 221

# In the Matter of Intention to Make a Proposal of Danier Leather Inc.

Penny J.

Heard: February 8, 2016
Judgment: February 10, 2016
Docket: 31-CL-2084381

Counsel: Jay Swartz, Natalie Renner, for Danier
Sean Zweig, for Proposal Trustee
Harvey Chaiton, for Directors and Officers
Jeffrey Levine, for GA Retail Canada
David Bish, for Cadillac Fairview
Linda Galessiere, for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge
Clifton Prophet, for CIBC

**Headnote**
Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous
D Inc. filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Motion brought to, inter alia, approve stalking horse agreement and SISP — SISP approved — Certain other relief granted, including that key employee retention plan and charge were approved, and that material about key employee retention plan and stalking horse offer summary would not form part of public record pending completion of proposal proceedings — SISP was warranted at this time — SISP would result in most viable alternative for D Inc. — If SISP was not implemented in immediate future, D Inc.'s revenues would continue to decline, it would incur significant costs and value of business would erode, decreasing recoveries for D Inc.'s stakeholders — Market for D Inc.'s assets as going concern would be significantly reduced if SISP was not implemented at this time because business was seasonal in nature — D Inc. and proposal trustee concurred that SISP and stalking horse agreement would benefit whole of economic community — There had been no expressed creditor concerns with SISP as such — Given indications of value obtained through solicitation process, stalking horse agreement represented highest and best value to be obtained for D Inc.'s assets at this time, subject to higher offer being identified through SISP — SISP would result in transaction that was at least capable of satisfying s. 65.13 of Act criteria.

***Penny J.*:**

**The Motion**

1 On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

2 Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to:

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

**Background**

3 Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

4 Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

5 In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

6 As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

7 Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

8 Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

**The Stalking Horse Agreement**

9 The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

10 On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

11 The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

12 The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

13 The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

**The SISP**

14 Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

15 Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

16 Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

17 The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

18 The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

19 Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

20 The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7.

21 The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 22-26.

22 A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

23 In *Brainhunter Inc., Re*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

*Brainhunter Inc., Re*, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) at paras. 13-17); *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) at para. 49.

24 While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 24; *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.) at paras. 50-51.

25 Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Mustang GP Ltd., Re*, 2015 CarswellOnt 16398 (Ont. S.C.J.) at paras. 37-38.

26 These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

27 The SISP is warranted at this time for a number of reasons.

28 First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

29 Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

30 Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

31 Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

32 There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

33 Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

34 Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

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

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

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

(d) the extent to which the creditors were consulted;

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

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

35 In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

36 The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

37 The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

38 The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

39 A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

40 Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

**The Break Fee**

41 Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

42 Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Nortel Networks Corp., Re*, [2009] O.J. No. 4293 (Ont. S.C.J. [Commercial List]) at paras. 12 and 26; *W.C. Wood Corp., Re*, [2009] O.J. No. 4808 (Ont. S.C.J. [Commercial List]) at para. 3, where a 4% break fee was approved.

43 The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

44 In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

45 I find the break fee to be reasonable and appropriate in the circumstances.

**Financial Advisor Success Fee and Charge**

46 Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

47 Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

*Sino-Forest Corp., Re*, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 46-47; *Colossus Minerals Inc., Re*, *supra*.

48 The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

49 The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

50 In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

51 Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

52 Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

53 Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

54 A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

**Administration Charge**

55 In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

56 Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

57 Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 11-15.

58 This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

**D&O Charge**

59 The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

60 Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

61 Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

62 Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

63 The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

64 The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

65 In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

66 I approve the D&O Charge for the following reasons.

67 The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

68 The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

69 The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

70 The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

71 Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

**Key Employee Retention Plan and Charge**

72 Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

73 Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

74 Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

75 Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Nortel Networks Corp., Re supra.*

76 In *Grant Forest Products Inc., Re*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

*Grant Forest Products Inc., Re*, [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]) at paras. 8-22.

77 While *Grant Forest Products Inc., Re* involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

78 The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

**Sealing Order**

79 There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

80 Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

81 In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 (S.C.C.) at para. 53.

82 In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Stelco Inc., Re*, [2006] O.J. No. 275 (Ont. S.C.J. [Commercial List]) at paras. 2-5; *Nortel Networks Corp., Re*, *supra*.

83 It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

84 The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP.

The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

85 The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

86 As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

*Order accordingly.*

# TAB 4

**CITATION:** Mustang GP Ltd. (Re), 2015 ONSC 6562
**COURT FILE NOs.:** 35-2041153, 35-2041155, 35-2041157
**DATE:** 2015/10/28



SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

**RE:** IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MUSTANG GP LTD.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST ONTARIO PARTNERS LIMITED PARTNERSHIP

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST POWER MUSTANG GENERATION LTD.

**BEFORE:** Justice H. A. Rady

**COUNSEL:** Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.

Joseph Latham for Harvest Power Inc.

Jeremy Forrest for Proposal Trustee, Deloitte Restructuring Inc.

Robert Choi for Badger Daylighting Limited Partnership

Curtis Cleaver for StormFisher Ltd.

No one else appearing.

**HEARD:** October 19, 2015

**ENDORSEMENT**

**Introduction**

[1] This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

(b) administratively consolidating the debtors' proposal proceeding;

(c) authorizing the debtors to enter into an interim financing term sheet (the DIP term sheet) with StormFisher Environmental Ltd. (in this capacity, the DIP lender), approving the DIP term sheet and granting the DIP lender a super priority charge to secure all of the debtors' obligations to the DIP lender under the DIP term sheet;

(d) granting a charge in an amount not to exceed $150,000 in favour of the debtors' legal counsel, the proposal trustee and its legal counsel to secure payment of their reasonable fees and disbursements;

(e) granting a charge in an amount not to exceed $2,000,000 in favour of the debtors' directors and officers;

(f) approving the process described herein for the sale and marketing of the debtors' business and assets;

(g) approving the agreement of purchase and sale between StormFisher Environmental Ltd. and the debtors; and

(h) granting the debtors an extension of time to make a proposal to their creditors.

**Preliminary Matter**

[2] As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as

the debtors attempt to come to terms with their debt. Any delay might ultimately cause prejudice to the debtors and their stakeholders. Both Mr. Chaiton and Mr. Latham expressed concern about adverse environmental consequences if the case were delayed. No other stakeholders appeared to voice any objection. As a result, the request was denied and the motion proceeded.

[3] Following submissions, I reserved my decision. On October 20, 2015, I released an endorsement granting the relief with reasons to follow.



**Background**

[4] The evidence is contained in the affidavit of Wayne Davis, the chief executive officer of Harvest Mustang GP Ltd. dated October 13, 2015. He sets out in considerable detail the background to the motion and what has led the debtors to seek the above described relief. The following is a summary of his evidence.

[5] On September 29, 2015, the moving parties, which are referred to collectively as the debtors, each filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended. Deloitte Restructuring Inc. was named proposal trustee.

[6] The debtors are indirect subsidiaries of Harvest Power Inc., a privately owned Delaware corporation that develops, builds, owns and operates facilities that generate renewable energy, as well as soil and mulch products from waste organic materials.

[7] Harvest Power Mustang Generation Ltd. was established in July 2010 in order to acquire assets related to a development opportunity in London. In October 2010, it purchased a property located at 1087 Green Valley Road from London Biogas Generation Inc., a subsidiary of StormFisher Ltd. The intent was to design, build, own and operate a biogas electricity production facility.

[8] In November 2011, a limited partnership was formed between Harvest Power Canada Ltd., Harvest Power Mustang GP Ltd. and Waste Management of Canada Corporation, referred to as Harvest Ontario Partners Limited Partnership or Harvest Ontario Partners. It was formed to permit the plant to accept organic waste to be used to generate renewable electricity. After the partnership was formed, Harvest Power Mustang Generation Ltd. became a 100 percent owned subsidiary of the partnership. In June 2012, its personal property was transferred to the partnership. It remains the registered owner of 1087 Green Valley Road.

[9] The plant employs twelve part and full time employees.

[10] The debtors began operating the biogas electrical facility in London in April 2013. Unfortunately, the plant has never met its production expectations, had negative EBITDA from the outset and could not reach profitability without new investment. The debtors had experienced significant "launch challenges" due to construction delays, lower than expected feedstock acquisition, higher than anticipated labour costs, and delays in securing a necessary approval from the Canadian Food Inspection Agency for the marketing and sale of fertilizer produced at the facility.

[11] Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying $1 million from a holdback held by Harvest Ontario Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and "caused a substantial drain on the debtors' working capital resources".

[12] The debtors' working capital and operating losses had been funded by its parent company, Harvest Power Inc. However, in early 2015 Harvest Power Inc. advised the debtors that it would not continue to do so. By the year ended September 2015, the debtors had an operating loss of approximately $4.8 million.

[13] In January 2015, the debtors defaulted on their obligations to Farm Credit Canada, its senior secured creditor, which had extended a demand credit facility to secure up to $11 million in construction financing for the plant. The credit facility was converted to a twelve year term loan, secured by a mortgage, a first security interest and various guarantees. In February 2015, FCC began a process to locate a party to acquire its debt and security, with the cooperation of the debtors. FCC also advised the debtors that it would not fund any restructuring process or provide further financing. The marketing process failed to garner any offers from third parties that FCC found acceptable.

[14] On July 9, 2015, FCC demanded payment of its term loan from Harvest Ontario Partners and served a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *BIA*. In August 2015, an indirect subsidiary of Harvest Power Inc. – 2478223 Ontario Limited – purchased and took an assignment of FCC's debt and security at a substantial discount.

[15] Shortly thereafter, StormFisher Ltd., which is a competitor of Harvest Power Inc., advised 2478223 that it was interested in purchasing the FCC debt and security in the hopes of acquiring the debtors' business. It was prepared to participate in the sale process as a stalking horse bidder and a DIP lender.

[16] On September 25, 2015, 2478223 assigned the debt and security to StormFisher Environmental Ltd., a subsidiary of StormFisher Ltd., incorporated for the purpose of purchasing the debtors' assets. The debt and security were purchased at a substantial discount from what 2478223 had paid and included cash, a promissory note and a minority equity interest. StormFisher Ltd. is described as having remained close to the Harvest Power group of companies in the time following its subsidiary's sale of the property to Harvest Power Generation Ltd. Some of its employees worked under contract for Harvest Power Inc. It was aware of the

debtors' financial difficulties and had participated in FCC's earlier attempted sale process.

[17] On September 29, 2015, the debtors commenced these proceedings under the *BIA*, in order to carry out the sale of the debtors' business as a going concern to StormFisher Environmental Ltd. as a stalking horse bidder or another purchaser. Given the lack of success in the sale process earlier initiated by FCC, and concerns respecting the difficulties facing the renewable energy industry in general and for the debtors specifically, the debtors believe that a stalking horse process is appropriate and necessary.

[18] In consultation with the proposal trustee, the debtors developed a process for the marketing and sale of their business and assets. The following summary of the process is described by Mr. Davis in his affidavit:

i. the sale process will be commenced immediately following the date of the order approving it;

ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;

iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;

iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;

v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;

vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;

vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;

viii. the closing of the sale transaction will take place within one business day from the sale approval date;

ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

[19] StormFisher Environmental Ltd. is prepared to purchase the business and assets of the debtors on a going-concern basis on the following terms:

> A partial credit bid for a purchase price equal to: (i) $250,000 of the debtors' total secured obligations to StormFisher Environmental Ltd. (plus the DIP loan described below); (ii) any amounts ranking in priority to StormFisher Environmental Ltd.'s security, including the amounts secured by: (a) the administration charge; (b) the D&O charge (both described below); and (c) the amount estimated by the proposal trustee to be the aggregate fees, disbursements and expenses for the period from and after closing of the transaction for the sale the debtors' business to the completion of the *BIA* proceedings and the discharge of Deloitte Restructuring Inc. as trustee in bankruptcy of estate of the debtors.

[20] The debtors and the proposal trustee prepared a cash flow forecast for September 25, 2015 to December 25, 2015. It shows that the debtors will require additional funds in order to see them through this process, while still carrying on business.

[21] StormFisher Environmental Ltd. has offered to make a DIP loan of up to $1 million to fund the projected shortfall in cash flow. In return, the DIP lender requires a charge that ranks in priority to all other claims and encumbrances, except the administration and D&O charges. The administration charge protects the reasonable fees and expenses of the debtors' professional advisors. The D&O charge is to indemnify the debtors for possible liabilities such as wages, vacation pay, source deductions and environmental remedy issues. The latter may arise in the event of a wind-down or shut down of the plant and for which existing insurance policies may be inadequate. According to Mr. Davis, the risk if such a charge is not granted is that the debtors' directors and officers might resign, thereby jeopardizing the proceedings.

[22] The debtors have other creditors. Harvest Power Partners had arranged for an irrevocable standby letter of credit, issued by the Bank of Montreal to fund the payment that might be required to the Ministry of Environment arising from any environment clean up that might become necessary.

[23] Searches of the *PPSA* registry disclosed the following registrations:

(a) Harvest Ontario Partners:

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts.

(b) Harvest Power Mustang Generation Ltd.

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts; and

(iii) Roynat Inc. in respect of certain equipment.

[24] There are two registrations on title to 1087 Green Valley Road. The first is for $11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for $239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

**Analysis**

**a) the administrative consolidation**

[25] The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion

materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting, administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Re Electro Sonic Inc.*, 2014 ONSC 942 (S.C.J.).



**b) the DIP agreement and charge**

[26] S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

> **50.6(1)** ***Interim Financing:*** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) 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 debtor'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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> **50.6(3)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

[27] S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

> **50.6(5)** ***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 debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;

> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

[28] This case bears some similarity to *Re P.J. Wallbank Manufacturing*, 2011 ONSC 7641 (S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

[29] The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminshed.

[30] In *Re Comstock Canada Ltd.*, 2013 ONSC 4756 (S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Sun Indalex Finance, LLC* v. *United Steelworkers*, 2013 SCC 6 as follows:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > …the purpose of the *CCAA*… is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> …
>
> Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
>
> [Emphasis in original]

[31] I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

**c) administration charge**

[32] The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (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 person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; 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 the effective participation of that person in proceedings under this Division.
>
> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

[33] In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Re Colossus Minerals Inc.*, 2014 ONSC 514 (S.C.J.) and the discussion in it.

**d) the D & O charge**

[34] The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 property of the person is subject to a security or charge – in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.
>
> (3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional default.



[35] I am satisfied that such an order is warranted in this case for the following reasons:

- the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;
- it is required only in the event that a sale is not concluded and a wind down of the facility is required;
- there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;
- the proposal trustee and the proposed DIP lender are supportive;

**e) the sale process and the stalking horse agreement of purchaser sale**

[36] The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

[37] In *Re Brainhunter* (2009), 62 C.B.R. ($5^{th}$) 41, Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

> 13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re,* [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:
>
> (a) Is a sale transaction warranted at this time?
>
> (b) Will the sale benefit the whole "economic community"?
>
> (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) Is there a better viable alternative?
>
> 14. The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.
>
> 15. Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.
>
> 16. Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.
>
> 17. I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[38] It occurs to me that the Nortel Criteria are of assistance in circumstances such as this – namely on a motion to approve a sale process in proposal proceedings under the *BIA*.

[39] In *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies* 2012 ONSC 175 (S.C.J.) the Court was asked to approve a sales process and bidding procedures, which included the use of a stalking horse credit bid. The court reasoned as follows:

> 6. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp*.: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:
>
> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
>
> 7. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

[40] I am satisfied that the sale process and stalking horse agreement should be approved. It permits the sale of the debtors' business as a going concern, with obvious benefit to them and it also maintains jobs, contracts and business relationships. The stalking horse bid establishes a floor price for the debtors' assets. It does not contain any compensation to StormFisher Environmental Ltd. in the event a superior bid is received, and as a result, a superior bid necessarily benefits the debtors' stakeholders rather than the stalking horse bidder. The process seems fair and transparent and there seems no viable alternative, particularly in light of FCC's earlier lack of success. Finally, the proposal trustee supports the process and agreement.

**f) Extension of time to file a proposal**

[41] It is desirable that an extension be granted under s. 50.4 (9) of the *BIA*. It appears the debtors are acting in good faith and with due diligence. Such an extension is

necessary so the sale process can be carried out. Otherwise, the debtors would be unable to formulate a proposal to their creditors and bankruptcy would follow.

[42] For these reasons, the relief sought is granted.

*"Justice H.A. Rady"*
Justice H.A. Rady

**Date:** October 28, 2015

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# Financing Insolvency Restructurings in the Wake of the Financial Crisis: Stalking Horses, Rogue White Knights and Circling Vultures

Janis Sarra*

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## I. INTRODUCTION

The financing of financially distressed companies is challenging. While additional financing could be provided outside of formal insolvency proceedings, corporate statutes in many jurisdictions prohibit incurring of additional debt while insolvent unless there is notice to, and consent of, creditors. In such circumstances, absent special protection, creditors are reluctant to advance further financing. Where debt is held by multiple creditors, insolvency proceedings are usually necessary to

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prevent a race to the assets and to allow the debtor company a short period in which to determine whether a going concern business plan and financing are possible.

Different jurisdictions place greater or lesser importance on offering a restructuring solution to firms in financial distress in addition to liquidation procedures. Where a restructuring option is available, many, but not all, jurisdictions have realized that any going concern strategy requires a means of financing the business until the appropriate workout plan can be devised, whether it is a restructuring of debt and equity, a going concern sale or a liquidating sale. This financing is called debtor in possession ("DIP") financing in Canada, and post-commencement financing in other jurisdictions; it provides the financing to continue operations during the insolvency proceeding and to cover the costs of insolvency and legal professionals in that proceeding. It is often connected closely to "exit-financing," the capital that will be needed to exit protection under the stay or moratorium provisions of insolvency legislation, and to assist the debtor company in the first period after restructuring.

There are a number of sources of post-commencement financing. They include the sale of some of the debtor's assets or the willingness of suppliers to continue supplying on credit for a limited period. In many jurisdictions, such financing historically came primarily from pre-filing banking and other traditional operating lenders. Pre-filing creditors often have an incentive to continue to lend, based on a desire to preserve ongoing business relations, the need to protect already sunk costs, and the potential for longer term upside credit relationships. In some instances, pre-filing lenders extend financing to ensure that their interests are not trumped by new financing that receives a priority charge. Even where their claims are already covered by their secured charge on the debtor's assets, pre-filing secured creditors may agree to provide DIP financing where they want to ensure that their position is not compromised during the workout process; that the debtor restructures in a manner that maximizes protection of their interests; or to maintain some control over the debtor during the proceedings.

Whether the post-commencement financing lender is a pre-filing creditor or not, it is unlikely to lend absent a secured charge. While some jurisdictions only allow post-commencement financing on as yet unencumbered assets or as a lower priority security interest on already encumbered assets where the value of the encumbered asset is sufficiently in excess of the amount of the pre-existing secured

obligation,[1] in Canada, priority secured charges for DIP financing can extend to already secured assets, if particular pre-conditions are met, such as notice to creditors.[2]

At the height of the financial crisis in 2008 and 2009, forbearance was a primary strategy for not forcing many businesses into insolvency, as manufacturing and other sectors were reeling from the ripple effects of the failure of financial institutions, the collapse of the asset-based commercial paper and mortgage markets, and the overall unavailability of credit. Banks and other lenders would grant extensions of time, renegotiate credit terms, or forbear on exercising their self-enforcement remedies for a specified period. As the worst of the crisis ended and credit continued to be tight, new strategies had to be developed to allow financing of insolvent debtors. This article explores some of those strategies for post-commencement financing, using Canadian insolvency law as illustrative of changes in the credit market. Part II discusses post-commencement financing generally, introducing some of the ongoing policy issues, the challenge of such financing for corporate groups and in cross-border proceedings, as well as recent changes to Canadian statutory language. Part III examines the growing trend of stalking horse proceedings as a mechanism to finance the workout or as a resolution to the debtor's financial distress, including the recent introduction of credit bids. Part IV discusses the impact of the introduction of distressed debt lenders into the insolvency financing market in a number of jurisdictions, and their effect on workout dynamics, including one case of a "rogue white knight." Finally, Part V discusses the impact of credit default swaps and other credit derivatives on the economic incentives in a restructuring proceeding.

## II. POST-COMMENCEMENT FINANCING OF INSOLVENT DEBTORS

If there is to be a restructuring aspect to any insolvency law, it must address the issue of post-commencement financing. New finance is often required on a fairly urgent basis to ensure the continued operation of the business while it is determining its future. The UNCITRAL Legislative Guide on Insolvency Law suggests that workout financing can be funded out of the debtor's existing cash flow through operation of a stay and cessation of payments on pre-commencement liabilities; or, where the debtor has no funds to meet immediate cash flow needs, financing may take the form of trade credit extended to the debtor by vendors of goods or services, or through loans or other forms of finance

1. UNCITRAL Legislative Guide on Insolvency Law 116 (New York: United Nations, 2005).

2. *See* discussion in Part III, *infra*, of the statutory criteria.

extended by lenders.[3] It observes that post-commencement finance needs to be balanced against the need to uphold commercial bargains; to protect the pre-existing rights and priorities of creditors; to minimize any negative impact on the availability of credit; and to consider the impact on unsecured creditors if remaining unencumbered assets are used to secure new lending, leaving nothing available for distribution if a reorganization were to fail.[4]

In jurisdictions where court approval is required, the court often engages in a balancing of interests and prejudice between the parties. Secured creditors may be required to make some sacrifice because of the reasonably anticipated benefits for all stakeholders, including employees, trade suppliers and other creditors.[5] Even on an urgent basis, notice should be given to creditors prior to subordinating their interests, in order to avoid their having to incur the additional costs of seeking to set aside an initial order approving financing. UNCITRAL suggests that the number of authorizations for such financing be kept to a minimum, generally preferring that decision making rest with the insolvency professional rather than with the court.[6] In Canada, DIP financing requires court approval. While the courts have been fairly consistent in respecting the statutory hierarchy of creditors' claims, they have engaged in a balancing of multiple interests during consideration of financing requests, having regard to the express aims and language of the insolvency statute.[7]

The courts have cautioned that there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to

3. UNCITRAL Legislative Guide on Insolvency Law 114 (New York: United Nations, 2005).

4. *Id.* at 115.

