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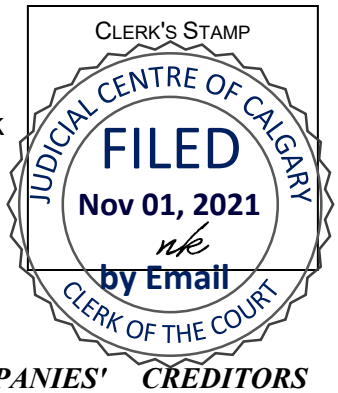

COURT FILE NUMBER	2001-05630
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED** **AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC, and DOMINION FINCO INC.**
DOCUMENT	**REPLY BENCH BRIEF OF CREDIT SUISSE AG** **(AVO Transaction)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. This Reply Brief is submitted in response to the October 25, 2021 Bench Brief of ACDC (the "**ACDC Brief**").[1] Specifically, this Reply Brief addresses the following allegations raised in the ACDC Brief: (a) the Agent has acted in bad faith and that, as a result, the Agent and the Monitor are estopped from pursuing the AVO Transaction without a second marketing process; (b) the Diavik Realization Assets have significant value that the Agent is attempting to expropriate; (c) the First Lien Lenders are recovering in excess of 126% on their funded debt; (d) ACDC purchased a proprietary interest in the Cash Collateral and Diavik Realization Assets; (e) ACDC's ownership of the Action is evidenced by the disclosure of the Action in the First Lien Credit Agreement, dated February 3, 2021 (the "**ACDC Credit Agreement**"); and (f) the court-ordered release sought by the Agent and DDMI is not a proper third party release.

II. ARGUMENT

A. <u>The Agent has not Acted in Bad Faith</u>

2. ACDC's assertion in the ACDC Brief that the Agent has not acted in good faith and that, as a result, the Agent and the Monitor are estopped from proceeding with the AVO Transaction, should be rejected outright. Such assertion is based on two faulty premises – first, that the MSA and the TSA (as defined in the ACDC Brief) require a second marketing process of the Diavik Interest, and second, that the Agent has failed to act in good faith and with due diligence by "laying in the weeds".

(a) *The MSA and TSA*

3. First, the MSA has been superseded by the Ekati APA. The agreed transaction terms in the MSA were memorialized, and incorporated into, the Ekati APA which governs the ongoing administration of the matters detailed therein, including the Diavik Realization Account.

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[1] Capitalized terms used but not defined herein have the meanings ascribed thereto in the Brief of Argument of the Agent, filed October 12, 2021 **["Agent's Brief"]**.

4. Diavik Realization Assets expressly do not include Diavik, nor does section 7.1(a)(iv) impose any obligation on the Monitor or any other party to complete a second marketing process of the Diavik Interest. Section 7.1(a)(iv) of the Ekati APA requires that Dominion (and the other Applicants defined as "Sellers") "from cash on hand, fund a designated bank account (which may be a bank account in the name of the Monitor) with a sufficient amount to cover the costs to administer the Diavik Realization Assets both before and after the Closing, in the amount of US$1,000,000 (the "Diavik Realization Account").[2]" Under the Ekati APA, "Diavik Realization Assets" are limited to "realizations and recoveries from or in respect of the Diavik Joint Venture Interest."[3]

5. If the intention of section 7.1(a)(iv) was to impose an obligation on Dominion to run a second SISP, the sophisticated parties to the Ekati APA were more than capable of including such an obligation in the Ekati APA. No such obligation exists because, as discussed further below, all parties were aware of the limited number of players in the diamond industry who could potentially buy the Diavik Interest – these included ACDC, who had already expressly declined to acquire such interest, and DDMI, which had, at that time, expressed no interest in buying Dominion out of the Diavik Joint Venture. Nor can such an obligation be inferred because US$1 million is not possibly sufficient to fund both the administration of the Diavik Realization Assets and a second SISP.

6. It is disingenuous for ACDC to claim, now that it does not like the AVO Transaction, that there was any contemplation, let alone a commitment, that a second marketing process would be undertaken in respect of the Diavik Interest. In fact, the Diavik Realization Account was established for an entirely different purpose, to the knowledge of all parties – the administration of the Diavik Realization Assets.

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[2] Affidavit of Kristal Kaye, sworn on October 13, 2021 **["Kaye Affidavit"]**, Exhibit D at section 7.1(a)(iv). Emphasis added.

[3] Kaye Affidavit, Exhibit D at section 3.1(b).

7. At the time the Ekati APA was approved by the CCAA Court, DDMI was holding more than $150 million (as valued by DICAN) of Dominion's production from Diavik (the "**Dominion Production**") as security for Cover Payments, a portion of which Dominion claimed should be delivered in accordance with paragraph 16 of the Second ARIO.[4] The Order (Approval of Monetization Process) (the "**Monetization Order**") had only recently been granted providing a waterfall for distribution of proceeds from the Dominion Production.[5] Diavik also continued to operate and produce diamonds, and DDMI continued to incur Cover Payments, secured by the Dominion Production.[6]

8. Given the adversarial proceedings between Dominion and DDMI throughout the CCAA proceeding, someone had to be tasked with monitoring and administering these matters on behalf of Dominion. That "someone" was the Monitor, as an independent third party. These oversight activities were to be paid for out of the Diavik Realization Account (which was funded by Dominion – not ACDC), in accordance with the Ekati APA.

9. Second, and in any event, the terms of the MSA are consistent with the Ekati APA. Nowhere does the MSA contain any obligation for the Monitor, the Agent, or any other party to market the Diavik Interest. Section 6 of the MSA[7] states:

> The Parties shall agree to a mechanism for the pursuit of the realization and recovery of the Diavik Assets, which among other things shall provide for a duly authorized independent official to have control and carriage thereof and for the costs thereof to be funded initially by the Company's payment at closing of the Transaction of US$1,000,000 from the Transaction proceeds at NewCo's direction to such official and thereafter to be funded at the cost of the 1L Lenders if they so elect in their sole discretion.[8] [Emphasis added]

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[4] Confidential Twelfth Report of the Monitor, dated January 11, 2021 at paras 20 and 21.

[5] Order (Approval of Monetization Process), dated November 4, 2020.

[6] Sixteenth Report of the Monitor, dated October 6, 2021 **["Sixteenth Report"]** at paras 33-35; Supplemental Report to the Sixteenth Report of the Monitor, dated October 19, 2021 **["Supplemental Sixteenth Report"]** at Appendix C.

[7] Kaye Affidavit, Schedule B to Exhibit D at section 6.

[8] Similar to the definition of "Diavik Realization Assets" in the Ekati APA, "Diavik Assets" in the MSA is defined as "all receivables, diamond production, claims, sales proceeds and other rights and assets realized or recovered in respect of such Diavik mine joint venture agreement interests."

In accordance with section 6 of the MSA, the Parties did agree to a mechanism for the pursuit of realizations and recovery of the Diavik Assets. That mechanism is contained at section 7.1(a)(iv) of the Ekati APA.

10. Further, section 6 of the MSA makes clear that once the Diavik Realization Account was exhausted, the Agent (not ACDC) retained the discretion to do what it deemed advisable with respect to the ongoing administration of the Diavik Realization Assets. Here, the Agent did exactly that by negotiating, and ultimately reaching a consensual resolution with DDMI, for the sale of the Diavik Interest in a manner which resolves all outstanding issues as between the Agent, Dominion and DDMI.

11. Importantly, the funding by Dominion of $1 million pursuant to section 6 of the MSA was a negotiated amount in recognition of the fact that, as discussed further below, the Agent was not receiving any recovery on its funded debt under the Ekati APA and, absent the $1 million funding obligation provided in section 6 of the MSA, the costs of administering the Diavik Realization Assets would have immediately been to the account of the Agent. In an effort to minimize its losses, the Agent negotiated the funding obligations into the MSA.

12. Third, even if the MSA could be read expansively to contemplate a second SISP in relation to the Diavik Interest (which is denied), the Parties to the MSA are the First Lien Lenders and the Bidders. It is nonsensical for ACDC to assert that the First Lien Lenders and the Bidders, in a private agreement, could somehow estop Dominion, as CCAA debtor, and the Monitor, a Court officer with the responsibility for overseeing the CCAA proceedings for the benefit of all stakeholders, from determining that a second SISP was not necessary and would be both costly and futile. Any suggestion that the Monitor is estopped from administering the estate in accordance with the CCAA and the Expansion of Monitor's Powers Order, granted January 27, 2021 (the "**EMP Order**") should be dismissed outright.[9]

[9] Order – Expansion of Monitor's Powers, granted January 27, 2021.

13. The TSA also does not assist ACDC. Section 1.02(a) of the TSA simply provides:

> Dominion agrees to take all reasonable steps that are necessary or desirable for the full realization and recovery of the Diavik Realization Assets, as determined by the Monitor, acting reasonably, and with the consent of the Agent (or the Agent's counsel) (the "Realization Activities"). The Realization Activities may include, among other things:
>
> (i) enforcement of all rights relating to the Diavik Realization Assets, including rights provided for under the Orders granted in the CCAA Proceedings and the Diavik Joint Venture Agreement;
>
> (ii) participation in management committee matters and meetings pursuant to the Diavik Joint Venture Agreement;
>
> (iii) review of reporting and calculations relating to the Diavik Diamond Mine by Diavik Diamond Mines (2012), Inc. ("DDMI");
>
> (iv) review of budgets and cash calls pursuant to the Diavik Joint Venture Agreement; and
>
> (v) exercising audit rights under the Diavik Joint Venture Agreement where appropriate.[10]

The Monitor confirmed in its Fifteenth Report, dated August 30, 2021, that since the granting of the EMP Order, it has undertaken the activities listed in section 1.02(a) of the TSA.[11]

14. Wholly absent from section 1.02(a) of the TSA is any requirement for the Monitor to run a new process to market the Diavik Interest. The Monitor's discretion to take all steps that it deems necessary or desirable, in its judgment, is expressly preserved in the TSA, limited only by the requirement that such steps are reasonable and the Agent (not ACDC) consents. The TSA is entirely consistent with both the MSA and the Ekati APA.

15. Further, the TSA was put in place for the benefit not of ACDC, but for the Agent. The Agent required that the TSA be entered since ACDC was offering employment to all, or almost all, of Dominion's employees and senior management and, in turn, depriving the Dominion estate of all knowledge and information about the Diavik Interest. The ongoing involvement of key

[10] Kaye Affidavit, Exhibit O at section 1.02.
[11] Fifteenth Report of the Monitor, dated August 30, 2021 at para 15.

personnel in the CCAA proceedings was required as otherwise the Monitor could not have administered the Diavik Interest which remained the property of Dominion.

