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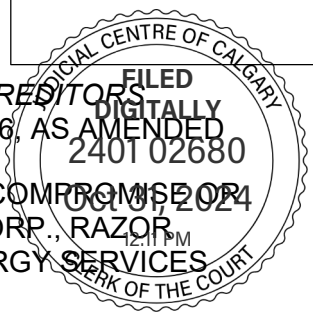

COURT FILE NUMBER	2401-02680
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.
DOCUMENT	**BOOK OF AUTHORITIES** **FOR BENCH BRIEF OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.** **TO BE HEARD ON NOVEMBER 8, 2024 AT 10:00 A.M.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Sean Collins, KC / Pantelis Kyriakakis / Nathan Stewart / Samantha Arbor Tel: 403-260-3531 / 3536 / 3534 / 3506 Fax: 403-260-3501 Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca / sarbor@mccarthy.ca

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LIST OF AUTHORITIES

STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, at sections 11, 11.02(2), 11.3, 23(1)(k), and 36(1)-(3);

CASE LAW AND SECONDARY SOURCES

2. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10;

3. *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182;

4. *Acerus Pharmaceuticals Corporation (Re),* 2023 ONSC 3314;

5. *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659;

6. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2000;

7. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828;

8. *Arrangement relatif à Goli Nutrition Inc.*, 2024 QCCS 1249;

9. *Arrangement relatif à Groupe Atis Inc et al*, (December 8, 2021) Que SC Montréal 500-11-059536-215 (Order);

10. *Bank of Montreal v Dynex Petroleum Ltd.*, 2002 SCC 7;

11. *Bank of Montreal v. Enchant Resources Ltd.*, 1999 ABCA 363;

12. *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2014 BCSC 945;

13. *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 332;

14. *Century Services Inc. v. Canada (Attorney General)*, [2010] SCC 60;

15. D. Greenfield, P. Maguire, D. Spencer, and K. Lenz, *When Insolvency and Restructuring Law Supercedes Contract,* Alberta Law Review (2017) 55:2 349-366, 2017 CanLIIDocs 35;

16. *Doman Industries Ltd., Re*, 2003 BCSC 376;

17. *Green Relief Inc et al, Re* (November 9, 2020) Ont SCJ Toronto CV-20-00639217-00CL (Approval and Vesting Order);

18. *Harte Gold Corp. (Re)*, 2022 ONSC 653;

19. *IMV Inc., et al., Re*, (October 18, 2023) NSSC Halifax 523334 (Order);

20. *In the Matter of a Plan of Compromise or Arrangement of Carillion Canada Holdings Inc.*, *et al* (March 1, 2018) Ont SCJ Toronto CB-18-590812-00CL (Factum of the Applicants);

21. *In the Matter of a Plan of Compromise or Arrangement of Carillion Canada Holdings Inc.*, *et al* (March 1, 2018) Ont SCJ Toronto CB-18-590812-00CL (Assignment Approval Order);

22. *In the Matter of Mountain Equipment Cooperative and 1314625 Ontario Limited*, Second Report of the Monitor, dated October 19, 2020;

23. *In the Matter of Nexii Building Solutions Inc.*, No. S240195, Vancouver Registry, Second Report of the Monitor, dated April 19, 2024;

24. *In the Matter of Nexii Building Solutions Inc.*, No. S240195, Vancouver Registry, Assignment Order, dated April 26, 2024;

25. *In the Matter of the Compromise or Arrangement of Entrec Corporation, et al.* (August 31, 2020), ABKB 2001 06423 (Assignment Order);

26. *Invico Diversified Income Limited Partnership v NewGrange Energy Inc*, 2024 ABKB 214;

27. J Stam and E Stitt, *Not Quite True Love: Forced Assignment of Agreements*, 2017 AnnRevInsolv 18;

28. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 6354;*

29. *Lydian International Limited (Re)*, 2020 ONSC 4006;

30. *Nexient Learning Inc. (Re)*, 2009 CanLII 72037 (ON SC);

31. *NextPoint Financial, Inc. (Re)*, 2023 BCSC 2378;

32. *Northmont Resort Properties Ltd. v. Reid*, 2018 ABQB 1002;

33. *Peakhill Capital Inc. v Southview Gardens Limited Partnership, 2023 BCSC 1476;*

34. *Playdium Entertainment Corp. Re*, 2001 CarswellOnt 4109;

35. *Prairiesky Royalty Ltd. v Yangarra Resources Ltd.*, 2023 ABKB 11;

36. *Quest University Canada (Re)*, 2020 BCSC 1883;

37. *Re ENTREC Corporation*, 2020 ABQB 751;

38. *Re Green Relief Inc.*, 2020 ONSC 6837;

39. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA);

40. *Sherman Estate v Donovan,* 2021 SCC 25;

41. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41;

42. *Third Eye Capital Corporation v. Ressources Dianor Inc.*, 2018 ONCA 253;

43. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508;

44. *Trican Well Service Ltd v Delphi Energy Corp*, 2020 ABCA 363;

45. *Veris Gold Corp*, 2015 BCSC 1204;

46. *Wiebe v Weinrich Contracting Ltd*, 2020 ABCA 396; and,

47. *Zayo Inc. v Primus Telecommunications Canada Inc.*, 2016 ONSC 5251.

TAB 1

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 October 2, 2024

Last amended on April 27, 2023

À jour au 2 octobre 2024

Dernière modification le 27 avril 2023

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

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 October 2, 2024. The last amendments came into force on April 27, 2023. Any amendments that were not in force as of October 2, 2024 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 2 octobre 2024. Les dernières modifications sont entrées en vigueur le 27 avril 2023. Toutes modifications qui n'étaient pas en vigueur au 2 octobre 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting 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; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made,

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la

(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.

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (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.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138.

Facteur additionnel : demande initiale

(5) Lorsqu'une demande est faite au titre du paragraphe (1) en même temps que la demande initiale visée au paragraphe 11.02(1) ou durant la période visée dans l'ordonnance rendue au titre de ce paragraphe, le tribunal ne rend l'ordonnance visée au paragraphe (1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65; 2019, ch. 29, art. 138.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Cessions

11.3 (1) Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(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.

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

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.

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) 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.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court

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.

Charge ou sûreté en faveur du fournisseur essentiel

(3) Le cas échéant, le tribunal déclare dans l'ordonnance que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté, en faveur de la personne déclarée fournisseur essentiel, d'un montant correspondant à la valeur des marchandises ou services fournis en application de l'ordonnance.

Priorité

(4) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

1997, ch. 12, art. 124; 2000, ch. 30, art. 156; 2001, ch. 34, art. 33(A); 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Révocation des administrateurs

11.5 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur de la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi s'il est

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

d) tous autres critères réglementaires compatibles avec ceux énumérés aux alinéas a) à c).

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.

1997, c. 12, s. 126; 2005, c. 47, s. 131; 2007, c. 36, s. 71.

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2005, c. 47, s. 131; 2007, c. 36, s. 71.

Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

22.1 Malgré le paragraphe 22(1), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Monitors

Duties and functions

23 (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, 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;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

Contrôleurs

Attributions

23 (1) Le contrôleur est tenu :

a) à moins que le tribunal n'en ordonne autrement, lorsqu'il rend une ordonnance à l'égard de la demande initiale visant une compagnie débitrice :

(i) de publier, sans délai après le prononcé de l'ordonnance, une fois par semaine pendant deux semaines consécutives, ou selon les modalités qui y sont prévues, dans le journal ou les journaux au Canada qui y sont précisés, un avis contenant les renseignements réglementaires,

(ii) dans les cinq jours suivant la date du prononcé de l'ordonnance :

(A) de rendre l'ordonnance publique selon les modalités réglementaires,

(B) d'envoyer un avis, selon les modalités réglementaires, à chaque créancier connu ayant une réclamation supérieure à mille dollars les informant que l'ordonnance a été rendue publique,

(C) d'établir la liste des nom et adresse de chacun de ces créanciers et des montants estimés des réclamations et de la rendre publique selon les modalités réglementaires;

b) de réviser l'état de l'évolution de l'encaisse de la compagnie, en ce qui a trait à sa justification, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

i) de conseiller le tribunal sur le caractère juste et équitable de toute transaction ou de tout arrangement proposés entre la compagnie et ses créanciers;

j) de rendre publics selon les modalités réglementaires, de temps et autres, les documents réglementaires et de fournir aux créanciers de la compagnie des renseignements sur les modalités d'accès à ces documents;

k) d'accomplir à l'égard de la compagnie tout ce que le tribunal lui ordonne de faire.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

2005, c. 47, s. 131; 2007, c. 36, s. 72.

Non-responsabilité du contrôleur

(2) S'il agit de bonne foi et prend toutes les précautions voulues pour bien établir le rapport visé à l'un ou l'autre des alinéas (1)b) à d.1), le contrôleur ne peut être tenu pour responsable des dommages ou pertes subis par la personne qui s'y fie.

2005, ch. 47, art. 131; 2007, ch. 36, art. 72.

Right of access

24 For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

2005, c. 47, s. 131.

Droit d'accès aux biens

24 Dans le cadre de la surveillance des affaires financières et autres de la compagnie et dans la mesure où cela s'impose pour lui permettre de les évaluer adéquatement, le contrôleur a accès aux biens de celle-ci, notamment les locaux, livres, données sur support électronique ou autre, registres et autres documents financiers.

2005, ch. 47, art. 131.

Obligation to act honestly and in good faith

25 In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

2005, c. 47, s. 131.

Diligence

25 Le contrôleur doit, dans l'exercice de ses attributions, agir avec intégrité et de bonne foi et se conformer au code de déontologie mentionné à l'article 13.5 de la *Loi sur la faillite et l'insolvabilité*.

2005, ch. 47, art. 131.

Powers, Duties and Functions of Superintendent of Bankruptcy

Attributions du surintendant des faillites

Public records

26 (1) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, a public record of prescribed information relating to proceedings under this Act. On request, and on payment of the prescribed fee, the Superintendent of Bankruptcy must provide, or cause to be provided, any information contained in that public record.

Registres publics

26 (1) Le surintendant des faillites conserve ou fait conserver, en la forme qu'il estime indiquée et pendant la période réglementaire, un registre public contenant des renseignements réglementaires sur les procédures intentées sous le régime de la présente loi. Il fournit ou voit à ce qu'il soit fourni à quiconque le demande tous renseignements figurant au registre, sur paiement des droits réglementaires.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

2005, c. 47, s. 131; 2007, c. 29, s. 109, c. 36, ss. 77, 112; 2012, c. 31, s. 421.

Obligations and Prohibitions

Obligation to provide assistance

35 (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

Obligation to duties set out in section 158 of the *Bankruptcy and Insolvency Act*

(2) A debtor company shall perform the duties set out in section 158 of the *Bankruptcy and Insolvency Act* that are appropriate and applicable in the circumstances.

2005, c. 47, s. 131.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Restriction

(9) Aucune ordonnance rendue au titre de la présente loi ne peut avoir pour effet de suspendre ou de restreindre le droit d'effectuer les opérations visées au paragraphe (8).

Valeurs nettes dues à la date de résiliation

(10) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par la compagnie à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée être un créancier de la compagnie relativement à ces sommes.

Rang

(11) Il ne peut être rendu, au titre de la présente loi, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

2005, ch. 47, art. 131; 2007, ch. 29, art. 109, ch. 36, art. 77 et 112; 2012, ch. 31, art. 421.

Obligations et interdiction

Assistance

35 (1) La compagnie débitrice est tenue d'aider le contrôleur à remplir adéquatement ses fonctions.

Obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité*

(2) Elle est également tenue de satisfaire aux obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité* selon ce qui est indiqué et applicable dans les circonstances.

2005, ch. 47, art. 131.

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, 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 monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor 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.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

TAB 2

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

9354-9186 Québec inc. et 9354-9178 Québec inc. *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc., IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation *Intervenants*

- et -

IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation
Intervenants

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.

RÉPERTORIÉ : 9354-9186 QUÉBEC INC. *c.* CALLIDUS CAPITAL CORP.

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Rowe et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

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.

Faillite et insolvabilité — Pouvoir discrétionnaire du juge surveillant dans une instance introduite sous le régime de la Loi sur les arrangements avec les créanciers des compagnies — Contrôle en appel des décisions du juge surveillant — Le juge surveillant a-t-il le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement si ce créancier agit dans un but illégitime? — Le juge surveillant peut-il approuver le financement de litige par un tiers à titre de financement temporaire? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 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

En novembre 2015, les compagnies débitrices déposent une requête en délivrance d'une ordonnance initiale sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). La requête est accueillie, et l'ordonnance initiale est rendue par un juge surveillant, qui est chargé de surveiller le déroulement de l'instance. Depuis, la quasi-totalité des éléments d'actif de la compagnie débitrice ont été liquidés, à l'exception notable des réclamations réservées en dommages-intérêts contre le seul créancier garanti des compagnies. En septembre 2017, le créancier garanti propose un plan d'arrangement, qui n'obtient pas subséquemment l'appui nécessaire des créanciers. En février 2018, le créancier garanti propose un autre plan d'arrangement, presque identique au premier. Il demande aussi au juge surveillant la permission de voter sur ce nouveau plan dans la même catégorie que

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.

les créanciers non garantis des compagnies débitrices, au motif que sa sûreté ne vaut rien. À peu près au même moment, les compagnies débitrices demandent un financement temporaire sous forme d'un accord de financement de litige par un tiers qui leur permettrait de poursuivre l'instruction des réclamations réservées. Elles sollicitent également l'approbation d'une charge super-prioritaire pour financer le litige.

Le juge surveillant décide que le créancier garanti ne peut voter sur le nouveau plan parce qu'il agit dans un but illégitime. En conséquence, le nouveau plan n'a aucune possibilité raisonnable d'être avalisé et il n'est pas soumis au vote des créanciers. Le juge surveillant accueille la demande des compagnies débitrices et les autorise à conclure un accord de financement de litige par un tiers. À l'issue d'un appel formé par le créancier garanti et certains des créanciers non garantis, la Cour d'appel annule l'ordonnance du juge surveillant, estimant qu'il est parvenu à tort aux conclusions qui précèdent.

Arrêt : Le pourvoi est accueilli et l'ordonnance du juge surveillant est rétablie.

Le juge surveillant n'a commis aucune erreur en empêchant le créancier garanti de voter ou en approuvant l'accord de financement de litige par un tiers. Un juge surveillant a le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement s'il décide que le créancier agit dans un but illégitime. Un juge surveillant peut aussi approuver le financement de litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*. La Cour d'appel n'était pas justifiée de modifier les décisions discrétionnaires du juge surveillant à cet égard et n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport à ces décisions.

La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Elle poursuit un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement catastrophiques qui peuvent découler de l'insolvabilité. Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie. La structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs.

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

Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant, qui a le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas. Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11 de la *LACC*, lequel confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée. Quoique vaste, ce pouvoir discrétionnaire n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC* et tenir compte de trois considérations de base : (1) que l'ordonnance demandée est indiquée, et (2) que le demandeur a agi de bonne foi et (3) avec la diligence voulue. La considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. En conséquence, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Étant donné que le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer ou à miner les objectifs réparateurs de la *LACC* ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un but illégitime — l'art. 11 de la *LACC* confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter. Ce pouvoir discrétionnaire s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *Loi sur la faillite et l'insolvabilité* et favorise l'équité fondamentale qui imprègne le droit et la pratique en matière d'insolvabilité au Canada. La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation que le juge surveillant est le mieux placé pour effectuer.

En l'espèce, la décision du juge surveillant d'empêcher le créancier garanti de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Lorsqu'il a rendu sa décision, le juge surveillant

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.

connaissait très bien les procédures en cause, car il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances. Il a tenu compte de l'ensemble des circonstances et a conclu que le vote du créancier garanti viserait un but illégitime. Il savait qu'avant le vote sur le premier plan, le créancier garanti avait choisi de n'évaluer aucune partie de sa réclamation à titre de créancier non garanti et n'avait pas tenté de voter sur ce plan, qui n'a finalement pas reçu l'aval des autres créanciers. Entre l'insuccès du premier plan et la proposition du nouveau plan (identique pour l'essentiel au premier plan), les circonstances factuelles se rapportant aux affaires financières ou commerciales des compagnies débitrices n'avaient pas réellement changé. Pourtant, le créancier garanti a tenté d'évaluer la totalité de sa sûreté à zéro et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si le créancier garanti avait été autorisé à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation à double majorité prévu par le par. 6(1) de la *LACC*. La seule conclusion possible était que le créancier garanti tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. La façon d'agir du créancier garanti était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans une procédure d'insolvabilité, ce qui comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Le créancier garanti a donc été empêché à bon droit de voter sur le nouveau plan.

La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 de la *LACC* et des objectifs réparateurs de la *LACC* de façon plus générale. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Cela ressort du libellé du par. 11.2(1), qui est large et ne prescrit aucune forme ou condition type. Le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur. Dans certaines circonstances, comme en l'espèce, le financement de litige favorise la réalisation de cet objectif fondamental. Les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Ces facteurs

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*.

Cases Cited

By Wagner C.J. and Moldaver J.

Applied: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; **considered:** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **referred to:** *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes v. The City of Saint John*, 2016 NBQB 125; *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Ernst & Young Inc. v. Essar Global Fund*

ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant, car ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. En outre, pour qu'un accord de financement de litige par un tiers soit approuvé à titre de financement temporaire, il ne doit pas comporter des conditions qui le convertissent effectivement en plan d'arrangement.

En l'espèce, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'accord de financement de litige à titre de financement temporaire. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par les compagnies débitrices sous le régime de la *LACC*, mène à la conclusion que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'accord de financement de litige à titre de financement temporaire. De plus, l'accord de financement de litige ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou l'existence de leurs droits d'avoir accès aux fonds provenant des actifs des compagnies débitrices, pas plus qu'on ne saurait dire qu'il s'agit d'une transaction à l'égard de leurs droits. Enfin, la charge relative au financement de litige ne convertit pas l'accord de financement de litige en plan d'arrangement. Une conclusion contraire aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers, un résultat qui est expressément prévu par l'art. 11.2 de la *LACC*.

Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

Arrêt appliqué : *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; **arrêts examinés :** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **arrêts mentionnés :** *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes c. The City of Saint John*, 2016 NBQB 125; *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271; *Ernst*

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.

la société débitrice ne s'extirpera jamais de la faillite, seul le dernier objectif est pertinent (voir par. 67). Dans la même veine, sous le régime de la *LACC*, lorsque la restructuration d'une société débitrice qui n'a pas déposé de proposition est impossible, une liquidation visant à protéger sa valeur d'exploitation et à maintenir ses activités courantes peut devenir l'objectif réparateur principal. En outre, lorsque la restructuration ou la liquidation est terminée et que le tribunal doit décider du sort des actifs résiduels, l'objectif de maximiser le recouvrement des créanciers à partir de ces actifs peut passer au premier plan. Comme nous l'expliquerons, la structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs réparateurs.

(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*

(2) Le rôle du juge surveillant dans les procédures intentées sous le régime de la *LACC*

[47] Un des principaux moyens par lesquels la *LACC* atteint ses objectifs réside dans le rôle particulier de surveillance qu'elle réserve aux juges (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 18-19). Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant. En raison de ses rapports continus avec les parties, ce dernier acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure.

[48] La *LACC* mise sur la position avantageuse qu'occupe le juge surveillant en lui accordant le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas et de « [s'adapter] aux besoins commerciaux et sociaux contemporains » (*Century Services*, par. 58) en « temps réel » (par. 58, citant R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484). Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11, qui confère au juge le pouvoir de « rendre toute ordonnance qu'il estime indiquée ». Cette disposition a été décrite

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

comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la *LACC* n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC*, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l'esprit les trois « considérations de base » (par. 70) qu'il incombe au demandeur de démontrer : (1) que l'ordonnance demandée est indiquée, et (2) qu'il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l'opportunité et la bonne foi, sont largement connues dans le contexte de la *LACC*. Le tribunal « évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi » (par. 70). Par ailleurs, l'exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d'insolvabilité est depuis peu mentionnée de façon expresse à l'art. 18.6 de la *LACC*, qui dispose :

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

(Voir aussi *LFI*, art. 4.2; *Loi nº 1 d'exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu'on s'y attarde. Conformément au régime de la *LACC* en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent

TAB 3

Court of Queen's Bench of Alberta

Citation: Accel Canada Holdings Limited (Re), 2020 ABQB 182

Date: 20200311
Docket: 1901 16581
Registry: Calgary

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

In the Matter of Accel Canada Holdings Limited and Accel Energy Canada Limited

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Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner

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[1] On March 6, 2020 I delivered an Oral Decision in these Applications and noted that written Reasons would follow. These are those Reasons.

[2] In these proceedings the Applicants, Accel Canada Holdings Limited and Accel Energy Canada Limited (collectively Accel and separately Holdings and Energy) applied on November 22, 2019 to this court for an Order in proceedings they had commenced under Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] to continue under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*] which was granted. On November 27, 2019 that Order was amended and restated with the Stay granted therein extended to January 31, 2020 and then on January 21, 2020, further extended to March 13, 2020.

[3] There are currently before this court Applications of four different stakeholders in these Arrangement proceedings, informally referred to as the Gross Overriding Royalty Applications. They involve applications for determination and if appropriate Declarations with respect to the following issues:

1. Whether the Gross Overriding Royalties ("GOR") held by ARC Resources Ltd ("ARC") and B.E.S.T. Active 365 Fund LP, B.E.S.T. Total Return Fund Inc. and Tier One Capital Limited Partnership (collectively "BEST"):

[88] However, other factors indicate the intention of the parties to create a security interest. The overall aim and essence of the transaction support the creation of a security interest. In fact, BEST acknowledges the intention of the parties to create a security interest by also making the conflicting argument that the BEST GORs are registerable security interests capable of achieving priority over TECs interests.

[89] Further, the BEST GORs create limited, revisionary interests that terminate upon repayment of the Aggregate Proceeds. While Accel requires BEST's permission to assign its interests and obligations under the BEST GORs, Accel is entitled to pool or unitize the lands without express consent of BEST and is not generally limited in its decisions with respect to the substances, including its use of the substances as required for its operations. Finally, no further consideration was provided by BEST to attain an interest in the land beyond the funds provided to Accel which the BEST GORs function to provide repayment for from Accel. There is no further nexus between BEST and Accel's interest in the land.

[90] With respect to BEST's submissions, it is clear that when both sets of agreements and the surrounding circumstances of each transaction are considered, the agreements document a short-term financing agreement secured by a time-limited and extinguishable GOR. This conclusion is supported by the extremely high rate of interest, the demand nature of the repayment terms, and the repurchase amounts being the loan amounts rather than a calculation of the real value of the royalty, which would be tied to the underlying reserves of the land it is granted over.

[91] The BEST GORs are therefore determined to be security interests and not interests in land.

[92] BEST also applies to lift the Stay to allow it to take in kind sufficient Petroleum Substances under the GOR to repay the loan amounts. For similar reasons given with respect to the ARC application of the same nature, that Application fails and is dismissed.

2. Vesting Off the ARC and BEST Interests/Redemption

[93] As this court has determined that all three GORs before the court are not interests in land, but rather are security interests, there is no issue that the court can vest off the interests represented by the respective registrations. See ***Third Eye Capital Corporation v Ressources Dianor Inc/ Dianor Resources Inc***, 2019 ONCA 508.

[94] Given that each set of agreements provides for payout calculations it should be a simple matter to determine what those amounts are when these proceedings have reached a point where funds are ready for distribution among the stakeholders.

[95] The priorities of the various stake holders before this court on these applications based on those registrations will be dealt with below.

3. Priorities

[96] TEC, ARC, and BEST each registered multiple security interests related to their respective interests against Energy and Holdings, including security interests related to the TEC Financing Agreements with Accel as well as the ARC GOR and BEST GORs. The TEC Financing Agreements provided funding to ACCEL for the purchase of various petroleum and natural gas assets, including the Redwater Assets.

TAB 4

CITATION: Acerus Pharmaceuticals Corporation (Re), 2023 ONSC 3314
COURT FILE NO.: CV-23-00693595-00CL
DATE: 2023-06-02

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ACERUS PHARMACEUTICALS CORPORATION, ACERUS BIOPHARMA INC., ACERUS LABS INC., AND ACERUS PHARMACEUTICALS USA, LLC

BEFORE: Penny J.

COUNSEL: *Elizabeth Pillon, Lee Nicholson* and *Philip Yang* for the Applicants

Stuart Brotman and *Mitch Stephenson* for the Monitor

Mervyn D. Abramowitz for the United States of America

Alex MacFarlane and *Xiaodi Jin* for First Generation Capital Inc.

D.J. Miller and *Alexander Soutter* for Jones Day

Kristina Bezprozvannykh for The Canada Life Assurance Company

Troels Keldmann as principal of Keldmann Healthcare and Keldmann Innovation

Brian Gilderman as principal of Precision Clinical Research, Inc.

HEARD: May 30, 2023

ENDORSEMENT

Overview

[1] On May 30, 2023 I granted a sale approval and reverse vesting order, extended the stay and granted other ancillary relief, with reasons to follow. These are my reasons. The capitalized terms used in these reasons reflect the meanings attributed to those terms in the relevant documents submitted to the court on this motion.

Background

[2] APC is an Ontario public company listed on the TSX and the OTCQB Exchange. APC operates out of its registered head office in Mississauga, Ontario. ABI and ALI are also OBCA corporations. APL was formed under the laws of the State of Delaware. There is a cross border component to these proceedings.

(iii) the Bid was only for a single product of the applicants and did not provide for a going-concern solution related to the remaining business of the applicants; and

(iv) the Bid does not assume any liabilities of the applicants nor provide for the potential employment of any existing employees.

The Transactions Do Not Disadvantage Any Stakeholder Relative to Any Other Viable Transaction

[18] Under the proposed transactions, the applicants, some of the unsecured creditors and all of the existing shareholders will have no recovery. However, the evidence makes it clear that these stakeholders would not realize any recovery in any other available restructuring alternative either (i.e., under either of the unsuccessful bids or in a bankruptcy/liquidation).

[19] The proposed transactions, by contrast, assure a going concern result. This will result in:

(a) an opportunity for each of the pharmaceutical products previously held by the applicants to be pursued and determine if they can be successfully brought to market at a future date;

(b) potential for several of the applicants' employees preserving their employment; and

(c) suppliers of goods and services having the opportunity to maintain their business relationship with the applicants on an ongoing basis in the future.

Is the Consideration Fair and Reasonable?

[20] The consideration payable for the purchased shares under the Subscription Agreement is fair, reasonable, and reflects the importance of the assets being preserved under the RVO structure. The purchase price for the purchased shares will be satisfied through FGC's credit bid and the financing of post-filing obligations, which, as noted, together total in excess of $65 million. The fairness and reasonableness of the consideration is confirmed by the results of the pre-filing strategic process, the pre-filing SISP, and the court approved SISP (discussed in more detail below). The consideration allows for the satisfaction of all the applicants' secured liabilities and assumption of some unsecured liabilities. Further, the consideration provides the applicants with the ability to implement the transactions and exit the CCAA proceedings as a going-concern.

[21] As noted earlier, the applicants' licenses and contracts with government entities may be difficult to transfer. Further, the applicants' tax attributes are also an important asset being preserved under the ARVO structure. The evidence is that the tax attributes were an important consideration for FGC in making its credit bid for all of the applicants' secured debt.

[22] The market (and the evidence) has shown that there is no other bidder out there who is willing to pay more for these assets.

> adversely affect the Jones Day Litigation as against APL or any individuals that have been named as defendants.

This language is so approved.

[29] Dr. Troels Keldmann attended the hearing. He is a principal of Keldmann Healthcare and Keldmann Innovation which sold certain product rights to a predecessor of APL in 2009. Part of the payment to Keldmann Innovation A/S was to be in the form of royalties under the Amended Product Development Agreement between Trimel Biopharma SRL, Keldmann Healthcare A/S and Keldmann Innovation A/S dated December 30, 2009. This agreement, however, is one of the Excluded Contracts being transferred to a ResidualCo under the terms of the Subscription Agreement. Dr. Keldmann was concerned that, although the Keldmann counterparties would lose the right to any future payments, should the product sold to APL be successfully developed at some future point, they would remain subject to a non-compete provision embedded in that agreement. The applicants immediately made it clear that they had no intention of relying on enforcement rights under this excluded contract and proposed that they would issue a formal disclaimer of rights under that contract. This appeared to satisfactorily address Dr. Keldmann's concern.

[30] Mr. Brian Gilderman also attended the hearing. Mr. Gilderman is a principal of Precision Clinical Research, Inc., which is conducting clinical trials on an APL product. Mr. Gilderman expressed concern about a potential mis-match between his obligation to continue to perform contractual services under the court's CCAA order while being at risk of not being paid for those services. This situation was complicated by the existence of "hold back" provisions in the service agreement. There was insufficient evidence before the court to address this issue properly. The applicants and the Monitor undertook to pursue the matter with Mr. Gilderman. If a satisfactory understanding cannot be reached, the parties may return to court for further direction.

The Subscription Agreement and the Proposed Transactions Allow Various Stakeholders to Maintain their Rights

[31] As noted earlier, the analysis of the applicants and the Monitor is that none of the applicants' creditors will be materially disadvantaged by the Subscription Agreement and the proposed transactions relative to any other viable alternative. In addition, the Subscription Agreement maintains many of the rights that creditors would otherwise have in an asset sale transaction. In the case of parties with existing contracts with the applicants, though no assignment of contracts (consensual or through an assignment order) is contemplated as part of the proposed transactions, the Subscription Agreement provides for all contracts, other than the Excluded Contracts, to remain with the applicants. The contracting parties, therefore, have the opportunity to continue supplying goods and services to the applicants post-CCAA proceedings if they choose to do so. While the Subscription Agreement does not require FGC to cure pre-filing arrears under the Retained Contracts, all contract counterparties have also been served with the applicants' motion record to provide them with notice that their contracts are either being retained or excluded as part of the proposed transactions.