5. United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]), affirmed (2000), [2000] B.C.J. No. 409, 16 C.B.R. (4th) 141 (B.C. C.A.), leave to appeal allowed but appeal discontinued (2000), [2000] S.C.C.A. No. 142, 2000 CarswellBC 2132, 2000 CarswellBC 2133 (S.C.C.) ¶¶ 2, 9, 12; JANIS P. SARRA, CREDITOR RIGHTS AND THE PUBLIC INTEREST, RESTRUCTURING INSOLVENT CORPORATIONS (2003).

6. UNCITRAL Legislative Guide on Insolvency Law 116 (New York: United Nations, 2005). The Guide notes that although requiring court involvement may generally assist in promoting transparency and provide additional assurance to lenders, in many instances the insolvency representative may be in a better position to assess the need for new finance. Similarly, where secured creditors consent to revised treatment of their security interests, approval of the court may not be required. UNCITRAL suggests that the court will generally not have access to expertise or information additional to that provided by the insolvency representative on which to base its decision. *Id.*

7. Both the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* in Canada have provisions for restructuring and provisions for debtor in possession financing.

the lenders whose position is being subordinated.[8] DIP financing requests in initial orders should be confined to what is reasonably necessary for the continued operation of the debtor corporation during a "brief but realistic period on an urgent basis."[9] The granting of post-commencement financing may allow a corporation to keep operating in order to retain value while trying to negotiate a workout with creditors. For stakeholders, such as workers, trade creditors, or local governments, it may also result in preservation of their investments, at least for the period that a restructuring plan is being formulated.[10] According super-priority financing has also been aimed at ensuring compliance with environmental obligations, in the public interest.[11] The court, in balancing interests, will weigh the possibility of a going-concern solution that potentially creates long-term upside value for numerous stakeholders, with the risk of further depletion of value that may be able to satisfy claims on a short-term basis.[12] This balancing of interest and prejudice is at the heart of most financing judgments. Notwithstanding these potential benefits to all stakeholders, absent careful scrutiny of the terms of the financing agreement, granting access to short-term capital can increase the risk of harm to stakeholders if the terms approved by the court lead to a restructuring plan that prejudices their interests more than a liquidation outcome.

There was a growing practice in the five years preceding 2008 in Canada of arranging DIP financing in an amount far in excess of what the debtor corporation anticipated needing, ostensibly to increase market

8. Re Skydome Corp. (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]) at 5; Re Royal Oak Mines Inc. (1999), 1999 CarswellOnt 792 (Ont. Gen. Div. [Commercial List]) ¶ 22; Re United Used Auto & Truck Parts Ltd. (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]), affirmed (2000), [2000] B.C.J. No. 409, 16 C.B.R. (4th) 141 (B.C. C.A.), leave to appeal allowed but appeal discontinued (2000), [2000] S.C.C.A. No. 142.

9. Re Royal Oak Mines Inc. (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]).

10. Janis Sarra, *Governance and Control: The Role of Debtor-in-Possession Financing under the* CCAA, *in* ANNUAL REVIEW OF INSOLVENCY LAW, 2004, 119-172 (Carswell, 2005).

11. Re Royal Oak Mines Inc. (2000), 2000 CarswellOnt 3686 (Ont. S.C.J. [Commercial List]).

12. Canadian courts have previously held that there are five principles operating in the court's consideration of applications for DIP financing and priming charges: adequate notice of DIP financing and priming requests, so that creditors can fully assess the impact of DIP financing decisions; sufficient disclosure; timeliness of the request; balancing the prejudice to creditors and other stakeholders; and the principle of granting priority financing as an extraordinary remedy. Courts apply these principles in an effort to find the optimal balancing of prejudice in the exercise of their jurisdiction to grant DIP financing or other priority charges. The court must weigh the likely risks against the likely gains of authorizing such financing; with a view to creating certainty in credit transactions while meeting the objectives of insolvency legislation.

confidence and provide creditors with some assurance that their post-filing claims would be met. However, the size of the DIP facility generated increased up-front fees, higher costs associated with heightened reporting requirements to the DIP lender, and, in some cases, more control elicited as a condition of providing the financing.[13] As the market for DIP financing started to increase, the competition meant that the margin on a DIP facility itself was not that great, but the DIP lender made its real profit on the up-front fees.

Canadian courts have granted "Drip DIPs," that require the debtor to come before the court on notice to creditors each time it seeks to draw down another tranche of funds. The only exposure of the DIP lender is the amount already advanced, and creditors have more information on which to assess their positions as the process unfolds. Gradual release of funds in the first few weeks or months can generate a higher degree of accountability. Where stakeholders are provided with timely information of the financing requirements and the opportunity to provide their views to the court on the necessity of the draw down, it can act as a temper on any managerial slack that has arisen from a generous DIP facility.[14] Drip DIPs frequently are structured so that the debtor can draw down according to an anticipated schedule; hence it is not necessary to come back before the court if there is no deviation from the schedule that would have adverse consequences for other creditors.

Where the lender is a pre-existing secured lender, such as a specific asset secured creditor, the creditor's claim is often unaffected by a reorganization proceeding, and the creditor may not support additional financing as it means delay in realizing on its claim. However, in some cases, subordinated pre-filing lenders may benefit from financing that is aimed at satisfying senior secured claims at the outset or early in the process, as it may enhance their position in the hierarchy of claims.

There is a question of whether post-commencement financing should be granted at all when the circumstances indicate that the financing would consume considerable resources and that the debtor has a questionable ability to successfully negotiate a plan. The court may decline post-commencement financing on a primed basis where the debtor seeks only to prolong the period before an inevitable liquidation, or where there is no possibility for a plan. The challenge is to ensure that such a decision is not premature such that creditors become unwilling to come to the negotiation table. The cases that have declined to grant the

13. Sarra, *supra* note 10, at 150.

14. Andrew Kent, Alex MacFarlane and Adam Maerow, "Who is in Control? A Commentary on Canadian DIP Lending Practices," May 2004, *available at* http://www.mcmillan.ca/Upload/Publication/DIP%20Financing%20Paper%20v10.pdf.

financing have relied in part on the fact that there were not ongoing operations, and employees and trade supply relations to protect during an interim period.[15] For example, the Alberta Court of Queen's Bench denied the application of a real estate company that had applied for *Companies' Creditors Arrangement Act* protection as it was unable to make all of its mortgage payments as a result of the economic downturn and defaults on leases.[16] The application was opposed by the majority of first mortgagees, who wanted to proceed with their foreclosure remedies. The Court concluded that it was not appropriate to grant relief; it appeared highly unlikely that any compromise or arrangement would be acceptable to creditors; the proposed costs were not appropriate given the circumstances; and there were not a large number of employees or significant unsecured debt in relation to the secured debt.

Thus, the policy issues in post-commencement financing can be summarized as the need to appropriately balance the interests of all creditors against the potential for a successful restructuring, with a view to the costs and benefits arising from the particular form and conditions of the proposed financing agreement. These policy issues arose first in the courts' exercise of their discretionary decision-making concerning DIP financing, and are now the subject of new Canadian legislative provisions.

### *A. Codification of DIP Financing in Canadian Insolvency Legislation*

DIP financing in Canada was initially hotly contested based on jurisdictional grounds, given the previous lack of statutory language; however, it became widely endorsed by the courts as a measure to "keep the lights on" during the period of negotiations for a restructuring plan.[17] With the amendments to Canadian insolvency legislation effective September 2009, the court's authority to authorize such financing was codified in both the *Bankruptcy and Insolvency Act* ("*BIA*") and *Companies' Creditors Arrangement Act* ("*CCAA*"), both statutes articulating criteria for assessing requests for financing on a primed basis.[18]

15. Re Octagon Properties Group Ltd. (2009), 2009 CarswellAlta 1325, 2009 ABQB 500 (Alta. Q.B.); Re Shire International Real Estate Investments Ltd., 2010 CarswellAlta 234, 2010 ABQB 84 (Alta. Q.B.).

16. Re Octagon Properties Group Ltd. (2009), 2009 CarswellAlta 1325, 2009 ABQB 500 (Alta. Q.B.).

17. *See* for example, Re Royal Oak Mines Inc. (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]). Re Indalex Ltd. (2009), 2009 CarswellOnt 1998, 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]); Re Conporec Inc. (2009), 2009 CarswellQue 2471 (Que. S.C.).

18. S. 11.2, *CCAA*; 2007, c. 36 proclaimed in force as of September 18, 2009.

UNCITRAL has recommended that an insolvency law should specify that the court may authorize the creation of a security interest having priority over pre-existing security interests if specified conditions are satisfied, including that existing secured creditors are given the opportunity to be heard by the court; the debtor can prove that it cannot obtain the finance in any other way; and the interests of the existing secured creditors will be protected.[19]

The Canadian criteria have some similarities, but do not require the debtor to establish that it can find no other financing, and do not require the pre-filing secured creditor to be fully protected. The factors that the court is to consider include, but are not limited to: the period during which the company is expected to be subject to restructuring proceedings; how the business is to be managed during the proceeding; whether management has the confidence of the debtor's major creditors; whether the loan would enhance the prospects of a viable compromise or arrangement being made; the nature and value of the company's property; whether any creditor would be materially prejudiced as a result of the charge; and the monitor's views.[20] The monitor in *CCAA* proceedings is a court-appointed officer that assists the court and parties in the restructuring process, and it can provide an impartial view of the need for, and efficacy of, any DIP financing requests.

The new statutory criteria for DIP financing essentially codify the tests used previously by Canadian courts but offer greater transparency for creditors and other stakeholders that are not repeat players in proceedings. The court is not restricted to consideration of only these factors,[21] nor is it required to give them equal weight and consideration.[22] The court has approved post-commencement financing with a corresponding charge where necessary to ensure that the business enterprise of the debtor would continue to operate as a going concern while it undergoes restructuring, having regard to the potential material prejudice to creditors, the preservation of employment and the prospects for a successful workout.[23] The court has held that even if certain creditors are materially affected by the DIP loan, the court must look to the broader picture, and a compromise that the creditor may have to

19. UNCITRAL Legislative Guide on Insolvency Law (New York: United Nations, 2005), at 118.

20. Section 11.2(4), *CCAA*; Re White Birch Paper Holding Co., 2010 CarswellQue 1780 (Que. S.C.J.).

21. Re Mecachrome International Inc. (2009), 2009 CarswellQue 5141, [2009] R.J.Q. 1306 (Que. S.C.); Re White Birch Paper Holding Co., 2010 CarswellQue 1780 (Que. S.C.J.); Re Canwest Global Communications Corp., (2009), 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]).

22. Re White Birch Paper Holding Company, 2010 CarswellQue 2675 (Que. S.C.).

23. *Id.*

accept can be outweighed by the positive effects of the financing on the total business of the debtor.[24]

For example, in *Re AbitibiBowater,* the Québec Superior Court approved a DIP financing facility where the benefits of the financing to all creditors, shareholders and employees outweighed the potential prejudice to some creditors.[25] There was an urgent need for the financing due to a serious lack of liquidity to meet payroll or key suppliers' deliveries; the term of the financing was relatively short; there was a reasonable prospect of a successful restructuring; and most of the stakeholders and the monitor supported the proposed financing. In stabilizing the continued operations of the debtor, the Court held that the financing potentially added value to the objecting term lenders' claims and the opportunity to contest future borrowing alleviated in part the prejudice suffered by the term lenders. The Court also observed that in the current credit market, DIP financing would not be available absent a priming charge; however it reduced the amount of the charge for the DIP facility as the Court was not satisfied with the explanation provided to support the amount sought.

How creditors bear the costs of post-commencement financing is an important question. The Canadian court has approved allocation of financing charges based on the following principles: that all secured creditors should contribute to the cost of restructuring; a strict accounting on a cost-benefit basis was impractical and not necessary or desirable for allocation purposes; security arrangements and priorities should not be readjusted as part of this process; the proportion each creditor should be allocated need not be equal; and the allocation should be equitable, rather than equal.[26] The Court held that while it is unfair to ignore the degree of potential benefit that each creditor might derive, the nature of proceedings under the *CCAA* makes a strict accounting on a cost-benefit basis impractical and ultimately defeating.[27]

### *B. Corporate Groups and Cross-Border Proceedings*

The challenge for post-commencement financing becomes more acute for debtors operating as a corporate group in multiple jurisdictions. Often the related businesses have highly integrated financial systems and interrelated debt and equity structures, yet the entities are registered in

24. *Id.*

25. Re AbitibiBowater Inc. (2009), 58 C.B.R. (5th) 62 (Que. S.C.).

26. Re Winnipeg Motor Express Inc, (2009), 2009 CarswellMan 383, 2009 MBQB 204 (Man. Q.B.).

27. *Id.* Where the allocation is *prima facie* fair, the onus is on an objecting creditor to demonstrate that the proposal was unfair or prejudicial. The court relied heavily on the monitor's expertise and involvement in approving the allocation.

different jurisdictions with different statutory language covering post-commencement financing. The policy issue is whether and to what degree can the assets of the group in one jurisdiction be used as part of the financing in insolvency proceedings to the benefit of group members in another jurisdiction.

Special purpose entities ("SPE") are often created within corporate groups to manage risk in the acquisition and financing of specific assets.[28] Corporate entities often have inter-entity financing arrangements involving loans and guarantees. The supply relationships between the entities may mean that there is short-term debt in the form of receivables granted from one entity to another. A restructuring may not be possible without a highly integrated workout strategy across multiple jurisdictions; and it is the interim financing that may be particularly challenging, given that different jurisdictions have different priorities and different degrees of willingness to allow post-commencement financing. In a number of jurisdictions, a significant method of enterprise group financing is cross-guarantee financing, where each company within a group guarantees the performance of the others.[29] UNCITRAL observes that cross-guarantees can operate to reduce the regulatory burden on companies by granting accounting and auditing relief to related entities, operating as a form of voluntary contribution or pooling in the event that one or more of the companies becomes financially distressed.[30] One advantage of this arrangement is that creditors can focus on the consolidated position for those entities, rather than on the individual financial statements of the wholly owned subsidiaries.

UNCITRAL suggests that insolvency laws should permit an enterprise group member in insolvency proceedings to advance post-commencement finance to other enterprise group members subject to insolvency proceedings; grant a security interest over its assets for post-commencement finance provided to another enterprise group member; and provide a guarantee or other assurance of repayment for post-commencement finance provided to another enterprise group member.[31] The insolvency law should specify that such financing may be provided where it is necessary for the continued operation of, or the preservation of the value of, the enterprise group member; and where any harm to creditors of that group member is likely to be offset by the benefit to be

28. UNCITRAL Working Group V (Insolvency Law), UNCITRAL Legislative Guide on Insolvency Law, Treatment of enterprise groups in insolvency, 23 April 2010. A/CN.9/WG.V/WP.90 and Addenda 1, November 2009 (A/CN.9/686). 2. A/CN.9/WG.V/WP.92 and A/CN.9/WG.V/WP.92/Add.1.

29. *Id.* at 29.

30. *Id.*

31. *Id.* at 37.

derived from advancing financing or a security interest.[32] There should be appropriate protection for the providers of post-commencement finance and for those parties whose rights may be affected; and there should be fair apportionment of the benefit and detriment associated with the financing among all group members involved.[33] UNCITRAL recommends a balancing of the interests of individual enterprise group members with what is required for the reorganization of the group as a whole.[34] A solvent group member might have an interest in the financial stability of related entities in order to ensure its own financial stability, particularly where it is closely integrated with or reliant on insolvent members for ongoing business activity.[35] UNCITRAL observes that the interest of a group member providing finance may relate more to the insolvency outcome for the group as a whole than to commercial considerations of profit or short-term gains, especially where there is a high degree of reliance between the businesses of the group members.[36] The *Nortel Networks* case is one such example.[37] Issues include the priority and extent to which inter-group financing should be allowed, the extent to which it encumbers the assets of one entity in furtherance of the restructuring of the entire corporate group, and how both secured and unsecured creditors' interests are to be assessed in considering the quantum and priority of the financing.

In Canada, one relatively new development is the approval of DIP financing charges that encumber assets of Canadian debtor entities to meet financing needs of related entities in the United States. The genesis of this change is both the increasingly interrelated nature of global business enterprises and the lack of financing during the worst of the financial crisis in 2008 and 2009. The downside risk for such financing is that Canadian creditors that may have had access to the value of those assets may lose that claim. The potential upside is the preservation of the business, jobs and trade relationships, which overall may be more valuable.

For example, in *Re InterTAN Canada Ltd.,* the Ontario Superior Court of Justice approved a DIP financing facility, the terms of which required the debtor to provide security for the borrowings of its US

32. *Id.* at 31.

33. UNCITRAL Working Group V (Insolvency Law), UNCITRAL Legislative Guide on Insolvency Law, Treatment of enterprise groups in insolvency, 23 April 2010. A/CN.9/WG.V/WP.90 and Addenda 1, November 2009 (A/CN.9/686). 2. A/CN.9/WG.V/WP.92 and A/CN.9/WG.V/WP.92/Add.1, at 37.

34. *Id.* at 32.

35. *Id.* at 32.

36. *Id.* at 36.

37. Re Nortel Networks Corp. (2009), 2009 CarswellOnt 4467, (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]).

parent in its Chapter 11 filing.[38] The Court expressed concern about inadequate notice to creditors regarding the request to use the debtor's assets as a basis for obtaining finance for a related entity, and observed that if debtors are going to request such extreme relief on an initial application, with little or no notice, it is up to the applicant to establish the evidentiary basis for the requested relief. In the absence of such evidence, parties should have no expectation that the court will grant such extraordinary relief. Justice Morawetz did approve the DIP facility on the basis that the potential upside of a going concern operation was preferable to liquidation, notwithstanding that provisions of the DIP facility effectively transferred assets from the Canadian debtor to another member of the enterprise group. He took into account the prospect of continued going concern operations; the continued employment of over 3,000 individuals; the benefits of continued operation for other third-party stakeholders; the fact that certain creditor groups would be largely unaffected by the *CCAA* proceedings; and the creation of an unsecured creditors' charge that provided a degree of protection to them.

In *Nortel Networks,* Canadian and US courts approved a series of agreements between the inter-related Nortel entities that provided the debtors with ongoing funding.[39] The Canadian court held that the scope of review must take account of the complex and interrelated funding agreements that had been developed over a period of years. It was appropriate to place reliance on the views of the monitor who had the benefit of intensive involvement for over a year, and to take account of extensive negotiations among the debtors and creditors. The Court was satisfied that the financing was fair and reasonable, and that the financial stability of the Canadian debtor was in jeopardy and would not improve without the approval of financing.

Cross-border entities and cross-border guarantees extend not only to interim financing but have been used as mechanisms to finance a sale process. For example, the Canadian Court approved a DIP facility in which US debtor entities advanced financing to Canadian debtors.[40] The US debtors were granted a charge over the assets of the Canadian debtor, limited to the amount of inter-company advances. The DIP facility was predicated on the US debtors' carrying out a sales process that would include the marketing of the businesses and assets of both sets of debtors,

38. Re InterTAN Canada Ltd. (2008), 2008 CarswellOnt 8040, 49 C.B.R. (5th) 248; additional reasons at (2009), 2009 CarswellOnt 687, 49 C.B.R. (5th) 260 (Ont. S.C.J. [Commercial List]).

39. Re Nortel Networks Corp., 2010 CarswellOnt 1044 (Ont. S.C.J. [Commercial List]).

40. Re Eddie Bauer of Canada Inc. (2009), 2009 CarswellOnt 3657 (Ont. S.C.J. [Commercial List]).

to be subject to approval by both the *CCAA* court and the US bankruptcy court. Both courts were satisfied that the proposed DIP facility and creation of the inter-company charge were appropriate in the circumstances.

In another proceeding, an extensive process to obtain new debt financing had been undertaken, and the debtors, having thoroughly canvassed the market, did not have any satisfactory alternative financing arrangements available. The Ontario Superior Court approved a cross-border DIP facility that provided that the Canadian debtors would guarantee loans to the US debtors and vice versa.[41] The Court was satisfied that the business was fully integrated, making it impracticable in the existing credit environment to secure alternate financing on a stand-alone basis. The Court held that the successful restructuring of the Canadian and US entities appeared to be inextricably intertwined and that financing was needed to continue day-to-day operations.

In granting a motion for DIP financing in another proceeding, the Ontario court was satisfied that secured creditors had received notice; the amount of the facility was appropriate having regard to the debtor's cash-flow statement; management had the confidence of the major creditors; there was no material prejudice to any of the creditors that would arise from the granting of the DIP charge; and the facility would enhance the prospects of a restructuring.[42] The Court held that continued timely supply of US services was necessary to preserve going concern value and that commencement of Chapter 15 proceedings to have the *CCAA* proceedings recognized as "foreign main proceedings" was a prerequisite to the DIP facility.