(b) ***The Agent has Acted in Good Faith***

16. Contrary to the highly inflammatory allegations of bad faith, collusion and secrecy made against the Agent in the ACDC Brief, the facts leading to the Support Agreement and the AVO Agreement are simple. At the time of the Ekati APA, there was no indication of any potential transaction for the Diavik Interest. In fact, all parties, including the Agent, believed that no such transaction would be forthcoming.

17. Following the closing of the Ekati APA, as has been the case throughout these CCAA proceedings, various disputes continued between DDMI, the Agent, and Dominion.[12] The Agent was in discussions with certain technical experts regarding a potential review of DDMI's updated estimate of Diavik reclamation costs and life of mine projections, among other things.[13] These disputes were complex, costly and time-consuming, not to mention a drain on the resources available to fund the Monitor's oversight activities.

18. In June 2021, DDMI approached the Agent (and not the reverse) to canvass whether a commercial arrangement was possible which (i) resolved the foregoing issues, (ii) negated the need for DDMI to continue making Cover Payments on Dominion's behalf, and (iii) avoided the ongoing expenditure of resources required by DDMI to prepare and provide ongoing reporting to the Monitor and the Agent.[14] Negotiations subsequently ensued which, in light of the size and complexity of Diavik and the Diavik Interest, took a number of months to conclude.[15] At all times during the negotiation, the Monitor was provided with regular reporting by the Agent and was kept apprised of all developments.

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[12] Sixteenth Report at paras 32, 36-37; Supplemental Sixteenth Report at Appendix C.
[13] Sixteenth Report at para 37.
[14] Sixteenth Report at para 38; Supplemental Sixteenth Report at Appendix C.
[15] Supplemental Sixteenth Report at Appendix C.

19. Contrary to ACDC's aspersions, the Agent never "la[id] in the weeds" or remained "silent" to "knowingly mislead" ACDC.[16] There is no obligation on a first-ranking creditor to "consult with" a subordinate creditor, such as ACDC (or its principals), in relation to a transaction, especially one that relates to an asset that the subordinate creditor has expressly declined to acquire.

20. ACDC was advised of the AVO Transaction (and the RVO Transaction) on September 27, 2021 – more than a week before the filing of the Monitor's application.[17] Notwithstanding that ACDC has known about the AVO Transaction for five weeks, ACDC:

(a) has done nothing to advance any due diligence with respect to Diavik;

(b) has failed to respond in a timely manner to the Monitor's numerous invitations to enter a non-disclosure agreement;

(c) has provided no indication that it intends to submit a bid for the Diavik Interest;

(d) has not made any offer to the Agent and DDMI to payout their priority claims so as to realize the "significant value" ACDC claims exists in the Diavik Realization Assets; and

(e) has not committed to advance the funding required to continue the CCAA Proceedings and administer Dominion's ongoing interest in the Diavik JVA, potentially until the end of life of Diavik.[18]

21. The diamond mining industry is very small – the players all know each other and are all well known.[19] These players have already had multiple opportunities to come forward with an offer to acquire the Diavik Interest, including: (a) prior to the CCAA proceedings in the 3 strategic processes undertaken by Dominion; (b) inside the formal SISP conducted in 2020; (c) in the time

[16] ACDC Brief at paras 50 and 54.

[17] Sixteenth Report at para 45.

[18] Sixteenth Report at paras 45 – 49; Supplemental Sixteenth Report at paras 11, 15-17, 19, and Appendices C, E, F and H.

[19] Affidavit of Brendan Bell, sworn June 12, 2020 at para 15; Fourth Affidavit of Brendan Bell, sworn on December 7, 2020 at paras 13 and 31.

period following the failure of the SISP to generate an executable transaction; and (d) in the more than 10 month period since the closing of the Ekati APA when it was well known that ACDC did not intend to acquire the Diavik Interest.[20] As it is entitled to do under the EMP Order and the TSA, the Monitor has confirmed that "there is limited benefit to a further marketing process of this asset."[21]

22. ACDC complains about the process and the AVO Transaction, but offers no other viable alternative. In its informed judgment (which is deserving of considerable deference by this Court), the Monitor has concluded that the AVO Transaction represents "the best recoveries available to Dominion's creditors from its remaining assets".[22] The Monitor has also concluded:

> the AVO Transaction represents immediate recoveries on a joint venture mining asset which is nearing the end of its mine life, facing significant uncertainty with respect to future production, is encumbered by large and uncertain reclamation costs and is a minority participating interest with very limited control over operations.[23]

The Agent submits that the AVO Transaction should be approved by this Honourable Court.

B. The Diavik Realization Assets have no Value to ACDC

23. ACDC submits that "there is significant value in the Diavik Realization Assets beyond the contingent claims of the First Lien Lenders under their LCs, especially if there is a meaningful attempt to determine the appropriate amount of the cash calls and Cover Payments."[24] There are three fundamental flaws with ACDC's position.

24. First, it is nothing more than a bald assertion. It ignores entirely the Monitor's evidence regarding the increase in estimated reclamation costs in DDMI's revised pre-feasibility study and the 2021 budget prepared by DDMI. As a result of this increase, the Monitor projects a shortfall

[20] Sixteenth Report at paras 4-5.
[21] Sixteenth Report at para 51(c).
[22] Sixteenth Report at para 81.
[23] Sixteenth Report at para 51(n).
[24] ACDC Brief at para 28.

of approximately $64.8 million (based on DICAN values) in DDMI's recovery of the amounts advanced on behalf of Dominion as Cover Payments – leaving no recovery for the Agent, much less subordinate claimants like ACDC.[25]

25. Second, even accepting ACDC's estimates of the potential upside of 20% to 50% that may be realized on the sale of the Dominion Production, such values are insufficient to result in any recovery to ACDC.[26] A 20% differential between the DICAN value and the realized sale price results in a shortfall to DDMI of $29 million, with no recovery to the Agent or ACDC. A 50% differential results in the current quantum of outstanding Cover Payments being satisfied, with an additional $24 million for distribution to the Agent, thereby resulting in a continuing net shortfall of approximately $30 million in the collateralization of the LCs and no recovery to ACDC. Even on ACDC's best case estimate, the Diavik Realization Assets have no value.

26. Third, if ACDC really is of the view that the Diavik Realization Assets have significant value beyond the claims of the First Lien Lenders under their LCs, the solution is simple – ACDC could satisfy the priority claims of DDMI and the Agent and take the Diavik Realization Assets for its own benefit. Its failure to do so is far more indicative of its true views on value than the bald assertions made in the ACDC Brief.

C. The Agent's Recovery is not in Excess of the Funded Debt

27. ACDC alleges that if the AVO Transaction is approved, the First Lien Lenders "get a recovery in excess of 126% on their funded debt and a quick exit."[27] This statement is inaccurate both factually and legally.

[25] Sixteenth Report at para 51(e).
[26] ACDC Brief at para 128.
[27] ACDC Brief at para 4.

28. Factually, the First Lien Lenders are not "recovering" anything under the AVO Transaction. Pursuant to the AVO Transaction, DDMI has simply agreed to release the LCs and, in turn, the First Lien Lenders' obligations to advance funds thereunder.

29. In addition, as part of the Ekati APA, the First Lien Lenders agreed to roll over Dominion's funded debt into the ACDC Credit Agreement.[28] The First Lien Lenders did not "recover" this amount – it remains outstanding and subject to all normal course credit risks.

30. In order to mitigate this risk to the First Lien Lenders and persuade them to roll over the funded debt into the ACDC Credit Agreement, ACDC agreed to grant the First Lien Lenders an incremental 2L bond and a new 3L bond under the Ekati APA.[29] Such additional security was negotiated as part of a larger commercial arrangement whereby the First Lien Lenders agreed to forego immediate payment and accept the ongoing credit risk of rolling over the funded debt, in circumstances where it remained exposed to the regulatory liabilities secured by the Diavik LCs. To date, the Agent has not recovered anything under the 2L bond or the 3L bond, and it bears the risk that if the operation of the Ekati Mine is not profitable, it will never see any recovery on its first lien debt, let alone these subordinate facilities.

31. ACDC has benefitted from such arrangement and is not now permitted to complain that the very terms it negotiated in order to secure those benefits may not be wholly favourable to it. Such position is nothing more than "buyer's remorse". Neither ACDC, nor this Court, is in a position to reopen a previously negotiated and executed transaction, entered into by sophisticated parties, based on the facts known to all parties at the time. As the Court noted in *Amcan Consolidated Technologies Corp, Re*, "contracts are bundles of reasonable expectations created by the promises given and there are significant commercial and societal policy advantages to the law

[28] Kaye Affidavit, Exhibit D, sections 2.4, 4.1(a), 4.2(a) and Schedule B at clauses 2 and Schedule A (Term Sheet).
[29] Kaye Affidavit, Exhibit D, Schedule B at Schedule A (Term Sheet).

recognizing and giving realization to those reasonable expectations. . . To use the vernacular, 'a deal is a deal'."[30]

32. ACDC's complaint about the Agent's potential recovery under the ACDC Credit Agreement is disingenuous - the math has not suddenly changed as a result of the AVO Transaction. Wholly separate and apart from the AVO Transaction, the Agent was always entitled to the 2L bond and 3L bond under the ACDC Credit Agreement in recognition of the Agent foregoing any immediate recovery on the closing of the Ekati APA. What ACDC now argues is that it was fine for the Agent to potentially recover on the 2L and 3L bonds when it was expecting to realize a loss on the LCs, but now that the Agent has negotiated a better than expected deal, ACDC is upset. ACDC's complaints are nothing more than "buyer's remorse".

D. The Cash Collateral and Diavik Realization Assets

33. Throughout the ACDC Brief, ACDC characterizes the purchase of the Cash Collateral and Diavik Realization Assets as "proprietary rights".[31] This is not accurate – ACDC only acquired a subordinate right to proceeds. While such "proceeds" may be distributed in kind (after satisfaction of the priority liens of DDMI and the First Lien Lenders), that does not alter the fundamental nature of what ACDC purchased.