[32] While the Excluded Contracts, Assets and Liabilities will be vested out into Residual Cos in this structure, this outcome is no different from the result that would obtain if the proposed transactions had been carried out using a typical asset purchase structure. Nor will there be any inter-company transfer of assets and liabilities among the existing applicants prior to closing. Therefore, the proposed transactions will not result in any material prejudice or impairment of any creditors' rights which might have been avoided in an asset purchase transaction.

Sufficient Effort has been Made to Obtain the Best Price and the Applicants have not Acted Improvidently

[33] The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investment or sale opportunities beginning in March 2022 and a robust sales process conducted by the applicants and E&Y from September 2022, both privately and under a court approved SISP post-filing. There is no evidence, or suggestion, that the process was less than fair and robust. Nor is there any prospect that a "better deal" was somehow available but not pursued.

The Share Transactions

[34] Consistent with ARVOs previously granted by this court, the proposed order in this case will terminate and cancel all options, securities and other rights held by any person that are convertible or exchangeable for any securities of APC. APC, previously publicly traded on the TSX, will be taken private as a result of the proposed transaction. The purchaser, FGC, currently holds approximately 89% of the issued and outstanding shares of APC. The other shareholders have been notified of the CCAA proceedings and the proposed transactions by way of various press releases and notices issued by the applicants and/or the Monitor.

[35] The jurisdictional and legal basis for these orders has been canvassed extensively in prior decisions of this court so I will not repeat that analysis here: *Harte Gold (Re)*, 2022 ONSC 653; *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354. In essence, equity claims must be subordinate to the claims of creditors. In no possible scenario, on the record before me, would there be any recovery for the shareholders of APC. The OBCA provides the relevant authority to order the restructuring of the shares and the articles as contemplated in the proposed Approval and Reverse Vesting Order.

The Releases

[36] The Release covers any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the transactions or the applicants, its assets, business or affairs or administration of the applicants, except any claim that is not permitted to be released under s. 5.1(2) of the CCAA. For avoidance of doubt, as noted above, the Releases will not release APL or the individuals named as defendants in the Jones Day litigation from liability in respect of that action.

Date: June 2, 2023

TAB 5

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-028436-194, 500-09-028474-195, 500-09-028476-190
(500-11-049838-150)

DATE: May 21, 2020

CORAM: THE HONOURABLE MARK SCHRAGER, J.A.
PATRICK HEALY, J.A.
LUCIE FOURNIER, J.A.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT

No.: 500-09-028436-194

HOME DEPOT OF CANADA INC.
APPELLANT – Impleaded Party
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.)
RAYMOND CHABOT INC.
RESPONDENTS/ INCIDENTAL RESPONDENTS
and
HOME HARDWARE STORES LIMITED
IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party
and
RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
GROUPE BMR INC. (Formerly known as Gestion BMR Inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin Inc.)
MATÉRIAUX LAURENTIENS INC.
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
INTACT INSURANCE COMPANY

L'UNIQUE GENERAL INSURANCE INC.
LA CAPITALE GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRE-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
PROMUTUEL INSURANCE OUTAOUAIS
PROMUTUEL INSURANCE LA VALLÉE
PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
PROMUTUEL INSURANCE VAUDREUIL- SOULANGES
PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES
PROMUTUEL INSURANCE LANAUDIÈRE
AIG TAIWAN INSURANCE CO LTD
AVIVA INSURANCE COMPANY OF CANADA
SOVEREIGN GENERAL INSURANCE COMPANY
INTERNATIONAL ASSOCIATION OF PLUMBING AND MECHANICAL OFFICIALS
JYIC INDUSTRIAL CORPORATION
INSURANCE COMPANY OF NORTH AMERICA
IAPMO RESEARCH AND TESTING INC.
FUBON INSURANCE CO. LTD
GEAREX CORPORATION
SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters
IMPLEADED PARTIES – Impleaded Parties

No.: 500-09-028474-195

GROUPE BRM INC. (Formerly known as Gestion BMR inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin inc.)
MATÉRIAUX LAURENTIENS INC.
INTACT INSURANCE COMPANY
APPELLANTS – Impleaded Parties
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.
RAYMOND CHABOT INC.
RESPONDENTS/INCIDENTAL RESPONDENTS

and

HOME HARDWARE STORES LIMITED

IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party

and

CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
L'UNIQUE GENERAL INSURANCE INC.
LA CAPITAL GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRES-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
PROMUTUEL INSURANCE OUTAOUAIS
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PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
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RONA INC.
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SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters

IMPLEADED PARTIES – Impleaded Parties

RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
APPELLANTS – Impleaded Parties
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International inc.)
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RESPONDENTS/INCIDENTAL RESPONDENTS
and
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HOME DEPOT OF CANADA INC.
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L'UNIQUE GENERAL INSURANCE INC.
LA CAPITALE GENERAL INSURANCE INC.
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JYIC INDUSTRIAL CORPORATION
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FUBON INSURANCE CO. LTD
GEAREX CORPORATION
SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters
IMPLEADED PARTIES – Impleaded Parties

JUDGMENT

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[1] On appeal from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier), that approved a plan of arrangement (the "**Plan of Arrangement**" or the "**Plan**") under the *Companies' Creditors Arrangement Act* ("***CCAA***") relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[2] For the reasons of Justice Schrager, J.A., with which Justices Healy and Fournier, JJ.A., concur, **THE COURT**:

In the file 500-09-028436-194

[3] **DISMISSES** the appeal with legal costs;

[4] **DISMISSES** the incidental appeal without legal costs

In the file 500-09-028474-195

[5] **DISMISSES** the appeal with legal costs;

[6] **DISMISSES** the incidental appeal without legal costs

In the file 500-09-28476-190

[7] **DISMISSES** the appeal with legal costs;

[8] **DISMISSES** the incidental appeal without legal costs.

certain amounts payable to holders of subordinated notes and the priority entitlement to interest payments. Farley, J. commented as follows:

> [7] The *CCAA* is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company.[42] (References omitted)

[67] The *dicta* in all of these cases reflect the orthodox view of the law put forward by the Appellants. However, none of the fact patterns resemble the chain of distribution in the present case. Nor were these judgments focused on a huge number of claims, which were stayed in this case and are effectively replaced by the Monitor's proceedings authorized under the Plan. This factual distinction makes these judgments of limited instructive or precedential value.

[68] What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA*[43] and the expanded view of the role of the monitor, indeed the baptism of the "super monitor".[44] The Appellants concede, if only indirectly, that the Monitor could be authorized to exercise rights of the Debtor against third parties as could a bankruptcy trustee. However, they object to the Monitor's power to sue one group of creditors (the Respondents) on behalf of another group of creditors (the consumers or their insurers).

[69] In my opinion, the Appellants objections are not well founded.

[70] Firstly, the bankruptcy trustee analogy is only a half truth. Trustees are the assignees of a bankrupt's property, and as such, exercise the patrimonial rights of the debtor but they also wear a second hat.[45] Trustees exercise rights and recourses on behalf of creditors against other creditors and against third parties.[46] Such rights and recourses arise from the *BIA* (for example, under s. 95 for preferences) as well as under the civil law generally (for example, the paulian action under arts. 1631 and following *C.C.Q.*). Most significantly, the *BIA* recourses to attack preferences, transfers under value and dividends paid by insolvent corporations have been available to *CCAA* monitors since the amendments adopted in 2007.[47] Thus, the mere fact that the

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42 *Stelco Inc., Re*, 2005 CanLII 41379 (Ont. Sup. Ct.).
43 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, para. 42 [*Callidus*].
44 Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s" in Jill Corraini and Blair Nixon (eds.), Annual Review of Insolvency Law, Toronto, Thomson Reuters, 2019, p. 650.
45 *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, para. 33.
46 *Lefebvre (Trustee of); Tremblay (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, paras. 32-40.
47 S. 36.1 *CCAA*.

[81] Absent a *CCAA* process, the creditors would have been free to consensually assign their rights or subrogate others, including, by way of example, a trustee of a litigation trust. Again, there is precedent in *CCAA* matters for such litigation trusts,[52] which trusts include rights of actions against third parties.[53] With the *CCAA* file, the Monitor, through the Plan, the vote and the sanctioning judgment in appeal, is in such position to exercise those rights against the Retailers. The Monitor is putting into effect the collective will of the creditors expressed through their unanimous vote approving the Plan of Arrangement. Giving effect to creditor democracy reflected in the *CCAA*[54] is a sound basis for a court to approve the Plan.

[82] Accordingly and in conclusion, given that the parties being sued are third parties vis-à-vis the *CCAA* estate and as such, have no claim on the litigation pool, and given that the creditors/beneficiaries of the litigation pool voted unanimously in favour of the Plan of Arrangement, there is sufficient legal rationale to grant the power in question. In addition, as indicated by the trial judge, the mechanism is a direct and practical way to maximize recovery for creditors.

* * *

[83] The Appellants have also argued that granting the Monitor the power to sue is a misuse of the resources of the Commercial Division of the Superior Court, since the proposed proceedings should be taken in the Civil Division. This, however, is purely a matter of case management for the Superior Court. There is but one Superior Court; its administrative divisions, such as the Commercial Division, are not separate and distinct tribunals.[55] Accordingly, there is no valid argument based on the jurisdiction of the Superior Court which can be brought to bear against the judgment of the lower court.

[84] The Appellants submit that they are prejudiced by the judgment in that eventual rights of appeal are restricted because leave is required under the *CCAA* but not under the *C.C.P.* for awards exceeding $60,000. The argument is not persuasive given that the judgment is not erroneous, the Monitor's recourses against the Retailers fall under the *CCAA* and consequently eventual appeals would be governed by s. 14 *CCAA*.

[85] In addition, the Appellants put forward a constitutional argument claiming that since the creditors and Retailers are not insolvent, proceedings of one against the other under the umbrella of the *CCAA* should not apply to them.

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52 Plan of Compromise and re-organization of Sino-Forest Corporation, December 3, 2012, Ont. Sup. Ct. CV-12-9667-00CL.

53 *Lutheran Church Canada (Re)*, 2016 ABQB 419, paras. 125, 134 and 135.

54 S. 6 *CCAA*.

55 *Re Arctic Gardens Inc.*, 1990 R.J.Q. 6 (Qc. C.A.). See also *TVA Publications inc. v. Quebecor World Inc.*, 2009 QCCA 1352, para. 71 (Morissette, J.A.); *Formula E Operations Limited v. Ville de Montréal*, 2019 QCCS 884.

TAB 6

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11- 060598-212

DATE: May 31, 2022

BY THE HONOURABLE MARIE-ANNE PAQUETTE, J.S.C.

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36 OF:

BLACKROCK METALS INC.
BLACKROCK MINING INC.
BRM METALS GP INC.
BLACKROCK METALS LP.
Debtors
-and-

DELOITTE RESTRUCTURING INC.
Monitor
-and-

INVESTISSEMENT QUÉBEC
OMF FUND II H LTD.
Secured Creditors
-and-

13482332 CANADA INC.
Shareholder Bidder
-and-

WINNER WORLD HOLDINGS LIMITED
4470524 CANADA INC.
GOLDEN SURPLUS TRADING
PROSPERITY STEEL
Intervenors

ORDERS (REASONS TO FOLLOW)

ON THE AMENDED SHAREHOLDER BIDDER'S APPLICATION TO EXTEND THE PHASE 2 BID DEADLINE (SEQ. 23)
AND
ON THE DEBTORS' APPLICATION TO APPROVE A VESTING ORDER (SEQ. 17)

CONSIDERING THE FOLLOWING:

[1] the two applications mentioned above;

[2] the Court has made a decision, based on the materials submitted in support and in contestation of such applications, both at the hearing and in advance of same;

[3] however, given the time constraints, the next steps for the implementation of the transaction and the financial implications of additional delays, the Court decides to issue the orders immediately, with reasons to follow; the latter which will follow as quickly as feasible;

FOR THESE REASONS, THE COURT:

1. <u>AMENDED SHAREHOLDER BIDDER'S APPLICATION TO EXTEND THE PHASE 2 BID DEADLINE (SEQ. 23)</u>

[4] DISMISSES the Application;

[5] WITH COSTS

2. <u>DEBTORS' APPLICATION TO APPROVE A VESTING ORDER (SEQ. 17)</u>

[6] **GRANTS** the Application;

[7] **DISMISSES** the Intervenor's Opposition to the Application;

[8] **ORDERS** that, unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meanings given to them in the Purchase Agreement, as such agreement may be amended and restated from time to time.

<u>PURCHASE AGREEMENT</u>

[9] **AUTHORIZES** and **APPROVES** the Transactions and the entering into and execution by the Applicants (including, as applicable pursuant to the present Order,

New ParentCo and an entity incorporated or to be incorporated pursuant to the Reorganization and defined in the Steps Memorandum as "**ResidualCo**") of the Purchase Agreement and the completion of the Transactions, with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

[10] **ORDERS** and **DECLARES** that, notwithstanding any provision hereof, the steps pertaining to the Closing of the Transactions, including all those steps described in the Steps Memorandum, shall be deemed to occur in the manner, order and sequence specified in Purchase Agreement and the Steps Memorandum, with such alterations, changes, amendments, deletions or additions thereto as are permitted under the Purchase Agreement or as may otherwise be agreed to by the Vendor and the Purchasers with the consent of the Monitor, and that the Monitor shall post any amended Steps Memorandum on the Monitor's website forthwith following agreement in respect of same.

[11] **REORGANIZATION**

[12] **AUTHORIZES** and **ORDERS** the Applicants to implement and complete the Reorganization contemplated in the Steps Memorandum, including notably:

a) upon the issuance of the present Order: **(i)** the incorporation by BlackRock Metals Inc. ("**BRMI**") of New ParentCo under the *Quebec Business Corporations Act* ("**QBCA**"), with authorized share capital consisting of a class of voting and fully participating common shares, and a class of non-participating redeemable and retractable voting shares (the "**Voting Shares**"), and the subscription by BRMI for one Voting Share, which will not be immediately paid; and **(ii)** the incorporation by BRMI of ResidualCo under the QBCA, with authorized share capital consisting of a class of voting and fully participating common shares, and the subscription by New ParentCo for one common share of ResidualCo, which will not be immediately paid;

b) the addition of New ParentCo and ResidualCo as Applicants under the CCAA in accordance with paragraph [28] of the present Order;

c) on the date that is one (1) business day before the Closing Date: **(i)** the exchange of all of the issued shares of BRMI for common shares of New ParentCo on a one-for-one basis, such that, as a consequence, New ParentCo will thereafter hold all of the then issued and outstanding shares in the capital of BRMI, and **(ii)** the simultaneous cancellation of the Voting Share held by BRMI for its subscription price, and the cancellation, for no consideration, of all of the issued and outstanding options and warrants or any other securities of BRMI (including securities convertible or exchangeable for shares of BRMI);

d) the various transfers and assumptions of assets and liabilities between BRMI, BlackRock Mining inc. ("**BRM Mining**"), BRM Metals GP inc. ("**BRM GP**"), BlackRock Metals LP ("**BRM LP**") and New ParentCo and ResidualCo, which

are to take place in the manner, at the times and for the consideration set forth in the Steps Memorandum and the agreements giving effect thereto, prior to the closing of the Purchase and Sale Transactions;

[13] **AUTHORIZES** the Applicants to:

a) take, proceed with, implement and execute any and all other steps, notifications, filings and delivery of any documents and assurances governing or giving effect to the Reorganization as the Applicants may deem to be reasonably necessary or advisable to conclude the Reorganization, including the execution of such deeds, contracts or documents contemplated in the Steps Memorandum and all such deeds, contracts or documents are hereby ratified, approved and confirmed; and

b) take such steps as are deemed necessary or incidental to the implementation of the Reorganization.

[14] **ORDERS** and **DECLARES** that the Applicants are hereby permitted to execute and file articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Transactions and that such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective notwithstanding any requirement under federal, provincial or territorial law to obtain director or shareholder approval with respect to such actions or to deliver any statutory declarations that may otherwise be required under corporate law to effect the Transactions.

[15] **ORDERS** and **DECLARES** that this Order shall constitute the only authorization required by the Applicants and the Vendor to proceed with the Transactions notwithstanding any requirement under applicable law to obtain director, shareholder, partner, member or other approval with respect thereto or to delivery any statutory declarations that may otherwise be required under corporate, partnership or other law, and, for greater certainty, no director, shareholder, contractual or regulatory approval shall be required in connection with any of the steps contemplated pursuant to the Transactions.

[16] **ORDERS** the Director appointed pursuant to section 260 of the CBCA to accept and receive any articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Transactions, filed by any of the Applicants pursuant to or to give effect to the Transactions, as the case may be.

[17] **ORDERS** the *Enterprise Register* pursuant to the QBCA to accept and receive any articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Transactions, filed by any of the Applicants pursuant to or to give effect to the Transactions, as the case may be.

SALE APPROVAL

[18] **AUTHORIZES** and **ORDERS** the Applicants, the Vendor, and the Monitor, as the case may be, to perform all acts, sign all documents and take any necessary action to execute any agreement, contract, deed, provision, transaction or undertaking stipulated in the Purchase Agreement with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor and any other ancillary document that may be required to give full and complete effect thereto and to implement the Transactions.

[19] **ORDERS** and **DIRECTS** the Monitor to: (i) issue and deliver to the Purchaser and to file with this Court a certificate substantially in the form appended as **Schedule "B"** hereto (the "**Certificate**") as soon as practicable upon the closing of the Purchase and Sale Transactions; and (ii) file with the Court a copy of the Certificate, no later than one business day after the issuance thereof.

[20] **ORDERS** and **DECLARES** that upon the earlier of the issuance and delivery of the Certificate to the Purchaser and the filing of the Certificate with the Court (the "**Effective Time**"), all right, title and interest in and to the Purchased Shares shall vest, effective at the Closing Time (as this term is defined in the Purchase Agreement), absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, Liabilities (direct, indirect, absolute or contingent), obligations, taxes, prior claims, right of retention, liens, royalties or any similar claim based on the extraction of minerals, security interests, charges, hypothecs, trusts, deemed trusts (statutory or otherwise), judgments, writs of seizure or execution, notices of sale, contractual rights (including purchase options, rights of first refusal, rights of first offer or any other pre-emptive contractual rights), encumbrances, whether or not they have been registered, published or filed and whether secured, unsecured or otherwise (collectively, the "**Encumbrances**"), including without limiting the generality of the foregoing, all Encumbrances created by order of this Court and all charges or security evidenced by registration, publication or filing pursuant to the *Civil Code of Québec* in movable / immovable property, and for greater certainty **ORDERS** that all of the Encumbrances affecting or relating to the Purchased Shares be cancelled and discharged as against the Purchased Shares, in each case effective as of the Effective Time.

[21] **ORDERS and DECLARES** upon issuance of the Certificate and effective prior to the Closing Time, any agreement, contract, plan, indenture, deed, certificate, subscription rights, conversion rights, pre emptive rights, options (including stock option or share purchase or equivalent plans and any rights under employment agreements or other agreements to awards under any such plan), share units (including restricted share unit or deferred share unit or similar incentive plans and any rights under employment agreements or other agreements to awards under any such plan), or other documents or instruments governing and/or having been created or granted in connection with the Purchased Shares and/or the share capital of BRMI that were existing prior to the Reorganization, if any, shall be deemed terminated and cancelled for no consideration.

[22] **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Lac-Saint-Jean-Ouest and the Registrar of the Public Register of Real and Immovable Mining Rights (known as GESTIM Plus), upon presentation of the Certificate and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and cancel the Encumbrances listed in **Schedule** "**C**" hereto on the immovable properties identified therein.

[23] **ORDERS** the registrar of the Québec Register of Personal and Movable Real Rights, upon presentation of the required form with a true copy of this Order and the Certificate, to cancel and strike the registrations of the hypothecs listed in **Schedule** "**C**" hereto

[24] **ORDERS** and **DECLARES** that any distributions, disbursements or payments made under this Order, including, for greater certainty, pursuant to the Transactions, shall not constitute a "distribution" by any Person for the purposes of section 107 of the *Corporations Tax Act* (Ontario), section 22 of the *Retail Sales Tax Act* (Ontario), section 117 of the *Taxation Act*, 2007 (Ontario), section 34 of the *Income Tax Act* (British Columbia), section 104 of the *Social Service Tax Act* (British Columbia), section 49 of the *Alberta Corporate Tax Act*, section 22 of the *Income Tax Act* (Manitoba), section 73 of *The Tax Administration and Miscellaneous Taxes Act* (Manitoba), section 14 of the *Tax Administration Act* (Québec), section 85 of *The Income Tax Act*, 2000 (Saskatchewan), section 48 of *The Revenue and Financial Services Act* (Saskatchewan), section 56 of the *Income Tax Act* (Nova Scotia), or any other applicable similar provincial, and/or territorial tax legislation (collectively, the "**Tax Statutes**"), and the Purchaser, the Vendor and the Applicants in making any such distributions, disbursements or payments, as applicable, is merely a disbursing agent under this Order, including, for greater certainty, pursuant to the Transactions, and is not exercising any discretion in making such payments and no Person is "distributing" such funds for the purpose of the Tax Statutes, and the Purchaser, the Vendor and the Applicants and any other Person shall not incur any liability under the Tax Statutes in respect of distributions, disbursements or payments made by it and the Purchaser, the Vendor and the Applicants and any other Person is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of or as a result of distributions, disbursements or payments made by it in accordance with this Order, including, for greater certainty, pursuant to the Transactions, and any claims of this nature are hereby forever barred.

[25] **ORDERS** and **DECLARES** that at the Effective Time, the Purchaser and the Applicants (other than New ParentCo and ResidualCo) shall be released from any and all claims, Liabilities (direct, indirect, absolute or contingent) or obligations with respect to any Taxes (including penalties and interest thereon) of, or that relate to the Applicants (including, without limiting the generality of the foregoing all Taxes that could be assessed against the Purchaser, the Vendor and the Applicants (including any predecessor corporations) pursuant to section 14.4 of the *Tax Administration Act*

(Québec), and/or any similar applicable provisions of the other Tax Statutes in connection with the Vendor or the Applicants).

[26] **ORDERS** and **DECLARES** that at the Effective Time, all Persons shall be deemed to have waived any and all defaults of the Applicants then existing or previously committed by the Applicants or caused by the Applicants, directly or indirectly, as a result of any circumstances that existed or event that occurred on or prior the Effective Date that would have entitled any such Person to enforce any rights or remedies, including a non-compliance with any covenant, positive or negative pledge, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Applicants arising from the insolvency of the Applicants, the filing by the Applicants under the CCAA, the completion of the Transactions, any and all notices of default and demands for payment under any instrument, including any guarantee arising from such default, shall be deemed to have been rescinded.

[27] **ORDERS** and **DECLARES** that the implementation of the Transactions shall be deemed not to constitute a change in ownership or change in control under any agreement, including without limiting the foregoing, any financial instrument, loan or financing agreement, executory contract or unexpired lease or contract, lease, employment agreements, permits and licences in existence on the Closing Date and to which any of the Applicants is a party.

[28] **DECLARES** that at the Effective Time, the Purchase and Sale Transactions shall be deemed to constitute and shall have the same effect as a sale under judicial authority as per the provisions of the Code of Civil Procedure and a forced sale as per the provisions of the *Civil Code of Québec*.

CCAA APPLICANTS

[29] **ORDERS**, with effect upon the later of the making of this Order and the incorporation of each of New ParentCo and ResidualCo, as applicable, that:

a) ResidualCo and New ParentCo are companies to which the CCAA applies;

b) ResidualCo and New ParentCo shall be automatically added as Applicants in these CCAA proceedings and any reference in any Order of this Court in respect of these CCAA proceedings to a “Debtor” or the “Applicants” – including any such reference in this Order – shall include ResidualCo and New ParentCo, *mutadis mutandis*, and, for greater certainty, each of the CCAA Charges (as such term is defined in the initial order issued by this Court in the present matter on December 23, 2021, as extended, amended and restated since (the “**Initial Order**”)) shall also constitute a charge on the property of ResidualCo and New ParentCo;

c) the CCAA proceedings of ResidualCo and New ParentCo and those of the other Applicants are consolidated under this single Court file, bearing file number 500-11-060598-212; and

d) the consolidation of these CCAA proceedings in respect of ResidualCo and New ParentCo shall be for administrative purposes only and shall not effect a consolidation of the assets and property or of the debts and obligations of each of the Applicants.

[30] **ORDERS** that at the Effective Time:

a) the Applicants other than ResidualCo and New ParentCo shall each cease to be Applicants in these CCAA proceedings, and each such entity shall be released from the purview of any Order of this Court granted in respect of these CCAA proceedings, save and except for the present Order, the terms of which (as they relate to any such entity) shall continue to apply in all respects.

[31] **ORDERS** and **DECLARES** that upon issuance of the Certificate and effective prior to the Closing Time, at the times indicated and in the manner set forth in the Reorganization and the documents giving effect thereto:

a) an amount of $37,500 in cash of BRMI shall vest absolutely and exclusively, at the times provided for in the Reorganization and before the Closing Time, in New ParentCo, in exchange for the BRMI Note (as this term is defined in the Steps Memorandum);

b) all Excluded Assets, except for the BRMI Note, shall vest absolutely and exclusively in ResidualCo in exchange the ResidualCo Notes (as this term is defined in the Steps Memorandum), and all Encumbrances shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer in each case;

c) BRMI, BRM Mining, BRM GP and BRM LP (collectively, the "**BlackRock Entities**") shall each own and hold respectively, to the exclusion of all other Persons, free and clear of and from any Encumbrances, except the permitted encumbrances listed on **Schedule** "**D**" hereto (the "**Permitted Encumbrances**"), all right, title and interest in and to all assets and properties that were owned by each of them respectively, other than the Excluded Assets;

d) all debts, liabilities, taxes, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) of each of the BRM Entities and their predecessors, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in

law or equity and whether based in statute or otherwise (collectively, "**Obligations**") other than the Assumed Obligations (all such Obligations being "**Excluded Obligations**") shall be transferred to, assumed by and vest absolutely and exclusively in New ParentCo, in consideration for the ResidualCo Notes and the BRMI Note which shall also be transferred and vest absolutely and exclusively in New ParentCo, the whole such that, at the times provided for in the Reorganization and before the Closing Time, the Excluded Obligations shall be novated in each case and become obligations of New ParentCo and not obligations of the BlackRock Entities, and the BlackRock Entities shall be forever released and discharged from such Excluded Obligations, and all Encumbrances securing Excluded Obligations shall be forever released and discharged, it being understood that nothing in the present Order shall be deemed to cancel any of the Permitted Encumbrances, as applicable to the BlackRock Entities;

e) the commencement or prosecution, whether directly, indirectly, derivatively or otherwise of any demands, claims, actions, counterclaims, suits, judgments, or other remedy or recovery with respect to any indebtedness, liability, obligation or cause of action against the Applicants (other than New ParentCo and ResidualCo) or the Purchasers (including any successor corporation) in respect of the Excluded Obligations shall be permanently enjoined and barred;

f) the Assumed Liabilities including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Purchase Agreement or the steps and actions taken in accordance with the terms thereof;

g) any Person that, prior to the Closing Date, had a valid right or claim against the Applicants (other than New ParentCo and ResidualCo) in respect of the Excluded Obligations (each a "**Claim**") shall no longer have such Claim against any of them or against the BlackRock Entities (including any successor corporation), but will have an equivalent Claim against New ParentCo in respect of the Excluded Obligations from and after the Closing Time in its place and stead, with the same attributes and rights resulting from existing defaults of the Applicants and nothing in this Order limits, lessens, modify (other than by change of debtor) or extinguishes the Excluded Obligations or the Claim of any Person as against New ParentCo which shall be the sole and exclusive debtor of the Claim.

AMENDMENT AND RESTATEMENT OF THE INITIAL ORDER

[32] **ORDERS** and **DECLARES** that the Initial Order shall be amended by:

a) adding ResidualCo and New ParentCo as Applicants in the heading;

b) adding, after subparagraph [41](l), the following subparagraph:

(l.1) may act on behalf and in the name of any of ResidualCo and New ParentCo;

[33] **ORDERS** and **DECLARES** that at the Effective Time the Initial Order shall be amended by:

a) deleting “BlackRock Metals Inc.”, “BlackRock Mining Inc.”, “BRM Metals GP Inc.”, and “BlackRock Metals LP” from the heading;

b) deleting the residual clause of paragraph [46]**ORDERS** that forthwith at the Effective Time, the Initial Order shall be restated to reflect the amendments made by paragraphs [31] and [32] hereof.

RELEASES

[34] **ORDERS** that effective at the Effective Time, (i) the present and former directors, officers, employees, legal counsel and advisors of the Applicants (including for purpose of clarity New ParentCo and ResidualCo, (ii) the Monitor and its legal counsel, and (iii) Orion and IQ, including in each case their respective directors, officers, employees, legal counsel and advisors (the Persons listed in (i), (ii) and (iii) being collectively, the “**Released Parties**”) shall be deemed to be forever irrevocably released and discharged from any and all present and future claims whatsoever (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, offer, investment proposal, dealing or other occurrence existing or taking place prior to the Effective Time or completed pursuant to the terms of this Order and/or in connection with the Transactions, in respect of the Applicants or their assets, business or affairs, or prior dealings with Applicants, wherever or however conducted or governed, the administration and/or management of the Applicants and these proceedings (collectively, the “**Released Claims**”), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, and are not vested nor transferred to ResidualCo or to any other entity, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim against the Directors (as this term is defined in the Initial Order) of the Applicants that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[35] **ORDERS** that, notwithstanding:

a) the pendency of these proceedings;

b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") in respect of the Applicants (including New ParentCo or ResidualCo) and any bankruptcy order issued pursuant to any such application; and

c) any assignment in bankruptcy made in respect of the Applicants (including New ParentCo or ResidualCo),

the implementation of the Transactions, including the transfer of the Excluded Assets to ResidualCo and the implementation of the Purchase and Sale Transactions under and pursuant to the Purchase Agreement, (i) shall be binding on any trustee in bankruptcy that may be appointed in respect of the Applicants (including New ParentCo or ResidualCo) and shall not be void or voidable by creditors of the Applicants, (ii) shall not constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA or any other applicable federal, provincial or territorial legislation, and (iii) shall not constitute nor be deemed to be oppressive or unfairly prejudicial conduct by the Applicants or the Released Parties pursuant to any applicable federal, provincial or territorial legislation.