## III. STALKING HORSE PROCEEDINGS

Given the ongoing problems with credit availability, other means of post-commencement financing have been pursued, including the sale of some of the debtor's assets. However, these sale processes may raise issues of fairness to stakeholders and the misuse of inside information similar to those raised by mergers and acquisitions outside of an insolvency proceeding. Recently, a number of insolvency proceedings have used various bidding or auction techniques to sell all or part of the enterprise to raise both post-commencement and exit financing. Stalking horse proceedings are one such strategy. The term "stalking horse"

41. Re Smurfit-Stone Container Inc. (2009), 2009 CarswellOnt 391, 50 C.B.R. (5th) 71 (Ont. S.C.J. [Commercial List]). The court approval limited the amount of borrowings under the facility pending further order of both the U.S. and the *CCAA* court.

42. Re Canwest Global Communications Corp., (2009), 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]).

comes originally from hunters using a horse to serve as a screen as camouflage when they stalked their prey.[43] In the insolvency context, it is used to signify a situation where the debtor makes an agreement with a potential bidder for a sale of the debtor's assets or business, and that agreement forms part of a process whereby an auction or tendering process is conducted to see if there is a better and higher bidder that will result in greater returns to creditors. The premise is that the stalking horse has undertaken considerable due diligence in determining the value of the debtor corporation and that other potential bidders can rely, to an extent, on the value attached by that bidder based on that due diligence.

"Stalking horse auction" processes have been used recently in Canadian-US cross-border proceedings, in part as a response to the tightening of credit and the need to generate higher bids for the value of some or all of the assets or business. In an auction, a preliminary bid by the stalking horse bidder is disclosed to the market and becomes the base amount that parties can then outbid, driving up the price and hence the value to meet creditors' claims. The stalking horse bidder in an insolvency proceeding enters the process knowing that it may not be the eventual purchaser. Hence it negotiates a price for its participation and its due-diligence activities, usually in the form of a "break fee," which it will receive if it is not ultimately successful in its bid for the debtor company. In this sense, it is similar to a white knight in a takeover transaction, in that the size of the break fee must be large enough to be auction-generating and small enough not to be auction-inhibiting.

In *Nortel Networks,* the Canadian and US courts approved a bidding procedure and asset-sale agreement for the purposes of conducting a "stalking horse" bidding process, including a break fee and expense reimbursement.[44] The hearing was conducted by video conference with the US Bankruptcy Court for the District of Delaware in accordance with the provisions of a cross-border protocol previously approved by the courts. The Canadian court held that it had jurisdiction under the *CCAA* to approve a sales process in the absence of a formal plan of compromise

43. The Online Etymology Dictionary, http://www.etymonline.com/index.php?l=s&p=55.

44. Re Nortel Networks Corp. (2009), 2009 CarswellOnt 4467, (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]). *See also* Re Eddie Bauer of Canada Inc. (2009), 57 C.B.R. (5th) 241 (Ont. S.C.J.). Previously, the US bankruptcy court has held that it will take the following factors into account in determining whether to approve a break fee: whether the fee correlated with a maximization of value to the estate; whether the request is arm's length; the degree of stakeholder support; whether the proposed fee is a fair and reasonable percentage of the proposed purchase price; any potential chilling effect on the market; the existence of safeguards; and whether there is an adverse impact on any opposing unsecured creditors; Re Hupp Industries, 140 B.R. 191 (Bankr. N.D. Ohio 1992).

or arrangement and a creditor vote, on the basis that the *CCAA* must be given a broad and liberal interpretation to achieve its objectives. The Court held that a sale by the debtor that preserved the business as a going concern was consistent with those objectives. Factors to be considered included, but were not limited to: is a sale transaction warranted at this time; will the sale benefit the whole "economic community"; do any of the debtor's creditors have a *bona fide* reason to object to the sale of the business; and is there a better viable alternative?

In another proceeding, the Ontario Superior Court of Justice approved a stalking-horse auction process in a *CCAA* proceeding where the proposed stalking horse, which was an insider and related party, had been scrutinized by the financial advisors, the independent committee of the board and the monitor.[45] With respect to a contested break fee, the Court held that the fee was a business decision that had been considered by the debtor and key creditor groups and that the amount of the break fee was consistent with break fees that had been approved in other proceedings.[46] In the circumstances of this case, the court found it unnecessary to substitute its business judgment for that of the applicants.

Canadian courts have generally supported sealed competitive bidding processes that allow submission of independent, self-contained bids, finding that bidders are entitled to fair compliance with such procedures.[47] The courts have supported insolvency professionals rejecting referential bids on the basis that they would frustrate a sealed competitive bidding process, as it would create unfairness if a party could introduce into the sealed bid system elements of a public auction without any risk of being outbid by another party. Where parties intended a fixed bid process, the court was satisfied that the receiver's rejection of a referential bid in favour of another bid was commercially fair and reasonable in the circumstances and should be accepted.[48]

Dowdall and Dietrich have argued that stalking-horse proceedings conducted by the debtor and not a neutral court-appointed officer raise concerns about the process, in that the stalking horse can exert considerable control over timelines, making them so tight that other bidders do not have a meaningful opportunity to undertake their due

45. Re Brainhunter Inc., 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]), adopting the tests used in Re Nortel Networks Corp. (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]),

46. *Id.*

47. Fifth Third Bank v. MPI Packaging Inc., 2010 CarswellOnt 29 (Ont. S.C.J. [Commercial List]).

48. *Id.*

diligence.[49] Stalking horse bidders may insist on restrictive terms in respect of who may be treated as a qualified bidder. Management may also have a conflict of interest where they are negotiating key employee retention packages, bonuses or other perquisites; and while these are ostensibly subject to some control in terms of the court's approval, the tight timeliness may create pressure to approve such plans, even where the court might otherwise have concerns.[50]

These concerns may be difficult to discern where the issues are complex and time is of the essence. However, courts have indicated that they will scrutinize such transactions. In *Re Mecachrome International Inc.,* Justice Gascon of the Québec Superior Court dismissed a motion to approve a plan-funding agreement proposed by the DIP lenders to fund a proposed *CCAA* plan, under which the DIP lenders would acquire all the shares of the Canadian debtor company in exchange for payment, including some funds to be directed to unsecured creditors to recover approximately 12% of their claims.[51] The Court held that the *CCAA* is aimed at enabling a debtor company, with the support of its creditors, to weather its financial difficulties and continue to operate in the interests of parties and society in general, and that a plan that is supported by creditors must be achieved at the best cost and under the best possible conditions for the creditors that inevitably suffer the consequences. Here, the fundamental goal of the *CCAA* in the circumstances was best served by refusing to approve the plan-funding agreement. The Court held that the cumulative effect of the absence of any legitimate and open process to canvass funding proposals; the narrow definition of what constituted a superior proposal under the plan-funding agreement and the lack of flexibility given to the board of directors to qualify a superior proposal as superior; the chilling effect of the high break fee; and the lack of evidence of a value maximizing process, all worked against the objective of a sufficient, transparent and open process. As well, the process contemplated by the proposed funding agreement would usurp the exercise of the right to vote belonging to creditors, and the agreement unnecessarily tied the hands of the Canadian debtor with respect to potential consideration of available alternative solutions that could benefit creditors. The Court held that the funding agreement closely resembled a stalking horse bid process with no real canvassing of the market. While the DIP lenders may have had a head start in any acquisition because of the inclusion of an exclusivity clause of limited

49. Daniel R. Dowdall and Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies?", in Janis Sarra, ed., *Annual Review of Insolvency Law, 2005* (Toronto: Carswell, 2006) at 8.

50. *Id.*

51. Re Mecachrome International Inc. (2009), 58 C.B.R. (5th) 49 (Que. S.C.).

duration in the DIP financing agreement, the Court held that such a clause did not, and could not, have the impact of relieving the Canadian debtors and the monitor of their duties, in terms of fairness, transparency, and openness towards all stakeholders. The Court found that the proposed break fee of 4.5% was too high, the evidence before it suggesting that the average break fee in a merger or acquisition is about 2.9%; and that the debtor had failed to show that the break fee was reasonable or adequately related to the costs of the DIP lender or its risk. The Court noted that while the approval of the monitor is an important factor, it is not decisive in and of itself.[52]

There is also the issue of the degree to which the DIP financier is, through terms of its facility, determining outcomes in other aspects of the *CCAA* proceeding. For example, in *Re AbitibiBowater Inc.,* the interim funding was provided on the basis that the funds could not be used towards the payment of special contributions to pension plans; and as a result, the Court concluded that it was necessary to suspend the special contributions to the pension plan.[53] While the DIP lender should be able to negotiate the terms of the facility, the courts need to be cognizant of the degree to which such terms will bind the court in future decisions. Tighter credit conditions have given DIP lenders greater leverage and the ability to exert more control. An alternative process that may offer better results for existing creditors is a credit-bid process.

### *A. Credit Bids*

A very recent development in financing workouts of insolvent businesses is the use of credit bidding, which has occurred in cases such as *Canwest* and *White Birch.*[54] A credit bid allows a creditor to essentially use its debt to bid for the equity of the company, often in a stalking horse process. Although there is no express language in the *CCAA* that allows credit bidding, as there is in the US Bankruptcy Code, Canadian courts have accepted credit bids as a reasonable means of financing the workout. There are a number of issues raised by this new financing. First, a creditor may have access to considerable information as a result of its position as a senior secured lender; thus, it is important to ensure that any bidding process is fair and transparent in terms of the financial and other disclosures. If the bidding creditor is also the DIP financier, it may pressure the debtor for a truncated process that does not

52. *Id.*

53. Re AbitibiBowater Inc. (2009), 2009 CarswellQue 4329 (Que. S.C.).

54. Re Canwest Global Communications Corp., (2009), 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]); Re White Birch Paper Holding Co., 2010 CarswellQue 1780 (Que. S.C.J.).

generate a true market for bids; or it may pressure for a lower value to be attributed to the business, given that pricing is difficult to determine at the point of insolvency. There is an important role for the monitor and the court in ensuring that the process is fair, that information is available that allows competitive bids to come forward, and that any conflicts of interest are controlled as much as possible. While credit bids may offer a helpful alternative to financing a workout, particularly in the tighter post-financial crisis credit market, their further development must be undertaken in a manner that ensures that the integrity of the *CCAA* process is maintained.

In the *Canwest* case, the credit bid was topped by a junior lender working in conjunction with other parties, generating increased value. Unlike new parties to insolvency proceedings, pre-filing secured creditors were already privy to confidential information, and generally such lenders are entitled to see other bids and proposals. The challenge was how to create a transparent and fair process that was truly open enough to generate other bids where appropriate. Another case upheld a creditor agreement that had provided for creditor bids, although the judgment did not expressly address the issues associated with credit bids. The Ontario Court approved a sale transaction involving transfer of the business and sale of real property of the applicants in both Canada and the US under a court-approved marketing process.[55] The Ontario debtor operated from businesses located in Canada and the United States. The selection of purchaser was based on a thorough analysis of all of the financial and commercial terms presented in all of the bids, and was recommended by the monitor and approved by the first lien lenders steering committee and the independent directors committee.[56] A 2007 inter-creditor agreement ("ICA") was found to be binding on the group of companies, including a provision that the first lienholders could credit bid their debt. The Ontario Superior Court of Justice found that by its terms and the definition of "bankruptcy code" in the ICA, the parties recognized that Canadian or US insolvency law might apply. Justice Campbell held that once a process has been put into place by court order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances. To permit an "invitation" to reopen that process not only would destroy the integrity of the process, but would likely doom the transaction that had been

55. Re Grant Forest Products Inc. (2010), 2010 CarswellOnt 2445 (Ont. S.C.J. [Commercial List]). Objections were raised by the subordinate secured creditor who questioned the jurisdiction of the court to convey real property assets located in the US.

56. *Id.* The second lien lenders had been consulted, and their views and questions were taken into account in the final selection of purchaser.

achieved.[57] The Court was satisfied that, by operation of the credit agreement, the first lienholders were entitled to exercise their remedies and the Canadian court had jurisdiction to provide the relief requested.[58]

The US caselaw on credit bids is extensive and has highlighted a number of policy issues in respect of this tool for generating post-commencement and exit financing. As Canadian parties develop these strategies, it will be important to study some of the problems that have arisen in the US context in terms of transparency and fairness of the process.

## IV. CIRCLING VULTURES AND ROGUE WHITE KNIGHTS

Traditional pre-commencement creditors who offer post-commencement financing are seen to have a stake in the long-term success of the business. However, constraints on credit granting by these institutions have lessened their ability to finance restructuring of insolvent companies. Other sources of financing may not have the same incentives in a restructuring proceeding. Is this shift in incentives a matter that should concern policymakers or the courts?

Distressed debt purchasers, often called vulture funds, have increasingly used strategic purchases to assert control in restructuring proceedings, by buying up debt across multiple classes at a discounted value or buying in sufficient quantity to obtain an effective veto over particular proposals and hence influence the outcome. Generally, Canadian courts have not been concerned with debt purchase transactions that may offer liquidity for trade suppliers, banks and other traditional creditors by creating a market for their devalued claims during insolvency proceedings.[59] Distressed debt purchasers offer creditors an opportunity for early exit and in some cases can lend their expertise to the development of viable business plans. Such lenders may also provide post-commencement financing such that the debtor obtains some

57. *Id.*, which was the product of the marketing process that was not only approved by the Ontario Court but not objected to by any party when it was initiated. The aggregate consideration being paid by the Canadian purchaser for the transferred assets and the U.S. purchasers for the Grant US Partnership assets was $403 million, subject to adjustment. It was urged that the proposed structure would maximize the value of the Grant U.S. Partnership assets.

58. *Id.* They may then release their security over the assets to be transferred in connection with the exercise of their remedies and by doing so, the security of the second lienholders over the transferred assets would be automatically and simultaneously released. Campbell J. accepted that the effect of the transaction may indirectly be a transfer of US real property assets and the release of a security over them of the second lienholders. The effect of the transaction was such that the claims of local creditors of the business of the US mills remained unaffected.

59. Janis Sarra, *Distressed Debt Purchasers in Canadian Restructuring Proceedings,* INSOL Newsletter, April, 2007.

financial breathing space in which to devise a going-forward strategy to address its insolvency. Canadian courts do not generally distinguish in insolvency proceedings between creditors' claims acquired through normal credit transactions and creditors' claims acquired at a discounted value at the point of a firm's financial distress.

Certain equity sponsors may organize their strategy to shift control early in the process towards their interests. They buy up the debt across classes at a severely discounted value and provide the post-commencement financing under stringent controls. Alternatively, they can buy most of the debt from a single class but purchase that debt through several entities and thus control the vote of the class through the "head count" numbers as well as the total value of claims. This strong creditor position then allows them to put in the equity bid and to be assured that it is accepted across the classes of creditors. While parties are entitled to conduct their affairs to maximize value, this strategy creates new challenges for the court in exercising its supervisory powers in terms of its ability to balance stakeholder interests.

The limited pool of DIP lenders often provides them with considerable bargaining power in negotiations for a post-commencement financing agreement. Given the thinness of the post-commencement financing market, lenders have been able to secure both extremely favourable financing terms, as well as extensive control rights in the provisions of the financing agreement. An example was the Teleglobe DIP financing agreement, in which the DIP lender was expressly given the right to approve any form of order coming before the court.[60] It is a normal practice of a DIP lender to protect its interest, but such control rights can also serve to prevent the debtor from considering strategies or bringing motions that better serve the interests of multiple stakeholders. Canadian courts have endorsed these financing agreements because they have been persuaded that the agreement is the only realistic means for the debtor corporation to keep operating while it attempts to negotiate a viable restructuring plan with its creditors. Often the court is advised that all the jobs will be lost if the DIP agreement is not approved. Control terms in a DIP agreement can create serious risk of prejudice to stakeholders. For example, the DIP lender can threaten to declare default on the agreement if particular motions are brought before the court or if the debtor takes particular positions where creditors bring motions. Other provisions can specify default of the DIP financing agreement if the court makes particular orders. The growth of distressed debt investors in insolvency workouts has created new pressure for timely

60. *In the matter of the Companies' Creditors Arrangement Act and Teleglobe Inc.* (May 15, 2002), Doc. 02-CL-4528 (Ont. S.C.J. [Commercial List]).

turnaround and workout plans that generate short-term returns on their investments and sometimes little interest in the long-term viability of the business enterprise.[61]

If the debtor is able to secure capital from existing senior operating lenders, the governance structure may not change, except that the lender imposes more stringent monitoring and, in some cases, control rights on the use of the financing. Governance of the debtor business enterprise plays a significant role in the potential success and, hence, upside value that may be generated by a successful workout, and post-commencement financing has been utilized as a tool in Canada, the US and elsewhere to influence governance.[62] Where creditors have confidence in the oversight and management of the debtor corporation and they determine that a going-concern outcome to the insolvency proceeding maximizes value for them, they are likely to provide the DIP facility.[63] However, where the party acquiring the distressed debt engages in abuse of its position or lacks good faith in its dealings with parties to an insolvency proceeding, the court may limit the ability of that creditor to veto an outcome to the proceedings, in keeping with the overall objectives of insolvency legislation. Canadian courts may consider the motives and conduct of a distressed debt purchaser where there is evidence of abuse of process or a lack of good-faith dealings.

To date, there have been few judgments that have addressed this type of behaviour. The court has observed that there are different types of vulture funds, some that have objectively concluded that the debtor has value and hence they purchase debt such that there is increased liquidity in the market for those who have a desire to cut their losses, and other vulture funds that are "somewhat more antisocial and may in certain circumstances be said to hold the affected parties to ransom."[64] The Court in *Curragh* held that while legally there is no difference in these claims, the court may question the effect on those traditional creditors who had put 100 cents on the dollar into the situation only to be caught in a credit crunch, and those who have "speculated" at pennies on the pound knowing that the situation is risky.[65] In *Re Canadian Airlines Corp.,* the Alberta Court held that the good faith of a distressed investor

61. *Id.*

62. *Id.*

63. Existing creditors can often make a decision on post-commencement financing quickly, given that they have already acquired knowledge of the debtor's financial position and may have sector-specific information that has informed previous credit decisions. Hence, they may have lower transaction costs in conducting the due diligence required in post-commencement financing decisions.

64. Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 1994 CarswellOnt 3851 (Ont. Gen. Div. [Commercial List]) ¶ 4.

65. *Id.*

may be a factor in considering approval of a *CCAA* plan.[66] There, the creditor continued to purchase a substantial amount of highly distressed debt when it was well aware of the financial deterioration of the debtor in order to leverage its position in the negotiations for a workout. Canadian courts will consider the motives of distressed debt purchasers in weighing the benefits and prejudice in particular restructuring cases.[67]

Where the DIP lender is not a pre-filing creditor, it may have different timelines in terms of satisfying its claims. As a consequence, the DIP creditor may encourage the debtor corporation to consider liquidation prematurely, when there is still value in the debtor that could accrue to junior secured and unsecured creditors. Similarly, it may press for a going-concern sale to third parties when a sale to existing creditors would satisfy a greater percentage of claims or produce less prejudice to claims overall. A new post-commencement finance lender may have little concern about the outcome of the insolvency proceeding, since its claims are fully protected by the priming charge and it has no pre-filing debt that may be underwater. Given the controls that it extracts in the financing agreement, the post-commencement financing lender may unduly pressure the debtor corporation to consider its interests above those of other creditors. It may also pressure the debtor company to engage in particular bargaining or litigious conduct that unnecessarily prejudices pre-filing creditors and dictates the outcome of bargaining, confident that the size of the facility and the conditions under which it was granted will prevail. Since an objective of Canadian *CCAA* proceedings is to facilitate a process whereby the debtor is given the opportunity to devise a viable plan of arrangement, the courts should consider the potential prejudice to these objectives where DIP lenders have imposed control rights that prevent directors and officers from decision-making in the interests of the firm and all its stakeholders.[68]

In Canada, the debtor corporation remains in control during the workout process, as the legislative scheme envisions, but not necessarily the directors and officers, who might be replaced or encouraged to resign. The ability of directors and officers to bargain for the terms of the DIP facility may allow them more room to negotiate overall with

66. Re Canadian Airlines Corp. (2000), 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9 (Alta. Q.B.) ¶ 105.

67. Re Uniforêt Inc. (2002), 40 C.B.R. (4th) 251, [2003] R.J.Q. 161 (Que. S.C.), leave to appeal to Que. C.A. refused (2002), 40 C.B.R. (4th) 281(Que. C.A.); Re Uniforêt Inc. (2003), 43 C.B.R. (4th) 254 (Que. S.C.), leave to appeal to Que. C.A. refused (2003), 44 C.B.R. (4th) 158 (Que. C.A.); leave to appeal to S.C.C. refused (2004), 329 N.R. 194 (S.C.C.).

68. Janis Sarra, "Governance and Control: The Role of Debtor-in-Possession Financing under the *CCAA*," *Annual Review of Insolvency Law, 2004* (Carswell, 2005) 119-172.

other stakeholders in finding the most appropriate plan of arrangement or compromise. The difficulty is where there is a lack of confidence in governance by the vast majority of creditors, but the DIP facility has the effect of entrenching the directors and officers. In some cases, corporate officers negotiate a specific provision that the debtor cannot change management and that such a change would be considered a default of the DIP agreement. Creditors are not given full access to the terms of the agreement and, thus, do not know of the existence of such terms at the point that the court endorses the DIP agreement.[69] The control issue in respect of DIP lenders has become important because the market for such lenders has been particularly thin since autumn 2008.