34. ACDC misses the fundamental point that it could not have purchased a proprietary right in the Cash Collateral and Diavik Realization Assets. Any right or claim it has to such assets only arises if and when Dominion receives a distribution from DDMI based on the Diavik Interest. ACDC is not a party to the Diavik JVA, nor did it acquire any interest in the Diavik Joint Venture. Dominion's ownership interest in the Cash Collateral and Diavik Realization Assets was intended to and must, by necessity, continue as ACDC otherwise has no direct ownership interest in, claim to, or right as against DDMI in respect of, the Cash Collateral and Diavik Realization Assets.

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[30] *Amcan Consolidated Technologies Corp*., Re, 2008 CarswellOnt 3953 at para 22. **[TAB 1]**
[31] ACDC Brief at paras 68 and 141.

35. As ACDC's interest in the Cash Collateral and Diavik Realization Assets is wholly dependent upon Dominion's continuing ownership interest in the Diavik Joint Venture, it could only have purchased one thing – a subordinate right to proceeds, if any such proceeds remain once the prior-ranking claims have been satisfied. As such, ACDC's subordinate interest in the Cash Collateral and Diavik Realization Assets can and should be vested out where, as here, such interest is shown to have no value to ACDC in light of the quantum of DDMI's and the First Lien Lenders' priority claims.

36. This Court's decision in *Re Quicksilver Resources Canada Inc.*[32] has no application to this case and does not assist ACDC. The issue in *Quicksilver* was whether an approval and vesting order created title where none existed so as to facilitate the debtor company's conveyance of title to an asset in which it no longer held an interest.[33] That is not the issue before this Court, nor is the Agent asking this Court to remedy title defects in order to facilitate the AVO Transaction. The Agent's position is simple, namely:

(a) with respect to the Cash Collateral and Diavik Realization Assets, ACDC acquired only a subordinate right to proceeds, which right has no value in excess of DDMI's and the First Lien Lenders' priority liens and should be vested out; and

(b) with respect to the Action, ACDC did not acquire any right, title or interest in the Action under the Ekati APA and, as a result, Dominion is entitled to discontinue it and release DDMI from outstanding claims. In the alternative, at best, ACDC acquired a bare subordinate right to proceeds from the Action, which in the current circumstances, can have no value to ACDC and should be vested out. In the further alternative, and in any event, regardless of whether or not ACDC acquired the Action or some other interest in the Action, this Court should exercise its well-established jurisdiction to grant a targeted release in favour of DDMI from any

[32] *Re Quicksilver Resources Canada Inc*, 2018 ABQB 653 **["*Quicksilver*"] [TAB 2]**
[33] *Quicksilver* at paras 52, 54-59. **[TAB 2]**

claims or liabilities arising from the Action to allow the AVO Transaction to be completed and facilitate the timely wind-up of this CCAA proceeding.

E. The ACDC Credit Agreement is Irrelevant to this Application

37. ACDC suggests in the ACDC Brief that, "the First Lien Lenders have acknowledged that the BC Civil Claim is owned by ACDC" as "[t]his ownership was memorialized in [the ACDC Credit Agreement]".[34] There is no merit to this statement. The ACDC Credit Agreement is entirely irrelevant to the issues before this Court.

38. Section 3.06(a) of the ACDC Credit Agreement is a "representation" and "warranty" of ACDC to the Lenders that "There are no actions, suits or proceedings . . . pending against" ACDC "that (i) would reasonably be expected, individually or in the aggregate, to result in a Material Adverse Effect (other than the Disclosed Matters) or (ii) involve this Agreement or the Transactions." The "Disclosed Matters" is defined to mean "the actions, suits and proceedings . . disclosed in Schedule 3.06."[35]

39. Schedule 3.06[36] to the ACDC Credit Agreement lists three matters in addition to the Action, including the following:

(a) "Dene Dyno Nobel (DWEI) Inc. has made submissions in the CCAA Proceedings with respect to amounts outstanding under the MGSA-Explosives-Bulk Explosives dated March 29, 2017 between DDM and Dene Dyno Nobel (DWEI) Inc."; and

(b) "Mr. Matthew Quinlan, a former executive officer of DDM, has made submissions in the CCAA Proceedings with respect to amounts outstanding under a Settlement Agreement dated March 6, 2020 between Mr. Quinlan and DDM."[37]

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[34] ACDC Brief at para 22.

[35] Kaye Affidavit, Exhibit J at section 3.06.

[36] The excerpt from the Credit Agreement attached as Exhibit "J" to Ms. Kaye's Affidavit redacted all other disclosed matters in Schedule 3.06 apart from the Action. An unredacted copy of Schedule 3.06 to the Credit Agreement is attached as **Appendix "A"** to this Reply Brief.

[37] See Appendix A to this Reply Brief.

40. When section 3.06 of the ACDC Credit Agreement is read together with schedule 3.06, the fundamental flaws with ACDC's position become apparent. First, the scope of schedule 3.06 is limited to "actions, suits or proceedings . . . pending against" ACDC. Presumably, ACDC would deny having any liability to DDMI in the Action since it excluded any liability at section 3.3(e) of the Ekati APA for "any and all Liabilities relating to Claims, Actions, suits, arbitrations, litigation matters, proceedings, investigations or other Actions… (iii) with respect to Excluded Contracts or any other Excluded Assets." The "Diavik Joint Venture Agreement" is an "Excluded Asset".[38]

41. Second, it is apparent from the matters disclosed in schedule 3.06 that, at best, schedule 3.06 is over inclusive and includes any concerns, disputes or, in the case of DDMI, actions, that were raised during the CCAA proceedings, regardless of whether such matters fit within the scope of disclosure required by section 3.06. For example:

(a) ACDC disclosed that Mr. Quinlan raised concerns during the CCAA proceedings about non-payment by Dominion of amounts owing under a settlement agreement (the "**Quinlan Settlement Agreement**"), notwithstanding that (i) the Quinlan Settlement Agreement is an "Excluded Contract" under the Ekati APA, and (ii) ACDC is not party to the Quinlan Settlement Agreement and has no liability thereunder;[39] and

(b) ACDC disclosed that Dene Dyno Nobel (DWEI) Inc. ("**Dene**") had complained during the CCAA proceeding about amounts due and owing under the MGSA-Explosives-Bulk Explosives dated March 29, 2017 (the "**Dene Contract**"), notwithstanding that cure costs were paid to Dene to remedy all of Dominion's

[38] Kaye Affidavit, Exhibit D at sections 3.3(e) and 3.2(a).

[39] The Ekati APA attached as Exhibit "D" to Ms. Kaye's Affidavit included excluded the chart of Assigned and Excluded Contracts which was appended to Ekati APA as Schedule A. Attached as **Appendix "B"** to this Reply Brief are the applicable portions of Schedule A - Assigned and Excluded Contracts.

monetary defaults under the Dene Contract as a condition of its assignment to ACDC and, in turn, no amounts remained outstanding.[40]

42. Third, and most importantly, schedule 3.06 is not a negotiated instrument. Neither the Agent nor the First Lien Lenders acknowledged the accuracy of anything stated on schedule 3.06. Section 3.06 is simply ACDC's disclosure – noting more, and nothing less.

F. The Requested Release is a Proper Third Party Release

43. The entirety of ACDC's argument is premised on the erroneous notion that it acquired a property right in the Action as opposed to a bare right to proceeds which can be vested out. The Agent's position with respect to ACDC's alleged purchase of the Action is set out in the Agent's Brief and will not be repeated here.

44. However, even if ACDC acquired the Action under the Ekati APA, it is well within the Court's jurisdiction to grant the requested release, as established in the jurisprudence set out in the Agent's and DDMI's Briefs. The scope of third party release is not limited in the manner suggested by ACDC. The Agent repeats and adopts the submissions in the Agent's and DDMI's Brief on this point.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st DAY OF NOVEMBER, 2021

OSLER, HOSKIN & HARCOURT LLP

Marc Wasserman / Michael De Lellis / Emily Paplawski
Counsel to Credit Suisse AG

[40] See Appendix B to this Reply Brief, See also Kaye Affidavit, Exhibit D at definitions of "Cure Amount" and "Cure Amount Funding".

APPENDIX A

SCHEDULE 3.06

Disclosed Matters

1. DDM filed an action, dated June 16, 2020, against Diavik Diamond Mines (2012) Inc. ("DDMI") in the Supreme Court of British Columbia Action No. S206419 with respect to DDMI's breaches of the Diavik Joint Venture Agreement.

2. Dene Dyno Nobel (DWEI) Inc. has made submissions in the CCAA Proceedings with respect to amounts outstanding under the MGSA-Explosives-Bulk Explosives dated March 29, 2017 between DDM and Dene Dyno Nobel (DWEI) Inc.

3. Mr. Matthew Quinlan, a former executive officer of DDM, has made submissions in the CCAA Proceedings with respect to amounts outstanding under a Settlement Agreement dated March 6, 2020 between Mr. Quinlan and DDM.

4. In response to the unprecedented global pandemic, and to protect the health and safety of its workforce and northern communities, in March 2020 DDM made the decision to put operations at the Ekati Core Zone Diamond Mine into a care and maintenance phase. In connection with that decision, approximately 409 employees were furloughed, 307 of which are unionized. The union has filed a grievance, alleging that DDM is in breach of the layoff provisions of the collective agreement. DDM disagrees that the layoff provisions apply to these unprecedented circumstances, which were not contemplated by the collective agreement. The union has filed a grievance in which it would seek damages. There have been no material updates on this grievance since its initial filing as a result of the CCAA stay of proceedings.