THE MONITOR

[36] **PRAYS ACT** of the Monitor's Report.

[37] **DECLARES** that, subject to other orders of this Court made in these CCAA proceedings, nothing herein contained shall require the Monitor to occupy or to take control, or to otherwise manage all or any part of the assets of the Applicants. The Monitor shall not, as a result of this Order, be deemed to be in possession of any assets of the Applicants within the meaning of environmental legislation, the whole pursuant to the terms of the CCAA.

[38] **DECLARES** that the Monitor, its employees and representatives shall not be deemed directors of ResidualCo or New ParentCo, *de facto* or otherwise, and shall incur no liability as a result of acting in accordance with this Order, other than any liability arising out of or in connection with the gross negligence or wilful misconduct of the Monitor.

[39] **DECLARES** that no action lies against the Monitor by reason of this Order or the performance of any act authorized by this Order, except by leave of the Court. The entities related to the Monitor or belonging to the same group as the Monitor shall benefit from the protection arising under the present paragraph.

GENERAL

[40] **ORDERS** that the Purchaser and any successor to the Applicants shall be authorized to take on behalf of the Applicants all steps as may be necessary to effect the discharge of the Encumbrances as provided for in paragraph [30] hereinabove.

[41] **DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

[42] **DECLARES** that the Monitor shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement the Order and, without limitation to the foregoing, an order under Chapter 15 of the U.S. Bankruptcy Code, for which the Monitor shall be the foreign representative of the Applicants. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to Monitor as may be deemed necessary or appropriate for that purpose.

[43] **REQUESTS** the aid and recognition of any court or administrative body in any province or territory of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order.

[44] **ORDERS** the provisional execution of the present Order notwithstanding any appeal and without the requirement to provide any security or provision for costs whatsoever.

WITH COSTS.

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MARIE-ANNE PAQUETTE, J.S.C.

Hearing dates: May 30, 31, 2022

TAB 7

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-060598-212

DATE: July 8, 2022 (**RECTIFIED July 13, 2022**)

BY THE HONOURABLE MARIE-ANNE PAQUETTE, Chief Justice

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36 OF:

BLACKROCK METALS INC.
BLACKROCK MINING INC.
BRM METALS GP INC.
BLACKROCK METALS LP.
Debtors
-and-

DELOITTE RESTRUCTURING INC.
Monitor
-and-

INVESTISSEMENT QUÉBEC
OMF FUND II H LTD.
Secured Creditors
-and-

13482332 CANADA INC.
Shareholder Bidder
-and-

WINNER WORLD HOLDINGS LIMITED
4470524 CANADA INC.
GOLDEN SURPLUS TRADING
PROSPERITY STEEL
Intervenors

RECTIFIED JUDGMENT
ON THE AMENDED SHAREHOLDER BIDDER'S APPLICATION TO EXTEND THE PHASE 2 BID DEADLINE (SEQ. 23)
AND
ON THE DEBTORS' APPLICATION TO APPROVE A VESTING ORDER (SEQ. 17) [1]

OVERVIEW

[1] The debtors BlackRock Metals Inc., BlackRock Mining Inc., BlackRock Metals LP and BRM Metals GP Inc. (collectively: **BlackRock**) were established in 2008. They are developing a metals and materials manufacturing business with a mine in Chibougamau, and a metallurgical plant to be located at the Port of Saguenay (**Project Volt**).

[2] The mine and plant to be built under Project Volt will eventually supply vanadium, high purity pig iron and titanium products, three specialty metals which are, according to

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[1] Reasons in support of orders issued on May 31, 2022 and rectified on June 1, 2022

> unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:
>
> (a) Why is the RVO necessary in this case?
>
> (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
>
> (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
>
> (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?
>
> [Emphasis added]

7.2 Discussion on criteria to approve an RVO

[100] The Court will now apply the criteria set out in paragraph 36(3) of the CCAA to the RVO Application, keeping in mind the other relevant factors identified by the case law, and will analyze the appropriateness of the RVO structure in particular.

[101] The process leading to the proposed sale was reasonable in the circumstances (s. 36(3)(a) of the CCAA). As detailed in the Fifth Report, BlackRock and the Monitor have conducted the SISP in accordance with the Bidding Procedures approved by this Court on January 7, 2022. The market has been adequately canvassed through a fulsome, fair and transparent process. It should be reiterated that BlackRock had already deployed a global search for financing during the years leading up to the initiation of the CCAA Proceedings, to no avail.

[102] In the present circumstances, the Court concludes that sufficient efforts have been made to get the best price for BlackRock's assets and that the parties acted providently. The record also shows the efficacy and integrity of the process followed.

[103] The Monitor approved of the process leading to the proposed sale and filed with the court a report stating that in their opinion the sale would be more beneficial to the creditors than a sale or disposition under a bankruptcy (s. 36(3)(a) and (b) of the CCAA).

The Monitor not only approved the SISP but also participated in the negotiation and development of the Bidding Procedures and had primary carriage of the process throughout. In the course of the SISP, the Monitor consulted with BlackRock.

[104] The Fifth Report concludes that the SISP was properly conducted and that the Proposed Transaction is beneficial for all the stakeholders compared to a bankruptcy scenario. The Monitor "is of the view that creditors who will suffer a shortfall following the Purchase Agreement would not obtain any greater recovery in a sale in bankruptcy." "Furthermore, bankruptcy proceedings would: (i) [c]ause additional delays and uncertainty in the sale of [BlackRock]'s assets; (ii) [j]eopardize the going concern operations of [BlackRock]; and, (iii) [l]ikely result in employees to be unemployed."[43]

[105] BlackRock's creditors were duly consulted (s. 36(3)(d) of the CCAA). The secured creditors of BlackRock are Orion and IQ who are also the Stalking Horse Bidders. Obviously, they have been consulted extensively and they consent to the RVO Application.

[106] Importantly, the Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government also expressed support for the Proposed Transaction, as outlined by their counsel in a letter sent to the Monitor on May 19, 2022:

> Our clients consider that the approval of the Stalking Horse Agreement offers the most, and perhaps the only, viable prospect to bring the BlackRock Mining Project into successful commercial operation and hence to secure for the Cree Nation of Eeyou Istchee the critically important benefits of the BallyHusky Agreement.[44]

[107] The other creditors are unsecured creditors who have been duly advised of the Initial Application and Order, including the Bidding Procedures. They have decided not to participate in the SISP and nothing indicates that they would oppose to the RVO Application.

[108] The effects of the proposed sale or disposition on the creditors and other interested parties are beneficial overall (s. 36(3)(e) of the CCAA). The Stalking Horse Bid is the best available alternative for BlackRock's creditors and other interested parties and should allow for BlackRock to emerge as a rehabilitated business in a stronger position to complete the Construction Financing and move forward with Project Volt. This outcome is advantageous to BlackRock and its stakeholders, including their creditors, employees, trading partners and First Nations partners.

[109] It is true that the RVO will result in the claim of unsecured creditors being transferred to ResidualCo, an empty shell where all unassumed liabilities will be transferred. This transfer simply reflects the fact that the BlackRock's value, as tested in

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43 Fifth Report, par. 57-60.
44 Exhibit R-11.

the market through the SISP and for many years prior to the current restructuring, is not high enough to generate value for these unsecured creditors.

[110] As for the other stakeholders, they will benefit on the whole from the approval of the Proposed Transaction, as it will allow the Debtors' business to emerge in a position to move forward as a going concern. This will benefit the employees, trading partners and First Nations partners and it will have indirect socio-economic benefits in the province of Quebec.

[111] The consideration to be received for the assets is reasonable and fair, taking into account their market value (s. 36(3)(f) of the *CCAA*). The consideration being paid by Orion and IQ, which is in excess of $100M, is importantly linked to the preservation the Debtor's permits (crucial to the conduct of the contemplated mining activities), certain existing contracts and its tax attributes.

[112] The reasonableness of the consideration is well established. Given the amount of the secured debt held by Orion and IQ, the consideration which they will pay exceeds i) what the market would be willing to pay to inherit intangible assets BlackRock has been able to build over time and ii) the capacity to raise on the market the financing required for Project Volt.

[113] Nobody submitted a higher bid after extensive attempts to raise financing over many years.

[114] Exceptionally, the RVO structure is appropriate in the circumstances. In his Fifth Report, the Monitor outlines the reasons why, in his opinion, the reverse vesting order structure that would be implemented would be "more appropriate and beneficial than a traditional vesting order structure and that the reverse vesting order structure is necessary, reasonable and justified in the circumstances":[45]

> (i) Numerous agreements, permits, licenses, authorizations, and related amendments are part of the assets that have to be transferred as per the Purchase Agreements. It could be more complex to transfer the benefits of these assets in a traditional vesting order structure since consents, approvals or authorizations may be required. A reverse vesting order structure minimizes risks, costs or delays of having these assets transferred;
>
> (ii) The proposed reverse vesting order structure results in better economic results for some creditors of BRM who see their pre-filing claim being assumed and retained. Also, the reverse vesting order structure will avoid any delays or costs associated with the assignments of the assumed contracts;

[45] Fifth Report, par. 65-66.

(iii) The contracts or obligations of the creditors and the stakeholders that are considered Excluded Assets and Excluded Obligations according to Schedule B of the Purchase Agreement will not be in a worse position than they would have been with a more traditional vesting of assets to a third party;

(iv) Most assets of BRM are intangibles, such as agreements, permits, licenses, authorizations and related amendments, and their value depend on the capacity of the purchasers to complete the financing and achieve the project. These assets would have no or limited value if some of them were not being preserved. The reverse vesting order structure allows to avoid any potential risks around the transfer to the purchaser.

[115] The Court agrees with the Monitor's conclusions. RVO structures have been found by courts to be appropriate in situations such as the present case, where a traditional sale of assets would lead to uncertainty regarding the transfer of numerous agreements, permits, authorizations and other regulatory approvals that are required for the continuation of a company's business.[46]

[116] Indeed, BlackRock operates in the highly regulated mining industry. Their business is almost entirely constituted of such intangible assets, which provide a head start of several years to the purchaser. Some of these assets cannot be assigned or are at least difficult to assign. Therefore, the capacity to restructure BlackRock depends heavily on the capacity to keep the existing legal entities in place while restructuring the share-capital of BlackRock. That is exactly what the RVO provides for.

[117] If BlackRock was forced to proceed with a traditional asset sale, it could significantly increase the costs, generate uncertainties and reduce the value its assets, to the detriment of all parties involved.

[118] Moreover, despite the Intervenors' firm belief, the SISP has unequivocally demonstrated that there is no realizable value in BlackRock's business or assets beyond the secured debt of IQ and Orion, such that there is no equity left for its unsecured creditors, let alone its shareholders.

[119] The Court adds that Shareholders have little or no say in CCAA proceedings like the present one, where the debtor company is insolvent and its shares have lost all value. This goes to their legal interest in contesting an arrangement or transaction proposed by the company.[47]

[120] In any case, the shareholders and unsecured creditors of BlackRock are not in a worse position with an RVO than they would be under a traditional asset sale. Either way,

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46 See *supra*, note 28.

47 *Proposition de Peloton Pharmaceutiques inc.*, 2017 QCCS 1165, par. 65-78; *Forest c. Raymor Industries inc.*, 2010 QCCA 578, par. 4-6; *Stelco Inc., Re*, 2006 CanLII 1773, par. 18 (Ont. SC).

[128] It is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction.[51] In fact, similar releases have been approved by this Court in recent cases involving RVO transactions, including in *Nemaska Lithium*.[52]

[129] This being said, the courts should not grant releases blindly and systematically.

[130] In *Harte Gold Corp.,* the Court approved releases in favor of various parties that included the purchaser and its directors and officers and considered the criteria ordinarily canvassed with respect to third-party releases provided for under a plan, as articulated in *Re Lydian International Limited*[53] and elsewhere[54]. They are the following:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.[55]

[131] In the present file, IQ's and Orion's participation was obviously instrumental to the restructuring of BlackRock's business. Considering the SISP and the opportunity given to BlackRock's stakeholders to participate in the process, it is reasonable for IQ and Orion to now start with a clean slate and not to be under the threat of potential claims as they will be leading BlackRock's efforts with Project Volt. The release will provide more certainty and finality.

[132] The release is thus reasonably connected and justified as part of the Proposed Transaction,[56] and it is to the benefit of BlackRock and its stakeholders generally as it will allow BlackRock to emerge as a solvent entity and be in the best possible position to,

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51 See *Re Green Relief Inc.*, 2020 ONSC 6837, par. 23-25; *8640025 Canada Inc. (Re)*, 2021 BCSC 1826, par. 43.

52 *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 103-106 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).

53 2020 ONSC 4006.

54 *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 78-86. See also *Re Green Relief Inc.*, 2020 ONSC 6837, par. 27-28.

55 *Re Lydian International Limited*, 2020 ONSC 4006, par. 54. See also: *Metcalfe & Mansfield Alternative Investments II Cord. (Re)*, 2008 ONCA 587;

56 See *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, par. 70 (leave to appeal to SCC dismissed, 2008 CanLII 46997).

TAB 8

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No.: 500-11-063787-242

DATE: April 17, 2024

BY THE HONOURABLE MARTIN F. SHEEHAN, J.S.C.

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

GOLI NUTRITION INC.
and
GOLI NUTRITION INC.
Applicants
and
DELOITTE RESTRUCTURING INC.
Monitor

RECTIFIED APPROVAL AND REVERSE VESTING ORDER

FOR THESE REASONS, THE COURT: 1

[1] **WHEREAS** the undersigned rendered a written judgment on April 9, 2024;

[2] **WHEREAS** the file number on the judgment submitted by the parties contained an error;

[3] **WHEREAS** it is appropriate to rectify the file number on the judgment;

FOR THESE REASONS, THE COURT:

[4] **MODIFIES** the file number on the judgment;

WHEREFORE THE COURT:

[7] ***GRANTS*** *the Amended Application.*

[8] ***ORDERS*** *that, unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meanings given to them in the Subscription Agreement.*

SERVICE

[9] ***ORDERS*** *that any prior delay for the presentation of this Amended Application is hereby abridged and validated so that the Amended Application is properly returnable today and hereby dispenses with further service thereof.*

[10] ***PERMITS*** *service of this Order at any time and place and by any means whatsoever.*

SUBSCRIPTION AGREEMENT

[11] ***AUTHORIZES*** *and* ***APPROVES*** *the Transactions and entering into and execution by the Vendor of the Subscription Agreement and completion of all the Transactions by the Vendor and Residual Co., with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.*

APPROVAL OF TRANSACTIONS

[12] ***AUTHORIZES*** *the Applicants, Residual Co., the Purchaser, and the Monitor, as the case may be, to perform all acts, sign all documents and take any necessary action to execute any agreement, contract, deed, provision, transaction or undertaking stipulated in the Subscription Agreement with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor and any other ancillary document which could be required or useful to give full and complete effect thereto and to implement the Transactions.*

[13] ***AUTHORIZES*** *and* ***DIRECTS*** *the Applicants, Residual Co., and any other successors of the Vendor to implement the Transactions contemplated in*

the Subscription Agreement (including the Pre-Closing Reorganization contemplated in the Steps Memo), including to:

13.1.1. execute and deliver any documents and assurances governing or giving effect to the Transactions as the Vendor, in its discretion, may deem to be reasonably necessary or advisable to conclude the Transactions, including the execution of such deeds, contracts or documents as may be contemplated in the Subscription Agreement (including the Steps Memo) and all such deeds, contracts or documents are hereby ratified, approved and confirmed; and

13.1.2. take such steps as are deemed necessary or incidental to the implementation of the Transactions.

[14] ***ORDERS*** *and* ***DECLARES*** *that the Applicants, Residual Co., and any successors of the Vendor are hereby permitted to execute and file articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Transactions and that such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective notwithstanding any requirement under federal, provincial or territorial law to obtain director or shareholder approval with respect to such actions or to deliver any statutory declarations that may otherwise be required by law to effect the Transactions.*

[15] ***ORDERS*** *and* ***DECLARES*** *that this Order shall constitute the only authorization required by the Applicants, Residual Co., and any successors to proceed with the Transactions and that no partner, director, shareholder, contractual or regulatory approval shall be required in connection with any of the steps contemplated pursuant to the Transactions and the execution, delivery, and performance of the foregoing have been and are within the power of the relevant parties, have been and are duly authorized by all necessary actions, and are hereby ratified for all intents and purposes.*

[16] ***ORDERS*** *and* ***DECLARES*** *that any defects in any proceedings, appointments, election, payments or any other corporate acts by the Applicants shall henceforth be deemed to be rectified and corrected, the whole provided such acts, proceedings, appointments, elections, payments or other corporate acts were permitted by law at the relevant times.*

[17] ***ORDERS*** *the Director appointed pursuant section 260 of the Canada Business Corporations Act, R.S.C., 1985, c. C-44 (the "****CBCA****") and the Registraire des entreprises du Québec pursuant to the Business Corporations Act, CQLR c S-31.1 to accept and receive any articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Transactions,*

filed by the Vendor, Residual Co., or any successors pursuant to the Transactions, as the case may be.

[18] ***ORDERS*** *and* ***DECLARES*** *that upon the issuance of a Monitor's certificate substantially in the form appended as* ***Schedule "A"*** *hereto (the "**Certificate**") to the Vendor and the Purchaser, the following shall occur and shall be deemed to have occurred on the Closing Date, all in accordance with the Closing Sequence set out in the Subscription Agreement and the steps contemplated thereunder:*

18.1.1. the Pre-Closing Reorganization shall be completed, and the transactions set out in the Steps Memo shall occur and shall be deemed to have occurred in the sequence set out in the Steps Memo, including for greater certainty (i) the addition of Residual Co. as an Applicant in these CCAA proceedings in accordance with paragraph 31.1.1 and 31.1.2, (ii) the cancellation of the Legacy Preferred Equity Interests in accordance with paragraph 18.1.2, and (iii) the vesting of the Excluded Assets, Excluded Liabilities and Excluded Contracts in and to Residual Co. in accordance with paragraph [32];

18.1.2. the Vendor shall, and shall be deemed to, redeem and acquire for cancellation each Legacy Preferred Equity Interest without any payment thereon, and all such redeemed Legacy Preferred Equity Interests together with any agreement, contract, plan, indenture, deed, certificate, subscription right, conversion right, pre-emptive right, option or other document or instrument governing or having been created or granted in connection with the Legacy Preferred Equity Interests shall be deemed terminated and cancelled;

*18.1.3. the Vendor shall issue the Subscribed Shares to the Purchaser, the Purchaser shall purchase the Subscribed Shares, the Consideration shall be paid in accordance with the Subscription Agreement, and all right, title and interest in and to the Subscribed Shares shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims (including any complaints or claims for fraud or fraudulent misrepresentation, breach of fiduciary duty, conversion, securities offences, violation of the Racketeer Influenced and Corrupt Organizations Act (U.S.), or misappropriations under the Defend Trade Secrets Act (U.S.)), Liabilities (direct, indirect, absolute or contingent), obligations, prior claims, right of retention, liens, security interests, charges, hypothecs, trusts, deemed trusts (statutory or otherwise), judgments or orders (including for injunctive relief or specific performance), writs of seizure or execution, notices of sale, contractual rights (including purchase options, rights of first refusal, rights of first offer or any other pre-emptive contractual rights) and encumbrances, whether or not they have been registered, published or filed and whether secured, unsecured or otherwise (collectively, the "**Encumbrances**"), including without limiting the generality of the foregoing, all Encumbrances created by order of this Court and all charges or security evidenced by*

registration, publication or filing pursuant to the Civil Code of Québec in movable / immovable property, and for greater certainty all of the Encumbrances affecting or relating to the Subscribed Shares be cancelled and discharged as against the Subscribed Shares, in each case effective as of the applicable time and date of the Certificate;

18.1.4. the Vendor shall, and shall be deemed to, redeem and acquire for cancellation each Legacy Common Equity Interest without any payment thereon, and all such redeemed Legacy Common Equity Interests together with any agreement, contract, plan, indenture, deed, certificate, subscription right, conversion right, pre-emptive right, option or other document or instrument governing or having been created or granted in connection with the Legacy Common Equity Interests shall be deemed terminated and cancelled; and

18.1.5. the Directors (as defined in the Initial Order) shall be deemed to have resigned from their positions without any further approvals, consents or other formalities being required and notwithstanding the provisions of any agreements governing the same, such resignations and releases to be effective at the Closing Time.

[19] ***ORDERS*** *the Personal and Movable Real Rights Registrar of the Register for Personal and Movable Real Rights, upon presentation of the Certificate and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and cancel the movable property Encumbrances listed in* ***Schedule "B"*** *hereto.*

[20] ***ORDERS*** *and* ***DECLARES*** *that any distributions, disbursements or payments made under this Order, including, for greater certainty, pursuant to the Transactions, shall not constitute a "distribution" by any Person for the purposes of section 107 of the Corporations Tax Act (Ontario), section 22 of the Retail Sales Tax Act (Ontario), section 117 of the Taxation Act, 2007 (Ontario), section 34 of the Income Tax Act (British Columbia), section 104 of the Social Service Tax Act (British Columbia), section 49 of the Alberta Corporate Tax Act, section 22 of the Income Tax Act (Manitoba), section 73 of The Tax Administration and Miscellaneous Taxes Act (Manitoba), sections 14 and 14.0.0.1 of the Tax Administration Act (Québec), section 85 of The Income Tax Act, 2000 (Saskatchewan), section 48 of The Revenue and Financial Services Act (Saskatchewan), section 56 of the Income Tax Act (Nova Scotia), section 159 of the Income Tax Act (Canada), section 270 of the Excise Tax Act (Canada), section 46 of the Employment Insurance Act (Canada), or any other similar federal, provincial or territorial tax legislation (collectively, the "****Tax Statutes****"), and the Vendor in making any such distributions, disbursements or payments, as applicable, is merely a disbursing agent under this Order, including, for greater certainty, pursuant to the Transactions, and is not*

exercising any discretion in making such payments and no Person is "distributing" such funds for the purpose of the Tax Statutes, and the Vendor and any other Person shall not incur any liability under the Tax Statutes in respect of distributions, disbursements or payments made by it and the Vendor and any other Person is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of or as a result of distributions, disbursements or payments made by it in accordance with this Order, including, for greater certainty, pursuant to the Transactions, and any claims of this nature are hereby forever barred.

[21] ***DECLARES*** *that the present Order does not prevent the Canada Revenue Agency and the Agence du revenu du Québec (collectively, the "**Tax Agencies**") to set off or compensate, if applicable:*

21.1.1. on one hand, any claim of any of the Tax Agencies against any Applicant, and, on the other hand, any claim of such Applicant against such Tax Agency, provided that the aforementioned claims shall both be pertaining to periods prior to the Filing Date; and

21.1.2. on one hand, any claim of any of the Tax Agencies against any Applicant, and, on the other hand, any claim of such Applicant against such Tax Agency, provided that the aforementioned claims shall both be pertaining to periods between the Filing Date and the Closing Time.

[22] ***ORDERS*** *and* ***DECLARES*** *that upon the issuance of the Certificate, all Persons shall be deemed to have waived any and all defaults of the Vendor, directly or indirectly, or non-compliance then existing or previously committed by the Vendor or caused by the Vendor, directly or indirectly, or non-compliance with any covenant, positive or negative pledge, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Vendor, or its successors, arising from the insolvency of the Vendor, the filing by the Vendor under the CCAA or the completion of the Transaction, and any and all notices of default and demands for payment under any instrument, including any guarantee arising from such default, shall be deemed to have been rescinded, and except as expressly contemplated by the Subscription Agreement, all contracts (excluding the Excluded Contracts) to which the Vendor is party upon delivery of the Monitor's Certificate will be and remain in full force and effect.*

[23] ***ORDERS****, for greater certainty, that: (a) nothing in paragraph [22] hereof shall waive, compromise or discharge any obligations of the Vendor in respect of any Retained Liabilities, and (b) the designation of any Encumbrance as a*

Retained Liability is without prejudice to the Vendor's right to dispute the existence, validity or quantum of any such Retained Liability, and (c) nothing in this Order or the Subscription Agreement shall affect or waive the Vendor's rights and defences, both legal and equitable, with respect to any Retained Liability, including, but not limited to, all rights with respect to entitlements to set-off or compensation or recoupments against such Retained Liability.

[24] ***ORDERS*** *and* ***DECLARES*** *that the implementation of the Transactions shall be deemed not to constitute a change in ownership or change in control under any agreement, including without limiting the foregoing, any financial instrument, loan or financing agreement, executory contract or unexpired lease or contract, lease, permit or license in existence on the Closing Date and to which the Vendor is a party.*

[25] ***ORDERS*** *that all monetary defaults of the Vendor in relation to each of the Retained Contracts will be remedied by the Purchaser within five (5) business days of the Closing Date, unless otherwise agreed to by the Purchaser and the applicable counterparty to the Retained Contract.*

[26] ***ORDERS*** *and* ***DIRECTS*** *the Monitor to issue the Certificate as soon as practicable upon the occurrence of the closing of the Transactions.*

[27] ***ORDERS*** *and* ***DIRECTS*** *the Monitor to file with the Court a copy of the Certificate, no later than two Business Days after the issuance thereof.*

[28] ***DECLARES*** *that upon the issuance of the Certificate, the Transactions shall be deemed to constitute and shall have the same effect as a sale under judicial authority as per the provisions of the Code of Civil Procedure and a forced sale as per the provisions of the Civil Code of Québec.*

[29] ***ORDERS*** *that, pursuant to clause 18(4) of the Act Respecting the Protection of Personal Information in the Private Sector (Québec), the Applicants or the Monitor, as the case may be, are authorized, permitted and directed to, at the Closing Time, disclose to the Purchaser and Residual Co., as applicable, all human resources and payroll information in the records of the Applicants pertaining to past and current employees of the Applicants. The Purchaser shall maintain and cause the Vendor, after Closing, to maintain and protect the privacy of such information, and Residual Co. shall maintain and protect the privacy of such information, as applicable, each in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Vendor prior to Closing.*

[30] ***ORDERS*** *that the Subscription Agreement and the Transactions shall constitute a "proposal" and this Order shall constitute a "reorganization", in each case for the purposes of Section 191 of the Canada Business Corporations Act.*

CCAA APPLICANTS

[31] ***ORDERS*** *that upon the issuance of the Certificate, in accordance with the Closing Sequence set out in the Subscription Agreement (including the Steps Memo):*

31.1.1. Residual Co. is a company to which the CCAA applies;

31.1.2. Residual Co. shall be added as an Applicant in these CCAA proceedings and any reference in any Order of this Court in respect of these CCAA proceedings to an "Applicant" or "Applicants" shall also refer to Residual Co. mutadis mutandis, and, for greater certainty, each of the CCAA Charges (as defined in the Initial Order) shall also constitute a charge on the property of Residual Co.; and

31.1.3. Goli shall cease to be an Applicant in these CCAA proceedings, and shall be released from the purview of any Order of this Court granted in respect of these CCAA proceedings, including the CCAA Charges, save and except for the present Order, the terms of which (as they related to Goli) shall continue to apply in all respects.

[32] ***ORDERS*** *that upon the issuance of the Certificate, in accordance with the Closing Sequence set out in the Subscription Agreement (including the Steps Memo):*

32.1.1. all Excluded Liabilities, Excluded Assets and Excluded Contracts shall vest absolutely and exclusively, at the times provided for in the Closing Sequence and Steps Memo, in Residual Co., and all Encumbrances charging the Excluded Liabilities, Excluded Assets and Excluded Contracts shall continue to attach thereto with the same nature and priority as they had immediately prior to their transfer in each case;

32.1.2. all Encumbrances shall attach to the Excluded Assets with the same priority as they had with respect to the assets and properties of the Vendor immediately prior to their transfer in each case;

32.1.3. the Purchaser shall own and hold, to the exclusion of all other Persons, free and clear of and from any Encumbrances, except the Permitted Encumbrances listed in ***Schedule "C"*** *hereto, all right, title and interest in the Subscribed Shares;*

32.1.4. all debts, liabilities, taxes, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature whatsoever of the Vendor, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured, due or not yet due, in law or equity and whether based in statute or otherwise, including, without limitation, the Excluded Liabilities or Excluded Contracts, arising before or after the CCAA filing of the Vendor, shall be transferred to, assumed by and vest absolutely and exclusively in Residual Co. with the same attributes and rights resulting from existing defaults of the Vendor, such that, as of the time provided in the Closing Sequence and Steps Memo, the Excluded Liabilities and the Excluded Contracts shall be novated in each case and become obligations of Residual Co. and not obligations of the Vendor, and the Vendor shall be forever released and discharged from such Excluded Liabilities and Excluded Contracts, and all Encumbrances shall be forever released and discharged, it being understood that nothing in the present Order shall be deemed to cancel any of the Permitted Encumbrances, as applicable to the Vendor;

32.1.5. the commencement or prosecution, whether directly, indirectly, derivatively or otherwise of any demands, claims, actions, counterclaims, suits, judgments, or other remedy or recovery with respect to any indebtedness, liability, obligation or cause of action against the Vendor (including any successor entity) in respect of the Excluded Liabilities and Excluded Contracts shall be permanently enjoined and barred;

32.1.6. the Retained Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Subscription Agreement or the steps and actions taken in accordance with the terms thereof;

32.1.7. the nature, attributes (including rights resulting from existing defaults of the Vendor) and priority of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to and assumption by Residual Co.; and

*32.1.8. any Person that, prior to the Closing Date, had a valid right or claim against the Vendor in respect of the Excluded Liabilities or the Excluded Contracts (each a "**Subject Claim**") shall no longer have such claim against the Vendor (including any successor corporation), but will have an equivalent claim against Residual Co. in respect of the Excluded Liabilities or the Excluded Contracts from and after the Closing Date in its place and stead, with the same attributes and rights resulting from existing defaults of the Vendor and, nothing in this Order limits, lessens, modifies (other than by change of debtor) or extinguishes the Excluded Liabilities or the Excluded Contracts or the Subject*

Claim of any Person as against Residual Co., and Residual Co. shall be the sole and exclusive debtor of such Subject Claim.