Hence, while distressed debt lenders have often provided needed capital, their ability to purchase at a discounted value and their short term profit horizon can sometimes result in workouts that are not aimed at maximizing overall creditor value or at maximizing the overall value of the business enterprise.

### *A. Rogue White Knights*

There is one case that illustrates some of the challenges of these new financing strategies. In *Minco-Division Construction Inc.*, a distressed debt buyer had acquired the debt at a significant discount in order to gain strategic control of the *CCAA* proceedings, and the Québec Superior Court held that it had jurisdiction to take into account the circumstances under which distressed debt is acquired in insolvency proceedings, especially in situations where the purchaser of such distressed debt is pursuing a hidden agenda, is acting in bad faith, or "tramples on the rights and expectations of others."[70] Minco-Division Construction Inc. was an owner-developer of a mixed residential and commercial condominium project under construction in Québec, which filed for court protection under the *CCAA,* owing its creditors more than $32 million. The first ranking Canadian bank granted DIP financing to the debtor, to be used to fund the restructuring process and to maintain and preserve the project. An interim receiver was appointed at the bank's request, to determine whether it was prepared to fund the sums required to complete construction. Over the course of the restructuring process, the DIP loan grew to approximately $5 million. The debtors had sought a "white knight" to buy out the bank's interest at a steep discount

69. *Id.*

70. Minco-Division Construction Inc. v. 9170-6929 Québec Inc., [2007] Q.J. No. 449, 2007 CarswellQue 420, 29 C.B.R. (5th) 183 (Que. S.C. (Commercial Div.)), at 36; leave to appeal to C.A. refused (29 January 2007), Montréal 500-09-017423-070 and 500-09-017419-078 (Que. C.A.).

in order to allow the debtor to seek permanent financing to fund a plan of arrangement and complete construction of its project. The white knight was found among three shareholders and another party, and the debtor had the expectation that the white knight would support the debtor's restructuring efforts and not assert claims for the full value of the debt that it had acquired. Disagreement among the principals resulted in the white knight purchasing the rights of the mezzanine lender and numerous construction liens in order to control the class of creditors and defeat the debtor's restructuring efforts. The Court concluded that no party intended that the white knight would take over the project; rather, its initial role was confined to putting the bank claim in friendly hands while looking for longer term financing to complete the project. The Court held that white knights usually have an interest when intervening to save a debtor from its creditors.[71]

In finding that the distressed debt buyer was a "rogue white knight," the Court held that "threatening to hijack the project and frustrate a plan intended to bring a measure of relief to many creditors, including the purchasers of units, does not square with the good faith conduct required of contracting parties by article 1375 *Code civile du Québec (CCQ).*"[72] In finding the white knight's interest to be akin to litigious rights, the Court ordered that the debtor could satisfy and discharge all claims owing to the white knight by paying it, in the context of its plan of arrangement, the amount that the white knight had itself paid to acquire the subject debt claims.[73] The Court further declared that on such payment by the debtors to the white knight, the debtors would be fully discharged in respect of the claims and the white knight would be deemed to have accepted Minco's plan of arrangement.

Hence on the particular facts of the case, the Québec Court exercised its general authority under insolvency legislation, drawing on

71. Here, the white knight investor was to have profited from its intervention at least to the extent of 30% or a fifty-fifty basis; instead the white knight used its position to try to take over the debtor on the strength of the giving in payment option contained in the security provisions of the bank claims. It was in this sense that the Court described it as a "rogue white knight."

72. *Id.* ¶ 36. Article 1375 specifies that "the parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished." In the circumstances, the Court decided to treat the claims of the white knight as if they were "litigious rights" because that was what the parties intended at the time that the bank debt was acquired at a discount. *Id.* ¶ 40. The Court drew from "litigious right," which is described in article 1782 *CCQ* as: "A right is litigious when it is uncertain, contested or contestable by the debtor, whether an action is pending or there is reason to presume that it will become necessary entitling a debtor of such right to be fully discharged by paying to the buyer the sale price, the costs related to the sale and interest on the price . . . per article 1784 *CCQ.*"

73. *Id.*

concepts in the Québec *Civil Code* to prevent an abuse of process by a distressed-debt purchaser in the course of restructuring proceedings. Having regard to the overall legislative objectives, the Court balanced the interests of multiple creditors and limited the effects of the conduct of the rogue white knight by limiting the value of its claims to the purchase price of those claims plus costs of proceedings and interest costs. The white knight did not suffer any financial loss, but it was not able to take advantage of control rights to hijack the debtor's efforts for a viable workout plan. The judgment in *Minco-Division Construction Inc.* indicates that where a creditor provides financing to support a debtor's restructuring and receives a control or veto position in the restructuring process, the court may consider whether the creditor has acted in a manner that is abusive, in bad faith or that is inconsistent with the reasonable expectations of the debtor and other creditors at the time that such funding was agreed upon. The competing consideration—that a party to commercial agreement is entitled to pursue all legal rights that it has acquired in the transaction—was subject to the considerations of abuse, bad faith and inconsistency with reasonable expectations in the context of the insolvency proceeding.

The willingness of the courts to intervene in the effects of commercial transactions when they threaten the policy behind the applicable insolvency legislation will be tested in the treatment of credit derivatives in insolvency proceedings. Like the development of distressed debt markets, credit derivatives alter the economic incentives and motivations of stakeholders in insolvency proceedings so that they are unrecognizable in the traditional model of creditors' incentives in insolvency proceedings.

## V. CREDIT DEFAULT SWAPS AND THE EFFECT ON POST-COMMENCEMENT FINANCING

While a full discussion is beyond the scope of this paper, financing issues in insolvency proceedings cannot ignore the incentive effects of credit default swaps and other credit derivatives on insolvency restructuring proceedings.[74] Credit derivatives are financial instruments that allow parties to manage credit exposure.[75] A credit derivative can be

74. For a discussion of credit derivatives, *see* Janis P. Sarra, *Credit Derivatives Market Design, Creating Fairness and Sustainability*, Oct. 2008, (London: NFSM, 2008); http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1399630.

75. There are numerous kinds of credit derivatives, such as credit default swaps, collateralized debt obligations ("CDOs"), full and index trades, and credit-linked notes. Elizabeth Murphy, Janis Sarra and Michael Creber, "Credit Derivatives in Canadian Insolvency Proceedings, 'The Devil will be in the Details,'" in *Annual Review of Insolvency Law, 2006* (Toronto: Carswell) at 187-234. Credit derivatives are classified as

a privately negotiated agreement that explicitly shifts credit risk from one party to the other; or it can be collateralized and housed within a special purpose vehicle that resells debt contracts in various tranches at differing prices, quality and risk. CDO can be cash-flow based, whereby the vehicle issues its own financial instruments to finance purchase of debts of different corporate entities, ensuring a fixed flow of loan repayments that are used to pay investors in the various tranches; or CDO can be synthetic, whereby the entity does not directly purchase debts but, rather, enters into credit default swaps with a third party, creating synthetic exposure to the debt of a number of corporate entities.[76] The most common credit derivative, a credit default swap ("CDS"), is a credit derivative contract in which one party, the "protection buyer," pays a sum of money periodically to the "protection seller," usually referable to the amount of protection provided by the contract. The protection seller's obligation to pay arises on the occurrence of a credit event, most frequently, the reference entity's failure to pay, bankruptcy, or restructuring. The reference entity is not a party to the credit default swap. The protection buyer that is a creditor of the reference entity hedges the risk of default by that entity and takes on the risk of default by the protection seller. The protection seller acquires the default risk of the reference entity. Unlike insurance, the amount of compensation that can be claimed under a credit derivative is not related to the actual losses suffered by the protection buyer.[77]

Credit derivatives emerged in the early 1990s as a tool for banks to manage their credit risk in respect of entities in which they had directly invested through their lending activities, diversifying their risk on loan default. In this respect, credit derivatives were initially effective in cushioning the commercial banks' losses in notable cases such as Enron and Parmalat. The market grew in less than two decades to an estimated $62 trillion in outstanding credit default swaps alone at the end of 2007. However, how such financial products work in practice bumps up against insolvency restructuring regimes that allow for the development of viable business plans that maximize enterprise value, preserve economic activity and save jobs. The existence of credit derivatives may

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either single- or multi-name (basket) products. Single-name credit derivatives are targeted on the credit worthiness of a single reference entity. Multi-name products hedge the risk of clustered defaults in a portfolio.

76. International Swaps and Derivatives Association (ISDA), 2006, https://www.isdadocs.org/index.html.

77. Credit derivatives do not require either the protection seller or protection buyer to actually hold an interest in the referenced asset; therefore the protection purchased by the protection buyer can be more than, less than, or completely unconnected to its underlying exposure to the reference entity. The protection buyer need not suffer an actual loss to be eligible for compensation if a credit event occurs.

perversely affect the motivation and behaviour of stakeholders of a financially distressed entity, and may cause greater complexity and uncertainty in a restructuring proceeding, as the real economic interests of claimants are not transparent.

Commercial banks as operating lenders traditionally had a strong role in monitoring the financial status of debtor companies, particularly in the period leading up to insolvency. However, their hedging of risk through derivatives has reduced the incentive to engage in oversight and monitoring, notwithstanding that they are best placed through loan covenants, access to information and in-house resources to engage in that monitoring. While arguably that hedging of risk freed up capital for other market participants seeking to borrow, the previous reliance that creditors and other market participants often had on banks to engage in such monitoring and the resultant signalling of a firm's financial health, have diminished considerably. Given the weaker covenants under which some debtor companies have financed their operations in recent years, creditors may be unable to assert control over a debtor until there has been a significant deterioration in its financial position, leading to deferred liquidation or restructuring and consequent lower recovery to creditors. It may no longer be feasible for the bank or other traditional operating lender to take a lead in restructuring negotiations, given that they have little or no remaining economic interest due to their credit default swaps.

On insolvency, one moral hazard is that a creditor that has material holdings of credit derivatives may have economic interests that encourage it to cause a default to occur so that there is a credit event. There are many factors that can affect the motivation and behaviour of stakeholders in an insolvency restructuring, given their economic interests; yet the creditor that has hedged its risk through a credit derivative is arguably in a different position in the restructuring proceeding, as there is a lack of transparency in respect of whether, in fact, there are economic interests at risk. This observation is not to suggest that credit derivatives drive behaviour in all cases; rather, it is a growing phenomenon with the move to cash settlements and growth of the market.

Under physical settlement of a CDS, the single institution from which a debtor company borrowed and believed it had a relationship results now in multiplicity of intermediaries and counterparties as CDS settle. The insolvent company may not even appreciate before commencing a restructuring proceeding that it is a reference entity. Cascading swaps means multiple rapid changes to who holds the claim,

making it difficult for a debtor company to establish who has a claim.[78] It can suddenly be dealing with literally hundreds of new claimants. Given settlement time lags where the protection seller with each physical settlement becomes the party at the restructuring bargaining table, the company's ability to devise a viable business plan can be hindered. This effect is particularly problematic if there is urgency in devising a plan because of a liquidity crisis or the need to maintain customer goodwill. Physical settlement of multiple CDS has the potential to cause a revolving door effect, making it hard for the company to build consensus and garner requisite support of creditors for a going forward viable business-restructuring plan.[79]

A number of jurisdictions have granted exemptions for derivatives from stays under insolvency laws because of the important public-policy goal of global financial stability. However, the continued trading of derivatives can cause further financial instability of the market in the name of preserving liquidity and makes restructuring increasingly difficult for particular debtors. In this respect, there is a tension between two broader public-policy goals. On the one hand, Basel II capital rules require the ability to terminate, net and realize on collateral in order to allow institutions to take offsetting transactions into account for capital purposes.[80] If parties cannot close out, they face exposure on their off-setting trades, which can cause greater financial problems in the market. On the other hand, the move towards rehabilitation in insolvency laws globally is driven by the recognition that liquidation can often leave value on the table that would have meant greater realizations for subordinated secured creditors, unsecured creditors and employees, as well as positive ripple effects in the local economy that can be realized by preservation of economic activity in the community.

Many restructurings are almost completely negotiated before any formal proceedings are taken, the UK being one such jurisdiction where this practice occurs. Yet creditors who may be obliged to assign their claims to protection sellers may not be able to bind their claims to an agreed restructuring plan, removing a valuable public policy tool to preserve economic activity.

Cash settlement of CDS poses different kinds of challenges for restructuring. Unlike insurance, no title to the claim passes, and there is no right of subrogation. With cash settlement, the protection buyer that is a creditor of the insolvent company continues to be the party with the

78. Murphy, Sarra & Creber, *supra* note 75, at 10.

79. *Id.*

80. Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards: a Revised Framework*, June 2004, http://www.bis.org/publ/bcbs107.htm (Basel II).

legal claim, although at a reduced or eliminated financial exposure.[81] The debtor and other creditors have no notice or knowledge of the reduced exposure. If the creditor is fully hedged, there will be little incentive to engage in constructive negotiations for a restructuring plan. This level of disengagement may be problematic for the restructuring. While in some cases there can be an active market for derivatives during a restructuring where credit-derivatives holders are also direct creditors and take an active and constructive role in workout negotiations, the converse can also occur. The financial institution with which the debtor company has had an operating lending relationship may be less interested in advancing further credit in the form of post commencement or exit financing if it has no ongoing financial interest in the debtor. The creditor may actually have over-coverage and thus a negative economic interest, materially benefitting if the restructuring fails. Yet parties to the restructuring currently have no information on the economic interest held by those parties hedged through a credit derivative.

Accordingly, a debtor company may find the creditor that is hedged under a CDS adamant in its refusal to agree to amendments to its credit documentation (such as a payment change or deferral) and changes to covenants that would otherwise trigger a default or obligation acceleration. In addition, protection-buying creditors will be unlikely to consent to the extension of the maturity date beyond the protection period unless a credit event has already occurred or the extension itself qualifies as a credit event. These motivations may complicate the efforts of distressed companies to negotiate arrangements with their creditors at the early stages of distress in an attempt to restructure outside of formal insolvency proceedings. Moreover, a claims-trader creditor may be seen as having a new, speculative and short-term interest in the debtor. Having acquired its position when the debtor company is already in financial difficulty, it is often hedging against the speculative outcome of the restructuring process. Such a creditor, perhaps holding a deciding vote, has little interest in the long-term viability of the company.

Moreover, the normative justification for carving out derivatives from stays under restructuring proceedings is unclear, given the shift from their risk-management function to speculative product. The failure to stay derivatives claims creates a statutory preference for particular creditors, over the claims of traditional secured creditors, employees, trade suppliers, and tort claimants. Considering the general insolvency

81. Where there are cash settled credit default swaps, on occurrence of a credit event, the CDS may be settled by determining the value of the underlying debt instrument through an ISDA-run or similar auction, whereby the protection seller pays the protection buyer for its estimated loss based on the value established in the auction or where a value can be determined based on post-credit-event bids for the debt product.

law goals of transparency, timeliness, and certainty, such exclusion must be revisited. As the bailouts of 2008-2009 illustrated, there is a broader public interest in how the global derivative market is to operate effectively, and adjustments to the system must be made after public-policy discussion among stakeholders broader than industry participants. Interests affected are beyond capital-markets participants, and regulation is needed to ensure that there is transparency in the nature of economic exposure and underlying risk. There should be a public-policy debate on whether there is a need to design new principles to account for the separation of economic and legal interest in the context of insolvency proceedings.

These observations are not to suggest that the market has failed to address some of its flaws itself. CDS protocols and index auctions have helpfully assisted in facilitating cash settlements. The purpose of such protocols is to offer market participants an efficient way to settle credit derivative transactions referencing.[82] The protocol mechanism facilitates industry-wide net settlement of CDS referencing an insolvent entity.[83] While these innovations are important, they address only one aspect of the settlement process. There continues to be a lack of transparency as to who is bearing the ultimate costs of the deficiencies in value when all the CDS settlements are completed. There are also significant issues in respect of central counterparty clearing facilities and the need for regulatory intervention that are beyond the scope of this discussion.

Some jurisdictions have statutorily created unsecured creditors' committees, where representative creditors have a role in the negotiations for an insolvency workout, paid out of the insolvency estate, and such

82. ISDA Protocols, *supra* note 3. For example, when Collins & Aikman filed for bankruptcy in 2005, there were concerns that there were not enough deliverable bonds to settle all the existing index-related contracts. To address this issue, the ISDA published the first protocols to amend the existing contracts for index-related trades to cash settlement from physical settlement on a multi-lateral basis, rather than through counterparty-to-counterparty negotiations, and to participate in an auction to determine the cash-settlement price of the defaulted bonds. With the CDS outstanding greater by multiples than the volume of bonds issued, the bonds would have to be bought and sold numerous times in the market to settle the CDS, which would have created pressure to source bonds, raising the price of the bonds higher than the likely recovery value. Hence, the market developed credit event auctions, first to facilitate cash settlement and more recently, to allow for physical settlement on net open positions. Nomura, CDS Recovery Basis, ISDA, 2006.

83. ISDA Auction Process, 2008, http://www.isda.org. The Lehman Brothers Holdings' auction illustrated that the market can price the value of CDS and allow cash settlement for counterparties to CDS trades. The auction set a price and resulted in protection sellers paying ninety-one cents on the dollar to protection buyers. More than 350 organizations adhered to the 2008 Lehman CDS Protocol, which provided a settlement procedure for approximately $6 billion of net CDS exposures; ISDA 2008 Lehman CDS Protocol, *id.*

committees often have strong normative sway with the court.[84] In some jurisdictions, courts recognize *ad hoc* committees of creditors for similar purposes. In thinking about the disconnection between economic interest and legal claim, it may be that the price for participation on such committees should be that such creditors are required to disclose the extent to which their economic risk has been hedged, with the court given authority to refuse to let the creditor participate where there is little or no economic interest.

Arguably, there should be mandatory disclosure during a restructuring proceeding of the real economic risks at stake, including disclosure of the amount of debt that has been hedged by creditors that seek to exercise their voting or oversight rights in a restructuring proceeding. Lack of transparency now means that the debtor company and other creditors are not aware of who is bearing the real economic risk of firm failure, inhibiting the potential for a viable business restructuring plan. The court should be granted authority to determine the scope and timing of disclosure, including making determinations in respect of confidentiality, limiting access only to parties in the proceeding, and determining any exceptions, such as for *de minimus* holdings. The court's consideration of any restructuring plan should take account of economic interests at stake. This weighing of interest could be accomplished in two different ways: voting on a restructuring plan could be premised on the real economic interests in the firm's insolvency, or alternatively, legal voting rights could be unaffected, but the court could be granted authority to weigh actual economic interests when considering parties' positions and exercise of voting rights. It is also helpful to consider amending insolvency-restructuring legislation to include credit derivatives within the mandatory stay of proceedings, except with leave of the court on the basis of unfair prejudice, the standard currently used for other creditors to be exempted from the stay. The court could then exercise oversight of the clearing process in a measured way that assists with the risk-management aspects of the products and slows the speculative market.[85] Such an approach could ensure that derivatives continue to settle where they are not adversely affecting the workout process, but could be stayed where the court was persuaded that the stay would prevent inappropriate conduct or would preserve going concern value pending negotiations for a restructuring plan.

84. *See, e.g.*, Rule 2019 of the US Bankruptcy Code.
85. Sarra, *supra* note 75, at 8.

## VI. CONCLUSION

Post-commencement and exit financing in insolvency proceedings continue to pose significant challenges, both in respect of attracting such financing and in considering how its availability and terms affect other stakeholders and the overall integrity of the insolvency system. While stalking horse proceedings, credit bids and other strategies to generate higher value have been a helpful response to financing in a period of global financial uncertainty and tightened credit conditions, they pose new challenges for other aspects of the insolvency system, such as the need for transparency and fairness; the need to consider multiple stakeholder interests; and the public interest in encouraging viable businesses with workable and fair business plans. The uncoupling of interest that has accompanied credit derivatives and their influence in insolvency proceedings has not yet garnered the attention of governments to date in any meaningful way, and the current extensive reforms proposed in the US and elsewhere have failed to address the issues raised by these products within insolvency restructuring proceedings. Post-commencement and exit financing are critically important to the restructuring goals of insolvency legislation. The challenges posed require considerably more attention over the next period.

# TAB 6

**SUPREME COURT OF CANADA**

**CITATION:** 9354-9186 Québec inc. *v.* Callidus Capital Corp., 2020 SCC 10

**APPEALS HEARD AND JUDGMENT RENDERED:** January 23, 2020
**REASONS FOR JUDGMENT:** May 8, 2020
**DOCKET:** 38594

**BETWEEN:**

**9354-9186 Québec inc. and 9354-9178 Québec inc.**
Appellants

and

**Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier**
Respondents

- and -

**Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals**
Interveners

**AND BETWEEN:**

**IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)**
Appellants

and

**Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier**

Respondents

- and -

**Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals**

Interveners

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

| | |
|---|---|
| **JOINT REASONS FOR JUDGMENT:** (paras. 1 to 117) | Wagner C.J. and Moldaver J. (Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring) |

**9354-9186 Québec inc. and**
**9354-9178 Québec inc.** *Appellants*

*v.*

**Callidus Capital Corporation,**
**International Game Technology,**
**Deloitte LLP, Luc Carignan,**
**François Vigneault, Philippe Millette,**
**Francis Proulx and François Pelletier** *Respondents*

and

**Ernst & Young Inc.,**
**IMF Bentham Limited (now known as Omni Bridgeway Limited),**
**Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and**
**Canadian Association of Insolvency and Restructuring Professionals** *Interveners*

- and -

**IMF Bentham Limited (now known as Omni Bridgeway Limited) and**
**Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)** *Appellants*

*v.*

**Callidus Capital Corporation,**

**International Game Technology,**
**Deloitte LLP, Luc Carignan,**
**François Vigneault, Philippe Millette,**
**Francis Proulx and François Pelletier** *Respondents*

and

**Ernst & Young Inc.,**
**9354-9186 Québec inc.,**
**9354-9178 Québec inc., Insolvency Institute of Canada and**
**Canadian Association of Insolvency and Restructuring Professionals** *Interveners*

**Indexed as: 9354-9186 Québec inc. *v.* Callidus Capital Corp.**

**2020 SCC 10**

File No.: 38594.