APPENDIX B

Type	Counterparty	Description	Dated	Cure Amount	Essential	Other	Excluded	Material	Aboriginal	To Be Assigned On Closing
Joint Venture Agreement	1012986 B.C. Ltd.	Core Zone Joint Venture	17-Apr-1997		X			X		Yes
Joint Venture Agreement	1012986 B.C. Ltd.	Reclamation Liability Agreement	28-Oct-2019		X			X		Yes
Joint Venture Agreement	1012986 B.C. Ltd.	Sales Representation Agreement	21-Dec-2002		X			X		Yes
Trade Agreement	121352 Canada Inc Technosub		1-Oct-2018				X			No
Trade Agreement	1366936 ALBERTA LTD	MSA-NARCOTIC DETECTION-SECURITY	01 Aug 2016			X				Yes
Trade Agreement	2076790 ALBERTA LTD			$ (3,247.70)		X				Yes
Trade Agreement	24/7 Occupational & Emergency Medical Solutions Inc. (24/7 OEMS)	MGSA-REMOTE AND ON-SITE MEDICAL SUPPORT SERVICES-MEDICAL	01 Dec 2018	$ (45,496.80)	X			X		Yes
Trade Agreement	507170 NWT LTD	COG-MOBILE MAINTENANCE-TIRE SUPPLY	13 Mar 2018	$ (359,393.00)	X			X	X	Yes
Trade Agreement	62 DEGREES NORTH INC.			$ (997.50)	X			X		Yes
Lease	606 Fourth Inc. (Dream)	CT-CALGARY OFFICE-LEASE	01 Jan 2018			X				Yes
Trade Agreement	ACASTA HELIFLIGHT INC.	MSA- HELICOPTER SERVICES	01 Mar 2020		X	X		X		Yes
Trade Agreement	ADVANCED MEDICAL SOLUTIONS INC	MPSA-Safety-SHUTTLE SERVICES	31 Jul 2011	$ (3,287.16)		X				Yes
Impact Benefit Agreement	Akaitcho Treaty 8				X			X	X	Yes
Trade Agreement	ALS ENVIRONMENTAL		1-Apr-2020			X				Yes
Trade Agreement	AON CANADA INC. O/A	CT CORPORATE INSURANCE	30-Oct-2018			X				Yes
Royalty Agreement	Archon Minerals Ltd	Private Royalty	5-Jun-2017			X		X		Yes
Trade Agreement	ARCTIC WEST TRANSPORT LTD	MGSA-FREIGHT-OVERSIZE	07 Dec 2017	$ (1,103,590.37)	X			X	X	Yes
Trade Agreement	AQUARIS VENTURES INC		26-Nov-2020			X				Yes
Trademark License	Ashwin Diamonds	Canadamark	26-Mar-2019			X				Yes
Trade Agreement	ATTAKROC INC.					X				Yes
Trade Agreement	ATS Services Ltd.	MPSA-Aviation-Aviation Professional Services	11 Oct 2018			X				Yes
Trade Agreement	AURORA GEOSCIENCES LTD.	MSA EXPLORATION PROFESISIONAL SERVICES	01 Jan 2019	$ (647,586.47)	X			X		Yes
Trade Agreement	AURORA GEOSCIENCES LTD.	MGSA - PROFESSIONAL SERVICES - EXPLORATION	31 May 2015		X			X		Yes
Trade Agreement	AURORA HEAVY TRUCK SALES		31-May-2019	$ (1,549,943.46)	X			X		Yes
Trade Agreement	AVEVA	CA - AVEVA SOFTWARE SOLUTIONS	22 May 2018	$ (8,640.90)		X				Yes
Trade Agreement	AVEVA	CA-SAAS CONNECT/SUBSCRIPTION-AGREEMENT	17 Aug 2018	$ (12,579.03)		X				Yes
Surety Indemnity	Aviva Insurance Company of Canada	Indemnity Agreement	30-Oct-2014				X			No
Surety Indemnity	Aviva Insurance Company, Argo Insurance Company	Indemnity Agreement	10-Apr-2018				X			No
Trade Agreement	B.A.T CONSTRUCTION LTD.	CSA GEOTECHNICAL HAZARD MANAGEMENT	27 Apr 2018			X				Yes
Trade Agreement	BASE CONSULTANTS EMP LTD	AD HOC ENGINEERING SERVICES	08 Oct 2019			X				Yes
Trade Agreement	BELL MOBILITY INC		6-Dec-2013	$ (1,310.04)		X				Yes
Trade Agreement	BELL MOBILITY INC					X				Yes
Trade Agreement	BGC ENGINEERING	ROCK MECHANICS CONSULTING	15-Jan-2021		X			X		Yes
Trade Agreement	BRINKS CANADA LIMITED		8-Jan-2020			X				Yes
Trade Agreement	BSI GROUP CANADA INC.	MGSA - ISO REGISTRATION AND AUDITING SERVICES	30 Sep 2014			X				Yes
Trade Agreement	BUREAU VERITAS CANADA (2019) INC				X			X		Yes
Trade Agreement	BURGUNDY MINING ADVISORS LTD	MPSA - Profesional Services - Exploration	06 Mar 2018		X			X		Yes
Trademark License	C.J. Exporters	Canadamark	26-Mar-2019			X				Yes
Trade Agreement	CALGARY ARCHIVES CORP	CT-SECURE DOCUMENT STORAGE AND ARCHIVING-STORAGE	01 Jul 2017			X				Yes
Trade Agreement	CANADA POST CORPORATION		11-Sep-2018			X				Yes
Trade Agreement	CANADA WEST BELTING PRODUCTS LTD.	MGSA- FIXED PLANT - BELTING SERVICES	01 May 2019			X				Yes
Trade Agreement	CANADA WEST BELTING PRODUCTS LTD.		25-Feb-2019			X				Yes
Trade Agreement	CANDELA COLLECTIVE INC					X				Yes
Trade Agreement	CARR LOGISTICS AND SAFETY SUPPORT	MPSA - LOGISTICS AND SAFETY SUPPORT - EXPLORATION	11 Jan 2015			X				Yes
Trade Agreement	Caterpillar Financial Services Leas	CAT FINANCING CAPITAL LEASES	16-May-2018		X			X		Yes
Royalty Agreement	Chris Jennings	Private Royalty	20-Sep-2003				X			No
Trade Agreement	COMPUCOM		1-Jan-2018	$ (24,298.03)	X			X		Yes
Trademark License	Corona Jewellery Ltd.	Canadamark	26-Mar-2019			X				Yes
Security Agreement	Credit Suisse, as Administrative Agent	Canadian law governed pledge and security agreement	1-Nov-2017				X			No
Security Agreement	Credit Suisse, as Administrative Agent	US law governed pledge and security agreement (DDM joined this agreement through a supplement dated as of December 21, 2017)	1-Nov-2017				X			No
Security Agreement	Credit Suisse, as Administrative Agent	US law governed trademark security agreement	1-Nov-2017				X			No
Security Agreement	Credit Suisse, as Administrative Agent	US law governed copyright security agreement	1-Nov-2017				X			No
Trade Agreement	DENE AURORA MINING LTD		1-Aug-2020	$ (827,249.53)	X			X	X	Yes
Trade Agreement	DENE DYNO NOBEL (DWEI) INC.	MGSA-EXPLOSIVES-BULK EXPLOSIVES	29 Mar 2017	$ (6,529,870.09)	X			X	X	Yes
Trade Agreement	DENDOFF SPRINGS LIMITED									Yes
Trade Agreement	DENESOLINE CORP. LTD	LOA-FACILITIES-WASTE OIL	28 Nov 2018		X	X		X		Yes
Trade Agreement	DESWIK			$ (5,457.38)		X				Yes