RELEASES

[33] ***ORDERS*** *that effective upon the issuance of the Certificate, (i) the Vendor, Martin Leroux, Michael Bitensky, Deepak Agarwal, and Randy Bitensky, and (ii) the Purchaser and its present and former directors, officers, employees, shareholders, legal counsel and advisors (the Persons listed in (i) and (ii) being collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims whatsoever (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, complaints, counterclaims, suits, damages, judgements, orders (including for injunctive relief or specific performance), executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, offer, investment proposal, dealing, statutory declaration under the CBCA as permitted pursuant to the terms of this Order, or other occurrence existing or taking place prior to the issuance of the Certificate or completed pursuant to the terms of this Order and/or in connection with the Transactions, in respect of the Vendor or its assets, business or affairs, or prior dealings with the Vendor, wherever or however conducted or governed, the administration and/or management of the Vendor and these CCAA proceedings (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, and are not vested nor transferred to Residual Co. or to any other entity and are extinguished. Nothing in this paragraph shall waive, discharge, release, cancel or bar any claim against past and present directors of the Vendor (Martin Leroux, Michael Bitensky and Deepak Agarwal) that relate to contractual rights of one or more creditors, or that is based on allegations of misrepresentations made by directors to creditors, or based on wrongful or oppressive conduct by directors, as it is not permitted pursuant to section 5.1(2) CCAA. Furthermore, nothing in this paragraph shall waive, discharge, release, cancel or bar the claims against past and present directors, officers and employees of the Vendor asserted in (a) the claims before the United States District Court for the Central District of California (case 2:23-cv-06597-CAS-MAA) against Goli Nutrition, Inc., 12416913 Canada Inc. (Predecessor 3), Deepak Agarwal, Michael Bitensky, VMG Partners Mentors Circle IV L.P., VMG Partners IV, L.P., Merical Inc., Randy Bitensky, VMG Partners, Wayne Wu, Jonathan Marshall and Roger Tyre by Sharon Hoffman and Odelya Hoffman et al., as amended (the "Hoffman v Goli Claim"), and (b) any filing of the claims asserted in the Hoffman v Goli Claim as compulsory*

counterclaims in the claim before the United States District Court for the Central District of California (case 5:23-cv-00514-GW-DTB) against Sharon Hoffman by Goli Nutrition Inc.

[34] ***ORDERS*** *that, notwithstanding:*

34.1.1. the pendency of these proceedings;

*34.1.2. any applications for a bankruptcy order now or hereafter issued pursuant to the Bankruptcy and Insolvency Act (Canada) (the "**BIA**") in respect of any Applicant or Residual Co. and any bankruptcy order issued pursuant to any such applications; and*

34.1.3. any assignment in bankruptcy made in respect of any Applicant or Residual Co.,

the implementation of the Transactions, including the transfer of the Excluded Assets, Excluded Liabilities, and Excluded Contracts to Residual Co. and the implementation of the Transactions under and pursuant to the Subscription Agreement, including those steps contemplated in the Steps Memo (i) shall be binding on any trustee in bankruptcy that may be appointed in respect of any Applicant or Residual Co. and shall not be void or voidable by creditors of the Applicants or Residual Co., as applicable (ii) shall not constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transactions under the BIA or any other applicable federal, provincial or territorial legislation, and (iii) shall not constitute nor be deemed to be oppressive or unfairly prejudicial conduct by any Applicant, Residual Co., the Purchaser or the Monitor pursuant to any applicable federal, provincial or territorial legislation.

DISTRIBUTIONS

[35] ***ORDERS*** *the Monitor, at Closing, to distribute the Deposit, by wire transfer of immediately available funds to BMO, as agent for the Syndicated Lenders.*

[36] ***ORDERS*** *the Applicants to pay the Closing Payment Amount, by wire transfer of immediately available funds to BMO, as agent for the Syndicated Lenders.*

[37] ***ORDERS AND DECLARES*** *that the distribution and the payment contemplated in paragraphs [35] and [36] of this Order are hereby authorized and approved and that this Order shall constitute the only authorization or approval required to proceed with the distribution of the Deposit and payment of the Closing Payment Amount.*

[38] ***ORDERS*** *that notwithstanding:*

38.1.1. the pendency of these proceedings;

*38.1.2. any applications for a bankruptcy order now or hereafter issued pursuant to the Bankruptcy and Insolvency Act (Canada) (the "**BIA**") in respect of any Applicant or Residual Co. and any bankruptcy order issued pursuant to any such applications; and*

38.1.3. any assignment in bankruptcy made in respect of any Applicant or Residual Co.,

distribution and the payment contemplated in paragraphs [35] and [36] of this Order (i) shall be binding on any trustee in bankruptcy that may be appointed in respect of any Applicant or Residual Co. and shall not be void or voidable by creditors of the Applicants or Residual Co., as applicable (ii) shall not constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transactions under the BIA or any other applicable federal, provincial or territorial legislation, and (iii) shall not constitute nor be deemed to be oppressive or unfairly prejudicial conduct by any Applicant, Residual Co., the Purchaser, the Monitor, or any other parties to these CCAA proceedings pursuant to any applicable federal, provincial or territorial legislation.

[39] ***DECLARES*** *that, in addition to any protections afforded to the Monitor under the CCAA, this Order, or any other order of the Court, the Monitor shall incur no liability whatsoever, including under any federal, provincial or foreign tax legislation, in respect of it making any of the distributions authorized by this Order.*

THE MONITOR

[40] ***ORDERS*** *that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is authorized, entitled and empowered to assign or cause to be assigned, at any time after the Closing Date, Residual Co. into bankruptcy and the Monitor shall be entitled but not obligated to act as trustee in bankruptcy of Residual Co.*

[41] ***DECLARES*** *that, subject to other orders of this Court, nothing herein contained shall require the Monitor to occupy or take control, or to otherwise manage all or any part of the assets of the Applicants or Residual Co. The Monitor shall not, as a result of this Order, be deemed to be in possession of any assets of the Applicants or Residual Co. within the meaning of environmental legislation or otherwise.*

[42] ***ORDERS AND DECLARES*** *that no provision of this Order is intended to appoint the Monitor, or any of its employees or representatives, as an officer,*

director or employee of any of the Applicants or Residual Co., de facto or otherwise, or to create a fiduciary duty to any party, including any creditor or shareholder of the Applicants or Residual Co.

[43] ***AUTHORIZES*** *the Monitor, its employees and representatives, to act in accordance with the Subscription Agreement, including with respect to the administration and disbursement of any amounts held in trust pursuant thereto, and to take any actions that are necessary or useful to give effect to the Subscription Agreement and this Order.*

[44] ***DECLARES*** *that without limiting any other protection afforded to the Monitor under the CCAA, this Order or any other order of the Court:*

44.1.1. the Monitor, as well as its employees and representatives, shall incur no liability whatsoever as a result of acting in accordance with this Order and the Subscription Agreement approved herein, other than any liability arising directly out of the gross negligence or wilful misconduct of the Monitor; and

44.1.2. no action lies against the Monitor by reason of this Order or the performance of any act authorized by this Order, except by leave of the Court on ten (10) days notice to the Monitor and its counsel.

The entities related to the Monitor or belonging to the same group as the Monitor shall benefit from the protections arising under the present paragraph.

GENERAL

[45] ***ORDERS*** *that the Purchaser and the Applicants shall be authorized to take all steps as may be necessary to effect the discharge of the Encumbrances other than Permitted Encumbrances as against the assets of the Applicants.*

[46] ***DECLARES*** *that this Order shall have full force and effect in all provinces and territories in Canada.*

[47] ***DECLARES*** *that the Monitor shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement the Order and, without limitation to the foregoing, an order under Chapter 15 of the U.S. Bankruptcy Code, recognizing the Order. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to Monitor as may be deemed necessary or appropriate for that purpose.*

[48] ***REQUESTS*** *the aid and recognition of any court or administrative body in any province or territory of Canada and any Canadian federal court or*

administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order.

[49] ***ORDERS*** *the provisional execution of the present Order notwithstanding any appeal and without the requirement to provide any security or provision for costs whatsoever.*

[50] ***THE WHOLE WITHOUT COSTS.***

_____
MARTIN F. SHEEHAN, J.S.C.

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Mtre Pascale Dionne Bourassa
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Mtre Nick Scheib
Attorney for Mr. Michael Betinsky

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Mtre Mélanie Martel
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Attorneys for DLA Piper (US) LLP

Hearing date: April 9, 2024

TAB 9

SUPERIOR COURT
(COMMERCIAL DIVISION)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No: 500-11-059536-215

Date: December 8, 2021

PRESIDING: THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

In the matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 of:

Atis Group Inc.

10422916 Canada Inc.

8528853 Canada Inc. (d.b.a. Portes et Fenêtres Altek Inc.)

9060642 Canada Inc.

9092455 Canada Inc. (d.b.a. Alweather Windows & Doors)

Distributeur Vitro Clair Inc.

Solarcan Architectural Holding Limited

Vitrerie Lévis Inc.

Vitrotec Portes & Fenêtres Inc.

Debtors

and

Atis LP

Mise-en-cause

and

Raymond Chabot Inc.

Monitor

Order Authorizing a Distribution, Releasing Certain CCAA Charges and Releasing the Beneficiaries, the CRO and the Directors and Officers

---

JP1736 **HAVING READ** the *Application for the Issuance of Approval and Vesting Orders and an Order (i) Authorizing a Distribution, (ii) Discharging the CRO, (iii) Releasing Certain CCAA Charges, (iv) Releasing the Beneficiaries, the CRO and the Directors and Officers and (v)*

Extending the Stay Period (the "**Application**") of Atis Group Inc., 10422916 Canada Inc., 8528853 Canada Inc. (d.b.a. Altek Windows & Doors), 9060642 Canada Inc., 9092455 Canada Inc. (d.b.a. Alweather Windows & Doors), Distributeur Vitro Clair Inc., Solarcan Architectural Holding Limited, Vitrotec Portes & Fenêtres Inc. and Vitrerie Lévis Inc. (collectively, the "**Applicants**") and Atis LP (together with the Applicants, the "**Debtors**") pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**"), the exhibits and the affidavit filed in support thereof and the Sixth Report of the Monitor dated October 25, 2021;

GIVEN the notification of the Application;

GIVEN the Initial Order rendered on February 19, 2021 (as amended, restated and otherwise modified from time to time, including on March 1, 2021, the "**Initial Order**");

GIVEN the submissions of counsel;

GIVEN the provisions of the CCAA;

GIVEN that it is appropriate to issue an order (i) authorizing an interim distribution to The Bank of Nova Scotia, (ii) releasing the Administration Charge, the CRO Charge and the Directors' Charge and (iii) granting a release in favour of The Bank of Nova Scotia, in its capacity as interim lender, Raymond Chabot inc., in its capacity as Receiver and/or Monitor, the Receiver's counsel, the Monitor's counsel and the Debtors' counsel (collectively, the "**Beneficiaries**"), the Chief Restructuring Officer, Solstice Groupe Conseil Inc. (Mr. Claude Rouleau) (the "**CRO**") and the Debtors' former, present or future director or officer and any person deemed to be a director or officer of any of the Debtors under subsection 11.03(3) of the CCAA (the "**Directors and Officers**").

THE COURT:

[1] **GRANTS** the Application.

[2] **DECLARES** that all capitalized terms used but not otherwise defined in the present Order (this "**Order**") shall have the meanings ascribed to them in the Application or in the Initial Order.

Notification

[3] **ORDERS** that any prior delay for the presentation of the Application is hereby abridged and validated so that the Application is properly returnable today and hereby dispenses with any further notification thereof.

[4] **PERMITS** notification of this Order at any time and place and by any means whatsoever, including by email.

Distribution

[5] **AUTHORIZES** the Monitor, for and on behalf of the Debtors and without further Order of the Court, to distribute the proceeds of the sale of the assets of the Debtors to the Bank of Nova Scotia, (i) first, in its capacity as Interim Lender and (ii) second, in its capacity as Secured Creditor, the whole under the conditions to

be agreed upon between the Monitor, for and on behalf of the Debtors and the Bank of Nova Scotia, or, failing same, upon further order of this Court.

Release of the Administration Charge, the CRO Charge and the Directors' Charge

[6] **ORDERS** that each of the Administration Charge, the CRO Charge and the Directors' Charge shall be terminated, released and discharged without any other act or formality, provided that nothing herein shall affect the status or priority of the Interim Lender's Charge and the Senior Security.

Additional protections

[7] **ORDERS** that, notwithstanding the discharge contained herein, nothing herein shall affect, vary, derogate from, limit or amend, and the Beneficiaries, the CRO (including in connection with any matters in its role as CRO that are ancillary or incidental to these CCAA Proceedings, following the date of this Order, as may be required (the "**CRO Incidental Matters**")) and the Directors and Officers shall continue to have the benefit of, any of the rights, approvals, releases, and protections in favour of the Beneficiaries, the CRO and the Directors and Officers, as applicable, at law or pursuant to the CCAA, and all Orders made in these CCAA Proceedings, including in connection with any CRO Incidental Matters, following the date of this Order.

[8] **ORDERS** that no action or other proceeding shall be commenced against the Beneficiaries, the CRO and the Directors and Officers in any way arising from or related to their capacity or conduct as a Professional, CRO, director and officer, Monitor or Receiver, as applicable, except with prior leave of this Court and on prior written notice to the Beneficiaries, the CRO and the Directors and Officers, as applicable.

[9] **ORDERS** that, effective at the date of this Order, (i) the Beneficiaries, (ii) the CRO, and (iii) the Directors and Officers, including in each case, their respective affiliates, officers, directors, partners, employees and agents, as applicable, (the Persons listed in (i), (ii) and (iii) being collectively, the "**Released Parties**") shall be deemed to be forever irrevocably and unconditionally released and discharged from any and all present and future claims whatsoever (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, losses, damages, judgments, executions, recoupments, debts, sums of money, expenses, costs, accounts, liens, taxes, penalties, interests, recoveries, and other obligations, liabilities and encumbrances of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured, or due or not yet due, in law or equity and whether based in statute, contract or otherwise) based in whole or in part on any act, omission, transaction, dealing or other occurrence, matter, circumstance or fact existing or taking place on or prior to the date of this Order, or completed pursuant to the terms of this Order and/or in connection with the transactions approved by this Court in the context of the CCAA Proceedings in respect of the Debtors or their assets, business or affairs or prior dealings with the Debtors, wherever or however conducted or governed, the administration and/or management of the Debtors and these CCAA Proceedings (collectively, the "**Released Claims**"), including in carrying out the CRO Incidental Matters,

which Released Claims shall be fully, finally, irrevocably, unconditionally and forever waived, discharged, released, cancelled and barred as against the Released Parties provided that nothing in this paragraph shall:

(a) waive, discharge, release, cancel or bar any claim against the Directors and Officers that is not permitted to be released pursuant to subparagraph 5.1(2) of the CCAA; and

(b) affect the right of a Person to:

(i) recover an indemnity under an insurance policy covering such Person; or

(ii) recover an amount regarding the liability of a Released Party or a claim against them under an insurance policy covering such Released Party; however, it is understood that any claim or liability for which an insurer is or would otherwise be subrogated against the Released Parties is released and discharged pursuant to the terms hereof, and the right of such Person to recover an indemnity under an insurance policy shall be limited to the insurance product which the insurer effectively pays regarding such claim or liability.

[9.1] **ORDERS** the Released Parties, whenever applicable, to cooperate with their insurers with respect to the defence of any claim advanced under subsection 9(b)(ii) hereof.

Bankruptcy

[10] **ORDERS** that:

(a) without limiting the effect of the approval and vesting order of this Court issued from time to time in the context of the CCAA Proceedings, the Monitor is authorized to execute any assignment in bankruptcy and related documents on behalf of the Debtors as may be necessary or desirable; and

(b) Raymond Chabot inc. is hereby authorized and empowered, but not obligated, to act as trustee in bankruptcy in respect of the Debtors in connection with any bankruptcy proceedings.

General Provisions

[11] **DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

[12] **DECLARES** that the Monitor shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement the Order and, without limitation to the foregoing, an order under Chapter 15 of the U.S. Bankruptcy Code, for which the Monitor shall be the foreign representative of the Debtors. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and

to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

[13] **REQUESTS** the aid and recognition of any court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order.

[14] **ORDERS** the provisional execution of this Order notwithstanding appeal, and without requirement to provide any security or provision for costs whatsoever.

[15] **THE WHOLE** without costs.

MICHEL A. PINSONNAULT, J.S.C.

M^tre François Alexandre Toupin
M^tre Alain Tardif
McCarthy Tétrault s.e.n.c.r.l., s.r.l.
Attorneys for the Debtors

Date of hearing: December 8, 2021

TAB 10

Bank of Montreal *Appellant*

v.

Enchant Resources Ltd. and D. S. Willness *Respondents*

Banque de Montréal *Appelante*

c.

Enchant Resources Ltd. et D. S. Willness *Intimés*

INDEXED AS: BANK OF MONTREAL *v.* DYNEX PETROLEUM LTD.

Neutral citation: 2002 SCC 7.

File No.: 27766.

Hearing and judgment: November 9, 2001.

Reasons delivered: January 24, 2002.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and LeBel JJ.

RÉPERTORIÉ : BANQUE DE MONTRÉAL *c.* DYNEX PETROLEUM LTD.

Référence neutre : 2002 CSC 7.

N^o^ du greffe : 27766.

Audition et jugement : 9 novembre 2001.

Motifs déposés : 24 janvier 2002.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie et LeBel.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Commercial law — Oil and gas industry — Overriding royalties — Whether overriding royalties arising from working interest capable of being interest in land.

The appellant Bank was a secured creditor of D, a corporation in liquidation. The trustee in bankruptcy wanted to sell all the oil and gas properties of D. One issue of concern was whether any such sale would be subject to overriding royalties arising out of the working interest held by D. Also, the respondents held overriding royalties and claimed priority over the Bank, as to the assets of D, because their interests, as protected by caveats filed in a land registration office, preceded the Bank's loans to D and its predecessors. The caveats claimed an interest in D's working interest as a result of services performed for D and/or its predecessors. The chambers judge granted the Bank's application for a preliminary determination finding that an overriding royalty interest cannot be an interest in land. The Court of Appeal set aside that decision, holding that overriding royalty interests can, subject to the intention of the parties, be interests in land.

Held: The appeal should be dismissed.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit commercial — Industrie pétrolière et gazière — Redevances dérogatoires — Une redevance dérogatoire issue d'une participation directe peut-elle constituer un intérêt foncier?

La Banque appelante était un créancier garanti de D, société en voie de liquidation. Le syndic de faillite voulait vendre tous les avoirs gaziers et pétroliers de D. Se posait donc notamment la question de savoir si la vente serait conclue sous réserve des redevances dérogatoires provenant de la participation directe détenue par D. Par ailleurs, les intimés étaient titulaires de redevances dérogatoires et prétendaient prendre rang avant la Banque quant aux avoirs de D, parce que leurs intérêts, protégés par des oppositions déposées à un bureau d'enregistrement foncier, étaient antérieurs aux prêts consentis par la Banque à D et à ses prédécesseurs. Les oppositions faisaient valoir un intérêt dans la participation directe détenue par D par suite de la fourniture de services à D ou à ses prédécesseurs. Le juge en chambre a accueilli la demande présentée par la Banque en vue de faire statuer de façon préliminaire qu'un droit de redevance dérogatoire ne pouvait constituer un intérêt foncier. La Cour d'appel a infirmé cette décision, statuant qu'un droit de redevance dérogatoire peut constituer un intérêt foncier, à condition que telle soit l'intention des parties.

Arrêt : Le pourvoi est rejeté.

The common law prohibition against the creation of an interest in land from an incorporeal hereditament is inapplicable to the oil and gas industry given its practices and the support found in the law. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre* if that is the intention of the parties.

Cases Cited

Referred to: *Berkheiser v. Berkheiser*, [1957] S.C.R. 387; *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703; *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1993), 138 A.R. 321, aff'd (1994), 157 A.R. 65; *Canco Oil and Gas Ltd. v. Saskatchewan* (1991), 89 Sask. R. 37; *St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd.*, [1963] S.C.R. 482; *Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66; *Isaac v. Cook* (1982), 44 C.B.R. 39; *Guaranty Trust Co. v. Hetherington* (1987), 50 Alta. L.R. (2d) 193, aff'd in part [1989] 5 W.W.R. 340; *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17; *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34.

Authors Cited

Davies, G. J. "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev*. 232.

Dukelow, Daphne A., and Betsy Nuse. *The Dictionary of Canadian Law*, 2nd ed. Scarborough, Ont.: Carswell, 1995, "corporeal hereditament", "incorporeal hereditament".

Ellis, W. H. "Property Status of Royalties in Canadian Oil and Gas Law" (1984), 22 *Alta. L. Rev*. 1.

Newman, J. Forbes. "Can a Gross Overriding Royalty Be an Interest in Land", in Insight Educational Services, *Oil & Gas Agreements Update*. Mississauga, Ont.: Insight Press, 1989.

APPEAL from a judgment of the Alberta Court of Appeal (1999), 74 Alta. L.R. (3d) 219, 255 A.R. 116, 220 W.A.C. 116, 182 D.L.R. (4th) 640, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 175, [2000] 2 W.W.R. 693, [1999] A.J. No. 1463 (QL), 1999 ABCA 363, reversing a judgment of the Court of Queen's Bench (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, 11 P.P.S.A.C. (2d) 291, [1995] A.J. No. 1279 (QL). Appeal dismissed.

Richard B. Jones, for the appellant.

L'interdiction reconnue en common law de créer un intérêt foncier à partir d'un héritage incorporel est inapplicable à l'industrie gazière et pétrolière, étant donné ses pratiques et l'appui fourni par la jurisprudence. Une redevance qui est un intérêt foncier peut être créée à partir d'un héritage incorporel tel qu'une participation directe ou un profit à prendre, si telle est l'intention des parties.

Jurisprudence

Arrêts mentionnés : *Berkheiser c. Berkheiser*, [1957] R.C.S. 387; *Saskatchewan Minerals c. Keyes*, [1972] R.C.S. 703; *Scurry-Rainbow Oil Ltd. c. Galloway Estate* (1993), 138 A.R. 321, conf. par (1994), 157 A.R. 65; *Canco Oil and Gas Ltd. c. Saskatchewan* (1991), 89 Sask. R. 37; *St. Lawrence Petroleum Ltd. c. Bailey Selburn Oil & Gas Ltd.*, [1963] R.C.S. 482; *Vanguard Petroleums Ltd. c. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66; *Isaac c. Cook* (1982), 44 C.B.R. 39; *Guaranty Trust Co. c. Hetherington* (1987), 50 Alta. L.R. (2d) 193, conf. en partie par [1989] 5 W.W.R. 340; *Vandergrift c. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17; *Nova Scotia Business Capital Corp. c. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118; *Friedmann Equity Developments Inc. c. Final Note Ltd.*, [2000] 1 R.C.S. 842, 2000 CSC 34.

Doctrine citée

Davies, G. J. « The Legal Characterization of Overriding Royalty Interests in Oil and Gas » (1972), 10 *Alta. L. Rev*. 232.

Dukelow, Daphne A., and Betsy Nuse. *The Dictionary of Canadian Law*, 2nd ed. Scarborough, Ont. : Carswell, 1995, « corporeal hereditament », « incorporeal hereditament ».

Ellis, W. H. « Property Status of Royalties in Canadian Oil and Gas Law » (1984), 22 *Alta. L. Rev*. 1.

Newman, J. Forbes. « Can a Gross Overriding Royalty Be an Interest in Land », in Insight Educational Services, *Oil & Gas Agreements Update*. Mississauga, Ont. : Insight Press, 1989.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1999), 74 Alta. L.R. (3d) 219, 255 A.R. 116, 220 W.A.C. 116, 182 D.L.R. (4th) 640, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 175, [2000] 2 W.W.R. 693, [1999] A.J. No. 1463 (QL), 1999 ABCA 363, infirmant un jugement de la Cour du Banc de la Reine (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, 11 P.P.S.A.C. (2d) 291, [1995] A.J. No. 1279 (QL). Pourvoi rejeté.

Richard B. Jones, pour l'appelante.

a working interest or a *profit à prendre*, if that is the intention of the parties.

Virtue J. in *Vandergrift*, *supra*, at p. 26, succinctly stated:

> . . . it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:
>
> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

VI. Conclusion

The appeal is dismissed with costs to the respondents.

Appeal dismissed.

Solicitors for the appellant: Jones, Rogers, Toronto.

Solicitors for the respondents: McDonald Crawford; Bennett Jones, Calgary.

incorporel tel qu'une participation directe ou un profit à prendre, si telle est l'intention des parties.

22 Dans *Vandergrift*, précité, p. 26, le juge Virtue dit succinctement :

> [TRADUCTION] . . . il semble assez clair que, selon le droit canadien, un droit de redevance ou un droit de redevance dérogatoire peut être un intérêt foncier si les conditions suivantes sont réunies :
>
> (1) les termes employés pour décrire l'intérêt sont suffisamment précis pour démontrer l'intention des parties que la redevance constitue un intérêt foncier, plutôt qu'un droit contractuel sur une fraction des hydrocarbures extraits du sol;
>
> (2) l'intérêt dont est issue la redevance est lui-même un intérêt foncier.

VI. Conclusion

23 Le pourvoi est rejeté avec dépens en faveur des intimés.

Pourvoi rejeté.

Procureurs de l'appelante : Jones, Rogers, Toronto.

Procureurs des intimés : McDonald Crawford; Bennett Jones, Calgary.

TAB 11

Bank of Montreal v. Enchant Resources Ltd., 1999 ABCA 363

Date: 19991217
Docket: 96-16526, 96-16536 & 97-17211

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE FOISY
THE HONOURABLE MR. JUSTICE BERGER
THE HONOURABLE MR. JUSTICE SULATYCKY

BETWEEN:
Appeal #16526

BANK OF MONTREAL

Respondent
(Plaintiff)

- and -

ENCHANT RESOURCES LTD., AND D.S. WILLNESS

Appellants
(Defendants)

- and -

DYNEX PETROLEUM LTD., ALBERTA ENERGY COMPANY LTD., ARDMORE INVESTMENTS LTD., TRANSCANADA PIPELINES LTD., AMOCO CANADA PETROLEUM LTD., ATCOR LTD., CRESTAR ENERGY INC., DANA DISTRIBUTORS LTD., VIMYVIEW LTD., COL-SYB HOLDINGS LTD., HEXAM HOLDINGS LTD., DAVIDS INVESTMENTS LTD., EDWARD W. HADWAY, ESTATE OF HARRY VEINER, VICTOR SOPKIW, NANCY OIL & GAS LTD., STANILOFF OIL & GAS LTD., CORY OILS LTD., DORAN INVESTMENTS LTD., ENCOR ENERGY CORPORATION INC., EPIC RESOURCES LTD., KIRRIEMUIR RESOURCES LTD., MERIDIAN OIL INC., NORTH CANADIAN OILS LIMITED, ODESSA NATURAL CORPORATION, PRECAMBRIAN SHIELD RESOURCES LIMITED, STAR OIL AND GAS LTD., SUNCOR INC., EARL GORDON, ANTELOPE LAND SERVES LTD., BRANNIGAN RESOURCES CANADA (1992) LTD., JIM BRUCE CONSULTANTS, SASKATCHEWAN OIL AND GAS CORPORATION, SASK OIL RESOURCES INC., LANDSEA OIL & GAS LTD., INTENSITY RESOURCES LTD., DEANE ENTERPRISES LTD., SHELL CANADA RESOURCES LTD., CHANNEL LAKE PETROLEUM LTD., AND ENRON OIL CANADA LTD.

Defendants not
party to the Appeal

AND BETWEEN:
Appeal #16536

BANK OF MONTREAL

Appellant
(Plaintiff)

- and -

MERIDIAN OIL INC., ODESSA NATURAL CORPORATION, ENCHANT RESOURCES LTD., and D.S. WILLNESS

(Respondents)
Defendants

- and -

DYNEX PETROLEUM LTD., ALBERTA ENERGY COMPANY LTD., ARDMORE INVESTMENTS LTD., TRANSCANADA PIPELINES LTD., AMOCO CANADA PETROLEUM LTD., ATCOR LTD., CRESTAR ENERGY INC., DANA DISTRIBUTORS LTD., VIMYVIEW LTD., COL-SYB HOLDINGS LTD., HEXAM HOLDINGS LTD., DAVIDS INVESTMENTS LTD., EDWARD W. HADWAY, ESTATE OF HARRY VEINER, VICTOR SOPKIW, NANCY OIL & GAS LTD., STANILOFF OIL & GAS LTD., CORY OILS LTD., DORAN INVESTMENTS LTD., ENCOR ENERGY CORPORATION INC., EPIC RESOURCES LTD., KIRRIEMUIR RESOURCES LTD., NORTH CANADIAN OILS LIMITED, PRECAMBRIAN SHIELD RESOURCES LIMITED, STAR OIL AND GAS LTD., SUNCOR INC., EARL GORDON, ANTELOPE LAND SERVICES LTD., BRANNIGAN RESOURCES CANADA (1992) LTD., JIM BRUCE CONSULTANTS, SASKATCHEWAN OIL AND GAS CORPORATION, SASK OIL RESOURCES INC., LANDSEA OIL & GAS LTD., INTENSITY RESOURCES LTD., DEANE ENTERPRISES LTD., SHELL CANADA RESOURCES LTD., ENRON OIL CANADA LTD. and CHANNEL LAKE PETROLEUM LTD.