Hearing and judgment: January 23, 2020.
Reasons delivered: May 8, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion*

*to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose □ Whether supervising judge can approve third party litigation funding as interim financing □ Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.*

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As

a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

*Held*: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable

treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to

constrain or bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* □ that is, acting for an improper purpose □ s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially

identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge

determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive. Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does

not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

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By Wagner C.J. and Moldaver J.

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APPEALS from a judgment of the Quebec Court of Appeal (Dutil, Schrager and Dumas JJ.A.), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), setting aside a decision of Michaud J.,

2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Appeals allowed.

*Jean-Philippe Groleau*, *Christian Lachance*, *Gabriel Lavery Lepage* and *Hannah Toledano*, for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.

*Neil A. Peden*, for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited).

*Geneviève Cloutier* and *Clifton P. Prophet*, for the respondent Callidus Capital Corporation.

*Jocelyn Perreault*, *Noah Zucker* and *François Alexandre Toupin*, for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier.

*Joseph Reynaud* and *Nathalie Nouvet*, for the intervener Ernst & Young Inc.

*Sylvain Rigaud*, *Arad Mojtahedi* and *Saam Pousht-Mashhad*, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for the judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

## I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed

and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

## II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86

million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million.

Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. *The Initial Competing Plans of Arrangement*

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[1] Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. *Creditors' Vote on Callidus's First Plan*

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. *Bluberi's Interim Financing Application and Callidus's New Plan*

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham").

Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

[19] The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this

[2] Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

## III. Decisions Below

### A. *Quebec Superior Court (2018 QCCS 1040) (Michaud J.)*

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally

entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.
>
> As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.
>
> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of

investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. *Quebec Court of Appeal (2019 QCCA 171) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))*

[32] The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was]

justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The

court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

## IV. Issues

[37] These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

## V. Analysis

### A. *Preliminary Considerations*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the

claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities

affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets

and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be

[3] We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167–68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing

with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

### (2) The Role of a Supervising Judge in *CCAA* Proceedings

[47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

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

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

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration

discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp- 566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this

respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 305 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol.

4, at N§149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at N§45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

> **Related creditors**
>
> **(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at N§33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a

restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

### (2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first

on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

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

> **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.

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

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

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs

counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.
>
> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the

appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so[4]. The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the

[4] It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

[79] Indeed, as the Monitor observes, "Once a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

[80] We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have

failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in

a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. *Bluberi's LFA Should Be Approved as Interim Financing*

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company

while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

[86] Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

> **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.

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard

form or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

[88] The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

> **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.

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank

[5] A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

**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.

(*CCAA*, s. 11.2(4))

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

### (2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of

[6] The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. National Bank of Canada*, 2006 QCCA 557 [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at

paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the

approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations,* [1935] A.C. 185 (P.C.).
>
> (Houlden, Morawetz and Sarra, at N§33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in C*rystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
>
> (*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of

the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a

recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and

- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that

is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> . . .
>
> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus

could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a

debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

## VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

*Appeals allowed with costs in the Court and in the Court of Appeal.*

*Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.*

*Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.*

*Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.*

*Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.*

*Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.*

*Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.*

# TAB 7

2009 CarswellOnt 4467
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4467, [2009] O.J. No. 3169, 179 A.C.W.S. (3d) 265, 55 C.B.R. (5th) 229

# 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: June 29, 2009
Written reasons: July 23, 2009
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
J. Carfagnini, J. Pasquariello for Monitor, Ernst & Young Inc.
M. Starnino for Superintendent of Financial Services, Administrator of PBGF
S. Philpott for Former Employees
K. Zych for Noteholders
Pamela Huff, Craig Thorburn for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P., Matlin Patterson Opportunities Partners (Cayman) III L.P.
David Ward for UK Pension Protection Fund
Leanne Williams for Flextronics Inc.
Alex MacFarlane for Official Committee of Unsecured Creditors
Arthur O. Jacques, Tom McRae for Felske & Sylvain (de facto Continuing Employees' Committee)
Robin B. Schwill, Matthew P. Gottlieb for Nortel Networks UK Limited
A. Kauffman for Export Development Canada
D. Ullman for Verizon Communications Inc.
G. Benchetrit for IBM

**Headnote**

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

***Morawetz J.*:**

**Introduction**

1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

4 The following are my reasons for granting these orders.

5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

6 The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

**Background**

8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

**Issues and Discussion**

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.). ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

> (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
>
> (b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and
>
> (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial*, *supra*, at paras. 43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5 $^{th}$ ) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Residential Warranty Co. of Canada Inc., Re* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc*. (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, *Re PSINet*, *supra*, *Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], *supra*, *Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

36 In *Re Consumers Packaging*, *supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> ...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

37 Similarly, in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, at paras. 43, 45.

38 Similarly, in *PSINet Limited*, *supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially

disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited*, *supra*, at para. 3.

39 In *Re Stelco Inc*., *supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc*, *supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.), *Winnipeg Motor Express Inc., Re* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership*, 2009 BCCA 319 (B.C. C.A.).

46 At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]
>
> 25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged...
>
> 26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

> (a) is a sale transaction warranted at this time?
>
> (b) will the sale benefit the whole "economic community"?
>
> (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

> (a) Nortel has been working diligently for many months on a plan to reorganize its business;
>
> (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16.

**Disposition**

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

*Motion granted.*

# TAB 8

2009 CarswellOnt 8207
Ontario Superior Court of Justice [Commercial List]

Brainhunter Inc., Re

2009 CarswellOnt 8207, 183 A.C.W.S. (3d) 905, 62 C.B.R. (5th) 41

# 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 BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC. (APPLICANTS)

Morawetz J.

Heard: December 11, 2009
Judgment: December 11, 2009
Written reasons: December 18, 2009
Docket: 09-8482-00CL

Counsel: Jay Swartz, Jim Bunting for Applicants
G. Moffat for Monitor, Deloitte & Touche Inc.
Joseph Bellissimo for Roynat Capital Inc.
Peter J. Osborne for R.N. Singh, Purchaser
Edmond Lamek for Toronto-Dominion Bank
D. Dowdall for Noteholders
D. Ullmann for Procom Consultants Group Inc.

**Headnote**

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

Applicants were protected under Companies' Creditors Arrangement Act — Applicants brought motion for extension of stay period, approval of bid process and approval of "Stalking Horse APA" — Motion granted — Motion was supported by special committee, advisors, key creditor groups and monitor — Opposition came from business competitor and party interested in possibly bidding on assets of applicants — Applicants established that sales transaction was warranted and that sale would benefit economic community — No creditor came forward to object sale of business — It was unnecessary for court to substitute its business judgment for that of applicants.

***Morawetz J.*:**

1 At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

2 The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

3 The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

4 The Monitor recommends that the motion be granted.

5 The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

6 Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

7 Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

8 The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

9 Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

10 The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

11 It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

12 Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

13 The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

> (a) Is a sale transaction warranted at this time?
>
> (b) Will the sale benefit the whole "economic community"?
>
> (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) Is there a better viable alternative?

14 The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

15 Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

16 Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

17 I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

18 In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

19 In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

20 With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

21 For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

22 For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

23 The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

24 Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

25 An order shall issue to give effect to the foregoing.

*Motion granted.*

# TAB 9

**PERSONAL PROPERTY SECURITY ACT**

S.N.W.T. 1994,c.8
In force May 7, 2001;
Except s.1(1), 42, 43(1.1), 71 which came into force April 27, 2001;
SI-004-2001

**LOI SUR LES SÛRETÉS MOBILIÈRES**

L.T.N.-O. 1994, ch. 8
En vigueur le 7 mai 2001, à l'exception de ses articles 42 et 71 et de ses paragraphes 1(1) et 43(1.1) qui sont entrés en vigueur le 27 avril 2001;
TR-004-2001

**AMENDED BY**

S.N.W.T. 1997,c.15
In force April 1, 1998;
SI-006-98
S.N.W.T. 1998,c.5
S.N.W.T. 1999,c.5
S.N.W.T. 2003,c.5
S.N.W.T. 2006,c.23
S.N.W.T. 2007,c.21
In force April 1, 2008;
SI-006-2007
S.N.W.T. 2009,c.12
S.N.W.T. 2009,c.14
In force August 1, 2009;
SI-005-2009
S.N.W.T. 2010,c.16
S.N.W.T. 2011,c.23
In force April 1, 2012
S.N.W.T. 2012,c.18
S.N.W.T. 2018,c.18
S.N.W.T. 2018,c.15
In force February 15, 2019
Except sections 1-2, 4-6, 8-11, 13-15 and 18-29
SI-001-2019

**MODIFIÉE PAR**

L.T.N.-O. 1997, ch. 15
En vigueur le 1er avril 1998;
TR-006-98
L.T.N.-O. 1998, ch. 5
L.T.N.-O. 1999, ch. 5
L.T.N.-O. 2003, ch. 5
L.T.N.-O. 2006, ch. 23
L.T.N.-O. 2007, ch. 21
En vigueur le 1er avril 2008;
TR-006-2007
L.T.N.-O. 2009, ch. 12
L.T.N.-O. 2009, ch. 14
En vigueur le 1er août 2009;
TR-005-2009
L.T.N.-O. 2010, ch. 16
L.T.N.-O. 2011, ch. 23
En vigueur le 1er avril 2012
L.T.N.-O. 2012, ch. 18
L.T.N.-O. 2018, ch. 18
L.T.N.-O. 2018, ch. 15
En vigueur le 15 février 2019 sauf les articles 1-2, 4-6, 8-11, 13-15 et 18-29, TR-001-2019

This consolidation is not an official statement of the law. It is an office consolidation prepared by Legislation Division, Department of Justice, for convenience only. The authoritative text of statutes can be ascertained from the *Revised Statutes of the Northwest Territories, 1988* and the Annual Volumes of the Statutes of the Northwest Territories.

Any Certified Bills not yet included in the Annual Volumes can be obtained through the Office of the Clerk of the Legislative Assembly.

Certified Bills,copies of this consolidation and other G.N.W.T. legislation can be accessed on-line at

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for disposition, if such expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement; and

(b) agreeing to fulfill any other obligations secured by the collateral.

de réparation, de transformation et de préparation en vue de l'aliénation, si le créancier garanti a effectivement supporté ces frais, ainsi que des autres frais normaux faits par le créancier garanti à l'occasion de l'exécution du contrat de sûreté;

b) par acceptation d'exécuter toutes autres obligations garanties par les biens grevés.

Right of reinstatement

(2) At any time before the secured party has disposed of the collateral or contracted for disposition under section 59 or before the secured party is deemed to have irrevocably elected to retain the collateral under section 61, the debtor, other than a guarantor or indemnitor, may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears, exclusive of the operation of an acceleration clause in the security agreement, and by curing any other default by reason of which the secured party intends to dispose of the collateral together with a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for disposition if such expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement.

(2) Avant que le créancier garanti n'ait aliéné les biens grevés ou qu'il ne se soit engagé à les aliéner en conformité avec l'article 59, ou avant que son choix d'accepter les biens grevés ne devienne irrévocable en conformité avec l'article 61, le débiteur, à l'exception d'une caution ou d'un garant, peut, sauf s'il en a convenu autrement par écrit après le défaut, rétablir le contrat de sûreté en payant l'arriéré, à l'exclusion de l'arriéré découlant de l'application d'une clause de déchéance de terme figurant dans le contrat de sûreté, en remédiant à tout autre défaut en raison duquel le créancier garanti envisage d'aliéner les biens grevés et en versant une somme égale aux frais normaux de saisie, de reprise de possession, de garde, de réparation, de transformation et de préparation en vue de l'aliénation, si le créancier garanti a effectivement supporté ces frais, ainsi que les autres frais normaux faits par le créancier garanti à l'occasion de l'exécution du contrat de sûreté.

Droit de rétablissement

Limit on right of reinstatement

(3) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement

(a) more than twice, if the security agreement provides for payment in full by the debtor not later than 12 months after the day value was given by the secured party; or

(b) more than twice in each year, if the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

(3) Sauf convention contraire, le débiteur ne peut rétablir le contrat de sûreté :

a) plus de deux fois, si le contrat prévoit un paiement en entier par le débiteur dans les 12 mois suivant la date à laquelle le créancier garanti a fourni une prestation;

b) plus de deux fois par année, si le contrat prévoit des paiements par le débiteur au cours d'une période de plus d'un an suivant la date à laquelle le créancier garanti a fourni une prestation.

Restriction au droit de rétablissement

Definition: "secured party"

**63.** (1) In this section, "secured party" includes a receiver.

**63.** (1) Au présent article, «créancier garanti» s'entend notamment du séquestre.

Sens de «créancier garanti»

Powers of Court

(2) On application by a debtor, a creditor of a debtor, a secured party, a Sheriff or any person with an interest in the collateral, the Supreme Court may

(a) make any order, including a binding declaration of a right and injunctive relief, that is necessary to ensure compliance with this Part or sections 17, 36, 37, 37.1 and 38;

(2) Sur demande d'un débiteur, d'un créancier du débiteur, d'un créancier garanti, d'un shérif ou de toute personne qui a un intérêt dans les biens grevés, la Cour suprême peut :

a) rendre toute ordonnance, notamment faire une déclaration de droits et accorder une injonction, qui soit nécessaire pour assurer l'observation de la présente partie

Pouvoirs de la Cour suprême

(b) give directions to any person regarding the exercise of rights or the discharge of obligations under this Part or sections 17, 36, 37, 37.1 and 38;
(c) relieve a person from compliance with the requirements of this Part or sections 17, 36, 37, 37.1 and 38;
(d) stay enforcement of rights provided in this Part or sections 17, 36, 37, 37.1 and 38;
(e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.

ou des articles 17, 36, 37, 37.1 et 38;
b) donner des directives à toute personne concernant l'exercice des droits ou l'acquittement des obligations prévus à la présente partie ou aux articles 17, 36, 37, 37.1 et 38;
c) soustraire toute personne aux exigences de la présente partie ou des articles 17, 36, 37, 37.1 et 38;
d) suspendre l'exercice des droits prévus à la présente partie ou aux articles 17, 36, 37, 37.1 et 38;
e) rendre toute ordonnance, notamment faire une déclaration de droits et accorder une injonction, qui soit nécessaire pour assurer la protection des intérêts de toute personne dans les biens grevés.

Appointment of receiver

**64.** (1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the rights and duties of the receiver.

Nomination d'un séquestre

**64.** (1) Le contrat de sûreté peut prévoir la nomination d'un séquestre et, sous réserve des autres dispositions de la présente loi ou de toute autre loi, déterminer ses droits et ses fonctions.

Duties of receiver

(2) A receiver shall
(a) take the collateral into his or her custody and control in accordance with the security agreement or order under which the receiver is appointed but, unless appointed a receiver-manager or unless the Supreme Court orders otherwise, shall not carry on the business of the debtor;
(b) open and maintain, in the name of the receiver as receiver, one or more accounts at a bank, credit union or other institution licensed to accept deposits in the Northwest Territories for the deposit of all money coming under the control of the receiver as receiver;
(c) keep records, in accordance with generally accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor;
(d) prepare, at least once in every six month period after the date of the receiver's appointment, financial statements of the administration of the receiver containing the prescribed information;
(e) indicate on every business letter, invoice, contract or similar document used or executed in connection with the receivership that the receiver is acting as a receiver; and

Fonctions du séquestre

(2) Le séquestre est tenu :
a) de prendre les biens grevés sous sa garde et sous sa responsabilité en conformité avec le contrat de sûreté ou l'ordonnance le nommant; toutefois, il ne peut exploiter l'entreprise du débiteur que s'il est nommé séquestre-gérant ou que si la Cour suprême l'ordonne;
b) d'ouvrir et de conserver, en sa qualité de séquestre, un ou plusieurs comptes dans un établissement autorisé à accepter des dépôts dans les Territoires du Nord-Ouest, notamment une banque ou une caisse de crédit, afin d'y déposer toutes les sommes qui viennent en sa possession;
c) de tenir des registres, en conformité avec des principes comptables généralement reconnus, relativement aux reçus, aux dépenses et aux opérations concernant les biens grevés ou d'autres biens du débiteur;
d) de dresser, au moins une fois tous les six mois après la date de sa nomination, des états financiers contenant les renseignements prescrits concernant son administration;
e) d'indiquer sur chaque lettre d'affaires, facture, contrat ou autre document similaire utilisé ou passé dans le cadre de ses fonctions qu'il agit en qualité de

# TAB 10

# COURT OF APPEAL FOR ONTARIO

CITATION: Equirex Leasing Corp. v. Medcap Real Estate Holdings Inc., 2019 ONCA 152
DATE: 20190228
DOCKET: C65589

Rouleau, van Rensburg and Roberts JJ.A.

BETWEEN

Equirex Leasing Corp.

Applicant (Respondent)

and

Medcap Real Estate Holdings Inc. and Bennington Financial Services Corp.

Respondents (Appellant)

F. Scott Turton, for the appellant

Brian H. Somer, for the respondent

Heard: December 10, 2018

On appeal from the order of Justice Douglas K. Gray of the Superior Court of Justice, dated May 18, 2018, with reasons reported at 2018 ONSC 3284, 8 P.P.S.A.C. (4th) 393.

REASONS FOR DECISION

[1] The appellant appeals from the order enforcing the respondent's rights under various fitness equipment leases and general security agreements.

[2] The respondent owns or has a registered security interest in the fitness equipment in issue in these proceedings. It leased fitness equipment to various

numbered companies that operated fitness facilities in premises owned by the appellant. For the purposes of this appeal, the relevant premises are: 3430 Fairview Street in Burlington ("Fairview"); 92-100 Centennial Parkway in Hamilton ("Centennial"); and 635 Upper Wentworth Street in Hamilton ("Upper Wentworth").

[3] The respondent entered into equipment leases and general security agreements with, and the appellant leased the premises respectively, to: 1860337 Ontario Inc. (at Fairview); 1860342 Ontario Inc. (at Centennial); and 1860335 Ontario Inc. (at Upper Wentworth). The appellant was also an "Additional Lessee" under the equipment leases between these numbered companies and the respondent. The general security agreements covered all the assets and undertakings of these numbered companies. The equipment leases provided that any default under them constituted default under any other agreements between these numbered companies and the respondent, which included the general security agreements. The respondent perfected its security interests under the equipment leases and general security agreements by registration in accordance with the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("PPSA").

[4] The equipment leases went into default which triggered default under the general security agreements. The numbered companies – 1860337, 1860342 and 1860335 – ceased operations. The respondent sought to repossess fitness

equipment from the Fairview, Centennial and Upper Wentworth premises. The respondent's representative, Mike Geroux, entered these premises and prepared inventory lists of all the equipment in place. The appellant subsequently prevented the respondent from repossessing the equipment. The appellant removed the equipment from the Fairview premises to an undisclosed location on its sale of the Fairview premises, and refused the respondent access to the Centennial and Upper Wentworth premises that the appellant continued to own and lease to 1927032 Ontario Inc. The sole principal of 1927032, Julie Catenacci, works as a school teacher. She is the niece of the principal of the appellant, John Cardillo.

[5] The respondent initiated its application against the appellant strictly in its capacity as landlord for entry to the properties that the appellant owns or controls and for recovery and possession of the respondent's equipment under the leases and collateral under the general security agreements with 1860337, 1860342, and 1860335.

[6] The application judge granted the application. His order provided for broad declaratory and other relief in relation to the equipment covered by the equipment leases and the collateral under the general security agreements, including the respondent's right to enter onto the Fairview, Centennial, and Upper Wentworth premises, and any other locations to repossess the fitness equipment set out in the equipment and inventory lists attached as schedules to the order.

[7] The appellant's principal submissions on appeal focus on the form and contents of the order approved by the application judge. The appellant submits that the application judge made the following reversible errors: approving the draft order provided by the respondent without allowing the appellant the opportunity to make submissions; granting relief in the absence of interested parties to the application and in light of the multiplicity of proceedings dealing with the same subject matter; and attaching the inventory lists prepared by the respondent as schedules to the order in the absence of proof that those lists contained the respondent's equipment or collateral. The appellant maintains that the order is inconsistent with the application judge's reasons, goes beyond the relief sought in the respondent's notice of application and the evidence, that the application judge's reasons are inadequate, and the order is incapable of enforcement.

[8] We do not accept these submissions.

[9] First, we see no error in the application judge's approach to settling the terms of the order and his acceptance of the draft order submitted by the respondent.