Trade Agreement	MAPTEK CANADA LTD.	CT-IT-MAPTEK SOFTWARE LICENSE	21 Sep 2015			X				Yes
Settlement Agreement	Matthew Quinlan	Legal Settlement	6-Mar-2020				X			No
Trade Agreement	MAXXAM ANALYTICS INC former Maxxam	MGSA-ENVIRONMENTAL-LAB SERVICES	3-Oct-2018		X			X		Yes
Trade Agreement	MCADOO FLOW-SYSTEMS LTD.					X				Yes
Trade Agreement	METSHAW FREIGHTERS LTD	MSA-FREIGHT-BULK HANDLING	13 Nov 2019	$ (329,344.00)	X			X	X	Yes
Trade Agreement	MICROSOFT CANADA INC.	CT IT AZURE SOFTWARE	06 Sep 2018	$ (39,020.90)		X				Yes
Trade Agreement	MIDNIGHT SUN DRILLING INC	MGSA EXPLORATION DRILLING PROGRAM	26 Aug 2018			X				Yes
Trade Agreement	MINERAL SERVICES CANADA INC.	MSA- LAB & ANALYSIS - EXPLORATION	01 Jun 2015	$ (34,247.67)	X			X		Yes
Trade Agreement	MORNEAU SHEPELL LIMITED	MPSA-EMPLOYEE AND FAMILY ASSISTANCE PROGRAM-HR	15 Nov 2015	$ (2,205.02)		X				Yes
Trade Agreement	MOTION INDUSTRIES (CANADA), INC.	MGA - INVENTORY	31 Jul 2018			X				Yes
Trade Agreement	MSS - MEDICAL SURGICAL SUPPLY LTD.					X				Yes
Trade Agreement	NATIVE COMMUNICATIONS					X				Yes
Trade Agreement	NORPAC CONSTRUCTION INC		25-Mar-2019			X				Yes
Trade Agreement	NORTH AMERICAN CONSTRUCTION GROUP	MGSA-MOBILE MAINTENANCE-REBUILD AND SERVICE	24 Jul 2019			X				Yes
Trade Agreement	NORTH AMERICAN CONSTRUCTION		31-May-2019			X				Yes
Impact Benefit Agreement	North Salve Metis Alliance				X			X	X	Yes
Trade Agreement	Norseman Structures		16-Nov-2020			X				Yes
Trade Agreement	NORTHCAN FREIGHTERS LTD.	MSA - Bulk Fuel Haul	30 Sep 2013	$ (386,828.98)	X			X	X	Yes
Trade Agreement	NORTHERN QUALITY CONTROL	MSA - ENVIRONMENTAL - MDMER SPECIALISTS SERVICES	01 Feb 2020			X				Yes
Trade Agreement	NORTH FIRE SYSTEMS		14-Feb-2016			X				Yes
Trade Agreement	NORTHWESTEL	Enterprise Performance	31-May-2017		X			X		Yes
Trade Agreement	NUNA DET'ON CHO CONTRACTING JOINT		31-Jan-2018			X				Yes
Trade Agreement	NUNASI FINANCIAL SERVICES LIMITED			$ (3,549.80)	X			X	X	Yes
Trade Agreement	OLLERHEAD & ASSOCIATES LTD.	MSA-GEOTECHNICAL-SURVEYING SERVICES	31 Dec 2016			X				Yes
Trade Agreement	ORBIS ENGINEERING FIELD SERVICES	MGSA-ENGINEERING-PROJECT	17 Apr 2019	$ (11,239.92)		X				Yes
Trade Agreement	OVERHEAD CRANE SOLUTIONS INC	MGSA-FACILITIES-OVERHEAD CRANE SERVICES	24 Apr 2019			X				Yes
Trade Agreement	PARKLAND FUEL CORPORATION		12-Aug-2019			X		X		Yes
Trade Agreement	PETERSON HR CONSULTING INC.	LABOUR RELATIONS SUPPORT	24 Jan 2020	$ (945.00)		X				Yes
Trade Agreement	PETRO-CANADA LUBRICANTS INC.	CT-MAINTENANCE-LUBRICANTS	01 Jan 2019			X				Yes
Trade Agreement	PETRO-CANADA LUBRICANTS INC.	CT-Hydrocarbons-FUEL AND LUBRICANTS SUPPLY	01 Apr 2020		X			X		Yes
Lease	Precambrian	CT-LEASE-YELLOWKIFE-CORPORATE OFFICE	01 Dec 2016				X			No
Trade Agreement	PROMETHEUS		4-Apr-2014			X				Yes
Collective Agreement	Public Service Alliance of Canada	Collective Agreement	10-Nov-2017		X			X		Yes
Trade Agreement	QCA SYSTEMS LTD		1-Mar-2020	$ (1,522.50)		X				Yes
Trade Agreement	RED ASSOCIATES ENGINEERING LTD.	MSA - STRUCTURAL INSPECTION OF LIFT EQUIPMENT	01 Apr 2020			X				Yes
	Revolving Credit Agreement (Interest at April 20 in USD)						X			No
Financing	Revolving Credit Agreement (Principle drawn in USD)	Credit Suisse, as Administrative Agent	1-Nov-2017				X			No
Trade Agreement	RICHES, MCKENZIE & HERBERT LLP					X				Yes
Trade Agreement	RICHWOOD	SC-TECHNICAL EQUIPMENT MAINTENANCE-MAINTENANCE	21 Feb 2018			X				Yes
Trade Agreement	RISK MANAGEMENT TECHNOLOGIES		16-Jun-2015			X				Yes
Trade Agreement	RPM GLOBAL CANADA LTD		4-Jan-2015	$ (16,278.26)		X				Yes
Trade Agreement	ROBERT HALF OF CANADA		28-Jun-2019			X				Yes
Trade Agreement	ROBERT'S MECHANICAL SERVICES LTD.	MSA-LABOUR RELIEF-WELDING AND MECHANICAL	01 Jul 2015	$ (84,379.17)		X				Yes
Trade Agreement	ROBERTSON GEOCONSULTANTS INC.	MPSC-GeoScience-INSPECTION SERVICES	31 Dec 2015			X				Yes
Trade Agreement	RON'S EQUIPMENT RENTAL & INDUSTRIAL		18-May-2017	$ (94,600.69)	X			X		Yes
Trade Agreement	ROPERGREYELL	CT-LEGAL ADVICE - LEGAL	03 Mar 2014			X		X		Yes
Trade Agreement	ROSS INDUSTRIES LTD	MSA - WINTER ROAD AND ICE THICKENING SERVICES	09 Jun 2014			X				Yes
Trade Agreement	RWDI AIR INC					X				Yes
Trade Agreement	SANDER GEOPHYSICS LIMITED	SANDER GEOPHYSICS LIMITED	22 Jan 2020	$ (9,345.00)	X			X		Yes
Royalty Agreement	Sandstorm	Private Royalty	20-Sep-2003				X			No
Trade Agreement	SANDVIK MINING AND CONSTRUCTION		1-Nov-2020	$ (100,104.63)	X			X		Yes
Trade Agreement	SARD VERBINNEN & CA LLC	CT-PUBLIC RELATIONS SUPPORT-FINANCE	15 Jul 2019			X				Yes
Trade Agreement	SASKATCHEWAN RESEARCH COUNCIL	MSA-LAB TESTING-ANALYSIS ORE SAMPLES	03 Aug 2015	$ (93,207.35)	X			X		Yes
Trade Agreement	SBL Testing Technologies Inc.	CT-DRUG TESTING RENTAL AGREEMENT-EQUIPMENT	28 Sep 2018	$ (989.23)		X				Yes
Trade Agreement	SCR MINING & TUNNELING	MUG VERLOK GROUND CABLE INSTALLATION	15 Oct 2019	$ (77,052.66)		X				Yes
Trade Agreement	SEEQUENT LIMITED		20-May-2014			X				Yes
Trade Agreement	SEERTECH SOLUTIONS AMERICA LLC	MSA - iLearning Software - Training	11 Aug 2019	$ (2,305.17)	X			X		Yes
Trade Agreement	SERVICENOW INC.		29-Sep-2017			X				Yes
Trade Agreement	SGS CANADA INC	MSA-Aviation-AD HOC AVIATION CONSULTATION SERVICES	15 Aug 2018			X				Yes
Trade Agreement	SHAW DIRECT	CT CAMP SATELITE CABLE	03 May 2017		X			X		Yes

TABLE OF AUTHORITIES

TAB NO.	AUTHORITY
1.	*Amcan Consolidated Technologies Corp*., Re, 2008 CarswellOnt 3953
2.	*Re Quicksilver Resources Canada Inc*, 2018 ABQB 653

TAB 1

2008 CarswellOnt 3953
Ontario Superior Court of Justice

Amcan Consolidated Technologies Corp., Re .

2008 CarswellOnt 3953

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 AMCAN CONSOLIDATED TECHNOLOGIES CORP., GRENVILL CASTINGS LIMITED and FLAMBOROUGH TOOL & MOULD LTD. APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 AS AMENDED (Applicants)

Cumming J.

Heard: July 3, 2008
Judgment: July 4, 2008
Docket: 07-CL-7166

Counsel: Liz Pillon for Applicants
Lisa Millman for Secured Creditor
Leah Price, Tamara Center for Purchaser
Alex MacFarlane for Monitor

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General principles

Table of Authorities

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

***Cumming J.*:**

The Motion

1 The Applicants, Amcan Consolidated Technologies Corp., Grenville Castings Limited and Flamborough Tool & Mould Ltd., move for directions with respect to the conduct of litigation relating to the dispute resolution provision under an Asset Purchase Agreement ("ASA") pertaining to the determination of the purchase price payable in respect of "Working Capital".

Background

2 The Applicant Grenville Castings Limited (now 177963 Canada Inc.) ("177" or the "vendor") has been brought under the operation of the *Companies' Creditors Arrangement* Act, R.S.C. 1983, c. C-36, as am.

3 Within this context of insolvency, 177 was the vendor of its assets to 2145311 Ontario Inc. ("214" or the "purchaser")) as purchaser under the ASA.

4 The assets sold included the so-called "working capital" for the price of some $10 million ($9 million cash and $1 million by way of a promissory note). The working capital included, *inter alia*, accounts receivable and inventory. The transaction closed about December 14, 2007.

5 Section 3.5 of the ASA sets forth the mechanics of the Monitor, Ernst & Young Inc., preparing a Draft Statement of Working Capital ("DSWC") as of the closing date. This was to be done "on a basis consistent with the preparation of the Estimated Working Capital and accounts receivable and inventory will be valued on a basis consistent with realization expectations under an orderly write down process." The Monitor delivered the DSWC to the parties on January 16, 2008. The DSWC calculated the working capital to be $10,800,000, some $658,000 more than the forecast amount of $10,143,000 as of December 14, 2007.

6 Section 3.5(2) of the APA provides that the vendor and purchaser then had 5 business days to review the DSWC and notify the other party and the Monitor of any objections.

> The Purchaser and the Vendor will have 5 Business Days to review the Draft Statement of Working Capital following receipt of it and each of the Purchaser and the Vendor must notify the other party and the Monitor in writing if it has any objections to the Draft Statement of Working Capital within such 5 Business Day period. The notice of objection must contain a statement of the basis of each of the Purchaser's or the Vendor's objections, as applicable, and each amount in dispute.

7 The purchaser filed a timely, detailed objection on January 22, 2008 (the "January objection"), claiming that as a result of its objections the closing working capital should properly be valued at only $6,211,000 on Dec. 14, 2007. If accepted, this would result in a reimbursement of the purchase price totalling some $2,789,000 to the purchaser and the extinguishment of the $1 million obligation of the purchaser under the promissory note..

8 The vendor disagreed with the objections raised and so responded January 29, 2008.

9 On February 4, 2008 the purchaser sent an additional document, claiming a further credit of US $96,017.50 in favour of the purchaser. This related to invoice #12517 dated October 23, 2007 issued to American Metal Technologies by the vendor.

10 The two parties were unable to resolve their differences in respect of the DSWC. By May 5, 2008 they had agreed to a litigation process and timelines to proceed before this Court as s. 3.5 (3) of the ASA provides.

11 Section 3.6 (1) and (2) of the ASA provide that the purchase price will be increased or decreased to the extent the working capital is more or less than $10,143,000.

> provided however that the Purchase Price shall not be decreased for uncollectible accounts receivable or unsaleable inventory reflected in the Estimated Working Capital which accounts and inventory the Purchaser acknowledges have been valued on a basis consistent with realization expectations under an orderly wind down basis.

12 On May 20, 2008 the purchaser forwarded a new objection (the "May 20 Objection"). If accepted, this would result in some $4,982,000 being the net working capital and a reimbursement to the purchaser of some $4,018,000. The changes in question in the May 20, 2008 objection relate in the main to the valuation for receivables and inventory.

The Issues

13 The vendor takes the position that the cut-off date for an objection as of the close of January 22, 2008 must be adhered to in accordance with s. 3.5 (2) of the ASA. The purchaser asserts that the February 4, 2008 submission by the purchaser and the later May 20, 2008 objection must be taken into account in the Court's determining the finalization of the purchase price for the working capital.

Disposition

14 The ASA is a commercial contract freely negotiated by sophisticated parties with no suggestion of inequality of bargaining power.

15 Section 2.2 of the ASA states the purchaser acknowledges that the assets in question will be purchased on an "as is, where is basis" as they shall exist on the closing date. The purchaser further acknowledges it has inspected the assets and is "relying entirely upon its own investigations...."

16 The purchaser exercised its due diligence prior to the closing. The purchaser was well aware of the contractual commitments as to deadlines through the ASA. This sale was in the context of an insolvency and was to be completed expeditiously. The secured lender to the vendor has already been paid $8 million of the $9 million cash paid for the working capital with $1 million being held in escrow pending the outcome of the dispute at hand. The record suggests the only remaining assets of the insolvent vendor are the $1 million held in escrow plus the $1 million owing by the purchaser in respect of the promissory note.