Defendants

AND BETWEEN:
Appeal #17211

BANK OF MONTREAL

Appellant
(Plaintiff)

- and -

MERIDIAN OIL INC., ODESSA NATURAL CORPORATION, ENCHANT RESOURCES LTD., and D.S. WILLNESS

(Respondents)
Defendants

- and -

DYNEX PETROLEUM LTD., ALBERTA ENERGY COMPANY LTD., ARDMORE INVESTMENTS LTD., TRANSCANADA PIPELINES LTD., AMOCO CANADA PETROLEUM LTD., ATCOR LTD., CRESTAR ENERGY INC., DANA DISTRIBUTORS LTD., VIMYVIEW LTD., COL-SYB HOLDINGS LTD., HEXAM HOLDINGS LTD., DAVIDS INVESTMENTS LTD., EDWARD W. HADWAY, ESTATE OF HARRY VEINER, VICTOR SOPKIW, NANCY OIL & GAS LTD., STANILOFF OIL & GAS LTD., CORY OILS LTD., DORAN INVESTMENTS LTD., ENCOR ENERGY CORPORATION INC., EPIC RESOURCES LTD., KIRRIEMUIR RESOURCES LTD., NORTH CANADIAN OILS LIMITED, PRECAMBRIAN SHIELD RESOURCES LIMITED, STAR OIL AND GAS LTD., SUNCOR INC., EARL GORDON, ANTELOPE LAND SERVICES LTD., BRANNIGAN RESOURCES CANADA (1992) LTD., JIM BRUCE CONSULTANTS, SASKATCHEWAN OIL AND GAS CORPORATION, SASK OIL RESOURCES INC., LANDSEA OIL & GAS LTD., INTENSITY RESOURCES LTD., DEANE ENTERPRISES LTD., SHELL CANADA RESOURCES LTD., ENRON OIL CANADA LTD. and CHANNEL LAKE PETROLEUM LTD.

Defendants
(Not Parties to this Appeal)

APPEAL FROM ORDERS OF
THE HONOURABLE MR. JUSTICE ROOKE
DATED DECEMBER 21, 1995 AND APRIL 4, 1997

REASONS FOR JUDGMENT

COUNSEL:

G. S. Griffiths, Q.C.
R. B. Jones
For the Bank of Montreal

J. C. Crawford, Q.C.
For the Enchant Resources Ltd. and D. S. Willness

R. C. Dixon
For Ernst & Young Inc, Trustee in Bankruptcy of Dynex Petroleum Ltd.

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interest);

(2) clause 3 and the language of grant in clause 1 indicated that it was the intention of the parties that the royalty be an interest in land;

(3) if it was a necessary condition of an interest in land that it also grant operating rights, clause 7 indicated that these rights might have been an incident of the grant and had been relinquished.

[73] The approach of both Matheson J. in *Canco* and Hunt J. in *Scurry-Rainbow* was to examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words. Matheson J. stated at p. 47:

> . . . the principal questions are whether Farmers Mutual was capable of granting an interest in the lands and whether it intended to do so and whether it accomplished that intention. As owner of a designated interest in mines and minerals in fee simple, Farmers Mutual clearly possessed an interest in the lands, and the wording of the Royalty Agreement permits of no other conclusion but that Farmers Mutual intended that the grant of the 3% gross royalty should constitute an interest in the lands. The fact that Farmers Mutual did not utilize all of the wording, or type of wording considered by some persons as perhaps essential, can surely not detract from an otherwise clearly manifested intention to create an interest in the lands.

And according to Hunt J. in *Scurry-Rainbow*, *supra*, at p. 474:

> There is in my view an unreality about placing too heavy an emphasis upon fine distinctions as the selection of words such as "in" rather than "on". Notwithstanding the significance that the courts have sometimes attached to these word choices, I doubt that parties who signed leases . . . should be taken to have intended to create an interest in land as opposed to a contractual right, as a result of such minuscule differences in language. . . . Rather, it is more appropriate to consider the substance of the transaction (namely, what were the parties actually trying to achieve?) and to regard the words they have used from that perspective.

United States Authorities

[74] No U. S. authorities on overriding royalties were provided by the parties. American case law, however, can be useful when considering issues not previously decided in Canada, particularly, in the context of oil and gas. However, as noted by Fruman J. (as she then was) in *Anderson* v. *Amoco*, *supra* at p. 41:

> American case law must be read with care. Unlike Canada, many U. S. states have adopted theories of ownership. Cases decided in one state may not apply in others because they differ in their classification of the interests landowners hold

TAB 12

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership,* 2014 BCSC 945

Date: 20140529
Docket: S117898
Registry: Vancouver

Between:

Barafield Realty Ltd. and Bristol Investments Ltd.

Plaintiffs

And

Just Energy (B.C.) Limited Partnership [formerly ES (BC) Limited Partnership], dba Energy Savings B.C. and in its capacity as successor to CEG Energy Options Inc., and the same Just Energy (B.C.) Limited Partnership

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page on June 2, 2014

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for Plaintiffs:	D. Dalke M. Hamata
Counsel for Defendants:	J. McLean J. Ensom
Place and Date of Trial:	Vancouver, B.C. March 10 - 14, 2014
Place and Date of Judgment:	Vancouver, B.C. May 29, 2014

CCAA. The intent of any stay of proceedings, in the context of a re-organization under the *CCAA* would be to allow the re-organization to proceed expeditiously without the distraction and uncertainty caused by ongoing or potential litigation related to the debtor company. The test to determine whether a court should authorize the assignment of an agreement notwithstanding a contrary provision or an insolvency default provision is whether such an order is "important to the reorganization process": *Nexient* at para. 56. Care must be taken to ensure that the third party rights would not be adversely affected beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition: *Nexient* at para. 59.

[108] In *Nexient*, the court found that it was not an appropriate case for the court to exercise its discretion to permanently stay the third party contractor's right to terminate the contract on insolvency. Staying the third party contractor's rights would not further the purpose of the *CCAA* by helping to reorganize or restructure the company in any way, given that the sale transaction with the purchaser had already completed and could not be unwound: *Nexient* at para. 83. On the other hand, the order would adversely affect the third party's contractual rights under the agreement. These reasons apply equally to the instant case.

[109] In order to eliminate this type of provision, there must be evidence that the sale was intended (by the third party, insolvent party and purchasing party) to take place only with a permanent stay of the right to terminate. There was no evidence that, upon entering the sale process, Nexient (the insolvent party) and Global (the purchasing party) intended an assignment on the basis of a permanent stay preventing ESI (the third party with contractual rights) from terminating the agreement: *Nexient* at paras. 85-90. The structure of the settlement and other transactions contradicted this idea. In the instant case, as previously noted, there is clear evidence that the defendant hoped for a stay, but acknowledged that the plaintiffs had this right to terminate and chose to take the risk not to notify them.

TAB 13

Court of Queen's Bench of Alberta

Citation: Bellatrix Exploration Ltd (Re), 2020 ABQB 332

Date: 20200521
Docket: 1901 13767
Registry: Calgary

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

And In the Matter of the Plan of Compromise or Arrangement of Bellatrix Exploration Ltd.

Reasons for Judgment of the Honourable Madam Justice M.H. Hollins

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[1] Bellatrix Exploration Ltd. is an oil and gas company involved in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36 (*CCAA*). It has been soliciting offers to purchase its assets or shares over approximately the last six months. On Thursday, May 7, 2020, I heard Bellatrix' application for an Order approving the Asset Purchase Agreement it signed with Winslow Resources Inc. on April 22, 2020. Winslow's offer was backed by its parent company, Return Energy Inc. doing business as Spartan Delta Corp. For consistency with other material filed in this Action, that purchaser is referred to herein as Spartan.

[2] The Spartan Asset Purchase Agreement, if approved, would produce sufficient funds to pay the *CCAA* priority charges and a substantial portion of the first lienholder notes, as well as providing for the assumption of other contractual and statutory obligations. It would not be sufficient to pay the entire first lienholder debt and would leave nothing for the second or third lien note holders.

[3] The application to approve was opposed by a group of creditors holding the majority of the second lien notes of Bellatrix, namely FS/EIG Advisor LLC and FS/KKR Advisor LC (EIG/KKR), as well as the remaining minority of second lien noteholders, separately represented.

[24] It appears that EIG/KKR thought they would have more time and more opportunity to finalize a competing proposal than what was afforded to them. They pointed out, legitimately, that the COVID pandemic has created logistical challenges and has introduced even more uncertainty into financial markets, making it more difficult to get the Westbrick bid in a final form.

[25] Bellatrix, along with all the other parties backing the Spartan Bid, argued that EIG/KKR had had more than ample time to negotiate the financing for a Binding Bid, having known from October of last year that they could end up needing to put a competing offer forward. More importantly, as of March 10, 2020, EIG/KKR knew unequivocally that the only offer in play was going to see them receive no recovery on their debt at all. From that point, if not before, it was incumbent on them to move quickly, presumably building on work done beforehand, to finalize their competing bid.

[26] They were unable to do this. I accept that the COVID pandemic, which was narrowly preceded by a severe and historic drop in the commodity prices for oil, made it very difficult to secure the missing financial and operational commitments. However, it is equally obvious that these factors may continue to affect market conditions negatively for some unknown period of time. Indeed, the uncertainty around the likely duration of these negative market forces is the reason given by the Bellatrix Board of Directors for approving the Spartan Bid. While the Spartan Bid is not ideal – certainly not for Bellatrix' creditors – it does allow the transfer of the company as a going concern to a bidder who had its financing secured and was ready to close on time, removing as much uncertainty around this transaction as possible. It is the proverbial bird in hand.

[27] This Court has discretion to allow or deny requests for adjournment of proceedings before it. However, that discretion, as all judicial discretion, must be exercised with a view to the fairness of the proceedings to all parties. The impact of denying EIG/KKR's adjournment application is devastating to them and to the investors they represent. However, putting the *CCAA* proceedings on hold for the next few weeks carries it owns costs and risks to the other participating parties.

[28] Spartan, as the successful bidder, was not shy about arguing the unfairness inherent in a process that imposed a number of conditions and deadlines on bidders, all of which it met in order to make a firm financial commitment in the midst of a difficult and uncertain market, only to be forced to unilaterally leave its offer on the table while a competing offer is further developed.

[29] Certainly, there is more than ample jurisprudence for considering the integrity of the process itself in this analysis; ***Re Grant Forest Products Inc*** 2010 ONSC 1846 at paras.28-33. In ***Royal Bank v Soundair Corp***, 1991 Carswell Ont 205 at para. 22, the Ontario Court of Appeal adopted the caution of the Nova Scotia Court of Appeal in ***Cameron v Bank of Nova Scotia***, (1981) 38 CBR (NS) 1 at p.11:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

assets for sale had been done prior to the court order. BMO was appointed as the Sale Advisor to assist Bellatrix in soliciting and developing potential bids. The process was to be overseen by the Monitor, as appointed in the Initial Order.

[39] The first phase, as mentioned, was just over one month. The deadline for binding bids in Phase II was not included in the SISP or in the SISP Order but was to be set by Bellatrix with the Monitor's consent.

[40] The process as envisioned was reasonable. It was also designed to be efficient; ***Soundair*** at para.16. Bellatrix set the deadline for binding bids at January 13, 2020 and then extended that deadline to February 7, 2020. There was no suggestion that this information was not communicated in a proper and timely way. The period of time between October 9, 2019 and February 7, 2020 was short enough to protect the value of the company assets for sale and long enough to provide Bellatrix with a good look at the market prospects, as discussed *infra*.

[41] Not only was there no dispute about the reasonability of the SISP before me, there had been no dispute about the final form of the SISP before the issuing Justice on October 9, 2019. As is often the case, the parties had negotiated their own concessions which were represented in that Order. Indeed, even EIG/KKR made the point that they had negotiated certain concessions in the form of the SISP before it was approved by the Court.

[42] I will also address the implementation of the sales process at this juncture, although I realize that is often done separately from a review of the mechanics of the process itself. The relevant cases make it clear, and it is completely intuitive, that the process must not only be designed to be fair but must be fairly implemented.

[43] EIG/KKR complained of a number of developments they felt were unfair; that they provided the necessary interim financing in order to protect their interests and then were "cut out" of the final bidding, that the First Lien Lenders opted to finance the Spartan Bid even though EIG/KKR had approached them first) and that EIG/KKR had made it known throughout the sales process that they might wish to put in a credit bid if whatever offer(s) came out of the SISP did not provide for recovery for the second lien noteholders.

[44] While it is true that EIG/KKR did provide the interim financing without which Bellatrix would not have had the opportunity to look for a purchaser under the protection of the *CCAA*, it is equally true that EIG/KKR's *quid pro quo* for doing so are the fees and interest payments they will receive in a priority position. It should not be treated as consideration for a strategic advantage to a credit bidder, at least not beyond what was negotiated in the SISP.

[45] The First Lien Lenders chose to back the Spartan Bid, even though that offer meant that the first lien debt advanced by that syndicate would not be paid out to those noteholders in full. It did so knowing that EIG/KKR was working on an alternative that would, if successful, see a more full recovery. It is safe to infer that the certainty of the Spartan Bid outweighed the possibility of increased recovery under a much less certain scenario.

[46] The Bellatrix Affidavit filed for this application also indicated that the Monitor had been notified at some prior point in time that Spartan might received confidential information that it ought not to have had. The Monitor investigated and determined that this had not affected the process or provided any advantage to Spartan as a bidder. Given what little information I had about this information and its source, combined with the fact that it was not much pursued in

argument, I am similarly convinced that it evidences no impropriety that has affected the sales process or the result.

B. Whether the Monitor approved of the SISP

[47] The Monitor supported the Court's approval of the SISP at the October 9, 2019 application.

C. Whether the Monitor Supports the Proposed Sale

[48] The Monitor supports the proposed sale of the Bellatrix assets to Spartan for the reasons set out in its Sixth Report. Those reasons included the experience of BMO as the Sale Advisor, the interest expressed in the Bellatrix assets from industry participants, the time taken to market the assets and its own experience in overseeing sales processes similar to this one. The Monitor's opinion was that the process was fair and open. While the Monitor, among others, engaged in ongoing discussions with EIG/KKR, those discussions did not culminate in a binding bid from EIG/KKR or any credit bidder.

[49] Because the Monitor is assumed to be independent and experienced, the Court is entitled to rely on the opinion of the Monitor, albeit not blindly. As quoted in ***Soundair*** at paragraph 21:

> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role of the Receiver both in the perception of receiver and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers; ***Crown Trust Co v Rosenberg*** (1986), 60 OR (2d) 87 at p.112

[50] In my view, the Monitor has discharged its duties to this point and its recommendation that the Spartan Asset Purchase Agreement be approved is entitled to due consideration.

D. The Extent to which the Company's Creditors were Consulted

[51] The Monitor's Report and the Affidavit of Mark Caiger of BMO outline the consultations undertaken with the various groups of creditors. EIG/KKR argued that they were not properly consulted because they were not provided with a copy of the final Spartan Asset Purchase Agreement, either as proposed or as signed. They say this was in contravention of Clause 7 of the SISP, which entitled them to receive further, detailed information about a competing third-party bid "in a form satisfactory to Bellatrix and the Monitor, more detailed information in respect of any such Binding Bid, including copies of the Binding Bid and any definitive agreement(s) in connection therewith" (Clause 7, SISP).

[52] However, a careful reading of that paragraph shows that the Monitor and BMO expressly retained the ability to vet information given to any credit bidder. While no particularly satisfactory explanation was provided to me as to why that document was not provided to EIG/KKR, I cannot conclude that EIG/KKR suffered any disadvantage as a result.

[53] In ***Soundair***, the unsuccessful bidder complained it was not given needed information, specifically an offering memorandum. However, the Court found the bidder was not prejudiced by that decision of the Receiver, rather its offer was rejected because it contained a condition

unacceptable to the Receiver; ***Soundair*** at paras.50-57. Similarly, the provision of the Spartan Asset Purchase Agreement itself was not necessary for EIG/KKR to get the financing in place that it was missing.

[54] The most important thing for EIG/KKR to know as creditors and potential competing bidders was the information given to them on March 10, 2020; that the only offer left was one that would be insufficient to pay anything beyond a portion of the first lien noteholders. Their real complaint is that the SISP afforded them no set period of time in which to finalize their bid and that Bellatrix, the Monitor and BMO should have put Spartan on ice to afford EIG/KKR an adequate and mutually-communicated/accepted period of time in which to finalize their competing bid.

[55] While I understand why EIG/KKR would be unhappy about the way things unfolded, I cannot conclude that the process was unfair to them. The SISP, which they negotiated with Bellatrix and others, did not provide that cushion of time – it only said that credit bids could be submitted after third party bids. The SISP further reserved to BMO and the Monitor the "sole discretion" to decide whether the financing arrangements for any credit bid were satisfactory.

[56] When the Bellatrix Board of Directors considered the Spartan offer on April 20, 2020, it opted to lock Spartan in by signing the Asset Purchase Agreement. EIG/KKR was not in a position at that time to give the Board any other viable options, nor had that changed appreciably by the time of this application.

[57] Service of Bellatrix' application and supporting Affidavit was effected on April 27, 2020 although the date for the hearing was not set or communicated until April 30, 2020. There was almost two weeks between service of the application and the return date of the motion. EIG/KKR certainly moved quickly within that time to put together their own Affidavit and to provide written confirmation of CIBC's interest. However, it was not the timing of the motion that was problematic, it was the failure of EIG/KKR to advance a firm competing offer before that; if not after March 10, 2020 then after April 23, 2020 when they learned more specifics of the Spartan transaction from the public announcement.

E. The Effects of the Proposed Sale on Creditors and Other Stakeholders

[58] While this Court is to consider the effect of the proposed sale on all stakeholders, the primary stakeholders are obviously the company's creditors. They have financed the company to their detriment and now hold compromised security for those debts. They have only the process itself to assist them.

[59] The Spartan Bid will see the first lien noteholders paid a portion of their outstanding debt but not all. The second and third lien noteholders will receive nothing. While some of the earlier non-binding bids would have been sufficient to pay the first lien debt in full plus some of the second lien debt, making the second lien noteholders the fulcrum creditors, that shifted over time to the point where the only certain offer on the table no longer covered the first lien noteholders. As I understand the Monitor's argument, that meant that the first lien noteholders became the fulcrum creditors and thus their preferences took on more importance.

[60] Assuming that I am understanding the meaning of the term correctly, I accept the Monitor's submissions. That does not absolve the Monitor nor the Bellatrix Board from consideration of other creditors, nor was that suggested; ***Soundair*** at para.21. Rather, it was

argued that the Bellatrix Board, with assistance from BMO and the Monitor, did consider the effect on these stakeholders before accepting the Spartan Bid.

[61] The Spartan Asset Purchase Agreement obligates Spartan to assume the obligations and liabilities, except relating to excluded assets. This will include environmental liabilities, as well as employment, regulatory and contractual obligations. The parties represented at the approval hearing included various contracting parties and regulators, all of whom supported the Spartan Bid. While they cannot be assumed to be overly concerned about which of Bellatrix' creditors receive payment, it is important to remember that these other stakeholders do represent the beneficiaries of a sale of the company as a going concern. From an overarching economic view, keeping contracts intact and people employed is a significant and positive factor.

[62] It is axiomatic that considering someone's interests is not the same thing as satisfying those interests. I accept the submissions of Bellatrix, the Monitor, BMO and the other parties supporting the Spartan bid that the interests of all parties and particularly the creditors were considered. The weighing of these competing interests and the ultimate decision by the Board to accept the Spartan bid are discussed below.

F. Is the Sale Price Fair and Reasonable?

[63] For EIG/KKR, the price on the proposed sale does not seem fair or reasonable because it believes that, given more time, it could present an offer to purchase the Bellatrix assets for much more that Spartan has offered. As I said in my brief oral decision, if the Westbrick offer had included committed financing, was unconditional and irrevocable and for a much higher price, that may have changed the assessment of the Spartan bid. Where a substantially higher bid turns up at the approval stage, it may indicate that all reasonable attempts to get the best offer were not made; ***Soundair*** at para. 28 quoting from ***Re Beauty Counsellors of Canada Ltd***., (1986), 58 CBR (NS) 237 (Ont. SC).

[64] However, the Westbrick offer cannot be said to be truly comparable to the Spartan Bid because of its outstanding conditions. The Bellatrix Board of Directors, the first lien noteholders and all the independent advisors to the company recommended a lower but certain offer over a higher but uncertain offer. The Board of Directors, who have statutory and common law fiduciary obligations to act in the best interests of the company as a whole, considered their options and chose this proposal. In fact, they committed to the sale in order to make sure that the one Binding Bid they did have did not disappear before this application could be heard and decided. The exercise of their business judgment deserves a measure of deference.

[65] The directors were assisted, as was Bellatrix and as is this Court, by an independent Monitor and an independent Sale Advisor, both of whom were working to find an arrangement that would benefit the entire economic community, with focus on the creditors. Bellatrix received six conditional non-binding offers during Phase II but no binding bids, plus two additional non-binding bids after February 6, 2020. Bellatrix, BMO and the Monitor then continued to work with all these bidders and with EIG/KKR to try and convert non-binding bids into binding bids.

[66] I am satisfied that the sufficient efforts were made to find the best possible price. While it will satisfy only a small portion of the company's entire debt, it is still the only unconditional offer in play, notwithstanding the time anticipated by the SISP plus the additional time since

TAB 14

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

Indexed as: Century Services Inc. *v.* Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

Répertorié : Century Services Inc. *c.* Canada (Procureur général)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> 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.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

TAB 15

WHEN INSOLVENCY AND RESTRUCTURING LAW SUPERCEDES CONTRACT

DON GREENFIELD,* PAT MAGUIRE,**
DAVID SPENCER,*** AND KEN LENZ****

The impact of counterparty insolvency on contracts has become an area of concern for those in the energy industry. The Bankruptcy and Insolvency Act, Companies' Creditors Arrangement Act, *Alberta* Business Corporations Act, *and* Canada Business Corporations Act *are all statutes that override or diminish strict contractual rights. This article examines six ways in which these pieces of legislation accomplish this: (1) restructuring proceedings; (2) stays of proceedings; (3) replacement and default clauses; (4) disclaimers of contracts; (5) assignment of contracts without the consent of the solvent counterparty; and (6) plans of arrangement. Public policy considerations support this legal framework, but it has a significant impact on the solvent party when trying to achieve restructuring or insolvency objectives and preserving legitimate bargains. Therefore, it is crucial for energy law practitioners to understand these policy considerations and this area of law to be able to properly advise clients of the inherent risks and options available.*

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I. INTRODUCTION

The goal of bankruptcy pursuant to the *Bankruptcy and Insolvency Act*[1] is to enable fair and orderly distribution of an insolvent person's property amongst that person's creditors.[2] The *Companies' Creditors Arrangement Act*[3] aims to provide a means for companies to reorganize their affairs and continue to operate as a going concern. The plan of arrangement provisions in the Alberta *Business Corporations Act*[4] and the *Canada Business Corporations Act*[5] are intended to force resolutions to certain corporate challenges that are impractical to resolve otherwise. All of these statutes overrule or otherwise diminish strict contractual rights, often to the surprise of corporate counsel. This article sets out some of the common ways this is accomplished within the framework of the statutes.

There are six sections to this article: (1) Restructuring Proceedings, which offers a high-level view of the legal frameworks available to restructure an insolvent business; (2) Stay of Proceedings, which discusses various elements related to how stays of proceedings function; (3) Replacement and Default Clauses, which discusses how these clauses operate in the context of insolvency proceedings; (4) Disclaimer of Contracts, which discusses companies' rights to disclaim contracts in the context of insolvency proceedings; (5) Assignment of Contracts Without the Consent of the Solvent Counterparty, which discusses companies' rights to assign contracts in the context of insolvency proceedings; and (6) The Power of a Plan, which discusses the use of the plan of arrangement sections found in corporate law statues in Canada to avoid certain contractual provisions. Generally, this article reveals how contractual rights are often secondary to the larger policy goals of insolvency and reorganization legislation, which are to maximize realization or the likelihood that a company will continue to operate as a going concern with all of the economic, social, and policy benefits that entails.

These policy considerations find contract law bending to insolvency and restructuring legislation in a number of respects material to the energy law practitioner. At the most fundamental legal level, the provisions of the *BIA* and the *CCAA* take precedence over contractual rights because they fall within federal jurisdiction pursuant to sections 91 and 92 of the *Constitution Act, 1867*.[6] A most basic constitutional principle in Canada is that legislation affecting areas of provincial responsibility must, in the event of a conflict, give way to legislation in areas of federal responsibility.[7] Contract law, which falls into the broad category of the provincial areas of property and civil rights, is unenforceable to the extent that there is a conflict with federal insolvency legislation.[8]

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1 RSC 1985, c B-3 [*BIA*].
2 Geoffrey H Dabbs, "General Overview of Bankruptcy and Insolvency Law" (2011) Continuing Legal Education Society of British Columbia Working Paper No 1.1 at 3, online: <https://www.cle.bc.ca/PracticePoints/BUS/11-GeneralOverview.pdf>.
3 RSC 1985, c C-36 [*CCAA*].
4 RSA 2000, c B-9 [*ABCA*].
5 RSC 1985, c C-44 [*CBCA*].
6 (UK), 30 & 31 Vict, c 3, ss 91–92, reprinted in RSC 1985, Appendix II, No 5.
7 This principle is otherwise known as the doctrine of paramountcy. As Justice Major explained in *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13, [2005] 1 SCR 188 at para 11, "[t]he doctrine of federal legislative paramountcy dictates that where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency."
8 *Redwater Energy Corporation (Re)*, 2016 ABQB 278, [2016] 11 WWR 716 at paras 95, 183.

Before turning to the larger concepts that affect contractual rights, it is useful to point out that certain commonly used contractual clauses are usually not enforceable: namely, clauses that make bankruptcy or insolvency a default under a contract. This has long been the law but was recently codified in the *BIA*, section 84.2(1):

> 84.2(1) **Certain rights limited** — No person may terminate or amend — or claim an accelerated payment or forfeiture of the term under — any agreement, including a security agreement, with a bankrupt individual by reason only of the individual's bankruptcy or insolvency.[9]

While there are some exceptions to this rule contained in further subparagraphs of this section of the *BIA*, a more important point is that the rule is actually of broader application, since virtually every insolvency proceeding involves a stay of any action enforcing rights based on an insolvency default.

II. RESTRUCTURING PROCEEDINGS GENERALLY

A. THE *BANKRUPTCY AND INSOLVENCY ACT*: RECEIVERSHIP, BANKRUPTCY, AND PROPOSALS

There are three primary procedures under the *BIA*. The first two are creditor controlled: receivership and bankruptcy; the third is the proposal procedure, which is debtor controlled. The goal of bankruptcy and receivership is to liquidate the assets of an insolvent person or company and to maximize the return to creditors. In furtherance of this goal, receivers or trustees are given a number of powers to terminate or perform contracts, renegotiate terms, sell assets, and perform other functions.

The third procedure is the *BIA* proposal provisions,[10] which allow a debtor to make a proposal to creditors that is voted on and either approved or disapproved, similar to the *CCAA*. If a proposal is approved by the required majority in number and two thirds in value,[11] it becomes a legally binding contract between the debtor and all its creditors. If a proposal is not approved, the debtor is declared bankrupt and a trustee is appointed who oversees the liquidation of its assets.[12]

B. THE *COMPANIES' CREDITORS ARRANGEMENT ACT*: PLAN OF ARRANGEMENT

The *CCAA* allows an insolvent company to propose a plan of arrangement to creditors to restructure its affairs, ultimately with a view to carrying on as a going concern. There are a number of key differences between *BIA* proposals and plans of arrangement under the *CCAA*, including the scale and the flexibility afforded by each. The *CCAA* can only be used by companies with more than $5 million of outstanding debt;[13] it is intended to be used for larger-scale reorganizations. However, the *CCAA* allows greater flexibility regarding dealing

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9 *BIA*, *supra* note 1, s 84.2(1).
10 *Ibid*, Part III.
11 *Ibid*, s 54(2)(d).
12 *Ibid*, s 57.
13 *CCAA*, *supra* note 3, s 3(1).

with complex corporate structures or contractual arrangements. If a *CCAA* plan is not approved, then typically a secured creditor would apply for an order lifting the stay of proceedings so that they may realize upon their security. However, that is not automatic as it would be in a *BIA* proposal, and sometimes a second plan is put forth and is successful.

C. THE BUSINESS CORPORATIONS LEGISLATION: PLAN OF ARRANGEMENT

Insolvency legislation is not the only legal framework available to reorganize a corporation. In some instances, the reorganization and arrangement provisions of the relevant business corporations legislation may serve as a useful alternative. A simple exchange of securities under the *ABCA*, for example, whereby creditors receive new securities in exchange for existing debt, may accomplish what is needed to return the company to a financially viable position, though there is some doubt about whether this can be accomplished under the *ABCA* except in conjunction with a federal statute.[14]

III. STAY OF PROCEEDINGS

In almost every formal insolvency proceeding, the court grants an order preventing or staying proceedings against the debtor company. The purpose of the stay is, in the case of receivership or bankruptcy, to allow an orderly disposition of assets. In the case of a *BIA* proposal or *CCAA* proceedings, the purpose of the stay is to allow the company time to prepare a proposal or a plan of arrangement without the day-to-day pressure of creditor demands. The scope of the stay is the critical issue and will determine what rights can be enforced. Unfortunately, receivership, *BIA* proposal proceedings, and *CCAA* proceedings have different language for the stay, and while they are broadly similar, reference needs to be made in each case to the applicable provisions. It is also worth noting that stays of proceedings have been granted under *CBCA* proceedings.[15] However, the scope of a stay is arguably limited to situations where it is not required to preserve solvency, as set out by Justice Jones in the recent decision of *9171665 Canada Ltd. (Re)*.[16]

A. *BANKRUPTCY AND INSOLVENCY ACT*

Under section 69(1) of the *BIA*, a stay of proceedings begins as soon as a debtor either files a notice of intention with the official receiver or files a proposal with a trustee with the Office of the Superintendent of Bankruptcy.[17] This stay binds both secured and unsecured creditors. The first stay of proceedings is triggered by filing a notice of intention and lasts for a period of 30 days; it may be extended in 45-day increments for a maximum period of six months.[18] A further stay of proceedings is triggered upon the filing of a proposal, and

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14 Frank R Foran & Terrence M Warner, "Reorganizing the Insolvent Oil and Gas Corporation: The Courts and Fairness" (1990) 28:1 Alta L Rev 132 at 133.

15 See *45133541 Canada inc (Arrangement relatif à)*, 2009 QCCS 6444, 2009 QCCS 6444 (CanLII); *8440522 Canada Inc (Re)*, 2013 ONSC 2509, 16 BLR (5th) 33; *Essar Steel Canada Inc (Re)*, 2014 ONSC 4285, 2014 ONSC 4285 (CanLII).

16 2015 ABQB 633, 617 AR 30 [*Connacher*].

17 *BIA*, *supra* note 1.