[10] There was no procedural unfairness to the appellant. The application judge was entitled to and did fashion a procedurally fair process for his approval of the order. He clearly advised the parties that he would entertain draft orders from

them and determine the form of the draft order. Excepting the schedules that are attached to the respondent's draft order, there is little substantive difference between it and the draft order submitted by the appellant.

[11] Moreover, the additional relief granted in the order is no more than a reiteration of the respondent's rights to the enforcement remedies under the leases, general security agreements, and the PPSA. While stated in broader terms, given the relief claimed by the respondent against the appellant specifically as landlord, "other locations", in addition to the Fairview, Centennial, and Upper Wentworth premises named under the leases, can only be reasonably understood in the circumstances of this case as referring to the "other locations" that are owned or controlled by the appellant. This interpretation is supported and in keeping with the other provisions of the order in para. 7 that the appellant must provide the respondent with the addresses of the other locations where the fitness equipment and collateral may be found, if not at the addresses on the leases, and in para. 9 that the appellant cannot refuse access to its premises to the respondent or its agent for the purpose of its carrying out repossession of equipment and collateral.

[12] In particular, under article 20, the leases provided that events of default by the lessees included the failure to make monthly rent payments under article 5; moving equipment from one location to another in contravention of article 9; or otherwise failing to comply with a term or covenant under the leases, such as

selling or transferring the leased equipment, contrary to article 8 or refusing to return the equipment upon termination of the leases as required under article 11. Article 21 stipulated that any default under the leases constituted defaults under any other agreement between the lessees and the respondent, which included the general security agreements. Pursuant to article 20 of the leases, the lessees' default permitted the respondent to enter and repossess the equipment. Articles 6 and 8 of the general security agreements similarly authorized the respondent to take possession of the collateral secured under the agreements upon any default, as well as any remedies under the PPSA.

[13] Under s. 62 of the PPSA, in accordance with the terms of the leases and general security agreements, the respondent has the following rights to possession of the equipment and collateral in which it has a perfected security interest:

> 62 (1) Upon default under a security agreement,
>
> (a) the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law;
>
> (b) if the collateral is equipment and the security interest has been perfected by registration, the secured party may, in a reasonable manner, render such equipment unusable without removal thereof from the debtor's premises, and the secured party shall thereupon be deemed to have taken possession of such equipment; and

> (c) the secured party may dispose of collateral on the debtor's premises in accordance with section 63.

[14] Subsection 63(4) of the PPSA requires the secured party to give notice to any interested persons prior to disposal of the collateral.

[15] Section 67 of the PPSA gives the court broad remedial powers to enforce a secured party's rights:

> 67 (1) Upon application to the Superior Court of Justice by a debtor, a creditor of a debtor, a secured party, an obligor who may owe payment or performance of the obligation secured or any person who has an interest in collateral which may be affected by an order under this section, the court may,
>
> (a) make any order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with Part V, section 17 or subsection 34 (3) or 35 (4);
>
> (b) give directions to any party regarding the exercise of the party's rights or the discharge of the party's obligations under Part V, section 17 or subsection 34 (3) or 35 (4);
>
> (c) make any order necessary to determine questions of priority or entitlement in or to the collateral or its proceeds;
>
> (d) relieve any party from compliance with the requirements of Part V, section 17 or subsection 34 (3) or 35 (4), but only on terms that are just for all parties concerned;
>
> (e) make any order necessary to ensure protection of the interests of any person in the collateral, but only on terms that are just for all parties concerned;

> (f) make an order requiring a secured party to make good any default in connection with the secured party's custody, management or disposition of the collateral of the debtor or to relieve the secured party from any default on such terms as the court considers just, and to confirm any act of the secured party; and
>
> (g) despite subsection 59 (6), if the secured party has taken security in both real and personal property to secure payment or performance of the debtor's obligation, make any order necessary to enable the secured party to accept both the real and personal property in satisfaction of the obligation secured or to enable the secured party to enforce any of its other remedies against both the real and personal property, including an order requiring notice to be given to certain persons and governing the notice, an order permitting and governing redemption of the real and personal property, and an order requiring the secured party to account to persons with an interest in the real property or personal property for any surplus.

[16] The application judge's order was made in conformity with the provisions of the leases and general security agreements and in accordance with his powers under the PPSA.

[17] Further, we disagree that relief is granted against interested parties who were not parties to the application and that the order affects other proceedings. The respondent initiated its application against the appellant strictly in its capacity as landlord for entry to the properties that the appellant owns or controls and for recovery and possession of the respondent's equipment under the leases and collateral under the general security agreements. The order prevents the

appellant as landlord from continuing to impede the respondent's proper exercise of its rights under the equipment leases and general security agreements. The respondent is entitled under the equipment leases and general security agreements to enter the leased premises and any of the appellant's premises where equipment and collateral in which the respondent has a security interest can be found, and to repossess it.

[18] The unchallenged evidence provided by Mr. Geroux and Neil Proctor, a former director of the numbered companies, established that the leases were in default, which triggered the respondent's rights to entry and immediate possession under the leases and the general security agreements. Mr. Geroux's unchallenged evidence was that the appellant removed the equipment from the Fairview premises and refused to return it, contrary to article 9 of the leases. Mr. Proctor testified that the numbered companies ceased operations and abandoned the premises, owned nothing, and had no banking privileges. Their evidence confirmed that 1860337, 1860342, and 1860335 had failed to make the required rental payments, contrary to article 5 of their respective leases, and to return the equipment upon termination, contrary to article 11. In accordance with the provisions of articles 20 and 21 of the leases and articles 6, 7 and 8 of the general security agreements, upon these defaults, the respondent was entitled to enter and repossess its equipment and collateral.

[19] In the application judge's endorsement, and as respondent's counsel acknowledged, the order only permits the respondent to recover equipment and collateral it owns and in which it has a registered security interest, as described in the schedules to the order. If any tenants claim that the equipment sought to be repossessed and sold by the respondent is not covered by the order, they have remedies to protect their rights and their personal property.

[20] The appellant's complaint is chiefly directed at the inventory lists of the equipment prepared by Mr. Geroux during his attendance at the Fairview, Centennial, and Upper Wentworth premises. The appellant maintains that the respondent has failed to prove that it owns or is entitled to possession of the equipment described in the inventory lists. As a result, the order allows the respondent to take possession of equipment in which it has no interest and to put the appellant's tenants out of business.

[21] We are not persuaded by these submissions.

[22] First, the inventory lists are necessary schedules to the order to ensure that it covers the respondent's equipment and collateral that the appellant may have moved to other locations. The unchallenged evidence of Mr. Geroux establishes that the appellant has moved some of the respondent's equipment among the premises that it owns or controls. This application is one part of myriad proceedings arising out of the long-running dispute between the appellant

and the respondent. The repossession of the respondent's equipment from the Fairview, Centennial, and Upper Wentworth premises was the latest in a series of numerous repossessions carried out by Mr. Geroux on behalf of the respondent in relation to equipment and collateral on premises owned by the appellant. Importantly, Mr. Geroux testified that in the course of the twenty or so repossessions, he often discovered that the appellant moved the respondent's equipment among its locations with the result that the equipment listed in the equipment schedules to the leases was not at the premises described in the leases but at other premises owned by the appellant. In the present case, there is no dispute the appellant moved the respondent's equipment from the Fairview premises to another location that it has refused to disclose to the respondent, and it has refused to return the respondent's equipment that it removed.

[23] Second, the evidence of Mr. Proctor provides the required evidentiary link between the respondent's equipment covered under the equipment leases and collateral under the general security agreements with 1860337, 1860342, and 1860335, and the equipment at the Centennial and Upper Wentworth premises that was recorded on the inventory lists by Mr. Geroux. Mr. Proctor testified that the fitness clubs at the Centennial and Upper Wentworth premises abandoned by 1860342 and 1860335 were immediately taken up and operated by 1927032, a company whose principal is closely related to the appellant's principal. Mr. Proctor provides accounting services to 1927032 and, as far as he knew, but

could not say for sure, 1927032 continued to use the equipment left behind in the premises by 1860342. In our view, it is an equally reasonable inference that 1927032 continued to use the equipment left behind by 1860335. Again, the respondent can only seize equipment it owns or collateral in which it has a security interest, and if that is not the case, 1927032 will have its remedies to protect its rights and personal property.

[24] We see no error in the application judge's decision to append the schedules to the order. In the circumstances of this case, the schedules are necessary in order to give full effect to the order.

**Disposition**

[25] For these reasons, the appeal is dismissed.

[26] The respondent is entitled to its partial indemnity costs in the amount of $10,000, inclusive of disbursements and applicable taxes.

"Paul Rouleau J.A."
"K. van Rensburg J.A."
"L.B. Roberts J.A."

# TAB 11

# *The Personal Property Security Act, 1993*

*being*

Chapter P-6.2* of the *Statutes of Saskatchewan, 1993* (effective April 1, 1995) as amended by the *Statutes of Saskatchewan*, 1996, c.9 and 18; 1997, c.16; 2000, c.L-5.1 and 21; 2001, c.20; 2004, c.L-16.1; 2007, c.S-42.3; 2010, c.E-9.22 and c.26; 2012, c.F-13.5, 2013, c.O-4.2; 2018, c.42; and 2019, c.18.

(b) the debtor, other than a guarantor or indemnitor, may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by:

(i) paying the sums actually in arrears, exclusive of the operation of an acceleration clause in the security agreement;

(ii) curing any other default by reason of which the secured party intends to dispose of the collateral; and

(iii) paying a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for disposition, if those expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement:

(a) more than twice, if the security agreement provides for payment in full by the debtor not later than 12 months after the day on which value was given by the secured party; or

(b) more than twice in each year, if the security agreement provides for payment by the debtor during a period greater than one year after the day on which value was given by the secured party.

1993, c.P-6.2, s.62.

**Applications to court**

**63**(1) In this section, **"secured party"** includes a receiver.

(2) On application by a debtor, a creditor of a debtor, a secured party, a sheriff or a person with an interest in the collateral, the court may make one or more of the following orders:

(a) an order, including a binding declaration of a right and an order for injunctive relief, that is necessary to ensure compliance with this Part or section 17, 36, 37 or 38;

(b) an order giving directions to any person regarding the exercise of rights or the discharge of obligations pursuant to this Part or section 17, 36, 37 or 38;

(c) an order relieving a person from compliance with the requirements of this Part or section 17, 36, 37 or 38;

(d) an order staying enforcement of rights provided in this Part or section 17, 36, 37 or 38;

(d.1) an order addressing a dispute arising in connection with rights mentioned in subsections 55(8) to (14);

(e) any order that is necessary to ensure protection of the interest of any person in the collateral.

1993, c.P-6.2, s.63; 2010, c.E-9.22, s.226.

# TAB 12

2000 SKCA 19

Docket: 3354

# *THE COURT OF APPEAL FOR SASKATCHEWAN*

CORAM: CAMERON, GERWING, AND JACKSON JJ.A.

---

ROCKY MEADOWS TRANSPORT LTD., GEORGE PAUL, and SHERONE PAUL

APPELLANTS

- and -

DOUBLE D CONSTRUCTION LTD. and DARYL LOWENBERG

RESPONDENTS

---

COUNSEL:

Mr. C. Hadubiak for the appellants
Mr. R. Morris for the respondents

DISPOSITION:

| | |
|---|---|
| On Appeal From: | The Court of Queen's Bench |
| Appeal Heard: | February 3, 2000 |
| Appeal Partially Allowed: | February 3, 2000 |
| Written reasons: | February 7, 2000 |
| Oral Reasons By: | The Honourable Mr. Justice Cameron for the Court |

CAMERON J.A.

This is an appeal against an order of the Court of Queen's Bench made in the course of wider proceedings concerning three security agreements between one or the other of the parties. The wider proceedings, commenced by way of action, were initiated some two years ago pursuant to an order of the Court of Queen's Bench under the provisions of *The Personal Property Security Act.* The validity and scope of the agreements, together with the actions of the parties in attempting either to realize upon the collateral or to prevent realization, as the case may be, are in dispute in these proceedings.

Following commencement of the action, the secured creditors, Rocky Meadows Transport and the Pauls, were first restrained from realizing upon the collateral pending trial and then later allowed to do so, when it appeared the collateral was in jeopardy and the action was going nowhere. Upon being allowed to do so, they began seizing the property of the debtors, Double D Construction and Lowenberg, notifying the debtors on the terms of *The Personal Property Security Act* that the property could be redeemed upon payment of an amount sufficient to satisfy the expenses associated with the costs of the seizure, together with the obligations secured by the agreements. The redemption amount was stated to be $633,025.

With that, Double D and Lowenberg applied to the Court of Queen's Bench for an order allowing them to redeem by payment into Court of the redemption amount, taking the position that the validity and scope of the security agreements had yet to be determined and that the redemption amount was excessive in relation to both the obligations under the agreements and the costs

associated with the seizure. Their application was allowed on terms, and it is the order which followed that is now before us.

The order provides as follows:

1. The applicants shall, by September 7, 1999, pay into court to the credit of this action the sum of $633,025.68.

2. Until said payment, the respondents are enjoined from selling or disposing of any of the collateral seized by them, including the collateral set out in their Notice of Repossession and Intention to Sell, dated July 13, 1999 or any amendments thereto.

3. The respondents are stayed from taking any Erther steps to enforce their security until the court determines the redemption price and the time within and the manner in which it must be paid.

   Upon payment into court to the credit of this action of the sum of $633,025.88, the respondents shall immediately discharge their security and release all collateral to the applicants or its nominee.

5. The issue of the amount of the redemption price, including the determination of the obligations secured by the collateral and expenses, as required by s. 62 of *The Personal Property Security Act,* shall be determined at a *viva voce* hearing, to be set out by the Local Registrar in conjunction with the parties.

6. The parties should apply to the Justice conducting the *viva voce* hearing for any directions required.

The order is said to have been beyond the power of the judge to make, first because it was made in the face of an interlocutory order of a judge of this court touching the subject matter and, second, because it exceeded the powers afforded the court by section 63 of *The Personal Property security Act.* We do not agree. The interlocutory order was immaterial in the circumstances, given the passage

of time and the renewed efforts to realize upon the security, and the provisions of section 63 are sufficiently wide to empower the court to make orders of this nature. This is especially so, having regard for the power conferred by subsection 63(2)(e), the object of which is to leave the Court with sufficient discretionary power to act effectively when necessary to ensure the protection of the interest of any person in the collateral.

This is not to say that all of the terms of the order are either sufficient or appropriate. Indeed we are of the view they are not. First, they are insufficient, for no provision was made for the eventuality that Double D Construction and Lowenberg might default in paying the specified sum into court. Second, they are inappropriate in so far as they direct that a *viva voce* hearing be held to determine the redemption price, together the time and manner of its payment. Indeed, both sides agree this was an inappropriate term, saying it was not possible to have these issues determined in isolation and in this way, given the proceedings as a whole, the tenor of the dispute, and the complexity of the issues dividing the parties. We suggested that perhaps the issues concerning the validity of the agreements, the amounts secured by them, and the reasonable expenses associated with the seizure, might be determined by way of an expedited trial of such issues, but not even that proved acceptable to counsel, who suggested this was not a workable proposition. No alternative remains, then, but to leave the issues to be determined at trial in the ordinary course.

In the meantime, the current deadlock over the seizure, disposition, and redemption of the collateral must be broken. It falls to be broken in an even

handed way, protecting, so far is it is possible to do so, the interest of both sides in the collateral. To this end, the order will be modified as follows:

1. Double D construction and Lowenberg will pay into the Court of Queen's Bench the sum of $633,025 on or before Friday March 3, 2000, without further extension of time. On payment in:

(a) the amount shall stand in place of the seized collateral;

(b) the seized collateral shall forthwith be released to Double D Construction and Lowenberg; and

(c) the obligations of Double D Construction and Lowenberg under the security agreements shall stand discharged.

2. In the event of default:

(a) Rocky Meadows Transport and the Pauls shall be free to dispose of the collateral currently under seizure and to seize and dispose of such further collateral as they think fit, subject always to the provisions of the *Act;* and

(b) the proceeds of all dispositions of collateral seized pursuant to the security agreements shall forthwith be paid into court to stand in the place of such collateral.

3. The monies paid in shall remain in court pending the trial of the action or actions now underway in the Court of Queen's Bench, or until further order of that Court.

4. The parties are given leave to apply to the Court of Queen's Bench on three days notice, or if need be *ex parte,* for such further directions or orders as may be required to effect the terms of this order.

5. The parties, and any one having notice of this order, are forewarned of the possibility of being found in contempt of court and suffering the consequences thereof should they fail to act in accordance with the *Act,* the terms of this order, and any further directions that may be made. This does not extend to the term requiring payment in of the sum of $633,025 on or before March 3, 2000.

6. Each of the parties shall proceed with dispatch in relation to the steps to be taken in the action or actions pending in the Court of Queen's Bench to the end of having them tried as soon as reasonably possible.

To this extent the appeal is allowed, with costs on appeal (taxed on the basis of double column 5 of Court of Appeal tariff of costs), to be costs in the cause.

# TAB 13

2012 SKCA 118
Saskatchewan Court of Appeal

CPC Networks Corp. v. Eagle Eye Investments Inc.

2012 CarswellSask 838, 2012 SKCA 118, [2013] 2 W.W.R. 260, 225 A.C.W.S. (3d) 238, 2 P.P.S.A.C. (4th) 254, 405 Sask. R. 86, 563 W.A.C. 86, 95 C.B.R. (5th) 76

# Eagle Eye Investments Inc. (Appellant) and CPC Networks (Respondent)

Jackson, Ottenbreit, Herauf JJ.A.

Heard: June 24, 2012
Judgment: December 6, 2012
Docket: CACV2207

Proceedings: affirming *CPC Networks Corp. v. Eagle Eye Investments Inc.* (2011), 2011 SKQB 436, 2011 CarswellSask 797, [2012] 9 W.W.R. 119, 18 P.P.S.A.C. (3d) 191, *(*sub nom. *Eagle Eye Investments Inc. v. CPC Networks Corp.)* 387 Sask. R. 147 (Sask. Q.B.)

Counsel: Bruce Wirth for Appellant
Clayton Barry for Respondent

**Headnote**

Personal property security --- Priority of security interest — Subordination and postponement

C Corp. entered into loan agreement (LA) with Business Development Bank of Canada (BDC) and granted security interest in all present and after-acquired property pursuant to general security agreement (GSA) — E Inc., whose sole director and beneficial owner was CFO of C Corp., also loaned money to C Corp. and loan was unsecured — Eventually BDC loan was assigned to E Inc. which demanded payment of it — C Corp.'s application seeking determination of indebtedness outstanding on BDC loan and order requiring E Inc. to release and discharge BDC security assigned to it upon payment of amount so determined was granted — Trial judge found E Inc. submitted that by virtue of assignment of BDC loan to it as well as assignment of security held by BDC which included LA and GSA, that E Inc. stepped into shoes of BDC and had all rights and remedies pursuant to GSA — Trial judge found BDC loan, LA and GSA were assigned without knowledge or consent of C Corp. and rights and obligations under GSA acquired by E Inc. were not exercised in good faith or in commercially reasonable manner — Trial judge found GSA was subject to terms of LA and it was contrary to LA to allow E Inc. to add its previously unsecured shareholders' loans to amount owing under LA — Trial judge found terms of LA and GSA were clear that security was in respect of BDC loan and not loans of third parties, and nothing in LA or GSA would lead C Corp. to believe that its unsecured creditors might achieve secured creditor status — Trial judge found only amounts secured by GSA were owing by C Corp. to BDC and GSA did not cover any previously unsecured debts owed by C Corp. to E Inc. — Trial judge found balance owed on BDC loan was determined to be $52,500 plus interest and prepayment penalty, and E Inc. was ordered to provide release and discharge of GSA — E Inc. appealed — Appeal dismissed — All obligations clause did not convert unsecured debt to secured debt — Parties did not intend that GSA covered unsecured debts owed to third party upon assignment — Appeal was best resolved on contractual terms — If contract will have no effect on priorities, there may be nothing preventing assignee from converting unsecured debt into secured debt, if intention of contracting parties warrants it — E Inc. did not step into shoes of bank — Bad faith and reasonability were not at issue.

***Jackson J.A.*:**

**I. Introduction**

1 The issue in the within appeal is whether an "all obligations" clause, contained in an assigned security agreement, can secure the previously unsecured debts owing by the debtor to the assignee from a time before the assignment took place. The Chambers judge held that the only amounts secured by the assigned security agreement were those owing by the debtor to the assignor at the time of the assignment (see: 2011 SKQB 436 (Sask. Q.B.)). I would dismiss the appeal, but not necessarily for all of the reasons given by the Chambers judge.

**II. Background Facts**

2 The background facts are taken from the decision of the Chambers judge and are uncontroverted.

3 CPC Networks, which was incorporated on July 9, 2007, owns and operates the largest and fastest privately owned fibre-optic looped network in Saskatoon. Larry Ayers, Jack Adams, Bernie Sabiston and Timothy Tkachuk were the initial shareholders, directors and officers. Larry Ayers was the president, Jack Adams was the chief financial officer and Bernie Sabiston and Timothy Tkachuk provided technical expertise. In addition to being the Chief Financial Officer of CPC Networks, Jack Adams was also the president, sole director and sole beneficial owner of his own corporation, Eagle Eye Investments Inc., which through a subsidiary owns 130,000 shares of CPC Networks.