17 The purchaser claims there is no real prejudice to the vendor to relax the five day deadline for objections and to allow the February 4, 2008 submission and May 20, 2008 objection to be considered by the Court in its determination of "working capital". The purchaser claims there are in fact "fictitious, erroneous or omitted accounts" in the purported accounts receivable. The purchaser also claims the Monitor has not met its obligations under s. 3.5 of the ASA. It is not my place on this interim motion to comment upon these somewhat bald allegations.

18 It is suffice to state the purchaser has had the relevant books and records relating to the assets purchased since the closing December 14, 2007 and had access to those books and records for some time prior thereto in pursuing its due diligence.

19 Moreover, two of the principal persons, Brian Gilhooly and Stu McGowan, employed by the vendor until March 2008, were involved in reviewing in detail the January objection and the source documents in responding to the January objection and preparing for the upcoming litigation. The vendor would have to seek to retain either or both of these individuals in responding to the May 20 objection.

20 The purchaser asserts that much of the May 20 objection is simply an update but does acknowledge that at least one main basis of objection is new, being the assertion that the inventory valuation should be discounted from the book values given. There is no apparent good reason offered as to why this asserted concern was not known to the sophisticated purchaser well prior to submitting the January 22, 2008 objection.

21 The five day deadline for objections seen in s. 3.5 (2) of the ASA is straightforward and clear. Indeed, when the vendor suggested in a February 14, 2008 letter to the purchaser some relatively minor adjustments to the "working capital" summary, the vendor expressly requested of the purchaser its consent to the proposed changes.

22 It is trite to state that contracts are privately made laws and as such are to be enforced unless there is an exceptional situation recognized at law as warranting a departure from the norm. Moreover, contracts are bundles of reasonable expectations created by the promises given and there are significant commercial and societal policy advantages to the law recognizing and giving realization to those reasonable expectations. Contracts are to be relied upon by the parties thereto. Contracts give certainty to the realization of the reasonable expectations created by promises made in the exchange of goods in the marketplace through a sale and purchase, as seen in the instant situation. To use the vernacular, 'a deal is a deal'.

23 For the reasons given, the applicants' motion is granted. In my view, and I so find, the dispute resolution process now before the Court under s. 3.5 (c) of the ASA is properly limited by reason of the terms of the contract to a consideration of the January 20 objection.

24 The parties have agreed that the matter of costs of the motion at hand is to be left to the discretion of the judge ultimately determining the finalization of the working capital.

2008 CarswellOnt 3953

End of Document

TAB 2

2018 ABQB 653
Alberta Court of Queen's Bench

Quicksilver Resources Canada Inc., Re

2018 CarswellAlta 1894, 2018 ABQB 653, [2018] A.W.L.D. 3903, 296 A.C.W.S. (3d) 468

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended

And in the Matter of the Compromise or Arrangement of Quicksilver Resources Canada Inc, 0942065 BC Ltd and 0942069 BC Ltd

Quicksilver Resources Canada Inc. (Applicant / Plaintiff)
and Rockyview Resources Inc. (Respondent / Defendant)

C.M. Jones J.

Heard: March 1, 2017
Judgment: September 11, 2018
Docket: Calgary 1601-03113

Counsel: Chris Simard, Aaron Rankin, for Applicant, Quicksilver Resources Canada Inc.
Steven Leitl, for Respondent, Rockyview Resources Inc.
G. Brian Davison, Q.C., for Trustee in Bankruptcy

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Asset sale — Vendor was energy company that became partner in partnership and transferred certain assets to partnership — Partnership became insolvent, and trustee in bankruptcy was appointed — Vendor and two subsidiaries were granted relief under Companies' Creditors Arrangement Act, and monitor was appointed — Court approved sale of certain assets of vendor to purchaser — Purchaser believed it was entitled to certain disputed assets that vendor contended had previously been transferred to partnership or had been excluded under agreement — Vendor brought application for declaration that purchaser had no interest in disputed assets — Application granted — Vendor had standing in accordance with terms of relevant orders, and trustee supported vendor's application — Two disputed assets were among assets that vendor had transferred to partnership — Purchaser could, and should, have resolved any uncertainty regarding what assets might have been transferred to partnership as part of its due diligence required under purchase agreement, and purchaser could not rely on vesting order to overcome insufficient due diligence — These two disputed assets had not been included in purchase agreement by its terms; failure to expressly exclude asset did not necessarily imply its inclusion; and vesting order could not create title where none existed — While third disputed asset was erroneously mentioned in one part of agreement, it still fell within definition of excluded assets.

Table of Authorities

Cases considered by *C.M. Jones J.*:

Canada (Attorney General) v. Fairmont Hotels Inc. (2016), 2016 SCC 56, 2016 CSC 56, 2016 CarswellOnt 19252, 2016 CarswellOnt 19253, 404 D.L.R. (4th) 201, [2017] 1 C.T.C. 149, 58 B.L.R. (5th) 171, 2016 D.T.C. 5135, [2016] 2 S.C.R. 720 (S.C.C.) — considered

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, *(*sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — referred to

Harvest Operations Corp. v. Attorney General of Canada (2017), 2017 ABCA 393, 2017 CarswellAlta 2466, 61 Alta. L.R. (6th) 1, [2018] 3 W.W.R. 51, [2018] 3 C.T.C. 25, 76 B.L.R. (5th) 15 (Alta. C.A.) — considered

Lemoine v. Smashnuk (2008), 2008 ABQB 193, 2008 CarswellAlta 361 (Alta. Q.B.) — considered

Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd. (2002), 2002 SCC 19, 2002 CarswellAlta 186, 2002 CarswellAlta 187, 20 B.L.R. (3d) 1, 209 D.L.R. (4th) 318, [2002] 5 W.W.R. 193, 98 Alta. L.R. (3d) 1, 283 N.R. 233, 299 A.R. 201, 266 W.A.C. 201, 50 R.P.R. (3d) 212, *(*sub nom. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.)* [2002] 1 S.C.R. 678, 2002 CSC 19 (S.C.C.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Words and phrases considered:

caveat emptor

Most people are familiar with the phrase "*caveat emptor*" or "buyer beware". It is a caution to purchasers of property to ensure that they are getting what they think they have paid for.

APPLICATION by debtor for declaration that purchaser had no interest in disputed assets.

***C.M. Jones J.*:**

I. Introduction

1 Most people are familiar with the phrase "*caveat emptor*" or "buyer beware". It is a caution to purchasers of property to ensure that they are getting what they think they have paid for. This dispute arises from exactly the kind of problem to which the phrase refers.

2 Quicksilver Resources Canada Inc. ("QRCI") held large natural gas reserves in Alberta and British Columbia, including approximately 126,500 acres in the Horn River basin in northeast BC. QRCI's business plan included the development of LNG export facilities on the BC coast. Its natural gas reserves in the Horn River basin were to supply this facility. It entered into mineral leases and surface leases with the Province of British Columbia and with various municipalities.

3 In late 2011, QRCI became a partner in a partnership (the "Fortune Creek Partnership") with 0927530 BC Unlimited Liability Company. On December 23, 2011, QRCI entered into an agreement (the "Contribution Agreement") with that numbered company and the Fortune Creek Partnership pursuant to which QRCI agreed to contribute certain assets to the Fortune Creek Partnership. The contributed assets were described as follows in Schedule A to the Contribution Agreement:

> The "Assets" are set forth on Exhibit 1 (Maxhamish Pipeline), Exhibit 2 (Compression Assets) and shall include the following:
>
> > (a) all permits, licenses, authorizations, surface rights (including easements, licenses of occupation and rights-of-way), and buildings, structures, appurtenances and tangible depreciable property situate thereon that are used or useful in connection with the operation of the Maxhamish Pipeline; but
> >
> > (b) specifically exclude any rights or interests in or relating to petroleum or natural gas or the production thereof, or in wells or wellsite facilities, or in the operation of the foregoing.

4 In 2016, the Fortune Creek Partnership became insolvent and on June 30, 2016, MNP Ltd. (the "Trustee") was appointed as Trustee in Bankruptcy.

5 Also in 2016, QRCI and two of its subsidiaries, 0942065 B.C. Ltd. and 0942069 B.C. Ltd., became insolvent. In an application dated March 8, 2016, brought pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c C-36 ("*CCAA*"), QRCI and its subsidiaries sought and obtained a stay of all proceedings and remedies taken or that might be taken against these

three entities. This Court determined that QRCI, 0942065 B.C. Ltd. and 0942069 B.C. Ltd. were companies to which the CCAA applied and appointed FTI Consulting Canada Inc as Monitor of QRCI. The Monitor became actively involved with various entities engaged in attempts to monetize QRCI's assets.

6 On March 21, 2016, QRCI and 1069130 BC Ltd, a subsidiary of Rockyview Resources Inc ("RRI"), entered into an asset purchase agreement (the "APA"). Notwithstanding that the named buyer was RRI's numbered subsidiary, in this decision, I refer to the APA as an agreement between QRCI and RRI because the pleadings, briefs and arguments in this matter frame the issue as a dispute between those two entities.

7 As part of CCAA proceedings, the APA required the approval of this Court. The application for that approval came before me on April 22, 2016 and I granted the requested order (the "Approval and Vesting Order").

8 A dispute subsequently arose between QRCI and RRI over specific assets that RRI claims were included in the sale to it. The assets in question (the "Disputed Assets") are as follows:

1. a metering station and building (the "Metering Station") located at the downstream or outlet end of the Maxhamish Pipeline, the location being legally described as a-59-A/094-O-14 in the Province of British Columbia;

2. a pig receiving station (the "Pig Receiver") at the same location; and

3. a BC Oil and Gas Commission ("OGC") Facility License for the Metering Station (the "Metering Station License").

9 QRCI acknowledges that the APA contained reference to the Metering Station License but it asserts that this was an error. Further, it claims that the Metering Station and the Pig Receiver were conveyed to the Fortune Creek Partnership. QRCI seeks a declaration that RRI has no interest in the Metering Station, the Pig Receiver and the Metering Station License, or in associated surface rights agreements.

10 RRI asserts that the Approval and Vesting Order vested title to the Disputed Assets in it.

II. Analysis

11 Three questions require consideration. First, had QRCI divested itself of the Disputed Assets under the Contribution Agreement such that the principle *nemo dat quod non habet* applies and the Disputed Assets could not have been sold under the APA? Second, were the Disputed Assets included in the sale from QRCI to RRI under the terms of the APA? Third, does the Approval and Vesting Order have the effect of vesting title to the Disputed Assets in RRI notwithstanding any frailties in QRCI's title and/or the terms of the APA?