18 *Ibid*, ss 50.4(8)–(9).

continues until the proposal succeeds and the trustee is discharged or the proposal fails and the debtor becomes bankrupt.

In a receivership, the stay of proceedings is set out in a template receivership order. The Alberta template order provides in paragraphs 8 and 9:

> **NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY**
>
> 8. No *proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed* and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 8; and (ii) affect a Regulatory Body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "Regulatory Body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.
>
> **NO EXERCISE OF RIGHTS OF REMEDIES**
>
> 9. *All rights and remedies* (including, without limitation, set-off rights) *against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court*, provided however … that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.[19]

The stay is broad and precludes any remedies under existing agreements. Counterparties must continue to provide goods or services in accordance with the existing agreements. The stay of proceedings is in place until the receiver completes its mandate, which is usually to sell assets of the insolvent entity and distribute the proceeds in accordance with the provincial priority scheme.

To lift a stay under the *BIA* or a receivership order, a creditor may apply to a court for a declaration that the stay of proceedings no longer applies to that creditor, or is lifted for a specific purpose. Typically, the applicant must convince the court that the stay causes the applicant undue hardship and that the applicant is likely to be significantly prejudiced, or provide some other equitable grounds.[20] There is a high bar to lift a stay of proceedings, but it is done in appropriate cases.

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19 Alberta Court of Queen's Bench, "Alberta Template Receivership Order" (2012) at paras 8–9, online: <https://albertacourts.ca/court-of-queens-bench/commercial-practice> [emphasis added].

20 *Canwest Global Communications Corp, Re* (2009), 59 CBR (5th) 72 (Ont Sup Ct J) at para 33.

B. *COMPANIES' CREDITORS ARRANGEMENT ACT*

As discussed earlier, to initiate proceedings under the *CCAA*, a company must be insolvent, or on the eve of insolvency, and must have outstanding liabilities of $5 million or more. The debtor company brings an initial order application for a stay of proceedings which the court grants for an initial 30 day period.[21] As with receivership, there is now a template order which provides in paragraphs 13–19 as follows:

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

13. Until and including **[DATE — MAX. 30 DAYS]**, 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 Applicant 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 Applicant 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 Applicant 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 Applicant to carry on any business which the Applicant is not lawfully entitled to carry on;

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

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

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

15. Nothing in this Order shall prevent any party from taking an action against the Applicant 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.

[21] *CCAA*, *supra* note 3, s 11.02(1).

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 Applicant, except with the written consent of the Applicant and the Monitor*, or leave of this Court.

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 Applicant*, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicant

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

NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT

18. Notwithstanding anything else contained in this Order, no creditor of the Applicant shall be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the 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 Applicant with respect to any claim against the directors or officers* that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect

> of the Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.[22]

Codified in the *CCAA* and set out in the standard order, a stay of proceedings under the *CCAA* cannot prohibit a person from requiring immediate payment for goods and services provided after the order is made (also known as post-filing claims) or require the further advance of money or credit.[23] Pre-filing claims are stayed and will be dealt with under a plan of arrangement or distribution of sales proceeds in the priority set out in the *CCAA,* the *BIA*, and other legislation. Set-off is specifically allowed under the provisions of the *BIA* and *CCAA* in respect of mutual obligations owed.[24] The court may grant extensions to the stay as it deems appropriate under the *CCAA*. Similar to the *BIA*, it is difficult to lift a stay under the *CCAA*, but the court will do so in appropriate cases of undue hardship, prejudice, or some other equitable ground.

1. MEANING OF PROCEEDINGS

The stay granted under the *CCAA* applies to "proceedings."[25] While the term "proceedings" is clearly broad enough to prevent the commencement of judicial or administrative remedies, the extent to which it restrains contractual rights is an interesting question that has received some judicial attention. The jurisprudence is clear that the term "proceeding" is meant to be interpreted broadly in order to maximize the ability of the court to prevent creditors from taking actions that will increase the financial stress on a debtor corporation while a plan of arrangement is being developed.[26] The court may restrain actions by parties who are not, strictly speaking, creditors of the debtor company.

In *Meridian Developments*, Justice Wachowich noted that "[t]o narrow the interpretation of 'proceeding' could lessen the ability of a court to restrain a creditor from acting to prejudice an eventual arrangement in the interim when other [creditors] are being consulted."[27] He added that in the absence of qualifying words after "proceeding," such as proceedings "which involve either a court or court official" or proceedings "before a court or tribunal," Parliament intended for "proceeding" to apply to more than legal proceedings.[28] Most significantly, in virtually every case, default provisions based on insolvency or bankruptcy are stayed and therefore unenforceable.

IV. REPLACEMENT AND DEFAULT CLAUSES

An example of the stay of proceedings applied to the oil and gas context arises in attempts to change the operator of an operation, upon the operator becoming insolvent. The Canadian Association of Petroleum Landmen (CAPL) industry standard operating procedure (currently

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22 Alberta Court of Queen's Bench, "Alberta Template CCAA Initial Order" (December 2012) at paras 13–19, online: <https://albertacourts.ca/court-of-queens-bench/commercial-practice> [emphasis added].
23 *CCAA*, *supra* note 3, s 11.01.
24 *Ibid*, s 21; *BIA*, *supra* note 1, s 97(3).
25 *CCAA*, *ibid*.
26 *Meridian Developments Inc v Toronto Dominion Bank* (1984), 11 DLR (4th) 576 at 584 (Alta QB) [*Meridian Developments*].
27 *Ibid*.
28 *Ibid*.

the *2015 CAPL Operating Procedure*)[29] provides that non-operators are allowed to immediately replace a bankrupt or insolvent operator as follows:

> The Parties acknowledge that the Operator's ability to fulfill its duties and obligations for the Parties' benefit is largely dependent on its ongoing financial viability and that the Operator may not seek relief at law, in equity or under the Regulations to prevent its replacement in accordance with this Subclause. The Operator will be replaced immediately after service of notice from any Non-Operator to the other Parties to such effect if:
>
> (a) the Operator becomes bankrupt or insolvent, commits or suffers any act of bankruptcy or insolvency, is placed in receivership or seeks debtor relief protection under applicable legislation (including the *Bankruptcy and Insolvency Act* (Canada) and the *Companies' Creditors Arrangement Act* (Canada)), and it will be deemed to be insolvent for this purpose if it is unable to pay its debts as they fall due in the usual course of business or if it does not have sufficient assets to satisfy its cumulative liabilities in full.[30]

The question is whether this is enforceable in the face of a stay of proceedings.

Historically, the law has been that leave of the court is required for a non-operator to invoke this clause against an insolvent operator under a stay of proceedings. This exact scenario was the subject of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* in 1988.[31] Norcen Energy Resources Ltd. (Norcen) was seeking to have Oakwood Petroleums Ltd. (Oakwood) removed as operator of certain oil and gas properties that Norcen had a working interest in. Norcen and Oakwood had an agreement, incorporating provisions of the 1981 CAPL joint operating agreement, which had provisions similar to those in the *2015 CAPL* for the replacement of the operator should the operator become insolvent. Oakwood had previously been granted a stay of proceedings under the *CCAA*, and Norcen argued that the Court had no jurisdiction to restrain Norcen's actions under this clause in its stay order.[32] It argued further that if section 11 of the *CCAA* could be interpreted that broadly, then it was unconstitutional in that it purported to affect contractual rights of third parties.[33] To Norcen's constitutional argument, Justice Forsyth responded:

> Accordingly, if promoting the continuance of insolvent companies is constitutionally valid as insolvency legislation, *it follows that a stay which happens to affect some non-creditors in pursuit of that end is valid.* Surely a necessary part of promoting the continuance of a company is to give that company some time to stop and gather its faculties without interference from affected parties for a brief period of time. In my opinion, *the distinction between creditors' contractual rights and the contractual rights of non-creditor third parties* that Norcen asks me to draw *is not a helpful one in these circumstances.* Continuance of a company involves more than consideration of creditor claims. For that reason, I am of the opinion that s. 11 of the C.C.A.A. can validly be used to interfere with some other contractual relationships in circumstances which threaten a company's existence.[34]

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29 Canadian Association of Petroleum Landmen, *2015 CAPL Operating Procedure* (Calgary: CAPL, 2015) online: <landman.ca/resources/forms-store/2015-capl-operating-procedure/> [*2015 CAPL*].
30 *Ibid*, s 2.02(A).
31 (1988), 63 Alta LR (2d) 361 (QB) [*Norcen Energy*].
32 *Ibid* at 366.
33 *Ibid*.
34 *Ibid* at 376 [emphasis added].

Similarly, default remedies for a party's failure to pay amounts to a counterparty in a typical oil and gas operating contract (for example, see section 5.05(B) of the *2015 CAPL*)[35] are likely not enforceable when the defaulting party is the subject of a stay of proceedings. This may be to the detriment of a minority owner who wants to bring about a change of operatorship against a resisting operator who is also the majority owner, "even where the operator is in persistent default under the terms of the agreement," and especially after the operator has declared itself insolvent.[36]

In 2016, the Alberta Court of Queen's Bench cast some doubt as to whether the law as set out in *Norcen Energy* applies in all cases. In *Bank of Montreal v. Bumper Development Corporation Ltd.*,[37] Eagle Energy Inc. (Eagle) and Bumper Development Corporation Ltd. (Bumper) were parties to a joint operating agreement with respect to certain wells and a battery facility. The joint operating agreement incorporated an earlier version of the *2015 CAPL*, with the identical immediate replacement clause. After Bumper filed under the *BIA*, a receiver was appointed over Bumper in order to protect and realize upon Bumper's assets and distribute the proceeds.[38] A stay of proceedings was in place to restrain all rights and remedies against Bumper.[39] The receiver conducted a sale of Bumper's Assets.[40] Both Eagle and Forent Energy Ltd. (Forent) submitted bids. In the interim, Eagle notified the receiver that it intended to assume operatorship and the parties had discussions regarding the terms of the sale. Prior to a bid being accepted, the receiver indicated to Eagle that it would not entertain any offer purporting to convey operatorship of Bumper's assets to anyone other than Eagle. The receiver later indicated to the Court that operatorship would not be part of any sale.[41]

Forent was the successful bidder and the receiver successfully applied for approval of the sale of Bumper's interest to Forent and for a vesting of the assets subject to later determination of Eagle's application to assume operatorship, which Forent opposed.[42] In the course of finding for Eagle, Justice Macleod wrote:

> Had Eagle pursued its right to be Operator at the time of the granting of the Receivership Order or soon thereafter, I can think of no reason why this Court would not have acceded to Eagle's request to lift the stay and grant a declaration with respect to both the wells and the Battery.
>
> The stay was granted incidental to the appointment of the Receiver to permit for orderly realization and distribution. Eagle's right to operate, however, arises under a contract which pre-dates the receivership. *Also, there is no reason to interfere with the contractual rights of Eagle which are not subject to the security of Bumper's creditors*.[43]

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35 *2015 CAPL*, *supra* note 29, cl 5.05(B).
36 Nigel Bankes, "Co-Ownership is a Messy Business (Even With an Operating Agreement)" (15 February 2009), *ABlawg* (blog), online: <ablawg.ca/2009/02/15/co-ownership-is-a-messy-business-even-with-an-operating-agreement/>.
37 2016 ABQB 363, 38 CBR (6th) 118.
38 *Ibid* at para 2.
39 *Ibid* at para 9.
40 *Ibid* at para 10.
41 *Ibid* at para 13.
42 *Ibid* at para 14.
43 *Ibid* at paras 18–19 [emphasis added].

Justice Macleod explicitly differentiated this case from *Norcen Energy*, highlighting that *Norcen Energy* dealt with section 11 of the *CCAA*, which gives broad powers to the court in situations where arrangements can be developed to save insolvent companies.[44] "Here, the issue is not Bumper's survival but the realization on its assets," wrote Justice Macleod.[45] To deprive Eagle of operatorship "would be tantamount to appropriating Eagle's right for the benefit of Bumper's creditors."[46] The Receiver and others were also directed to transmit all accounts and licences which were reasonably necessary for Eagle to assume operatorship.[47]

This case is of course of interest to lenders, as operatorship often has significant value, which a secured lender wants to preserve and realize upon in enforcement proceedings. But the case is equally important to others involved in joint ventures who often will want to replace an operator upon it being placed into receivership.

V. DISCLAIMER OF CONTRACTS

Another mechanism by which Canadian insolvency legislation can alter the contractual obligations of a debtor company to its creditors and non-creditors is through the disclaimer provisions of the *CCAA* and the *BIA*. Section 32(1) of the *CCAA* states:

> [A] debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.[48]

These provisions were enacted by Parliament in 2009 to codify the debtor's ability to disclaim contracts. They allow the debtor to terminate, or "disclaim" in insolvency parlance, contracts if such termination enhances value or facilitates the restructuring of the debtor company, despite some harm to the counterparties to the contract. If a disclaimer is approved, either by the monitor or by the court, the counterparty can make a claim in the insolvency proceeding for damages resulting from the disclaimer as an unsecured creditor.

Section 65.11(1) of the *BIA* provides substantially similar provisions for debtors who initiate proceedings under the *BIA* proposal provisions.[49] The process is also similar under both statutes. Once the debtor proposes to disclaim the contract, the monitor either grants or refuses consent. If the monitor approves, the disclaimer takes effect 30 days after the counterparties to the contract receive notice, unless a counterparty applies to the court to challenge the disclaimer. If the monitor does not approve, the debtor must, on notice to the monitor and counterparties, apply for court approval of the disclaimer.[50]

In deciding to approve a disclaimer, a court must consider the following factors: (a) whether the monitor approved the proposed disclaimer; (b) whether a disclaimer will enhance

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44 *Ibid* at para 20.
45 *Ibid*.
46 *Ibid* at para 23.
47 *Ibid* at para 27.
48 *CCAA*, *supra* note 3, s 32(1).
49 *BIA*, *supra* note 1, s 65.11(1).
50 *Ibid*, s 65.11; *CCAA*, *supra* note 3, s 32.

the prospects of a viable compromise or arrangement; and (c) whether a disclaimer will likely cause significant financial hardship to a counterparty to the agreement.[51] It is fair to say that these factors are strongly in favour of the ability to disclaim contracts. It will be rare that a disclaimer is not allowed, subject to certain cases where it is not permitted for policy or other reasons.

In the recent, unreported decision of *Credit Suisse AG v. Southern Pacific Resource Corp.*, the applicant, Altex Energy Ltd. (Altex) was a trade creditor of Southern Pacific Resource Corp. (Southern Pacific).[52] After Southern Pacific applied for a stay of proceedings under the *CCAA*, it issued a notice to disclaim a terminal construction and rail services agreement. The disclaimer was not opposed by any counterparty and Southern Pacific ceased using Altex's services at the date of the disclaimer. Altex argued in its application that it was entitled to payment for the 30 day period from the date of the notice of disclaimer. Southern Pacific said the disclaimer took immediate effect. Justice Romaine held that the counterparty to the disclaimed contract was not entitled to payment after the date of the disclaimer notice, arguably contrary to the plain wording of the section.[53]

For non-insolvency lawyers, the 8 March 2016 United States Bankruptcy Court decision of *Re Sabine Oil & Gas Corp.* created much concern.[54] In that case, the Court ruled that the bankrupt could terminate a midstream gathering agreement because the agreement did not create an interest in land. In the United States, as in Canada, agreements that create interests in land cannot be unilaterally terminated and run with the land notwithstanding bankruptcy. This has long been the law and is an important consideration when drafting many agreements, like rights of first refusal (ROFRs) or gross overriding royalties. ROFRs may be interests in land[55] and as a result, such an interest should not be terminable in an insolvency. Similarly, gross overriding (and similar) royalties may also be held to be interests in land and thus survive the royalty payor's insolvency.[56]

As a result of the resilience provided by an interest in land, parties may be tempted to "bankruptcy proof" their agreements by purporting to embed within them interests in land. There are a few challenges to this strategy. Notwithstanding the emphasis in *Dynex* of the parties' intention to create an interest in land, an express declaration of such intention is not necessarily sufficient to make it so.[57] As one celebrated author notes in his commentary to *Walter Energy Canada Holdings, Inc. (Re)*,[58] an insolvency case where a royalty was determined not to be an interest in land, determination of this intention "still requires assessment of the intentions of the parties *as revealed in the language used in the document and any relevant surrounding commercial circumstances*."[59]

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51 *CCAA*, *ibid*, s 32(4).
52 (28 October 2016), Calgary 1501-05908 (Alta QB).
53 *Ibid*.
54 550 BR 59 (NY Bankr 2016) [*Sabine*].
55 *Koppe v Garneau Lofts Inc*, 2008 ABQB 354, 455 AR 76; Paul M Perell, "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991) 70:1 Can Bar Rev 1.
56 *Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7, [2002] 1 SCR 146 [*Dynex*].
57 *Third Eye Capital Corp v Dianor Resources Inc*, 2016 ONSC 6086, 41 CBR (6th) 320.
58 2016 BCSC 1746, 39 CBR (6th) 292.
59 Nigel Bankes, "Pre-*Dynex* Royalty Agreements Continue to Spawn Interest in Land Litigation" (13 October 2016), *ABlawg* (blog), online: <https://ablawg.ca/2016/10/13/pre-dynex-royalty-agreements-continue-to-spawn-interest-in-land-litigation/> [emphasis added].

Interestingly however, the 2007 amendments to the *CCAA* explicitly indicate only that "a lease of real property or of an immovable if the company is the lessor" is not subject to disclaimer, instead of referencing interests in land.[60] That language is narrower than the historic prohibition of termination of interests in land. The authors could not locate case law considering this point, but suggest that the narrow language does not really affect the principle, which is based on the fact that one cannot undo a conveyance, as opposed to terminate a contract.

As relates to pipeline, processing, and other midstream agreements, the purported creation of an interest in land is often sought to be achieved by land dedication. While a full analysis of this issue is beyond the scope of this article, having regard for the 2007 amendments to the *CCAA*, *Sabine*, and the recent Canadian royalty cases, one might be concerned about relying on the purported creation of an interest in land in an effort to have a contract survive insolvency. A more conventional approach to credit support (that is, the prior registration of a security interest, land charge, or debenture) would seem to be the safer route where circumstances permit.

VI. ASSIGNMENT OF CONTRACTS WITHOUT THE CONSENT OF THE SOLVENT COUNTERPARTY

In 2007, the *BIA* was amended by the addition of section 84.1, which allows a court, upon being satisfied that certain prerequisites are met, to grant an order assigning the rights and obligations of the bankrupt under any agreement to a purchaser, even without the consent of the counterparty to the agreement.[61] An equivalent provision is in the *CCAA* under section 11.3.[62] Although it is not expressly stated in the statutes, both sections have been held to effectively override contractual provisions requiring consent, where the court considers the withholding of consent unreasonable.[63] This is not entirely new, as prior to these amendments, there were a number of cases, primarily dealing with selling valuable leases, where courts implied a reasonableness requirement into a consent provision, and did not allow a landlord to unreasonably withhold consent.[64]

In the insolvency context, a court's aim is to facilitate maximum value recovery for stakeholders, or preserve the entity as a going concern. Under the *BIA* and *CCAA*, courts in Canada will permit an assignment unless there are real and substantial concerns regarding the assignee or there is some other significant reason.[65] The policy reasons for allowing the assignment of contracts is the facilitation of the successful and expedient restructuring of a company's financial health or the orderly liquidation of its assets, depending on the circumstances.

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60 *CCAA*, *supra* note 3, s 32(9)(d).
61 *BIA*, *supra* note 1, s 84.1.
62 *CCAA*, *supra* note 3, s 11.3.
63 See e.g. *Ford Motor Company of Canada, Limited v Welcome Ford Sales Ltd*, 2011 ABCA 158, [2011] 8 WWR 221 at para 66 [*Ford*].
64 See e.g. *Hayes Forest Services Limited (Re)*, 2009 BCSC 1169, 57 CBR (5th) 52 [*Hayes Forest*].
65 Lloyd W Houlden, Geoffrey B Morawetz & Janis P Sarra, *The 2017 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2017) at 1362–63.

Under section 84.1(4) of the *BIA*, courts are to consider "(a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and (b) whether it is appropriate to assign the rights and obligations to that person."[66] Section 11.3(3) of the *CCAA* directs that the court also consider whether the monitor has given consent.[67] Both sections test the "appropriateness" of assigning the rights and obligations to that person and both consider whether the assignee is able to perform the obligations.

In determining the reasonableness of withholding consent to assignment, the question to be asked is whether a reasonable person would have withheld consent in the circumstances, taking account of the commercial realities of the marketplace, the economic impact of the assignment, and the financial position of the proposed assignee.[68] In most cases, it will be unreasonable to withhold consent, as the counterparty is usually better off with anyone other than an insolvent debtor counterparty.

While many assignments are permitted, the courts will also refuse if the assignment does not actually help the debtor and the prejudice is significant. In *Nexient Learning Inc., Re*,[69] the Ontario Superior Court of Justice addressed its authority to authorize the assignment of a license agreement. *Nexient Learning* involved a motion to assign a contract from Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, Nexient) to a third party on terms that would permanently stay the right of ESI International Inc. (ESI) to exercise rights of termination that arose as a result of Nexient's insolvency. ESI was the respondent to the motion.[70]

The Court determined that it should exercise such authority only in circumstances where it is important to the reorganization process, notwithstanding any provisions to the contrary within the relevant agreement.[71] Whether or not authorization is important to the reorganization process requires consideration of the purpose of the *CCAA* or the *BIA* and the effect on the parties' contractual rights. In *Nexient Learning* the Court found that the requested assignment would have no impact on the *CCAA* proceedings and would amount to unfair interference with the licensor's contractual rights.[72]

In addition, section 11.3(2) of the *CCAA* and section 84.1(3) of the *BIA* define specific agreements that may not be assigned.[73] These include agreements entered into after proceedings are commenced under the *CCAA* or after the date of bankruptcy, eligible financial contracts (such as options and derivatives), collective agreements, certain financing agreements, and a lease of real property or an immovable where the debtor is the lessor.

Furthermore, a court may refuse to permit an assignment of rights and obligations that are "not assignable by reason of their nature."[74] Generally, this includes personal contracts such as a contract of employment. Quoting the Manitoba Court of Appeal in *Black Hawk Mining*

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66 *BIA*, *supra* note 1, s 84.1(4).
67 *CCAA*, *supra* note 3, s 11.3(3).
68 Houlden, Morawetz & Sarra, *supra* note 65 at 1364; *Hayes Forest*, *supra* note 64 at para 32.
69 (2009), 62 CBR (5th) 248 (Ont Sup Ct J) [*Nexient Learning*].
70 *Ibid*.
71 *Ibid* at 258.
72 *Ibid* at 264.
73 *CCAA*, *supra* note 3, s 11.3(2); *BIA*, *supra* note 1, s 84.1(3).
74 *Ford*, *supra* note 63 at para 11.

Inc. v. Manitoba (Provincial Assessor),[75] the Alberta Court of Appeal in *Ford* accepted the test for determining whether an agreement contains rights and obligations which by their nature are not assignable to be as follows: "Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another."[76]

VII. THE POWER OF A PLAN

As described above, a plan of arrangement made under business corporations legislation, such as the *ABCA* or the *CBCA* can help corporations achieve certain business and economic outcomes to benefit their stakeholders that would be administratively more difficult to achieve under other corporate provisions. A plan of arrangement offers a flexible means of conveniently achieving a wide array of corporate reorganizations that may be proposed by a corporation and voted on by its shareholders.[77] Once the corporation's shareholders have approved the plan, court approval must be obtained, and once this happens, the plan is binding upon the corporation and "all other persons," which includes counterparties to contracts.[78] It is an interesting question as to how far one can go in adjusting existing contractual rights.

The vague concept of fairness is at the centre of judicial discussion of when courts adjust the contractual rights of third parties to achieve a viable plan of arrangement. In *Protiva Biotherapeutics Inc. v. Inex Pharmaceuticals Corp.*,[79] Protiva Biotherapeutics Inc. (Protiva) appealed an order from the Supreme Court of British Columbia endorsing a plan of arrangement proposed by Inex Pharmaceuticals Corporation (Inex) to effectively transfer the assets and liabilities of Inex to Tekmira Pharmaceuticals Corporation (Tekmira). The result was that Inex's contractual obligations with Protiva went to Tekmira.[80] Protiva objected because the assignment of the contracts at issue required Protiva's consent.[81]

The issue in the appeal was whether the trial Court erred in interpreting section 291(4)(c) of British Columbia's *Business Corporations Act*,[82] as empowering the Court to make a discretionary order affecting contractual rights to ensure that the arrangement was fully carried out, and, in the alternative, whether it wrongly exercised its discretion.[83]

Protiva's main point regarding the first ground of appeal was that in order for a court to extinguish contractual rights, there must be clear language in a statute authorizing it to do so. The Court of Appeal disagreed, stating that no contract was being extinguished, and

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75 2002 MBCA 51, [2002] 7 WWR 104 at para 82, citing *Maloney v Campbell* (1897), 28 SCR 228 at 233.
76 *Ford*, *supra* note 63 at para 55.
77 Karen Carteri, "BC Courts Uphold Controversial Plan of Arrangement" (2008), *McMillan LLP* (blog), online: <www.mcmillan.ca/BC-Courts-Uphold-Controversial-Plan-of-Arrangement>.
78 *ABCA*, *supra* note 4, s 193(9).
79 2007 BCCA 161, 280 DLR (4th) 704 [*Protiva*].
80 *Ibid* at para 1.
81 *Ibid*.
82 SBC 2002, c 57, s 291(4)(c).
83 *Protiva*, *supra* note 79 at para 2.

> [i]n all material respects, Tekmira will be what Inex was, with the same personnel, balance sheet and undertaking, and bound to all the obligations under the contracts with Protiva. All that Protiva loses is the right to say 'no' to the assignment, an option the judge said was tantamount to a veto of the arrangement.[84]

Protiva was unsuccessful on the first ground of appeal, and in respect of the second, that the trial Court's discretion was inappropriately exercised, the Court of Appeal held that the lower Court's balancing of Protiva's right to withhold its consent against the overall benefit of the arrangement, including a potential benefit to Protiva, was not in error.[85] The Court of Appeal categorically rejected the notion that "a proponent of an arrangement must be *in extremis* or otherwise show a public interest justification before third party contractual rights can be affected."[86] The Court stated further that "[t]his would create a threshold requirement that finds no support in the legislation. Third party rights must be considered and accommodated within the discretionary analysis but they cannot be erected as an impermeable barrier to an arrangement."[87] This finding echoes the larger dominating principle regarding the approval of arrangements that was articulated by the Supreme Court of Canada in respect of section 192 of the *CBCA*,[88] namely, that it "focuses on whether the arrangement, objectively viewed, is fair and reasonable and looks primarily to the interests of the parties whose legal rights are being arranged."[89] Further, when reviewing a "proposed arrangement to determine if it is fair and reasonable under s. 192, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way."[90]

In Alberta, the courts have focused on the effect of arrangements on shareholders in determining whether the requirements for an arrangement have been met. In *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.*[91] (a decision involving section 193 of the *ABCA*,[92] similar to the arrangement provision under section 192 of the *CBCA*[93]), Lukoil Overseas Kumkol B.V. (Lukoil) objected to PetroKazakhstan Inc.'s (PetroKazakhstan) arrangement to facilitate a sale of all of PetroKazakhstan's outstanding shares.[94] Lukoil asserted that its pre-emption rights in a shareholders' agreement with PetroKazakhstan would be affected (Lukoil and PetroKazakhstan each owned 50 percent of the shares in a third corporation).[95] The shareholders' agreement included restrictions on assignment of the parties' interests, which Lukoil asserted would be breached if the arrangement was approved.[96]

Lukoil claimed this effect on its rights under the shareholders' agreement was contrary to law and established that the arrangement was not brought in good faith. However, the Court found that if it accepted Lukoil's position, the shareholders of PetroKazakhstan would be

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84 *Ibid* at para 15.
85 *Ibid* at para 23.
86 *Ibid* at para 21.
87 *Ibid*.
88 *Supra* note 5.
89 *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560 at para 119.
90 *Ibid* at para 138.
91 2005 ABQB 789, 12 BLR (4th) 128 [*PetroKazakhstan*].
92 *Supra* note 4.
93 *Supra* note 5.
94 *PetroKazakhstan*, *supra* note 91 at para 1.
95 *Ibid* at para 9.
96 *Ibid* at para 19.

prejudiced as the deal would likely fall through.[97] Lukoil was permitted to pursue its breach of contract claim through arbitration, and whether Lukoil succeeded would not impact the fairness of the arrangement to the PetroKazakhstan shareholders[98] (it was an "all cash" deal so the shareholders would not be responsible for any future contractual liability).[99] Furthermore, the argument that the Court would sanction a breach of contract by authorizing the arrangement presumed that the arrangement would breach the shareholders' agreement, an issue that was in dispute but not before the Court.

The Court was not willing to put the deal in jeopardy pending the uncertain outcome of Lukoil's breach of contract claim, especially since Lukoil's rights to pursue a remedy for the breach would not be affected by the arrangement. Therefore, despite the third party's claim that the arrangement breached a shareholders' agreement, the Court instead focused on the effect of the arrangement on the applicant's shareholders, and found that the requirements for an arrangement were met.[100]

The interpretation of the arrangement provisions in corporate legislation by courts in BC and Alberta has resulted in corporate lawyers using those provisions when rights under contracts are to be assigned and obtaining the consent of counterparties appears impractical. For example, several transactions where a corporation has monetized its tax losses have involved: (1) transferring nearly all of the assets and liabilities of the corporation to a newly incorporated entity having the same shareholders, directors, and officers as the corporation; and (2) transferring the shares of the corporation to a third party wishing to acquire the company's tax characteristics. As is typically the case for oil and gas companies, the asset transfer is practically difficult to implement as the assets include numerous (sometimes hundreds or thousands) of contracts, with various types of provisions speaking to assignment. Typically, some of those provisions require consent which can be arbitrarily withheld, and some require consent which cannot be unreasonably withheld. By using the arrangement provisions which refer to the division of the business carried on by a corporation[101] and providing a simple notice to all of the counterparties, each of the contracts can be assigned once the court issues its final order approving the arrangement, which is binding on not only the corporation and its shareholders but on all other persons, including the contract counterparties. This approach is far superior, from a practical perspective, than attempting to obtain all of the necessary consents under the strict terms of the contracts. The approach is particularly appealing for non-controversial situations where, from an objective business perspective, no contract counterparts ought to object to the assignment.