4 In February 2008, CPC Networks accepted a Letter of Offer from the Business Development Bank of Canada. According to the Letter of Offer, the Bank loaned $150,000 to CPC Networks and, as security, CPC Networks granted a General Security Agreement in favour of the Bank. According to the General Security Agreement, CPC Networks granted the Bank a security interest in all of its present and after acquired property and agreed that the General Security Agreement was assignable without notice to CPC Networks.

5 The Letter of Offer specified a "Loan Amount" of $150,000 and contained a clause, saying "To the extent that any provision of the application for financing or any of the security is inconsistent with or in conflict with the provisions of this Letter of Offer, the provisions of this Letter of Offer shall govern."

6 The relevant provisions of the General Security Agreement granted by CPC Networks to the Bank are as follows:

> **5. OBLIGATIONS SECURED**
>
> (The Security Interests and charges you have granted to BDC secure all indebtedness and obligations to BDC)
>
> This Security Agreement is in addition to and not in substitution for any other security interest or charge now or in the future held by BDC from the Borrower or from any other person and shall be general and continuing security for the payment and performance of all indebtedness, liabilities and obligations of the Borrower to BDC (including interest thereon), whether incurred prior to, at the time of or after the signing of this Security Agreement including extensions and renewals, and all other liabilities of the Borrower to BDC, present and future, absolute or contingent, joint or several, direct or indirect, matured or not, extended or renewed, wherever and however incurred, including all advances on current or running account, future advances and re-advances of any loans or credit by BDC and the Borrower's obligation and liability under any contract or guarantee now or in the future in existence whereby the Borrower guarantees payment of the debts, liabilities, and/or obligations of a third party to BDC, and for the performance of all obligations of the Borrower to BDC, whether or not contained in this Security Agreement (all of which indebtedness, liabilities and obligations are collectively called the "Obligations").
>
> . . .
>
> **25. ASSIGNMENT**
>
> (Should BDC assign or transfer or otherwise deal with this Security Agreement on its own behalf, you agree that the Security Agreement shall remain binding and effective upon you.)

BDC may, without notice to the Borrower, at any time assign or transfer, or grant a security interest in, all or any of the Obligations [defined above in clause 5], this Security Agreement and the Security Interests. The Borrower agrees that the assignee, transferee or secured party, as the case may be, shall have all of BDC's rights and remedies under this Security Agreement and the Borrower will not assert as a defense, counterclaim, right of set-off or otherwise any claim which it now has or may acquire in the future against BDC in respect of any claim made or any action commenced by such assignee, transferee or secured party, as the case may be, and will pay the assigned Obligations to the assignee, transferee or secured party, as the case may be, as the said Obligations become due.

. . .

**28. ENUREMENT**

This Security Agreement shall enure to the benefit of BDC and its successors and assigns, and shall be binding upon the Borrowers and its heirs, executors, administrators, successors and any assigns permitted by BDC, as the case may be.

[Emphasis added]

7 Between July 6, 2009 and November 30, 2009, according to the evidence of Mr. Adams, Eagle Eye loaned money to CPC Networks to pay expenses and to build its fibre-optic network. Eagle Eye claimed CPC Networks was indebted to it in the amount of $465,555.81. The loan was unsecured although Mr. Adams pressed CPC Networks to provide security, which CPC Networks appeared at one point prepared to grant, but then ultimately refused to provide.

8 In February 2010, after CPC Networks refused to enter into a security agreement with Eagle Eye, the latter commenced an action against CPC Networks for the monies allegedly owed pursuant to the unsecured loan. CPC Networks, in its Statement of Defence, denied owing the monies on the terms or in the amount claimed, and advanced a counterclaim alleging that Mr. Adams took unauthorized payments from CPC Networks funds.

9 After the action was commenced, Mr. Adams was removed as Chief Financial Officer of CPC Networks. Mr. Ayers eventually resigned as a director and officer on March 17, 2010.

10 In March 2010, Mr. Ayers incorporated Black Dove Capital Corp. On March 31, 2010, Black Dove gave notice to CPC Networks that the Bank had assigned the General Security Agreement and the Letter of Offer to Black Dove. Mr. Ayers facilitated the assignment. Mr. Ayers then sent an email to CPC Networks noting it for default and demanding full repayment of the remaining amount of the Bank loan ($140,000). Mr. Ayers also advised CPC Networks that Black Dove had appointed him as interim receiver of CPC Networks until the loan was repaid.

11 CPC Networks disputed the demanded amount, and more specifically, an amount claimed by Mr. Ayers for professional services valued at $23,715 and a prepayment penalty charged by the Bank.

12 CPC Networks then applied pursuant to *The Personal Property Security Act, 1993*, S.S. 1993, C. P-6.2 [*PPSA*], for an order: (i) setting aside Mr. Ayers's appointment as receiver; (ii) requiring Mr. Ayers to vacate CPC Networks' office immediately; and (iii) enjoining Black Dove from taking any further enforcement actions regarding the loan without leave. That order was granted on April 15, 2010.

13 Following the April 15, 2010 order, CPC Networks, Black Dove and Mr. Ayers agreed on a payment schedule with respect to the Bank loan. CPC Networks made all payments in this regard, such that as of October 24, 2011, $52,500 plus interest from October 10, 2011 remained to be paid on the debt.

14 In July 2011, Black Dove assigned the Bank loan to Eagle Eye. Eagle Eye then demanded payment, on or before July 8, 2011, of an annual management fee of $350 for each of 2010 and 2011, and requested that CPC Networks give it authorization for direct payments for all payments due after July 10, 2011. Eagle Eye further demanded that CPC Networks provide bank statements, financial information, information regarding equipment purchases, and current customer lists. The failure to provide

that information led Eagle Eye to state that CPC Networks was in default of the Bank General Security Agreement that Eagle Eye, as the assignee from Black Dove, now held.

15 Mr. Tkachuk, who is now the Vice-President of Operations of CPC Networks, stated that because of these demands for financial and other information, CPC Networks requested a payout statement from Eagle Eye with a view to paying the amount remaining. The payout statement sent by Eagle Eye indicated that CPC Networks owed $749,356.50:

| | |
|---|---|
| Bank loan | $57,700.00 |
| Eagle Eye loan | $465,556.00 |
| Costs | $140,590.59 |
| Interest | $85,709.91 |

16 On August 31, 2011, CPC Networks then brought another application under s. 63 of the *PPSA* for an order directing Eagle Eye to release and discharge the Bank security that had been assigned to it, upon payment of the amount properly owing under the General Security Agreement, to be determined by the Court. It is that application that gives rise to the decision under appeal.

17 At the same time, Eagle Eye sought an order that CPC Networks provide documentation including bank statements and accounting data that Eagle Eye stated it was entitled to receive by virtue of the terms of the General Security Agreement.

**III. Decision of the Chambers Judge**

18 CPC Networks' position throughout has been that the General Security Agreement secures liabilities that may have arisen between the Bank and CPC Networks only, i.e., the outstanding amount remaining to be repaid under the Letter of Offer in the approximate amount of $52,000. CPC Networks wanted to pay out this amount and obtain a discharge of the General Security Agreement. CPC Networks further asserted that Eagle Eye is not acting in good faith or in a commercially reasonable manner. It believes Mr. Ayers, Mr. Adams, and Eagle Eye are abusing the court's processes by engaging in multiple vindictive and vexatious lawsuits that are frivolous in nature.

19 Eagle Eye resists those arguments, saying first that the assignment resulted in the General Security Agreement now covering all other debts of CPC Networks owed to Eagle Eye on the footing that the General Security Agreement secured both the Bank loan and the Eagle Eye loan because Eagle Eye 'stepped into the shoes' of the Bank upon assignment. As a consequence, so the argument goes, CPC Networks is not entitled to a discharge of the General Security Agreement until all of the monies owed pursuant to both loans are paid, which is approximately $465,000 as alleged by Eagle Eye. Eagle Eye also maintains that it did not act in bad faith and that its actions were commercially reasonable, and further, that it had legitimate business reasons to see CPC Networks' records, citing Mr. Tkachuk's previous issues with accounting records and improperly adhering to generally accepted accounting principles.

20 The Chambers judge found that the General Security Agreement did not secure the unsecured debt owed by CPC Networks to Eagle Eye, and that the rights and obligations under the General Security Agreement, as acquired by Eagle Eye via the assignment, were not executed in good faith or in a commercially reasonable manner. He held that Mr. Ayers, Mr. Adams, and Eagle Eye were trying to take advantage of the other shareholders of CPC Networks, especially in relation to another pending action between the parties. He granted the application and made the following order (at para. 44):

> 1. That the indebtedness outstanding on the BDC loan made between CPCN and BDC dated February 8, 2008 is $52,500 as of October 24, 2011, plus interest at 10.7% from October 10, 2011 to the date of payment. As the BDC loan has been assigned to Eagle Eye, upon CPCN paying to Eagle Eye the said sum of $52,500 plus interest at the rate of 10.7% from October 10, 2011, and the prepayment penalty of three months' further interest on the prepaid principal amount together with any discharge fees and costs paid to BDC as referred to in para. 42 hereof, Eagle Eye shall provide a release and discharge of the GSA [General Security Agreement].

2. CPCN is entitled to its costs of the application which I fix at $2,400 based on double Column 4 of the Tariff, items 1, 5(a)(i) and (c).

21 In granting the order, the Chambers judge reasoned in the following manner. Where there is conflict between the Letter of Offer and the General Security Agreement, he found that the Letter of Offer takes precedence. He then went on to find that the Letter of Offer "clearly refers to a loan of $150,000 plus interest and further provides for a right of prepayment of the loan if an indemnity equal to three months further interest on the principal is paid" (para. 25). Based on this, he concluded that it would be contrary to the Letter of Offer to allow Eagle Eye to add its previously unsecured shareholders' loans to the amount owing under the original Letter of Offer with the Bank. He held that the reference to "other liabilities of the borrower" in the General Security Agreement means the other liabilities owing to the Bank. With that, he concluded that "the terms of the LA [Letter of Offer] and GSA [the General Security Agreement] are clear that the security is in respect to the BDC [Business Development Bank of Canada] loan and not loans of third parties" (para. 25).

22 The Chambers judge referred to all the relevant decisions, which may be found in his reasons. He also referred to an article by Roderick J. Wood entitled "Turning Lead into Gold: The Uncertain Alchemy of 'All Obligations' Clauses" (2004), 41 Alta. L. Rev. 801 at 809, where the author states that courts have refused to convert unsecured claims into secured claims, when security is assigned, for a variety of reasons, including: (i) it would be unfair to the debtor; (ii) it would have a destructive impact on the principle of *pro rata* sharing in bankruptcy law; and (iii) it would have a disruptive effect on the PPSA priority regime with a subsequent loss of predictability. The Chambers judge was satisfied that these reasons supported his conclusion that the only amounts secured by the General Security Agreement were the amounts owing by CPC Networks to the Bank and that the General Security Agreement does not cover any previously unsecured debts owed by CPC Networks to Eagle Eye.

23 Since the effect of the decision of the Chambers judge resulted in the General Security Agreement being discharged, Eagle Eye's application to receive financial and other information from CPC Networks was in effect dismissed.

**IV. Analysis**

***1. Application under The Personal Property Security Act, 1993***

24 As a preliminary matter, I note that the matter came to the Chambers judge as an application under s. 63(2) of the *PPSA* which allows a "debtor" to apply to the Court of Queen's Bench for an order "giving directions to any person regarding the exercise of rights or the discharge of obligations pursuant to this Part." The Part referred to is Part V of the *PPSA*, which refers to "Rights and Remedies on Default" and includes s. 62(1)(a) of the *PPSA*. That clause reads as follows:

> 62(1) At any time before the secured party or a receiver has disposed of the collateral or contracted for disposition pursuant to section 58 or 59 or before the secured party is deemed to have irrevocably elected to retain the collateral pursuant to s. 61:
>
> (a) a person who is entitled to receive a notice of disposition pursuant to subsection 59(6) or (10) may, unless that person otherwise agrees in writing after default, redeem the collateral by:
>
> (i) tendering fulfilment of the obligations secured by the collateral; and
>
> (ii) paying a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for disposition, if those expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement.
>
> [Emphasis added]

25 Since Eagle Eye considered that CPC Networks was in default for failing to provide financial and other information, CPC Networks applied to the Court of Queen's Bench under s. 63(2) of the *PPSA* to obtain an order fixing the amount owing under the General Security Agreement to allow it to tender fulfillment of the obligations secured by the agreement and to obtain an order discharging the security.

26 Thus the controversy is fixed over whether the amount owing under the General Security Agreement is the amount owing under the Bank loan only or whether the amount owing includes the unsecured debt owing to Eagle Eye. Determining the amount owing under the General Security Agreement in this context takes the Court to the classic question of the effect of an assigned security agreement that contains an "all obligations" clause and the extensive analysis provided by Professor Wood in his above-mentioned article. To resolve the question in dispute, the Court must determine whether the Letter of Offer and the General Security Agreement secure CPC Networks' unsecured debt to Eagle Eye.

27 Section 63 of the *PPSA* expands the authority of the Court of Queen's Bench to hear matters in chambers without an action being commenced beforehand (see: Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, *Personal Property Security Law*, (Toronto, ON: Irwin Law, 2005) at pp. 574 to 576; Ronald C.C. Cuming & Roderick J. Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (N.p.: Carswell, 1994) at pp. 453-454); and *Andrews v. Mack Financial (Canada) Ltd.* (1987), [1988] 2 W.W.R. 747 (Sask. C.A.). The exercise in this case, however, requires the Court to determine what the parties intended when they entered into the Bank loan and the General Security Agreement. Such an exercise might, in another case, require that the Court set the matter down for trial. Determining the intention of the parties may in any given case require an assessment of the credibility of the witnesses. In this case, however, no dispute exists about the facts necessary to resolve the only issue in the case and neither party requested or wanted the Court to direct a trial of the issue. They were content to have the Court pass on the matter in the context of affidavit evidence only. In all of the circumstances, it is appropriate for the Court to decide the issue in the context of s. 63.

***2. Approach taken by the Chambers Judge***

28 The Chambers judge has provided a thorough review of the issues and the law, and for the most part, his analysis is correct, with a couple of caveats.

29 In my respectful view, it is not necessary to answer the question whether a security agreement can ever secure the previously unsecured debts owing by the debtor to the assignee. Assuming that the priority system in bankruptcy and under the *PPSA* is not affected and the assignee behaves in a commercially reasonable manner, what rule of law prevents a debtor from agreeing to an assignable, all obligations clause? The ratio of this decision should not be that, as a matter of contract law or secured transactions law, a debtor and a secured party can never agree to an assignment of an agreement containing an all obligations clause permitting the secured party to assign the security to a third party, who holds a prior unsecured debt, and thereby secure that past unsecured indebtedness.

30 A security agreement must be construed as a specialized form of contract, but the principles of contract law are also in play. The overarching principle of contract interpretation is to give effect to the intention of the parties — keeping in mind, as may be necessary, the nature of the contract as a security agreement and having regard for commercial reasonableness, good faith and the priority structure both inside and outside of bankruptcy. Further, courts must give sufficient respect to the principles of secured transactions law that allow security agreements to secure past and present indebtedness, as well as future indebtedness, and thereby, give effect to what are known in the trade as "all obligations" clauses.

31 As has often been said, in the context of secured transactions law, "constraints on freedom of contract should not be readily implied in the absence of clear legislative direction" (see: *Personal Property Security Law*, *supra* at p. 27). A court must be concerned about fairness and the effect on bankruptcy and other priorities, but if the contract will have no effect on priorities, there may well be nothing preventing an assignee from converting unsecured debt into secured debt, if that is the intention of the contracting parties.

32 I find support for this view in this passage taken from *Personal Property Security Law*, *supra* at pp. 319-21:

> ... [C]ourts have been unwilling to permit an assignee to claim the benefit of an all obligations clause in respect of obligations incurred by the assignee before the assignment. It is not entirely clear whether these courts have decided that this outcome is impossible as a matter of law, or if they have simply determined that the clause used in the agreement was not sufficient to produce this result. In England, Australia, and New Zealand, the courts have embraced the former

argument and have held that only the clearest of language in the security agreement would permit an unsecured creditor to obtain secured creditor status by taking an assignment of a security agreement that contains an all obligations clause.

In Canada, some courts take the view that the result is impossible as a matter of law. ...

The authors are of the view that the idea that there is a substantive rule of law that prevents the parties from extending all obligations clauses to cover obligations that were originally owed to another person is an overreaction to the problem. ... The authors are of the opinion that a more selective approach is required ....

[Emphasis added]

Or in the words of Professor Wood, "[i]stead of outright invalidation, a more selective approach is needed" (*Wood*, *supra*, at p. 817).

33 Thus, I prefer an approach that answers the question raised by the contracts and the circumstances of the within appeal only. The within appeal is best resolved on the basis of construing the contracts in question.

***3. What did the Parties Intend?***

34 The main issue is this: as a matter of interpretation of the governing contracts, did the parties intend that the "all obligations" clause contained in the General Security Agreement means that an assignee from the Bank could secure its prior unsecured debts? I agree with the Chambers judge that this issue must be resolved against the assignee, Eagle Eye.

35 The Court must first interpret the General Security Agreement and the Letter of Offer to determine whether the original contracting parties intended the assignment clause to secure the unsecured debts of a future assignee. If the parties did so intend, the Court would then have to determine whether a commercially defensible reason exists preventing the General Security Agreement from operating in that manner. In the within appeal, however, the Court does not reach the second question.

36 Ascertaining the intention of contracting parties is an objective exercise informed by the factual matrix surrounding the formation of the contract with the words in the contract being given their natural and ordinary meanings unless absurdity would result (see: *SaskPower International Inc. v. UMA/B&V Ltd.*, 2007 SKCA 40, [2007] 6 W.W.R. 277 (Sask. C.A.)). A contract is to be interpreted as of when it is executed (see: *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.), at 901). Further, the meaning of a contract should not change as time passes (see: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed. (Markham, ON: LexisNexis Canada, 2012) at 52). Applying these principles to the within appeal excludes much of the affidavit evidence before the Court for the purposes of contractual interpretation as the evidence focuses on the conduct and intentions of various individuals after entry into the General Security Agreement.

37 The factual matrix surrounding the signing of the Letter of Offer and the General Security Agreement includes that CPC Networks was a start-up corporation needing to secure debt financing. Mr. Ayers and Mr. Adams secured the loan and admit that, at the time, the Bank was the only lender willing to provide financing. The Letter of Offer and the General Security Agreement are standard form contracts. The bargain did not depend upon permitting the assignment of the security agreement including its all obligations clause to a third party. It is reasonable to infer that CPC Networks was in the position of having to 'take-it-or-leave-it.'

38 Considering the factual matrix, it does not appear objectively that the Bank and CPC Networks intended that the General Security Agreement would cover the unsecured debts of CPC Networks that may be owed to a third party upon assignment. While the General Security Agreement permits an assignment without notice, it does not state that upon assignment, the General Security Agreement will act to secure any and all unsecured debts previously owed to the assignee. Financial institutions, such as the Bank, are certainly concerned about the debts that may be owed to them, but it is a stretch to assume, without clear words that a financial institution and the debtor intend that an "all obligations" clause secures, upon assignment, the debtor's unsecured debts to the assignee.

39 Eagle Eye submits that, in receiving the assignment of the General Security Agreement, it 'stepped into the shoes' of the Bank, such that this would allow it to use the General Security Agreement to secure the previously unsecured debts owed to it by CPC Networks. Eagle Eye relies on the wording of the assignment clause in support of its argument, specifically where the clause states that "[t]he Borrower agrees that the assignee ... shall have all of BDC's rights and remedies under this Security Agreement...." It further relies on the broad wording of the General Security Agreement, which states that the security agreement "shall be general and continuing security for the payment and performance of all indebtedness, liabilities and obligations of the Borrower to BDC ... whether incurred prior to, at the time of or after the signing of this Security Agreement...." Eagle Eye's submission is not supported by the application of the principles of contractual interpretation in this case.

40 In the within appeal, no provision in the loan documents or the General Security Agreement clearly expresses an intention by the Bank with respect to the unsecured debts of a third party. It is one thing for a financial institution to intend to secure its own past, present and future debts, but quite another for it to intend to secure the past unsecured debts of others. In saying this, I would not want to be taken as saying that a vulnerable debtor could not, as a matter of contract, intend to create such a clause. The point is that the agreements to be construed in the within appeal, viewed in light of the factual matrix, do not demonstrate that the parties intended at the time of contracting that the General Security Agreement would operate in the way suggested by Eagle Eye.

41 As Professor Wood indicates "[t]he interpretive approach has been applied consistently across several different jurisdictions" (see *Wood*, *supra* at p. 812). In support of this statement — in the context of the assignment of claims to a secured party — he mentions *McVeigh v. National Australia Bank Ltd.*, [2000] FCA 187, 278 A.L.R. 429 (Australia Fed. Ct.). He also mentions *Town Oil (Receiver of) v. Bank of Montreal*, [1988] B.C.J. No. 826 (B.C. C.A.) where the Court concluded that the parties intended that an all obligations clause should cover obligations assigned to the secured party even though the clause did not refer specifically to such obligations.

42 The Chambers judge was correct to review the existing authorities cited by Professor Wood, but as the author states, many of these authorities do not state as a matter of principle that a debtor cannot agree to such a clause. By and large they hold that the particular drafting of the "all obligations" clause in the security agreement was not sufficiently clear and unequivocal to produce any other result than that the clause did not extend to the debtor's past indebtedness to the assignee (see: Wood, pp. 809-810). Other decisions referred to by Professor Wood involve a disruption of either the bankruptcy or secured transactions priority regimes. The significance of the case law, however, is that it confirms a restrictive interpretation of the assigned security agreement in the within appeal.