12 As a preliminary matter, RRI asserts that QRCI has no standing to bring this application as it claims no ownership interest in the Disputed Assets. I am satisfied that QRCI does have standing by virtue of the orders granted in the CCAA proceedings. The initial order dated March 8, 2016 provides that "The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder." Similarly, the Approval and Vesting Order provides that "The Applicants, the Purchaser, the Monitor and any other interested party, shall be at liberty to apply for further advice, assistance and directions as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction." As QRCI was an Applicant under both of these Orders, it had standing to bring the current application. I note also that the Trustee supports QRCI's application.

A. The Disputed Assets were transferred under the Contribution Agreement

13 As noted above, the assets transferred pursuant to the Contribution Agreement included all buildings, structures and tangible depreciable property "used or useful in connection with the operation of the Maxhamish Pipeline". RRI asserts that the Metering Station was not situate on the Maxhamish Pipeline right of way and was not used or useful in connection with the operation of the Maxhamish Pipeline.

14 In order to interpret the term "used or useful in connection with the operation of the Maxhamish Pipeline", I must take into account the context of natural gas transport; see *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at paras 56 ff.

15 Having conveyed the Maxhamish Pipeline to the Fortune Creek Partnership, QRCI entered into an agreement (the "Gathering Agreement") to permit the transport of its natural gas through that pipeline from the Horn River Basin. The Gathering Agreement was attached as a schedule to the Contribution Agreement and defines "Gathering System" as follows:

> "Gathering System" means all real and personal property of every kind, nature, and description comprising the Maxhamish Pipeline operated by the Operator and as shown on Exhibit B, including but not limited to all pipelines, valves and metering facilities thereof.

16 The Gathering Agreement also defines "Delivery Point" to mean:

> the point at which Gas is delivered from the Gathering System to (i) up to the Direction Change Date the Spectra Maxhamish North meter station located at a-5-a/94-0-14; and (ii) from and after the Direction Change Date, the inlet of the Fortune Creek compressor located at 66-A/94-O-15 . . .

17 As noted above, the legal description a-5-a/94-0-14 is the location of the Metering Station.

18 RRI argues that the definition of Delivery Point distinguishes between the Gathering System and the Metering Station, suggesting that the Metering Station is not part of the Gathering System and therefore was not conveyed to the Fortune Creek Partnership pursuant to the Contribution Agreement.

19 I do not accept RRI's argument. The Contribution Agreement neither defined "Gathering System" nor purported to convey the same. Accordingly, I do not believe the definition of Delivery Point in the Gathering Agreement should be allowed to overwhelm what would otherwise be a reasonable interpretation of assets conveyed to the Fortune Creek Partnership under the Contribution Agreement. The Metering Station is expressly contemplated in the definition of Delivery Point and I find that it was contemplated as "used or useful in connection with the operation of the Maxhamish Pipeline".

20 RRI also argues that, even though gas in the Maxhamish Pipeline had to pass through the Metering Station before entering the Gathering System, the Metering Station did not actually move gas through the pipeline, as would, for example, a compressor. On that basis, it asserts that the Metering Station is not used or useful in the operation of the pipeline.

21 Again, I disagree with RRI. Since the purpose of moving natural gas through a pipeline is to bring it to market and since natural gas is sold by volumetric measure, I find that a facility to measure volumetric flow through a pipeline would be useful to the operation of that pipeline. Indeed, the evidence satisfied me that not only was the Metering Station used in connection with the operation of the Maxhamish pipeline, its *only* use was in connection with the operation of that pipeline.

22 Another of RRI's arguments is that the Metering Station is not an "Asset" within the meaning of the Contribution Agreement because it is not situate on the Maxhamish Pipeline right of way.

23 This, in my view, is irrelevant. The definition of "Assets" in the Contribution Agreement includes licenses that are used or useful in the operation of the Maxhamish Pipeline. This, I find, includes the Metering Station License that permits the operation of technology designed to measure throughput from the pipeline to the Gathering System. The definition of "Assets" further includes buildings, structures and tangible property situate thereon. The Metering Station is situate on the land referenced in the Metering Station License. The same applies to the Pig Receiver, which is situate at the same location.

24 More generally, RRI asserts that a description of an asset conveyed as "used or useful" is subjective and vague and is not a clear statement of what QRCI actually conveyed to the Fortune Creek Partnership.

25 In this connection, QRCI proferred the affidavit evidence of Mr. Bob McGregor, its Vice President, Finance. Mr. McGregor averred that the Disputed Assets were integral to the Maxhamish Pipeline. RRI objected to Mr. McGregor's evidence as "opinion"

based on his "interpretation" of the Contribution Agreement. RRI asserts that the evidence constitutes a legal opinion that Mr. McGregor is not qualified to give.

26 I agree that, on its face, the "used or useful" articulation is not particularly helpful. I view Mr. McGregor's evidence as an attempt to describe what he considers to be the essential components of a pipeline that is used to move natural gas from the field to a distant gathering system. I am persuaded that his explanation of why a metering station might be considered useful in connection with the operation of such a pipeline is reasonable, based on common sense and decoupled from legal analysis.

27 Moreover, I find that RRI could, and should, have resolved any uncertainty regarding what assets might have been transferred to the Fortune Creek Partnership under the Contribution Agreement as part of its due diligence required under the APA. I will expand upon this later in these Reasons, but for the moment, it will suffice to say that RRI knew of the Contribution Agreement, which was identified in the APA as an Excluded Contract. RRI could have addressed the risk of assets having been transferred by seeking a more precise description of the assets conveyed under the Contribution Agreement.

B. The Disputed Assets were not included in the Asset Purchase Agreement

28 QRCI also argues that the Metering Station and Pig Receiver were not included in the APA and were not sold to RRI. Various provisions of the APA come into play in respect of this argument.

29 Section 2.1, entitled "Purchase and Sale", provides that:

> Upon the terms and subject to the conditions of this Agreement, on the Closing Date, Seller shall sell, transfer, assign, convey and deliver, or cause to be sold, transferred, assigned, conveyed and delivered, the Oil and Gas Assets to Buyer, and Buyer shall purchase the Oil and Gas Assets from Seller pursuant to the Approval and Vesting Order.

30 "Oil and Gas Assets" are defined in section 1.1(jjj) to include QRCI's "right, title and interest" in and to other defined asset types, being "Petroleum and Natural Gas Rights", "Tangible Property" and "Miscellaneous Interests", discussed in detail below.

31 Tangible Property is defined in section 1.1 (nnnn) to be the "Seller's Interest" in the Tangibles, which, under section 1.1 (oooo), means "the Facilities, and any and all tangible depreciable equipment and facilities that are located within, upon, or *in the immediate vicinity of the Lands*, or that are used or *intended to be used* in producing, gathering, processing, treating, dehydrating, *measuring*, transporting, making marketable or storing Petroleum Substances, excluding the Excluded Assets but including . . . " various subcategories of equipment. [Emphasis added.]

32 Section 1.1 (nn) defines "Facilities" to be the facilities identified in Schedule A. Schedule A does not refer to either a metering station or a pig receiver.

33 The Metering Station could be said to be used in measuring Petroleum Substances. Under section 1.1(oooo)(ii) the definition of Tangibles includes:

> . . . all equipment, machinery, fixtures and other tangible personal property and improvements located on, used or held for use or obtained in connection with the ownership or operation of the Lands . . . *including* . . . *meters*. [Emphasis added]

34 The "Lands" are set out in Schedule A to the APA. QRCI argues that the Metering Station is 30 km away from the Lands and cannot be said to be "in the immediate vicinity of the Lands". It also asserts that a metering station 30 km away from its wells cannot be said to be used in connection with the ownership or operation of those lands.

35 In my view, a metering station some 30 km away and decoupled from the wells and other facilities cannot reasonably be said to relate directly to the operation of the Lands. Rather, the Metering Station was used in the operation of the Maxhamish Pipeline.

36 As set out above, the definition of Tangibles excludes the Excluded Assets set out in Schedule C. RRI asserts that since the Metering Station was not included in the Excluded Assets schedule, it must have been included in the conveyance by QRCI. Presumably, it would make the same argument in relation to the Pig Receiver.

37 Failure expressly to exclude an asset does not necessarily imply its inclusion. Typically, a seller identifies what it is selling with somewhat general language and then excludes specific items. It is not surprising that QRCI would not have expressly excluded the Metering Station and the Pig Receiver, given that it was of the view that it no longer owned those assets.

38 Accordingly, I find that neither the Metering Station nor the Pig Receiver was conveyed by the APA.

39 QRCI acknowledges that the Metering Station License was contemplated by the APA, but takes the position that this was an error. It again refers to the evidence of Mr. McGregor, who indicated in his affidavit that the Metering Station License was "incorrectly and erroneously included in a schedule of assets" in the APA. RRI again objects to this evidence, arguing that it is merely Mr. McGregor's opinion based on his interpretation of the Contribution Agreement.

40 In my view, Mr. McGregor's evidence surrounding the alleged mistake seems candid and plausible. It also seems to me to be consistent with my analysis above respecting the Contribution Agreement. In any event, however, I am not persuaded that the Metering Station License formed part of the assets transferred under the APA.

41 Schedule C provides at paragraph (k) that Excluded Assets include:

> (k) all Licenses and pending applications therefore to the extent *related to* any other Excluded Assets or the Excluded Liabilities [Emphasis added]

42 Paragraph (q) provides that Excluded Assets include certain contracts, referred to as Excluded Contracts. Subparagraph (q)(iv) incorporates as an Excluded Contract:

> (iv) Contribution Agreement dated December 23, 2011 with Seller, Fortune Creek Gathering and Processing Partnership and 0927530 B.C. Unlimited Liability Company, as amended from time to time

43 The Contribution Agreement is an Excluded Contract and therefore an Excluded Asset. The Metering Station License would appear to be a license *related to* that Excluded Asset, making it an Excluded Asset also.