In situations where the contract counterparts might well have a reasonable objection to the assignment, the use of a corporate plan of arrangement might nonetheless be successful. As described above, courts will consider the larger picture and are loathe to find that, in effect, a third party has a veto over a reorganization that benefits stakeholders generally. From the perspective of a contract counterparty, the court's position might well seem like a failure to honour the deal that the counterparty bargained for when the contract was negotiated. This raises the obvious question of whether protections against this outcome can be negotiated at

97 *Ibid* at para 48.
98 *Ibid* at para 67.
99 *Ibid* at para 53.
100 *Ibid* at para 66.
101 *CBCA*, *supra* note 5, s 192(1)(d); *ABCA*, *supra* note 4, s 193(1)(d).

the time the contract is signed. For example, could a covenant be included that the corporation will not propose a plan of arrangement that results in the contract counterparty losing any rights or privileges it has under the terms of the contract, and could injunctive relief be obtained preventing the company from seeking court approval for a plan of arrangement that breaches the covenant? Perhaps, but will the court view such measures as an undue interference with the court's general discretion under the corporate arrangement provisions to approve a reorganization seen to be in the best interests of all stakeholders? If the court is willing to override non-assignment provisions in the contract, why would any specific covenant be treated differently? Arguably the only enforceable protection available might be liquidated damages for breach of the covenant, presuming the court does not view the payment of the damages as, given the particular circumstances, an effective veto over the reorganization under the plan of arrangement.

VIII. CONCLUSION

As a consequence of reduced commodity prices, and in the context of a number of high profile insolvencies, parties in the energy industry are increasingly concerned about the impact a counterparty insolvency might have on contracts material to their businesses. Insolvency law clearly permits contracts to be terminated or assigned without consent, or can result in certain contractual provisions being unenforceable. Such risks should be taken into account in the overall assessment of counterparty risk and credit risk management strategies. But having regard for the overall policy considerations that support this legal regime, the industry's collective interest in ensuring the maximization of resources available to an insolvent party and its creditors, and the ability of parties to structure their arrangements so as to efficiently allocate and manage these risks, this legal structure seems ultimately well-founded, notwithstanding the periodic unfairness viewed from the perspective of a singular adversely affected counterparty.

From the solvent party's perspective, insolvency law can have significant effects on terms that were bargained and paid for by a counterparty, and an unsecured claim may have little value. It is not always easy to achieve a balance between achieving restructuring or insolvency objectives and preserving legitimate bargains. Yet parties are not without legal tools to address these risks. Increasingly sophisticated counterparty credit risk assessment tools, coupled with conventional security interests and other credit risk mitigation measures, allow parties to a transaction to assess and manage the consequences of insolvency law.

The importance of understanding the law in this area, the breadth of a court's authority under insolvency law and in connection with plans of arrangement, and strategies for managing the attendant risks resulting from this legal landscape, has never been as important to energy practitioners. Increasingly, borrowers, lenders, and counterparties are approaching these issues with greater sophistication and nuance, relying less on traditional covenants and security interests, and more on context- and risk-specific measures, to ensure the most efficient allocation of opportunities and risks. All of this requires a more complete understanding of the law and policy considerations underlying insolvency in the energy industry.

TAB 16

Citation: In the Matter of Doman Industries et al
2003 BCSC 376

Date: 20030307

Docket: L023489
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Tysoe
Pronounced in Chambers
March 7, 2003

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

AND

IN THE MATTER OF THE *COMPANY ACT*
R.S.B.C. 1996, c. 62

AND

IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*
R.S.C. 1985, c. C-44

AND

IN THE MATTER OF THE *PARTNERSHIP ACT*
R.S.B.C. 1996, c. 348

AND

IN THE MATTER OF DOMAN INDUSTRIES LIMITED,
ALPINE PROJECTS LIMITED
DIAMOND LUMBER SALES LIMITED, DOMAN FOREST PRODUCTS LIMITED
DOMAN'S FREIGHTWAYS LTD., DOMAN HOLDINGS LIMITED, DOMAN INVESTMENTS LIMITED, DOMAN LOG SUPPLY LTD., DOMAN – WESTERN LUMBER LTD., EACOM TIMBER SALES LTD.,
WESTERN FOREST PRODUCTS LIMITED
WESTERN PULP INC., WESTERN PULP LIMITED PARTNERSHIP, and QUATSINO NAVIGATION COMPANY LIMITED

PETITIONERS

Counsel for the Petitioners:	M.A. Fitch, Q.C., S. Martin and R. Millar
Counsel for the Ad Hoc Committee of Senior Secured Noteholders:	G. Morawetz, R. Chadwick and J.J.L. Hunter, Q.C.
Counsel for Wells Fargo, National Association:	J.F. Dixon
Counsel for Herb Doman:	G.K. Macintosh, Q.C. and R.P. Sloman
Counsel for Her Majesty the Queen in Right of British Columbia:	D.J. Hatter and R. Butler
Counsel for Attorney General of Canada:	R.D. Leong
Counsel for CIT Business Credit Canada Inc.:	W.C. Kaplan, Q.C. and P.L. Rubin
Counsel for the Monitor, KMPG Inc.:	J.I. McLean
Counsel for Brascan Financial, Merrill Lynch and Oppenheimer Funds:	D.I. Knowles, Q.C., M. Buttery and I. Nordholm
Counsel for Toronto Dominion Asset Management Inc., TD Securities Inc. and Tordom Company:	P. Macdonald and G. Gehlen
Counsel for Petro-Canada:	K. Zimmer
Counsel for Pulp, Paper & Woodworkers of Canada, Locals 3 and 8:	W. Skelly

failed ***CCAA*** proceeding where the other party to the agreement, which had a contractual right to consent to an assignment, was objecting to the assignment. As the Court in the ***Playdium*** case relied on s. 11(4) of the ***CCAA***, I assume that the Order prevented the other party to the agreement from terminating the assigned agreement as a result of the failure to obtain its consent to the assignment. I was also referred to my decision in ***Re Woodward's Ltd.*** (1993), 17 C.B.R. (3d) 236, where I relied on the inherent jurisdiction of the court to stay the calling on letters of credit issued by third parties at the instance of the debtor company.

[15] The law is clear that the court has the jurisdiction under the ***CCAA*** to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring. In this regard, I agree with the following reasoning of Spence J. at para. 32 of the supplementary reasons in ***Playdium***:

> In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by the Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the Court should not take such a restrictive view of the s. 11(4) jurisdiction.

[16] Spence J. made the above comments in the context of a third party which had a contract with the debtor company. In my opinion, the reasoning applies equally to a creditor of the debtor company in circumstances where the debtor company has chosen not to compromise the indebtedness owed to it. The decision in ***Luscar Ltd. v. Smoky River Coal Ltd.,*** 1999 ABCA 179 is an example of a permanent stay being granted in respect of a creditor of the restructuring company.

[17] Accordingly, it is my view that the court does have the jurisdiction to grant a permanent stay preventing the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on events of default existing prior to or during the restructuring period to accelerate the repayment of the indebtedness owing under the Notes. It may be that the

held that it should receive a liberal interpretation in view of the remedial nature of the ***CCAA***. However, in my opinion, a liberal interpretation of s. 11(4) does not permit the court to excuse the debtor company from fulfilling its contractual obligations arising after the implementation of a plan of compromise or arrangement.

[22] In my view, there are numerous purposes of stays under s. 11 of the ***CCAA***. One of the purposes is to maintain the status quo among creditors while a debtor company endeavours to reorganize or restructure its financial affairs. Another purpose is to prevent creditors and other parties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts or accelerate the repayment of the indebtedness owing by the debtor company when it would interfere with the ability of the debtor company to reorganize or restructure its financial affairs. An additional purpose is to relieve the debtor company of the burden of dealing with litigation against it so that it may focus on restructuring its financial affairs. As I have observed above, a further purpose is to prevent the frustration of a reorganization or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the

restructuring period. All of these purposes are to facilitate a debtor company in restructuring its financial affairs. On the other hand, it is my opinion that Parliament did not intend s. 11(4) to authorize courts to stay proceedings in respect of defaults or breaches which occur after the implementation of the reorganization or restructuring plan, even if they arise as a result of the implementation of the plan.

[23] In the present case, the obligation of the Doman Group to make an offer under Section 4.16 of the Trust Indenture does not arise until ten days after the Change of Control. The Change of Control will occur upon the implementation of the Reorganization Plan, with the result that the obligation of the Doman Group to make the offer does not arise until a point in time after the Reorganization Plan has been implemented. This is a critical difference in my view between this case and the authorities relied upon by the counsel for the Doman Group.

[24] Section 11(4) utilizes the verbs “staying", “Restraining” and “prohibiting". These verbs evince an intention of protecting the debtor company from the actions of others, including creditors and non-creditors, while it is endeavouring to reorganize its financial affairs. This

TAB 17

Court File No. CV-20-00639217-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	MONDAY, THE 9TH
	)	
JUSTICE KOEHNEN	)	DAY OF NOVEMBER, 2020
	)	

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 **GREEN RELIEF INC.** (the "**Applicant**")

ORDER
(Approval and Vesting Order)

THIS MOTION, made by the Applicant, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order, among other things: (i) approving the Share Purchase Agreement (the "**SPA**") between the Applicant and AOCO Ventures Inc., as assignee of 2650064 Ontario Inc. (the "**Purchaser**"), dated October 15, 2020, and the transactions contemplated thereby (the "**Transactions**"), (ii) adding 12463873 Canada Inc. ("**ResidualCo**") as an Applicant to these CCAA proceedings; (iii) transferring and vesting all of the Applicant's right, title and interest in and to the Excluded Assets, Excluded Contracts and Excluded Liabilities (as defined in the SPA) to and in ResidualCo; (iv) vesting all of the right, title and interest in and to the New Common Shares (as defined in the SPA) in the Purchaser; was heard on November 2 and 3, 2020, by video conference due to the COVID-19 pandemic.

ON READING the Applicant's Notice of Motion, the affidavit of Neilank Jha sworn October 15, 2020, and the Eighth Report of PricewaterhouseCoopers Inc., LIT, in its capacity as Monitor of the Applicant (the "**Monitor**"), to be filed (the "**Eighth Report**"), and on hearing the submissions of counsel for the Applicant, counsel for the Monitor, counsel for the Purchaser, and counsel for those other parties appearing as indicated by the counsel slip, no one appearing for

defined in the Initial Order) and the Monitor shall not take, or be deemed to have taken, possession or control of the Property or the Business of ResidualCo, or any part thereof.

21. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor and its legal counsel shall continue to have the benefit of all of the indemnities, charges, protections and priorities as set out in the Initial Order and any other Order of this Court and all such indemnities, charges, protections and priorities shall apply and extend to the Monitor and the fulfillment of its duties and the carrying out of the provisions of this Order.

22. **THIS COURT ORDERS** that nothing in this Order shall constitute or be deemed to constitute the Monitor as receiver, assignee, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of the Applicant or ResidualCo within the meaning of any relevant legislation and that any distributions to creditors of ResidualCo or the Applicant by the Monitor will be deemed to have been made by ResidualCo.

23. **THIS COURT ORDERS** that the power and authority granted to the Monitor by virtue of this Order shall, if exercised in any case, be paramount to the power and authority of ResidualCo with respect to such matters and, in the event of a conflict between the terms of this Order and those of the Initial Order or any other Order of this Court, the provisions of this Order shall govern.

RELEASES

24. **THIS COURT ORDERS** that effective upon filing of the Monitor's Certificate, (i) the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicant, legal counsel and advisors of the Applicant, and (ii) the Monitor and its legal counsel (collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not

yet due, in law or equity and whether based in statute or otherwise) based in whole or in part of any act or omission, transaction, dealing or other occurrence existing or taking place prior to the filing of the Monitor's Certificate and that relate in any manner whatsoever to the Applicant or any of its assets (current or historical), obligations, business or affairs or this CCAA Proceeding, including any actions undertaken or completed pursuant to the terms of this Order, or arising in connection with or relating to the SPA or the completion of the Transactions (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, *provided that* nothing in this paragraph shall waive, discharge, release, cancel or bar any claim: (i) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, (ii) against the former directors and officers of the Applicant for breach of trust arising from acts or omissions occurring before the date of the Initial Order, (iii) that may be made against any applicable insurance policy of the Applicant prior to the date of the Initial Order, or (iv) that may be made against the current directors and officers that would be covered by the Directors' Charge granted pursuant to the Initial Order.

GENERAL

25. **THIS COURT ORDERS** that, following the Effective Time, the Purchaser shall be authorized to take all steps as may be necessary to effect the discharge of the Claims and Encumbrances as against the New Common Shares.

26. **THIS COURT ORDERS** that, following the Effective Time, the title of these proceedings is hereby changed to

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF 12463873 CANADA INC.

27. **THIS COURT ORDERS** that, notwithstanding Rule 59.05, this Order is effective from the date that it is made, and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal order need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party may nonetheless submit a formal order for original signing, entry and filing when the Court returns to regular operations.

TAB 18

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

see *Target Canada Co. (Re),* 2015 ONSC 1487, at paras. 14-17.

[22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[23] In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:

(a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,

(b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

[24] The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re),* (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found "the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise."

[25] A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.

[26] More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.

[27] In *Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218* at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc,* 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc,* 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently

- The efficacy and integrity of the process followed

- The interests of the parties, and

- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[28] In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that "the terms 'sell or otherwise dispose of assets outside the ordinary course of business' under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*": *Nemaska* QCCA at para 19.

[29] Similarly, in *Quest University Canada (Re)*, 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court's authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on CCAA jurisdiction in *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.

[30] In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.

[31] Fitzpatrick J. relied on *Callidus* to the effect that:

- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence". 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"

- the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company"

- 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

- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence

- 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. The supervising judge is best positioned to undertake this inquiry.

[32] The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. 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. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[33] Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.

[34] The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not "meritorious", also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. "reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings": *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

[35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

[40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

[41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

[42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

[43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

[44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

[45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

Fairness of Consideration

[66] Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable.[1]

[67] A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational – both payments being made to bring about the acquisition of the Mine as a going concern.

[68] It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the prefiling strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

[69] The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

[70] As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

[71] The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would

[1] The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

[72] It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

[73] The position of the purchaser is, not unreasonably, that it will not both continue to fund ongoing operations and the CCAA process and undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

[74] The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

[75] In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

[76] For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

[77] In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's

assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

[78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

[79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

[80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

[81] Whether the claims to be released are rationally connected to the purpose of the restructuring: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

[82] Whether the releasees contributed to the restructuring: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

[83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

[84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

[85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

[86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

[87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

[88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

TAB 19

2023 Hfx No. 523334

SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF: **Application by IMV Inc. and Immunovaccine Technologies Inc. and IMV USA Inc. (the "Applicants"), for relief under the *Companies' Creditors Arrangement Act***

Order

Sgd. JPB J. Before the Honourable Justice John P. Bodurtha in chambers:

The Applicants propose to make a compromise or arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and they applied for an initial order and, now or in the future, other relief under the CCAA as may be sought on notice of motion.

The following parties received notice of this application: see attached at Schedule "A".

The following parties, represented by the following counsel, made submissions:

Party	Counsel
Applicants	**McCarthy Tétrault LLP** Alain N. Tardif François Alexandre Toupin **Stewart McKelvey Lawyers** Sara L. Scott
Monitor, FTI Consulting Canada Inc.	**Stikeman Elliott LLP** Maria Konyukhova Natasha Rambaran
Horizon Technology Finance Corporation, as agent	**Aird & Berlis LLP** Miranda Spence Kyle Plunkett

WHEREAS on May 1, 2023, this Court granted an Initial Order under the CCAA in respect of the Applicants (as amended and restated on May 5, 2023, the "**Initial Order**"), which, among other things, appointed FTI Consulting Canada Inc. as monitor in these proceedings (the "**Monitor**");

AND WHEREAS on May 5, 2023, this Court granted an Amended and Restated Initial Order (the "**ARIO**"), which, among other things, extended the Stay Period until and including July 17, 2023;

AND WHEREAS on May 9, 2023, this Court granted a Claims Process Order (the "**Claims Process Order**"), approving the procedure for the determination and adjudication of claims against the Applicants and their present and former, *de facto* and *de jure*, directors and officers (the "**Directors and Officers**");

AND WHEREAS on July 17, 2023, this Court the Court granted an Extension Order which, among other things, further extended the Stay Period until and including August 18, 2023;

AND WHEREAS on August 17, 2023, this Court the Court granted an Extension Order which, among other things, further extended the Stay Period until and including September 29, 2023;

AND WHEREAS on September 6, 2023, the Court granted an Approval and Vesting Order (the "**Approval and Vesting Order**") which, among other things, approved the transaction contemplated by the Agreement of Purchase and Sale dated September 1, 2023 (the "**Purchase Agreement**"), by and between Horizon Technology Finance Corporation (the "**Collateral Agent**"), as purchaser, and IMV Inc. and IVT, as vendors (the "**Transaction**");

AND UPON motion of the Applicants for an Order, *inter alia*, granting a release in favour of the Directors and Officers as well as a "channeling injunction" to allow the pursuit of claims against the Directors and Officers as against any existing director and officer insurance policies;

AND UPON reading the Fifth Report of the Monitor dated September 22, 2023 and the other materials filed herein;

AND UPON hearing the submissions on behalf of the Applicants and the Monitor;

NOW UPON MOTION IT IS HEREBY ORDERED AND DECLARED THAT:

Service and Definitions

1. Service of this Order is permitted at any time and place and by any means whatsoever.

2. All capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the ARIO or the Claims Process Order in these CCAA proceedings, as the context requires.

Effective Time

3. This Order and all of its provisions are effective as of 12:01 a.m. Halifax time, province of Nova Scotia, on the date of this Order (the "**Effective Time**").

Release and Channeling Injunction

4. From and after the Effective Time, the Directors and Officers shall be forever irrevocably and unconditionally released and discharged from any and all present and future claims, losses, damages, judgments, executions, recoupments, debts, sums of money, expenses, costs, accounts, liens, taxes, penalties, interests, recoveries, and other obligations, liabilities and encumbrances of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured, or due or not yet due, in law or equity and whether based in statute, contract or otherwise) based in whole or in part on any act, omission, transaction, dealing or other occurrence, matter, circumstance or fact existing or taking place on or prior to the Effective Time or completed pursuant to the terms of the Approval and Vesting Order and/or in connection with the Transaction, in respect of or relating to, in whole or in part, directly or indirectly, any of the Applicants or their assets, liabilities, business or affairs wherever or however conducted or governed,

the administration and/or management of the Applicants, these CCAA proceedings and/or the Chapter 15 case commenced in the United States Bankruptcy Court for the District of Delaware, or the Transaction (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably, unconditionally and forever waived, discharged, released, cancelled and barred as against the Directors and Officers, and the commencement, prosecution, continuation or assertion, whether directly, indirectly, derivatively or otherwise, by any Person of any Released Claims against the Directors and Officers, whether before a court, administrative tribunal, arbitrator, other dispute resolver or otherwise, shall be permanently restrained and enjoined; provided, however, that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim against the present and former directors of the Applicants that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

5. From and after the Effective Time, any person having, or claiming any entitlement or compensation relating to any and all present and future claims (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, executions, recoupments, debts, sums of money, expenses, accounts, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) against a Director and Officer except a claim that is not permitted to be released pursuant to subsection 5.1(2) of the CCAA (a "**Director and Officer Claim**") shall be irrevocably limited to recovery in respect of such Director and Officer Claim solely from the proceeds of the applicable insurance policies held by the Applicants (the "**Insurance Policies**"), and persons with any Director and Officer Claim will have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from any of the Directors and Officers, other than enforcing such person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies.

6. The Directors and Officers of the Applicants, or any one of them, are hereby authorized, for administrative purposes only and for the purpose of preserving and insurance coverage available to the Applicants, if any, to provide instructions with respect to any claim to be advanced as against the Applicants and any insurer of the Applicants, as the case may be. In the event that the Directors and Officers disagree with respect to any instruction to be given pursuant to this paragraph, the instructions agreed upon by a majority of such Directors and Officers shall prevail. The Directors and Officers are not personally liable for any action taken in accordance with this paragraph. For greater certainty, the Directors and Officers shall not incur any personal liability resulting from or in connection with any instruction given to any insurer in accordance with this paragraph.

General

7. This Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

8. The aid and recognition of any Court, tribunal, regulatory or administrative body in Canada, the United States of America or elsewhere, 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 the Monitor as may be necessary or desirable to give effect to this Order,

to grant representative status to the Monitor or the authorized representative of the Applicants in any foreign proceeding, to assist the Applicants and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.

9. Each of the Applicants and the Monitor may apply to any court, tribunal, or regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and the Monitor may act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

Issued October 18, 2023

Prothonotary

TRACE ELIZABETH
Deputy Prothonotary

IN THE SUPREME COURT
COUNTY OF HALIFAX, N.S.
I hereby certify that the foregoing document, identified by the seal of the court, is a true copy of the original document on the file herein.

OCT 18 2023

Deputy Prothonotary

TRACE ELIZABETH
Deputy Prothonotary

TAB 20

Court File No. CV-18-590812-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **CARILLION CANADA HOLDINGS INC.**, **CARILLION CANADA INC.**, **CARILLION CANADA FINANCE CORP.** AND **CARILLION CONSTRUCTION INC.** (each, an "**Applicant**", and collectively, the "**Applicants**")

FACTUM OF THE APPLICANTS
(Assignment Approval Order)

March 1, 2018

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Lawyers for the Applicants

Court File No. CV-18-590812-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **CARILLION CANADA HOLDINGS INC.**, **CARILLION CANADA INC.**, **CARILLION CANADA FINANCE CORP.** AND **CARILLION CONSTRUCTION INC**. (each, an "**Applicant**", and collectively, the "**Applicants**")

FACTUM OF THE APPLICANTS
(Assignment Approval Order)

PART I – OVERVIEW AND FACTS

1. On January 25, 2018, this Court granted an Initial Order (as amended, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). On February 8, 2018, this Court granted the Sale Approval, Vesting and Interim Financing Order (the "**Approval Order**"), which, among other things, approved the transaction (the "**Transaction**") contemplated by the transaction agreement dated February 4, 2018 entered into among Carillion Canada Inc., Carillion Construction Inc. and Hamblin Watsa Investment Counsel Ltd., in its capacity as the investment manager of Fairfax Financial Holdings Limited ("**Fairfax**") (the "**Transaction Agreement**"). This Factum is filed in support of the proposed Assignment Approval Order substantially in the form of the draft order included at Tab 3 of the Applicant's Supplemental Motion Record (the "**Assignment Approval Order**"), which puts in place necessary relief for the completion of the Transaction.

Reynolds Affidavit at para 21; Supplementary Affidavit at para 5.

11. The Purchaser has also elected to acquire the assets of the Additional Subsidiary, including, through assignments, the Additional Assigned Contracts (collectively, the "**Additional Purchased Assets**"), with such assignments (by consent if, required, or Court Order) being a condition precedent to the closing of the sale of the Additional Purchased Assets.

Reynolds Affidavit at para 11.

12. It is a condition precedent to closing that satisfactory waivers of change of control and non-monetary defaults are received from any counterparties to the Assigned Contracts and the Minority Outland Contracts or an Order of this Court is granted providing similar relief.

Reynolds Affidavit at para 11.

13. The Assigned Contracts and Minority Outland Contracts form the core assets of the Services Business. It is essential to the Transaction that the operation and the value of such contracts be preserved in the hands of the Purchaser following closing. This Court's assistance is necessary to satisfy this requirement.

Reynolds Affidavit at para 11.

B. Status of Consents to Assignment and Waivers of Insolvency and Change of Control Defaults

14. The Vendors (i) have distributed requests for consents and waiver to all applicable counterparties to the Assigned Contracts and the Minority Outland Contracts, and (ii) have continued to communicate directly with such counterparties in an attempt to procure executed consents and waivers prior to the date for the hearing for the proposed Assignment Approval Order.

TAB 21

Court File No. CV-18-590812-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR	)	THURSDAY, THE 1st
	)	
JUSTICE HAINEY	)	DAY OF MARCH, 2018

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 CARILLION CANADA HOLDINGS INC., CARILLION CANADA INC., CARILLION CANADA FINANCE CORP. AND CARILLION CONSTRUCTION INC. (each, an "**Applicant**", and collectively, the "**Applicants**")

ASSIGNMENT APPROVAL ORDER

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order, among other things (i) assigning the rights and obligations of the Vendors under and to the Assigned Contracts to the Purchaser, (ii) prohibiting any counterparty to the Assumed Contracts from exercising any right or remedy under the Assumed Contracts by reason of any Insolvency Defaults, any defaults arising from the assignment thereof, or the Transaction or any parts thereof and deeming such defaults to be waived, (iii) extending the stay of proceedings granted pursuant to the Initial Order in respect of the Minority Outland Subsidiaries for a period of 120 days following the delivery of the Initial Purchased Assets Monitor's Certificate, and (iv) granting the other relief set out herein, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion dated February 24, 2018, the Amended Notice of Motion dated February 27, 2018, the Affidavit of Simon Buttery, sworn February 6, 2018, the Affidavit of Elizabeth Reynolds, sworn February 24, 2018 (the "**Reynolds Affidavit**"), the Supplementary Affidavit of Elizabeth Reynolds, sworn February 27, and the Third Report of the Monitor, dated February 28, filed, and such further materials as counsel may advise, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Purchaser and counsel for those parties listed on the counsel slip for today's hearing, and no one appearing for any other interested person, although properly served as appears from the affidavit of Juliene Cawthorne-Hwang sworn February 28, 2018, filed, affidavit of Juliene

Cawthorne-Hwang sworn February 28, 2018, filed, and supplemental affidavit of Cawthorne-Hwang sworn February 28, 2018 (collectively, the "**Affidavits of Service**").

Service

1. **THIS COURT ORDERS** that the filing and service of the Notice of Motion, Amended Notice of Motion, Motion Record and the Supplemental Motion Record, including method and timing of notice and service to the Supplementary Service List (as defined in the Affidavits of Service), pursuant to the E-Service Protocol of the Commercial List, or otherwise in the manner described in the Affidavits of Service, is hereby approved and validated and that the time for service of the Notice of Motion, Amended Notice of Motion, Motion Record and the Supplemental Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

Capitalized Terms

2. **THIS COURT ORDERS** that, unless otherwise defined herein, capitalized terms used in this Order shall have the meaning given to them in Schedule "**A**" hereto.

Initial Assigned Contracts and Minority Outland Contracts

3. **THIS COURT ORDERS** that upon delivery of the Initial Purchased Assets Monitor's Certificate:

(a) all of the rights and obligations of the Vendors under and to the Initial Assigned Contracts shall be assigned, conveyed, transferred to and assumed by the Purchaser pursuant to section 11.3 of the CCAA and such assignment is valid and binding upon all of the counterparties to the Initial Assigned Contracts, notwithstanding any restriction, condition or prohibition contained in any such Initial Assigned Contracts relating to the assignment thereof, including any provision requiring the consent of any party to the assignment; and

(b) the counterparties to the Initial Assigned Contracts and Minority Outland Contracts are prohibited from exercising any rights or remedies under the Initial Assigned Contracts and Minority Outland Contracts, and shall be forever barred and estopped from taking such action, by reason of (i) any Insolvency Defaults thereunder, (ii) any restriction, condition or prohibition contained therein relating

to the assignment thereof or any change of control, or (iii) the Transaction or any parts thereof (including, for certainty, the assignment of the Initial Assigned Contracts pursuant to this Order), and are hereby deemed to waive any defaults relating thereto. For greater certainty and without limiting the foregoing, no counterparty to an Initial Assigned Contract or Minority Outland Contract shall rely on a notice of default sent prior to the filing of the Initial Purchased Assets Monitor's Certificate to terminate an Initial Assigned Contract or Minority Outland Contract.

4. **THIS COURT ORDERS** that with respect to the Initial Assigned Contracts that are real property leases (collectively the "**Initial Real Property Leases**"), upon delivery of the Initial Purchased Assets Monitor's Certificate, the Purchaser shall be entitled to all of the rights and benefits and subject to all of the obligations as tenant pursuant to the terms of the Initial Real Property Leases and registrations thereof and may enter into and upon and hold and enjoy each premises contemplated by the Initial Real Property Leases and, if applicable, any renewals thereof, for its own use and benefit, all in accordance with the terms of the Initial Real Property Leases, without any interruption from the Vendors or the landlords under the Initial Real Property Leases or any person claiming through or under any of the Vendors or the landlords under the Initial Real Property Leases.

5. **THIS COURT ORDERS** that the stay of proceedings granted pursuant to the Initial Order in respect of the Minority Outland Subsidiaries shall terminate 120 days following the delivery of the Initial Purchased Assets Monitor's Certificate

Additional Assigned Contracts

6. **THIS COURT ORDERS** that upon delivery of the Additional Purchased Assets Monitor's Certificate:

(a) all of the rights and obligations of the Vendors under and to the Additional Assigned Contracts shall be assigned, conveyed, transferred to and assumed by the Purchaser pursuant to section 11.3 of the CCAA and such assignment is valid and binding upon all of the counterparties to the Additional Assigned Contracts, notwithstanding any restriction, condition or prohibition contained in any such Additional Assigned Contracts relating to the assignment thereof, including any provision requiring the consent of any party to the assignment; and

TAB 22

Of No. S209201
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF MOUNTAIN EQUIPMENT COOPERATIVE AND
1314625 ONTARIO LIMITED

PETITIONERS

SECOND REPORT OF THE MONITOR

ALVAREZ & MARSAL CANADA INC.