43 With this conclusion, it is not necessary to consider the trial judge's finding that Eagle Eye and its principals were acting in bad faith and not in a commercially reasonable manner. If the Court had found that the parties had intended that the all obligations clause could secure the prior unsecured debts of an assignee, any question of bad faith or lack of commercial reasonableness would not enter the equation.

44 One final point must be made. The Chambers judge held that it would be contrary to the Letter of Offer to allow Eagle Eye to add its previously unsecured shareholders' loans to the amount owing under the original Letter of Offer with the Bank. I do not take the Chambers judge as saying that the Letter of Offer restricts the force of the obligations clause as between the original contracting parties when the parties so intend. Such an interpretation may affect other significant aspects of secured transactions law that do permit future advance financing (see: *Personal Property Security Law*, *supra* at p. 317).

**VII. Conclusion**

45 The appeal is dismissed with costs in the usual way.

***Ottenbreit J.A.*:**

I concur

***Herauf J.A.*:**

I concur

*Appeal dismissed.*

# TAB 14

# ALBERTA TEMPLATE CCAA INITIAL ORDER EXPLANATORY NOTES

Alberta Template Orders Committee
Calgary/Edmonton, Alberta

## INTRODUCTION

In February 2006 the Alberta Template Orders Committee ("Alberta Committee")[1] finalized an Alberta Template Receivership Order for Alberta.[2] The favourable receipt of the Alberta Template Receivership Order led to the development of the Alberta Template CCAA Initial Order ("CCAA Initial Order")

As with the Alberta Template Receivership Order, for reasons of commonality, practicality and efficiency, the Alberta Committee considered it appropriate to use the Ontario CCAA Initial Order (Long Form)[3] ("Ontario Order") as a starting point, focusing on those areas where the Alberta practice or legislation diverged from that in Ontario.

The CCAA Initial Order is not meant to be the last word in either draftsmanship or applicability to each situation. Rather, consistent with the philosophy applied to the Alberta Template Receivership Order, the CCAA Initial Order is meant to serve as a starting point from which any additions, amendments or deletions can be black-lined and brought to the attention of the Justice from whom the order is sought. The assistance of members of the judiciary to the Alberta Committee does not mean that there is any "arrangement" with the Court that a CCAA order will be granted in all instances where the proposed order approximates the CCAA Initial Order, or at all. In each application, the discretion of the presiding Justice will be completely unfettered by the use or non-use of the CCAA Initial Order.

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[1] The Alberta Committee consists of Darren Bieganek, Q.C., Robert Anderson, Q.C., Jeremy Hockin Q.C., David Mann, Rick Reeson, Q.C., Randal van der Mosselaer, Adam Maerov, Carole Hunter and Chuck Russell, Q.C., Josef Kruger, Q.C. with input from Justice K.M. Horner, Justice K.M. Eidsvik, and Justice K.G. Neilsen.

[2] The Alberta Template Orders Committee, "The New Template Version No. 1, February 2006" (2006), 18 Comm. Insol. R. 37.

[3] T. Reyes and S. Bomhoff, "The New Standard Form Template CCAA First-Day Orders Explanatory Notes for Long Form and Short Form CCAA Orders, Versions Dated July 25, 2006" (2006), 18 Comm. Insol. R. 93 ("Ontario Explanatory Notes").

## CLAUSE BY CLAUSE REVIEW OF THE CCAA INITIAL ORDER

The following headings correspond to the headings in the CCAA Initial Order, and identify the paragraphs contained within those headings under discussion in these notes. Capitalized terms are defined as in the CCAA Initial Order.

## SERVICE [PARA. 1, SEE ALSO STYLE OF CAUSE AND PREAMBLE]

The CCAA Initial Order contemplates the initial application will be made by the debtor company in open court, on notice to affected parties (see, for example, the notes to paragraphs 31-36 below). The preamble references service and those who made submissions at the hearing.

**Paragraph 1** abridges the notice (if necessary) and provides that sufficient notice has been given.

In certain situations (for example, urgency), the application could be made *ex parte*, on evidence supporting the need to proceed without notice. In that case, the preamble should be amended to delete reference to service and to establish why it is appropriate to proceed *ex parte*. **Paragraph 1** should then be amended to completely dispense with service.

The CCAA Initial Order contemplates that the application will be made before a Justice in Chambers. Counsel are referred to the procedure set out in the "Notice to the Profession" dated December 7, 2010, as amended, for booking applications under the Commercial/Duty Justice Initiative.

## POSSESSION OF PROPERTY AND OPERATIONS [PARAS. 4-9]

**Paragraph 4** authorizes the Applicant to remain in possession of its assets, to continue its business and the employment of its employees and advisors, and to retain further advisors as necessary in the ordinary course of business, to carry out the terms of the Order.

**Paragraph 4 (d)** should only be utilized where necessary, in view of the fact that central cash management systems often operate in a manner that consolidates the cash of applicant companies. Specific attention should be paid to cross-border and inter-company transfers of cash.

Provision for a central cash management system may be necessary where the Applicant carries on business along with other related companies. As identified in the Ontario Explanatory Notes, implementation of a central cash management system may alter substantive rights and is to be used with caution. Given the relative infrequency of the need for such a provision, one has not been included in the CCAA Initial Order. In appropriate circumstances, such a provision could be included and brought to the Court's attention as a departure from the template.

**Paragraph 5** allows (to the extent permitted by law), but does not require the Applicant to pay certain expenses, whether incurred prior to or after the Order. As with the Ontario Order, the CCAA Initial Order is intentionally limited in terms of payment of pre-filing liabilities, in order to treat to the extent possible all pre-filing payments equally pending the filing and approval of a plan. Typically, payments for pre-filing liabilities will be suspended until the plan is approved and thereafter made only in accordance with an approved plan. **Paragraph 5** permits payment of some pre-filing liabilities simply to avoid the operating issues which would otherwise arise from ceasing payments for regular and frequent payments, such as wages. Counsel should be prepared to advise the court of payroll arrangements and include evidence of these in the supporting affidavit.

**Paragraph 6** entitles (but does not require) the Applicant to pay all reasonable expenses incurred in carrying on business in the ordinary course after the Order.

**Paragraph 7** requires the Applicant to remit or pay statutory deemed trust amounts in favour of the Crown, sales taxes, and any amounts payable to the Crown or other taxation authority in respect of municipal or other taxes ranking ahead of secured creditors. This paragraph applies only to amounts arising or to be remitted after the Order, unless otherwise ordered by the Court.

**Paragraph 8** permits (but does not require) the Applicant to pay rent under real property leases until such time as the lease is disclaimed or resiliated, excluding rent in arrears.

**Paragraph 9** directs the Applicant to make no payments to any of its creditors as of the date of the Order, except as specifically permitted in the Order. The Applicant is similarly prevented from granting security interests in respect of any of its property and from granting credit or incurring liabilities, except in the ordinary course of business.

In certain situations, more extensive payment of pre-filing claims, or charges for the payment of pre-filing and post-filing claims of critical suppliers, are needed to facilitate a successful CCAA restructuring in the best interests of the stakeholders as a whole. In that event, counsel can insert and black-line a provision to this effect for the Court's consideration.

**RESTRUCTURING [PARAS. 10-12]**

**Paragraph 10** grants the Applicant extensive rights to restructure its business. These provisions underline the need for notice to affected parties of the initial order. Section 36 of the CCAA now provides that sales out of the ordinary course of the debtor's business require court authorization. The Alberta Committee felt that in the interests of judicial economy, prospective authorization for sales up to a certain dollar ceiling could be authorized in the initial order, provided the notice requirements of Section 36 were met on the initial application.

**Paragraphs 11 and 12** of the CCAA Initial Order provide a mechanism reflecting the interests of both the Applicant and its landlord regarding the showing of the property, the identification and resolution of issues surrounding fixtures and, of course, the preservation of the landlord's remedies.

Consistent with the Ontario approach, there is no provision for the payment of percentage rent, as the Alberta Committee agreed that this level of detail was unnecessary in a standard form order. This and other details arising in particular situations could be inserted and black-lined to the CCAA Initial Order in appropriate circumstances.

There is no provision permitting the Applicant to dispose of property located on the leased premises without interference of any kind from landlords, and "notwithstanding the terms of any leases". In limited circumstances, such a provision may be appropriate to include in an initial order without notice to the landlord (for example, a pre-Christmas retail insolvency, or where perishable goods are involved).

**NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY [PARA. 13]**

**Paragraph 13** of the CCAA Initial Order contemplates an initial stay period of a maximum of 30 days, subject to extension by further order.

**NO EXERCISE OF RIGHTS OR REMEDIES [PARAS. 14-16]**

**Paragraph 14** describes a broad stay of rights and remedies against or in respect of the Applicant or the Monitor, or affecting the Business or the Property.

**Paragraph 15** permits taking action against the Applicant in order to preserve rights respecting statutory limitation periods, without the need for a Court application. This alleviates the onus placed on a claimant to seek Court approval to file whatever documents are necessary to meet the deadline in question. No further steps are permitted beyond the action necessitated to comply with the limitation, except in accordance with other provisions of the order.

Counsel should be aware that the CCAA preserves the rights of set-off. The Courts have recognized the application of the law of set-off in the CCAA context, and have specifically permitted set-off to "cross the line" of the CCAA filing date: see for example, ***Re Blue Range Resource Corp.*** (2000), 84 Alta. L.R. (3d) 665 (C.A.); ***Re Canadian Airlines Corp.*** (2001), 14 B.L.R. (3d) 258 (Alta. Q.B.); ***Re Air Canada*** (2003), 45 C.B.R. (4th) 13 (Ont. S.C.J.).

There are examples of extension of a stay to prevent exercise of set-off, without leave: ***Re Air Canada, supra***. However, to the extent that such a stay operates to require payment by a creditor of a debt otherwise subject to valid set-off against a debt owing from the debtor company, it amounts to cancellation of the rights Parliament has preserved in the CCAA.

To the extent that a party wishes to challenge the ability to set-off, that can be brought to the Court's attention at the initial application, or later through the comeback clause (for example, opportunistic acquisition of a cross claim).

**NO INTERFERENCE WITH RIGHTS, CONTINUATION OF SERVICES, NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT [PARAS. 16-18]**

During restructuring, an ongoing supply of goods and services to the debtor company is necessary in order to preserve the status quo while the debtor company attempts to strike an arrangement with its creditors. Therefore, **paragraph 16** of the CCAA Initial Order prohibits persons from altering, terminating or failing to renew agreements with the Applicant. This puts the onus on the party not wishing to be forced to continue supplying or to renew to make an application and persuade the Court otherwise within the context of the proceeding. Similarly, to the extent someone wishes to force a renewal in the absence of a contractual renewal right, this too will have to be brought to the Court's attention.

Section 11.01 of the CCAA provides, however, that a CCAA order may not prohibit a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made. **Paragraph 17** of the CCAA Initial Order confirms that the Order does not prohibit requiring immediate payment.

In some instances, a priority charge may be appropriate to provide a certain level of protection to creditors forced to continue dealing with the debtor company: see for example, ***Re Air Canada*** (2003), 43 C.B.R. (4th) 1 (Ont. C.A.) at para. 17, and see also ***Re Smoky River Coal Ltd.*** (2000), 19 C.B.R. (4th) 251 (Alta. Q.B.), aff'd in part (2001), 28 C.B.R. (4th) 127 (Alta. C.A.). This charge was sometimes referred to as a "Post-Petition Trade Creditor's Charge". Section 11.4 of the CCAA now contemplates a "critical suppliers' charge". The CCAA Initial Order does not include such a provision, but to the extent that one may be necessary in a particular case, it can be brought to the Court's attention and included as a black-lined addition. The Alberta Court of Appeal emphasized in ***Re Smoky River Coal Ltd.***, supra at para. 17 that priority charging provisions must clearly indicate the scope and extent of the charge.

Section 11.01 of the CCAA prohibits requiring the further advance of money or credit. This is reflected in **Paragraph 18.**

**PROCEEDINGS AGAINST DIRECTORS AND OFFICERS, DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE [PARAS. 19-22]**

It is essential that a company seeking to reorganize under the CCAA have competent directors and officers to guide the restructuring and accordingly, the Alberta Committee thought it important to extend the stay to cover directors and officers, and to include an

indemnity and a charge in the CCAA Initial Order. These respectively appear at **paragraph 19, paragraph 20 and paragraph 21.**

The CCAA in section 11.51 now expressly permits the inclusion of an indemnity and a charge in favour of directors and officers. Prior to the most recent amendment of the statute, there were a number of cases that supported the Court's ability to make such orders: see for example, ***General Publishing Co., Re*** (2003), 39 C.B.R. (4th) 216 Ont. S.C.J.); ***JetsGo Corporation, Re***, 2005 CarswellQue. 2700 (S.C.).

Section 11.51(3) of the CCAA provides that the Court may not grant this type of Order if, in its opinion, adequate indemnification insurance could be obtained at reasonable cost.

**APPOINTMENT OF MONITOR [PARAS. 23-30]**

**Paragraph 23** appoints the Monitor as an officer of the court to monitor the Property and the Applicant's conduct of the Business in accordance with the CCAA and the terms of the order. The Applicant is required to advise the Monitor of all material steps taken by the Applicant pursuant to the order, and to co-operate with the Monitor.

The Monitor is granted broad restructuring powers in **paragraph 24.**

**Paragraph 25** provides that the Monitor shall not take possession of the property and shall take no part in the management of the business. So long as the Monitor does not take possession nor manage, the prohibition in ***GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.,*** [2006] 2 S.C.R. 123 does not come into play. **Paragraph 25** also goes on to specify that

nothing in the Order shall require the Monitor to take possession or control of any of the property that might be environmentally contaminated or that might cause or contribute to a discharge of a substance contrary to law. The Order does not, however, exempt the Monitor from reporting or disclosure as required by environmental legislation.

**Paragraph 26** does not require the Monitor to collect information, but rather contemplates the Monitor will simply pass along information provided by the Applicant in response to reasonable requests for information from creditors. The Monitor does not have responsibility or liability with respect to the information so disseminated. Subject to Court order, confidential information is not to be disseminated.

**Paragraph 28** contemplates that the Monitor's fees (including its counsel fees) will be paid by the Applicant on a regular basis as part of the costs of the proceedings. Paragraph 29 requires that the Monitor and its legal counsel pass their accounts from time to time.

**Paragraph 30** grants a charge to the Monitor, counsel for the Monitor and the Applicant's counsel as security for their professional fees and disbursements. (“Administration Charge”). These charges are permitted by Section 11.52 of the CCAA.

## INTERIM FINANCING [PARAS. 31-36]

Given the frequent necessity for what is now called "interim" financing (formerly, Debtor In Possession – "DIP" financing) in CCAA proceedings, it is provided for in **paragraphs 31 to 36** of the CCAA Initial Order. It can only be granted on notice to affected secured creditors, pursuant to Section 11.2 of the statute. These provisions allow interim financing to a predetermined maximum amount, and also envision the filing of a Commitment Letter, so that the Court and the affected parties can address the details of the proposed financing at the initial application.

Notwithstanding its common role in CCAA proceedings, interim financing is an exceptional remedy, and severely impacts the rights of existing secured parties given the super-priority afforded. Evidence establishing the need for interim financing must be supplied and all affected parties should be given notice. The typical practice in Alberta is therefore to seek the consent of, or at least notify secured creditors who are going to be affected by the interim financing. The Interim Lender's Charge must not secure any obligation which existed before the CCAA Order is made. Only in very exceptional cases, where the evidence supports the extension of the Interim Lender's Charge to pre-existing obligations, will the Court permit such extension. See for example ***Re Comark Inc.***, 2015 ONSC 2010.

Interim financing provisions should only be applied for *ex parte* in exceptional circumstances and in that event, should only be for an amount sufficient to "keep the lights on". Ongoing interim financing should be re-visited at the comeback application.

## VALIDITY AND PRIORITY OF CHARGES, ALLOCATION [PARAS. 37-42]

**Paragraph 37** provides for the following ranking: Administration Charge, Interim Lender's Charge, Directors' Charge. This ranking may be subject to negotiation, and must be tailored to the circumstances of the case before the Court. Similarly, the quantum of each charge may be negotiated, however, **paragraph 37** contemplates a cap on each.

The Alberta Committee was of the view that certain characteristics should be common to all of these charges. For example:

1. The charges do not require registration under any system of registration in Alberta (although parties may wish to consider doing so) **(paragraph 38)**;

2. The charges should generally attach to all of the debtor's property and prevail over all other interests **(paragraph 39)**. However, the applicant must be prepared to justify this "super priority", particularly where no notice is given of the initial application;

3. The Applicant/borrower should be precluded from granting any interest that would rank in priority to, or *pari passu* with, any of the charges **(paragraph 40)**; and

4. The charges should not by themselves be an event of default or be subject to subsequent proceedings to be set aside **(paragraph 41)**.

The Alberta Committee recognizes that the "super priority" of these charges may be limited by other variables, such as lack of notice to certain secured or statutory creditors over whom the priority is being asserted, and by specific statutory terms which do not permit the granting of a priority charge over certain statutory-based charges. This must be assessed by counsel on a case-by-case basis.

Pursuant to section 34(11) of the CCAA no order may be made which has the effect of subordinating financial collateral (as defined in section 2(1) of the CCAA).

**Paragraph 43** provides that any interested party may apply to the Court for an order to allocate the Administration Charge, the Interim Lender's Charge and the Directors' Charge amongst the various assets comprising the Property. This paragraph is not intended to pre-determine the success or failure of such an application, but rather only to signal the ability to bring the application.

**SERVICE AND NOTICE, GENERAL [PARAS. 44-51]**

**Paragraph 44** reflects the expanded duties and functions of the Monitor to deal with service of notices and the dissemination of information concerning the proceedings contained in section 23 of the CCAA. **Paragraph 45** permits service by e-mail and allows materials to be posted on the Monitor's website, which is to be established for informational (as distinct from service) purposes. The regulations under the CCAA (SOR 2009-219, Sections 7 & 9) mandate what the monitor is now required to post on its website. The CCAA Initial Order expands on that to include substantially all materials filed by or on behalf of the Monitor or served upon it, other than confidential materials.

**Paragraph 48 and paragraph 49** permit the Monitor to seek assistance and recognition from domestic and foreign jurisdictions.

**Paragraph 50** is the comeback clause and allows for applications to vary or amend the order on 7 days'notice to all affected parties.

**Paragraph 51** provides that the Order is effective as 12:01 a.m. Mountain Standard Time on the date of the Order.

**CONCLUSION**

The Alberta Committee hopes that the CCAA Initial Order will be a useful tool to both the bench and bar by providing a familiar and well-understood starting point. As counsel and the Court consider an appropriate order for a given case, black-lining to the CCAA Initial

Order should enable them to expeditiously address changes needed to appropriately tailor the order to the circumstances.

The CCAA Initial Order is not intended to apply universally to every CCAA proceeding, nor is it intended to raise any sort of onus that will require counsel to meet some legal or evidentiary burden in order to depart from the template. Rather, it is intended as a practical help to the bench and bar, to ensure both are acquainted with typical tents of an initial CCAA order, so that departures from such terms can be quickly highlighted.

**The Alberta Template Orders Committe**

# TAB 15

CANADA

CONSOLIDATION

CODIFICATION

# Companies' Creditors Arrangement Act

# Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to May 4, 2020

Last amended on November 1, 2019

À jour au 4 mai 2020

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## OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

**Published consolidation is evidence**

**31 (1)** Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

**Inconsistencies in Acts**

**(2)** In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

## CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

**Codifications comme élément de preuve**

**31 (1)** Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

**Incompatibilité — lois**

**(2)** Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

## LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

## MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

## NOTE

This consolidation is current to May 4, 2020. The last amendments came into force on November 1, 2019. Any amendments that were not in force as of May 4, 2020 are set out at the end of this document under the heading "Amendments Not in Force".

## NOTE

Cette codification est à jour au 4 mai 2020. Les dernières modifications sont entrées en vigueur le 1 novembre 2019. Toutes modifications qui n'étaient pas en vigueur au 4 mai 2020 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

**(a)** an agreement entered into on or after the day on which proceedings commence under this Act;

**(b)** an eligible financial contract; or

**(c)** a collective agreement.

**Factors to be considered**

**(3)** In deciding whether to make the order, the court is to consider, among other things,

**(a)** whether the monitor approved the proposed assignment;

**(b)** whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

**(c)** whether it would be appropriate to assign the rights and obligations to that person.

**Restriction**

**(4)** The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

**Copy of order**

**(5)** The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

**11.31** [Repealed, 2005, c. 47, s. 128]

**Critical supplier**

**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 or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

**Obligation to supply**

**(2)** If the court declares a 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.

présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

**Facteurs à prendre en considération**

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

**a)** l'acquiescement du contrôleur au projet de cession, le cas échéant;

**b)** la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

**c)** l'opportunité de lui céder les droits et obligations.

**Restriction**

**(4)** Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la compagnie est insolvable, est visée par une procédure intentée sous le régime de la présente loi ou ne s'est pas conformée à une obligation non pécuniaire.

**Copie de l'ordonnance**

**(5)** Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 29, art. 107, ch. 36, art. 65 et 112.

**11.31** [Abrogé, 2005, ch. 47, art. 128]

**Fournisseurs essentiels**

**11.4 (1)** Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.

**Obligation de fourniture**

**(2)** S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.