44 Alternatively, as discussed above, QRCI takes the position that it contributed the Metering Station to the Fortune Creek Partnership pursuant to the Contribution Agreement. It asserts that, under British Columbia law, the Metering Station License could not be transferred and that, therefore, it holds bare legal title to the Metering Station License in trust for the Fortune Creek Partnership. I note that section 4.1 of the Contribution Agreement provides as follows:

> 4.1 Declaration of Trust
>
> QRCI hereby acknowledges to, declares and covenants with the Partnership that, in respect of all of the Assets which are held or registered in the name of QRCI, or in respect of which QRCI holds legal title, or any residual, contingent or future interest, QRCI as and from the Effective Time, stands possessed of and holds such Assets and all receipts, proceeds or products from the Assets in trust for the exclusive benefit of the Partnership and QRCI shall only deal with such Assets as instructed by the Partnership. . . .

45 QRCI also notes that section 1.1(gggg) of the APA sets out the following definition of "Seller's Interest": all of Seller's right, interest, title and estate, whether absolute or contingent, *legal or beneficial*. [Emphasis added.] QRCI alleges that it holds only bare legal title to the Metering Station License and that only such bare legal title could have been transferred to RRI under the APA.

46 The APA provides that QRCI conveyed the "Seller's Interest" in the described assets to RRI. If the "Seller's Interest" was limited to bare legal title, then that is all that could be conveyed. Therefore, if I am wrong in my conclusion that the Metering Station License is an Excluded Asset that was not conveyed under the APA, then I find that QRCI held, and conveyed to RRI, only bare legal title to the Metering Station License.

47 RRI argues that it intended to purchase all of QRCI's assets in British Columbia and asks how it could have been expected to know what assets QCRI might have conveyed to the Fortune Creek Partnership. I have little sympathy for this argument. The APA does not state that QCRI purports to sell all of its remaining assets in British Columbia, nor does it provide that it is RRI's intention to acquire all such assets. Even if QRCI stated that it was selling all of its remaining British Columbia assets to RRI, it would be necessary to determine what assets remained to be sold. In my view, RRI should have conducted sufficient due diligence to allow it to make that determination.

48 In section 5.12 of the APA, QRCI states, *inter alia*, that it "does not make any representation or warranty, express or implied, of any kind, at law or in equity, with respect to . . . the title of Seller to the Oil and Gas Assets". Section 5.12 also states that RRI is relying on its own investigations: "Buyer acknowledges and confirms that it is relying on its own investigations concerning the Oil and Gas Assets and it has not relied on advice from Seller or its Representatives with respect to the matters specifically enumerated in the immediately preceding paragraphs in connection with the purchase of the Oil and Gas Assets pursuant hereto. Buyer further acknowledges and agrees that it is acquiring the Oil and Gas Assets on an "as is, where is" basis." In my view, none of the other representations or warranties in the APA qualifies QRCI's refutation of any assertion that it holds title to the assets it purports to sell.

49 RRI appears, by virtue of section 5.12, to have foregone any right to hold QCRI accountable for title defects and to have assumed sole responsibility for ascertaining what QCRI did or did not have the right to sell. I do not view QRCI as having a duty to alert RRI to issues relating to ownership of assets. Further, if it was RRI's intention to purchase the Disputed Assets, it could have insisted that those items be expressly included.

50 I also note that section 13.6 of the APA is an "entire agreement clause" stating that the APA represents a complete and exclusive statement of the terms of the agreements between QRCI and RRI. This seems to me to preclude RRI from relying on any other alleged representations by QRCI.

51 Taking all of the foregoing into account, I find that neither the Metering Station nor the Pig Receiver was conveyed to RRI by the APA. I am of the view that the Metering Station License fell within the definition of Excluded Assets and therefore also was not conveyed to RRI. If I am wrong in that conclusion, I find that QRCI held only bare legal title to the Metering Station License and, therefore, only that bare legal title was conveyed to RRI.

C. The Vesting Order was limited to QRCI's interest in the Disputed Assets

52 As noted above, on April 22, 2016, I granted the Approval and Vesting Order. That Order was contemplated by section 2.1 of the APA which provides, *inter alia*, that "Buyer shall purchase the Oil and Gas assets from Seller pursuant to the Approval and Vesting Order." This application raises the question of the role of the Approval and Vesting Order in the sales process.

53 The Approval and Vesting Order approves the APA and provides that, upon delivery of a necessary certificate, "all of [QRCI's] right, title and interest in and to the Purchased Assets shall vest absolutely, exclusively, entirely and forever in [RRI], free and clear of and from any and all rights, claims, titles, interests" and other claims. RRI argues that the Approval and Vesting Order operates to vest in it title to the Disputed Assets regardless of any prior conveyances under the Contribution Agreement.

54 With increasing use by courts of CCAA orders to vest off third party claims to an insolvent's assets, it becomes important to consider to what extent such orders can be used to abrogate such a third party's claim to title to the assets.

55 The objective of the Approval and Vesting Order is to expunge claims to QRCI's title and to allow "for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser". RRI argues that it is important to provide

purchasers with certainty and security. Otherwise, CCAA proceedings would be impaired and it would be more difficult to arrive at an arrangement fair to all stakeholders. It asserts that expropriating a third party's title to assets conveyed and transferring that title by Court order to a purchaser is a fair price to pay to achieve that objective.

56 I cannot agree that this approach would be desirable from a policy perspective. In my view, such an approach would:

(a) reward inadequate due diligence on the part of persons responsible for preparing accurate descriptions of assets conveyed;

(b) undermine certainty and security by vesting with the Court far-reaching powers to restructure economic relationships and expectations in ways never contemplated by parties to commercial arrangements;

(c) render a provision such as section 5.12 of the APA meaningless by relieving the buyer of the risk it expressly agreed to assume; and

(d) be inconsistent with the fairness intended by the CCAA because a non-party to proceedings may find its property summarily expropriated.

57 Perhaps most troubling from the Court's perspective is the inference that the Court is somehow engaged in the due diligence process of confirming title to assets purported to be sold. I would suggest that it would be an abuse of CCAA orders to interpret them as the Court's confirmation that title the seller does not possess may be vested in the buyer free of claims to ownership by the true owner. The better interpretation is that a CCAA order may vest off certain claims against title, but does not create title.

58 In any event, I am satisfied that the Approval and Vesting Order, by its terms, was limited to QRCI's interest in the Disputed Assets. Clause 3 of the Approval and Vesting Order purported to vest in RRI "all of [QRCI's] right, title and interest in and to" the assets being conveyed. It does not purport to confer on RRI title to assets that did not belong to QRCI. The APA and the Approval and Vesting Order therefore work in harmony and contemplate a conveyance of no better title to the assets than QRCI had. Claims to be expunged do not include third party title to assets previously conveyed.

59 Accordingly, as the Metering Station and Pig Receiver were not owned by QRCI and were not conveyed to RRI under the APA, the Approval and Vesting Order does not apply to those assets. The same is true of the Metering Station License if I am correct in my conclusion that it was an Excluded Asset that was not conveyed under the APA. If the Metering Station License was not an Excluded Asset, then the APA conveyed bare legal title to it and the Approval and Vesting Order confirmed the conveyance of that bare legal title.

III. Relief

60 QRCI seeks a declaration that RRI has no right, title or interest in the Disputed Assets. With respect to the Metering Station and the Pig Receiver, I am prepared to grant that declaration.

61 With respect to the Metering Station License, if I am correct in my conclusion that it is an Excluded Asset under the APA, then I also grant a declaration that RRI has no right, title or interest in it.

62 In the event that I am wrong in concluding that the Metering Station License is an Excluded Asset, QRCI asks that I grant an order rectifying the APA to remove from it reference to the Metering Station License. I note that rectification is an equitable remedy within the discretion of the Court and, for the reasons that follow, I decline to grant it.

63 Historically, rectification was available only in cases of mutual mistake. More recently, however, the Supreme Court of Canada has made clear that, in appropriate circumstances, rectification may be granted to relieve a unilateral mistake; see *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19 (S.C.C.) and *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 (S.C.C.).

64 QRCI asserts that this is a case of mutual mistake in that QRCI did not think it was selling the Disputed Assets and RRI thought it was. I think the mistake is more properly characterized as unilateral on QRCI's part, but in my view, nothing turns on that distinction.

65 The Supreme Court held in both *Performance Industries* and *Fairmont Hotels* that rectification is to be used "with great caution", an admonition that recently was echoed by our Court of Appeal in *Harvest Operations Corp. v. Attorney General of Canada*, 2017 ABCA 393 (Alta. C.A.). The Court will exercise its discretion only if four conditions precedent articulated by the Supreme Court in *Performance Industries* are satisfied. Those conditions may be summarized as follows:

1. There must be a prior oral agreement inconsistent with the instrument to be rectified.

2. Permitting the respondent to take advantage of the error would amount to "fraud or the equivalent of fraud".

3. The applicant must show the precise form in which the written instrument can be made to express the prior intention.

4. All of the foregoing must be established by "convincing proof".

66 QRCI has failed to meet the second condition precedent. While I am satisfied that RRI was remiss in its due diligence, there is nothing in its conduct that would rise to the level of fraud or its equivalent. Consequently, if bare legal title to the Metering Station License was conveyed, I decline to rectify the APA to obviate that result.

67 This would leave RRI holding bare legal title to the Metering Station License, an outcome that is desirable to neither party. This difficulty may be resolved by reference to the nature of bare legal title. In *Lemoine v. Smashnuk*, 2008 ABQB 193 (Alta. Q.B.) at para 42, Moen J made these comments:

> . . . A "bare trust" is a trust where the trustee holds property without any duty to perform except to convey it to the beneficiary or beneficiaries, upon demand. The definition of a bare, naked or simple trust assumes two things: (1) that the beneficiary is able to call for the property on demand; and (2) either that no active duties were ever required by the settlor or that the active duties have been performed (*Waters' Law of Trusts in Canada*, 3rd ed., D.W.M. Waters, Toronto: Thomson Carswell, 2005, at p. 32).

68 If RRI holds bare legal title to the Metering Station License, its only duty is to convey the same to the beneficial owner upon demand. QRCI has provided evidence, in the form of Mr. McGregor's affidavit, that the Trustee in Bankruptcy for the Fortune Creek Partnership, as beneficial owner of the Metering Station License has made a demand for its transfer. I accept that evidence and am prepared to grant a declaration that if bare legal title to the Metering Station License was conveyed to RRI by the APA, RRI is compelled to transfer it to the Trustee in Bankruptcy or its nominee.

69 Counsel asserted that RRI has paid property taxes in respect of some of the Disputed Assets, which would not be its obligation in light of my conclusions regarding ownership. Accordingly, I will remain seized of this matter and RRI is at liberty to make a further application to address any possible overpayment.

70 The parties may speak to costs.

Application granted.