OCTOBER 19, 2020

ALVAREZ & MARSAL

f) reviewing weekly funding requests under the Interim Financing Facility prepared by Management and attending to discussions regarding same;

Statutory and Other Responsibilities

g) posting filed court materials and other relevant information as they become available to the Monitor's Website;

h) preparing this Second Report;

Communication Matters

i) conducting ongoing discussions with the Monitor's legal counsel, Management, the Petitioners' legal counsel, financial advisor to the Agent, and other stakeholders, among others, to discuss various matters;

j) attending to various discussions with the members of the MEC Board, Management, and the Petitioners' legal counsel regarding the process of communications to employees, vendors, MEC members and other interested parties;

k) reviewing draft communications prepared by Management in respect of employee terminations as well as follow up communications;

Creditor and Other Stakeholder Matters

l) receiving approximately 359 telephone and email inquiries as of October 11, 2020 from trade creditors, MEC members, employees and other parties. The Monitor continues to track and log these inquiries and has addressed the queries where required;

m) holding discussions and liaising with Management, the MEC Board, and the Special Committee in respect of the CCAA Proceedings and related matters generally;

n) holding discussions with Management, the Special Committee and counsel to MEC to discuss handling of member and customer data in accordance with privacy laws and regulations; and

Other Matters

o) coordinating and holding discussions with Management regarding transition and post-closing matters.

5.0 ASSIGNMENT OF LEASES AND CONTRACTS

5.1 Pursuant to the APA, the Petitioners are to use commercially reasonable efforts, as directed by and in cooperation with the Purchaser, to obtain the written consent of the counterparties to the various contracts that are included in the Purchased Assets (where consent to an assignment is required) to the assignment of those contracts to the Purchaser, which include:

a) 16 real property leases, including 15 of MEC's retail locations and the distribution centre located in Brampton, Ontario (the "**Real Property Leases**");

b) 27 assumed contracts, including IT related contracts and agreements with key apparel suppliers (the "**Material Contracts**"); and

c) 59 personal property leases (the "**Personal Property Leases**")

(collectively, the "**Consent Required Contracts**").

5.2 The Purchaser continues to review the Consent Required Contracts and possible additions thereto. The total number of Consent Required Contracts may be updated prior to the hearing to approve same.

5.3 On October 1, 2020, the Petitioners, in consultation with the Purchaser and the Petitioners' legal counsel, delivered to the counterparties to the Consent Required Contracts a letter requesting consent to assignment to the Purchaser and advising that if consent was not obtained, the Petitioners would be required to seek a court order assigning the applicable contract under the CCAA.

5.4 As at the date of this Second Report, the Petitioners have received consents (executed and/or conditional) to assignments or amendments from all the counterparties to the Real Property Leases (the "**Real Property Lessors**") and the Purchaser has correspondingly negotiated and/or is in the process of negotiating amended lease agreements with the Real Property Lessors. In addition to the 16 real property leases, the Purchaser will continue to maintain the 6 owned retail locations and 1 owned distribution centre located in Surrey, British Columbia for a total of 21 retail locations and two distribution centres.

5.5 The Petitioners have not obtained consents for 79 of the Consent Required Contracts, as disclosed in Schedule B of the Assignment Order (the "**Remaining Contracts**") and is seeking approval from this Honourable Court to assign the Remaining Contracts to the Purchaser in accordance with s. 11.3 of the CCAA after which the Purchaser shall pay the applicable Cure Costs.

5.6 The Monitor understands that the relatively large number of consents that remain outstanding is not a result of counterparties opposing the assignment of the Remaining Contracts but rather because no result has been received from those counterparties to date.

5.7 The Monitor is of the opinion that the assignment of the Remaining Contracts appears to be appropriate and commercially reasonable in the circumstances when considering the factors referenced in s. 11.3 of the CCAA. In particular, the Monitor notes the following factors in

TAB 23

No. S240195
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF NEXII BUILDING SOLUTIONS INC., NEXII CONSTRUCTION INC.,
NBS IP INC., AND NEXII HOLDINGS INC.

PETITIONERS

SECOND REPORT OF KSV RESTRUCTURING INC. AS CCAA MONITOR

April 19, 2024

2. The Monitor believes it is appropriate for the Vendors to proceed with the proposed legal name changes to facilitate the continuation of the Omicron business as a going concern (the "Name Change"). The AVO also includes approval to amend the style of cause in the CCAA Proceedings in order to reflect the Name Change.

6.3 Assignment Order

1. The Sale Agreement contemplates the assignment to the Purchasers of certain contracts that require counterparty consent to assign such contracts or purport to prohibit the assignment thereof, in respect of which the Assignment Order is sought. These contracts are listed in Schedules "C", "D", "E", "F", "G" and "H" to the proposed Assignment Order (the "Assigned Contracts"). The Assigned Contracts are an integral component of the Purchased Assets.

2. The Monitor has been advised by the Purchasers that the Purchasers are not prepared to proceed with the Sale Agreement without the proposed Assignment Order being made under section 11.3 of the CCAA. The Sale Agreement is conditional upon an Order from the Court pursuant to Section 11.3 of the CCAA, assigning to the Purchasers the rights and obligations of the Vendors under the Assigned Contracts for which a consent, approval or waiver necessary for the assignment has not been obtained.

3. The Monitor has been advised by counsel for the Purchasers that the Purchasers have, contemporaneously with or prior to this application, delivered request letters to each counterparty of the Assigned Contracts, requesting their consent to the proposed assignment. The Purchasers have advised the Monitor that they will update the Monitor as to which counterparties have provided their consent in advance of the hearing and any Assigned Contracts for which consent has been received will be removed from the Assignment Order.

4. The Monitor believes that the Purchasers will be able to perform the obligations under the Assigned Contracts based on the following:

    a) the Purchasers are formed under the laws of British Columbia or Canada with their principal place of business in Vancouver, British Columbia;

    b) the Purchaser entities to whom the Assigned Contracts are to be assigned are acquiring the Vendors' assets in substantially the same structure as such assets are currently held by the Vendors (i.e., the Assigned Contracts are not being assigned to entities that will have materially different assets; and

    c) the Purchasers' principals will be the existing senior management of the Vendors, who are familiar with the Vendors' design, construction and engineering businesses and are best positioned to continue servicing the Assigned Contracts and keep them in good standing.

5. The Monitor believes that the proposed Assignment Order will be of material benefit to the counterparties to many of the Assigned Contracts. For example, the Purchasers intend to assume all liabilities and obligations under the Assigned Contracts.

TAB 24

Action No S240195
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

and

IN THE MATTER OF NEXII BUILDING SOLUTIONS INC., NEXII CONSTRUCTION INC, NBS IP INC. and NEXII HOLDINGS INC. OLD OMICRON CANADA INC., 4540514 CANADA INC., 1061660 B.C. LTD., 0592286 B.C. LTD, 0713447 B.C. LTD, AND 0597783 B.C. LTD.

PETITIONERS

ASSIGNMENT ORDER

BEFORE THE HONOURABLE) April 26, 2024
JUSTICE STEPHENS)

ON THE APPLICATION of KSV Restructuring Inc., in its capacity as the Court-appointed Monitor (in such capacity, the "**Monitor**") coming on for a hearing at Vancouver, British Columbia, on the 26th day of April, 2024; AND ON HEARING counsel for the Monitor Michael Shakra and Andrew Froh, and those other counsel listed on **Schedule "A"** hereto, and no one else appearing although duly served; AND UPON READING, the material filed, including the Second Report of the Monitor dated April 19, 2024 (the "**Report**"); AND PURSUANT TO the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), the British Columbia *Supreme Court Civil Rules*, and the inherent jurisdiction of this Court;

THIS COURT ORDERS AND DECLARES THAT:

1. Capitalized terms used but not otherwise defined in this Order shall have the meaning given to them in the Asset Purchase Agreement dated April 19, 2024 between the Vendors and Purchasers (as defined below) a copy of which is attached hereto as **Schedule "B"** (the "**Sale Agreement**").

2. The time for service of this Notice of Application and supporting materials is hereby abridged such that the Notice of Application is properly returnable today.

APPROVAL OF ASSIGNMENT OF ASSIGNED CONTRACTS

3. Upon delivery of the Monitor's Certificate and subject to Section 2.3 of the Sale Agreement:

(a) all of the rights and obligations of the Vendors under and to the contracts set forth at **Schedule "C" to "H"** hereto (collectively the "**Assigned Contracts**" and each, an "**Assigned Contract**") shall be assigned, transferred, and conveyed to and assumed by 15925347 Canada Inc., 1474480 B.C. Ltd., 1474737 B.C. Ltd., 1474741 B.C. Ltd., 1464115 B.C. Ltd., 1474484 B.C. Ltd. (collectively, the "**Purchasers**"), respectively, as identified in the applicable Schedules hereto pursuant to Section 11.3 of the CCAA and such assignment is valid and binding upon all counterparties to the Assigned Contracts, notwithstanding any restriction, condition or prohibition contained in any such Assigned Contracts, relating to the assignment thereof, including but not limited to, any transfer restrictions or provision(s) relating to a change of control or requiring the consent of, or notice for any period in advance of the assignment to, any party to such Assigned Contracts; and

(b) the Assigned Contracts shall remain in full force and effect in accordance with the terms thereof. Notwithstanding the foregoing, and subject to paragraph 5 below, the counterparties to the Assigned Contracts are prohibited from exercising any rights or remedies (including, without limitation, any right of set-off) or pursue any demand, claim, action or suit under the Assigned Contracts, and shall be forever barred, enjoined and estopped from taking such action by reason of:

(i) any circumstance that existed or event that occurred on or prior to the Closing Date that would have entitled such counterparty to the Assigned Contract to enforce those rights or remedies or caused an automatic termination to occur;

(ii) any default arising from the insolvency of the Vendors or any of their affiliates;

(iii) any default arising as a result of the commencement of this CCAA proceeding;

(iv) any restriction, condition or prohibition contained therein, including any transfer restrictions relating to the assignment thereof or any change of control;

(v) the implementation of the Sale Agreement and the proposed Transaction or any parts thereof (including the assignment of the Assigned Contracts pursuant to this Order and any default arising as a result of such assignment); or

(vi) one or more of the Vendors having breached a non-monetary obligation under any of the Assigned Contracts,

and the counterparties under the Assigned Contracts are hereby deemed to waive any defaults relating thereto; provided, however, that the foregoing shall not prevent a counterparty to an Assigned Contract from pursuing any demand, claim, action or suit under an Assigned Contract in respect of performance of a Vendor's obligations thereunder prior to the Closing Date, but only to the extent any losses suffered by the applicable Purchaser as a result of or in connection with such demand, claim, action or suit are covered by the Purchaser's insurance policies required under the applicable Assigned Contract. For greater certainty and without limiting the generality of the foregoing, no counterparty under an Assigned Contract shall rely on a notice of default sent prior to the filing of the Monitor's Certificate to terminate an Assigned Contract as against the applicable Purchaser or its permitted assignee in accordance with the Sale Agreement or against the applicable Vendor.

4. The assignment of the Assigned Contracts shall be subject to the provisions of the approval and vesting order of the Honourable Justice Stephens dated April 26, 2024 (the "**Approval and Vesting Order**") directing that the Vendors' rights, title and interests in and to the Assigned Contracts shall vest absolutely in the Purchasers free and clear of all Claims and Encumbrances other than the Permitted Encumbrances in accordance with the provisions of the Approval and Vesting Order.

5. All monetary defaults in relation to the Assigned Contracts as set out in **Schedules "C"** to **"H"** hereto, if any, other than those arising solely by reason of (i) the Vendors' insolvency, (ii) the commencement of these CCAA proceedings, or (iii) any failure of any of the Vendors to perform a non-monetary obligation under any of the Assigned Contracts, shall be paid by the Purchasers, as applicable, in an amount agreed to by the Purchasers, as applicable, and the counterparty to such Assigned Contracts or as otherwise determined by further order of this Court within 30 calendar days of the delivery of the Monitor's Certificate.

6. Upon the delivery of the Monitor's Certificate and except as expressly set out to the contrary in any agreement among the Vendors, the Purchasers and the applicable counterparty under an Assigned Contract, each Purchaser, as applicable, shall be entitled to all of the rights and benefits and subject to all of the obligations pursuant to the terms of the applicable Assigned Contracts.

7. Notwithstanding:

   (a) the pendency of these CCAA proceedings or the termination thereof, and any declaration of insolvency made herein;

   (b) any applications for a bankruptcy order in respect of any or all of the Vendors now or hereafter made pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") and any bankruptcy order issued pursuant to any such applications; and

   (c) any assignment in bankruptcy made by or in respect of any or all of the Vendors,

the assignment of the Assigned Contracts to the Purchasers pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Vendors or any of them and shall not be void or voidable by creditors of the Vendors, nor shall it constitute or be deemed to be a transfer at undervalue, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, or any similar legislation of a jurisdiction outside of Canada, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

8. If an Assigned Contract is excluded from the Assumed Contracts prior to the Closing Date in accordance with the Sale Agreement (or as otherwise agreed between the Vendors and Purchasers), then such Contract shall cease to be an Assigned Contract for the purposes of this Order.

GENERAL

9. This Court hereby requests the aid and recognition of other Canadian and foreign Courts, tribunals, regulatory or administrative bodies, including any Court or administrative tribunal, to act in aid of and to be complementary of this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners, the Vendors, the Purchasers and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Petitioners, the Purchasers, the Vendors and the Monitor and their respective agents in carrying out the terms of this Order.

10. The Petitioners, the Vendors, the Monitor, the Purchasers or any other party, each have liberty to apply for such further and other directions or relief as may be necessary or desirable to give effect to this Order.

11. Endorsement of this Order by counsel appearing on this application, other than counsel for the Vendors, is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

BY THE COURT

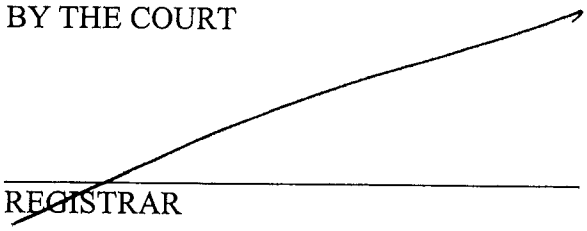
REGISTRAR

CHECKED
pc

Signature of
☐ Party ☑ Lawyer for KSV Restructuring Inc.

Bennett Jones LLP
(Michael Shakra)

BY THE COURT



REGISTRAR

TAB 25

Clerk's stamp:

COURT FILE NUMBER	2001 06423
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 THE COMPROMISE OR ARRANGEMENT OF ENTREC CORPORATION, CAPSTAN HAULING LTD., ENTREC ALBERTA LTD., ENTREC CAPITAL CORP., ENTREC CRANES & HEAVY HAUL INC., ENTREC HOLDINGS INC., ENT OILFIELD GROUP LTD., and ENTREC SERVICES LTD.
DOCUMENT	**ASSIGNMENT ORDER (FORT McMURRAY TRANSACTION)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, 10155 - 102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.9746 Fax: 780.424.5866 Lawyer's Name: Rick T.G. Reeson Q.C. / Asim Iqbal / Bryan A. Hosking Lawyer's Email: rreeson@millerthomson.com aiqbal@millerthomson.com bhosking@millerthomson.com File No.: 144572.3

DATE ON WHICH ORDER WAS PRONOUNCED:	**August 31, 2020**
LOCATION WHERE ORDER WAS PRONOUNCED:	**Calgary, Alberta**
NAME OF JUSTICE WHO MADE THIS ORDER:	**The Honourable Justice B. E. Romaine**

UPON THE APPLICATION by ENTREC Corporation, Capstan Hauling Ltd., ENTREC Alberta Ltd., ENT Capital Corp., ENTREC Cranes & Heavy Haul Inc., ENTREC Holdings Inc., ENT Oilfield Group Ltd., and ENTREC Services Ltd. (collectively, the "**Applicants**") for an order

assigning the Assigned Contracts and the Additional Assigned Contracts (each as defined below) pursuant to Section 11.3 of the *Companies' Creditors Arrangement Act* (the "**CCAA**");

AND UPON HAVING READ the Amended and Restated Initial Order of this Court dated May 25, 2020, the Affidavit of John Stevens sworn August 24, 2020 (the "**Stevens Affidavit**"), and the Fourth Report of Alvarez & Marsal Canada Inc. (the "**Monitor**") in its capacity as Court-appointed Monitor of the Applicants (the "**Fourth Report**"), filed, and the Confidential Supplement to the Fourth Report (the "**Confidential Monitor Report**"), to remain unfiled; **AND UPON HEARING** the submissions of counsel for the Applicants, counsel for LaPrairie Crane (Alberta) Ltd. (the "**Purchaser**"), counsel for the Monitor and counsel for Wells Fargo Capital Finance Corporation Canada, as agent for a syndicate of lenders, no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Service, filed; **AND HAVING GRANTED**, on this day, an Order (the "**FMM Transaction AVO**") approving the Fort McMurray Transaction (as defined in the Stevens Affidavit) and vesting in the Purchaser, all of the Applicants' right, title and interest in and to the purchased assets as described in the Sale Agreement (as defined in the FMM Transaction AVO)

SERVICE

1. Service of notice of this application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this application and time for service of this application is abridged to that actually given.

CAPITALIZED TERMS

2. Capitalized terms used but not otherwise defined in this Order shall have the meaning given to such terms in the Stevens Affidavit.

ASSIGNMENT OF ASSIGNED CONTRACTS

3. Upon delivery by the Monitor to the Applicants and the Purchaser of the Monitor's Closing Certificate (as defined in the FMM Transaction AVO), all of the rights and obligations of the Applicants under and to the Assumed Contracts (as defined in the Sale Agreement), listed on Schedule "**A**" hereto (the "**Assigned Contracts**"), shall be assigned, conveyed and transferred to, and assumed by, the Purchaser pursuant to section 11.3 of the CCAA.

4. The assignment of the Assigned Contracts is declared valid and binding upon all of the counterparties to the Assigned Contracts notwithstanding any restriction, condition or

TAB 26

Court of King's Bench of Alberta

Citation: Invico Diversified Income Limited Partnership v NewGrange Energy Inc, 2024 ABKB 214

Date: 20240412
Docket: 2301 16260
Registry: Calgary

Between:

Invico Diversified Income Limited Partnership, by its general partner, Invico Diversified Income Managing GP Inc.

Applicant

- and -

Newgrange Energy Inc.

Respondent

Reasons for Decision
of the
Honourable Justice M.H. Hollins

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bid, in exchange for the forgiveness of approximately $6.5M in debt owed to Invico.[1] In addition, Invico will assume certain liabilities attached to the assets being transferred and make a cash payment of approximately $650,000 for court-ordered charges and statutory priorities.

[12] I will first address the suitability of the RVO mechanism and then address Invico's request to vest out the NewGrange and Shareholders' GORs.

3. Reverse Vesting Orders

[13] RVOs can be an appropriate vehicle for the sale of insolvent companies or their assets in *CCAA* proceedings. Because an RVO vests title to shares and/or assets directly in the purchaser, as opposed to offering them to open market, additional scrutiny is required to ensure that the sale is fair and reasonable. Further, because RVOs generally involve the creditor taking some assets and liabilities while disclaiming others, courts have a heightened role in ensuring that doing so does not work an avoidable unfairness to affected parties.

[14] Any sale in a *CCAA* proceeding, whether through an RVO or otherwise, must answer the questions in s.36(6) *CCAA* as follows (paraphrased):

(a) Was the process leading to the proposed sale reasonable?

(b) Does the Monitor approve the proposed sale?

(c) Has the Monitor opined that the proposed sale would be more beneficial to creditors than a sale under a bankruptcy?

(d) Were the creditors consulted?

(e) How will the creditors and other interested parties be affected?

(f) Is the consideration offered fair and reasonable?

[15] These factors were reviewed in *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 at para.16, in which the Ontario Court of Appeal also focussed on the efficacy, integrity and fairness of the process generally.

[16] The SISP was granted by this Court on August 25, 2023. FTI has filed its Reports outlining its compliance with the SISP Order, including going through both Phase I and Phase II of the SISP process. That resulted, as mentioned, in three bids; two independent bids and Invico's own stalking horse bid.

[17] The process was conducted fairly and over an appropriate length of time, allowing numerous potential offerors to participate. The only reason the sales process under the SISP did not proceed to conclusion was Tidewater's termination of the processing contracts, leading to the shutting in of the majority of the wells in the Asset and the existing bidders aborting their bids. The Monitor has been supportive of all the steps in the proceeding, including the conversion to a *CCAA* proceeding, the SISP and now the RVO in the form sought. I am satisfied that the relevant factors in s.36(6) *CCAA* and *Soundair* have been sufficiently and fairly addressed.

---

[1] Invico's debt is quantified differently in different places in the filed material, ranging from $6.3-$6.7M. I have not attempted to discern this with certainty because the debt, at either end of that range, vastly exceeds the value of the assets which are the subject of the proposed transaction.

[18] However, as mentioned, there are additional factors to consider in granting an RVO. Neither the *BIA* nor the *CCAA* explicitly authorize an RVO, it is now accepted that ss.11 and 36(6) *CCAA* (in this case) provide the authority to grant an RVO where it is "appropriate in the circumstances"; see *Southern Star Developments Ltd v Quest University Canada*, 2020 BCCA 364 at para.11.

[19] Notwithstanding that authority, an RVO is still supposed to be an "extraordinary" measure; *Harte Gold Corp (Re)*, 2022 ONSC 653 at para.38. Presumably this is because, while it creates favourable conditions for the RVO purchaser, it has the potential of being unfair to other stakeholders. For example, an RVO circumvents the debtor making a plan or a proposal and may therefore be misused to thwart particular creditors or stakeholders who would otherwise have a right to participate in the approval or rejection of the proposal in the creditor class vote. Further, where the proposed purchase under an RVO is a credit bid, there may be a concern about fair value being paid for what is being purchased because, *inter alia*, the RVO structure affords intangible benefits to the purchaser that would not be enjoyed under the more conventional Sales and Vesting Order (SAVO).

[20] As a result, the following additional questions must be answered:

(a) Why is the RVO necessary?

(b) Does the RVO structure produce an economic result that is at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under another viable alternative? and

(d) Does the consideration being paid reflect the value of the intangible assets being preserved under the RVO?

Harte Gold (Re), ibid.

[21] An RVO may be necessary where the debtor is operating in a highly regulated industry and holds regulatory permits and licences that a purchaser would, in the normal course, have to obtain in its own name, by application or assignment. This involves a great deal more time and cost than assuming the existing permits and licences, with all the attendant obligations of course.

[22] The same may be true of existing contracts to which the debtor is a party and of existing tax attributes that would be lost if the assets were simply sold to a new purchaser under a SAVO; *Just Energy Group Inc v Morgan Stanley Capital Group Inc*, 2022 ONSC 6354 at para.34.

[23] Chris Wutzke, Invico's Chief Investment Officer, has deposed that Invico is proposing to retain all oil and gas licences, all software licences, all agreements relating to specific projects and all regulatory attributes of Free Rein; Paragraphs 19, 28 of Wutzke Affidavit #3 sworn and filed February 2, 2024.

[24] Is Invico paying a fair price for the Free Rein assets? A credit bid in these circumstances can be hard to evaluate. On one hand, Invico is receiving an asset that the free market valued at something less than $2M, excluding the GOR, in exchange for the forgiveness of $6.5M in debt. But if Free Rein is put back into bankruptcy proceedings with no imminent purchaser, the remaining producing wells will likely be shut in and devolve to the Orphan Well Association, leaving Invico with no recovery at all. Accordingly, the actual value of the debt forgiveness may be something less than $6.5M, given that the only other option is for Invico to receive nothing.

TAB 27

2017 ANNREVINSOLV 18

Annual Review of Insolvency Law
Editor: Janis P. Sarra

18 — Not Quite True Love: Forced Assignment of Agreements

Not Quite True Love: Forced Assignment of Agreements

Jennifer Stam and Evan Stitt[*]

I. — INTRODUCTION

In the legal profession, commercial contracts are pieces of paper — they are drafted, negotiated, interpreted, and litigated. In the business world, a commercial contract is often more than that — it is the tangible embodiment of a relationship between two parties. Although the contract exists, the relationship often has little to do with the piece of paper and more to do with the people, the business, the products, the service, and a multitude of other elements. Obviously, some commercial relationships are more significant than others. They often depend on the availability of alternatives, the complexity or uniqueness of the product or service, the unique job skills required by the people who are servicing the contract, the quantity and scope of the product or service, whether products are generic or tailored specifically for a party, whether the industry is regulated, whether licenses or regulatory approvals are required, geographical scope and other factors. It is also equally obvious that, much like in personal relationships, in a commercial relationship, the importance of that relationship to one of the parties may be substantially more significant than it is to the other party.

One of the main purposes and touted benefits of the "liquidating *CCAA*"[1] is the continuation of a business where the most likely alternative is a piecemeal liquidation and break up of assets. The benefit of a liquidating *CCAA* is that often a new buyer can get a "fresh start" — a business free and clear of most liens and historical debt — while jobs, supply, service, and customer relationships are all preserved. From a counterparty's perspective, however, the proposed new business partner may not always be a match made in heaven. The question is, what options does that counterparty have?

When a sale occurs, there are two basic decisions that must be made with respect to executory contracts: (a) what contracts does the buyer want to assume and which ones should be repudiated; and (b) is the contract counterparty content to continue doing business with the new business owner, and if not, does such counterparty have a valid basis on which to object to the assignment? Contract counterparties fortunate enough to not experience having had one of their customers, clients, commercial partners, etc, enter into insolvency proceedings may turn to the terms of their contract and point to the assignment clause that, in many cases, will say that a contract cannot be assigned without their consent, sometimes the language specifies acting reasonably, sometimes in a party's sole discretion. They are then sorely disappointed when they are told about section 11.3 of the *Companies' Creditors Arrangement Act (CCAA)*,[2] which allows the court to overrule an objection to assignment and force the assignment of a contract. Even more disappointing to these parties is the unwelcome news that the sheer momentum of a *CCAA* sale, which often has the support of many, if not all, key constituents in the *CCAA* proceeding, means any objection to an assignment is almost always an uphill and expensive battle. This dynamic does not mean that in the right circumstance, the battle is not worth fighting or impossible to win. Where there are truly meritorious arguments, it would appear that the court will not easily override the contractual rights of the contract counterparty.

II. — A BRIEF HISTORY

In 2005, the federal government proposed a series of important changes to Canada's insolvency legislation with the tabling of Bill C-55, which included the introduction of sections 11.3 of the *CCAA* and 84.1 of the *BIA* on the assignment of agreements.[3] Prior to the introduction of these sections, it was typically assumed that where a contract counterparty had the right to consent to an assignment of its contract, that right had to be respected except in very limited circumstances where specific legislation allowed for that right to be overridden. The most common example of this exception arises in relation to real property leases that, in Ontario, could be assigned by a licenced insolvency trustee under section 38(2) of the *Commercial Tenancies Act*.[4] Absent such exception, there were very few cases where courts ever forced the assignment of contracts over the objection of a counterparty, although the court maintained that it had the jurisdiction to do so under the broad powers granted to it under the *CCAA*. Two notable instances where this forced assignment occurred were *Re Playdium Entertainment Corp*[5] and *Re Nexient Learning*.[6] These pre-amendment cases continue to inform courts' analyses even in post-amendment cases.

In *Playdium*, the Playdium group's initial attempts at restructuring under the *CCAA* were unsuccessful, but a proposed transfer of all of the Playdium assets to a newly formed corporation had the backing of most stakeholders, including the two primary secured creditors. Pursuant to the transfer, the new corporation would assume all the material contracts of the Playdium group. However, Famous Players, a counterparty to one of these agreements, objected to the assignment. Famous Players argued that the Playdium group was not in compliance with certain provisions of their agreement, and disputed that steps proposed by the new entity would have the effect of achieving compliance with the agreement. Justice Spence of the Ontario Superior Court of Justice agreed with the first argument and noted the possibility of the second, but nevertheless, ordered the assignment of the agreement. Famous Players' right to sue for breach of the agreement was preserved as against the new corporation, and because of the existence of pre-filing defaults, in theory, Famous Players would be able to issue notices of default against the new entity as soon as the *CCAA* stay was lifted. Ultimately, Justice Spence found that the entire deal hinged on the assignment of the contracts, and as such, the risk was an acceptable one.

The case of *Re Nexient Learning* occurred just prior to the enactment of the amendments to the *CCAA*. In that case, Justice Wilton-Siegel of the Ontario Superior Court of Justice considered whether the debtor had demonstrated that the court's discretion in ordering an assignment was "important to the reorganization process".[7] Justice Wilton-Siegel was careful to note that an assignment order must not affect a counterparty's rights beyond what is absolutely necessary to further the reorganization.[8] In this case, the proposed assignee was looking for an order permanently staying the counterparty's contractual right to terminate the agreement for material breach. Having first agreed to purchase the debtor's assets without the agreement, the assignee had returned to the court seeking an order assigning the agreement after the sale had been completed. Ultimately, Justice Wilton-Siegel found that the proposed assignee could not demonstrate that the assignment would further the *CCAA* proceedings — an obvious finding given the retroactive nature of the relief sought — and that the assignee's desire to permanently stay the counterparty's contractual right to terminate the agreement was similarly unjustifiable.

III. — ASSIGNMENT OF CONTRACTS POST-AMENDMENTS

Section 11.3 states:

> Assignment of Agreements
>
> 11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

> Exceptions
>
> (2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under
>
> (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.

Although there was some speculation that the enactment of section 11.3 would drastically change the practice of assignment of contracts in Canada and potentially create a system much closer to the assumption and assignment process seen in § 365 of the United States ("US") *Bankruptcy Code*,[9] the practice to date has remained relatively unchanged and "forced assignment motions" on a contested basis have remained uncommon.

In many ways, the case law that has developed since 2009 merely expands on the principles articulated in *Playdium* and *Nexient*. In particular, balancing the parties' competing interests and not unduly infringing upon the rights of the counterparty remain foremost considerations. Nevertheless, section 11.3 leaves many open questions that have not yet been conclusively resolved in the case law, including:

1. When will agreements not be assignable by "reason of their nature"?

2. What level of evidence is required to establish that the proposed assignee is able to perform the obligations under the contract?

3. When will a court find that it is "appropriate" to assign an agreement over the objection of the counterparty?

4. To what extent can non-monetary defaults be permanently stayed or otherwise eliminated as grounds for termination?

1. — Agreements not Assignable by Reason of their Nature

Section 11.3(2) of the *CCAA* expressly excludes from assignment several categories of agreements: those agreements that are entered into after the date of the bankruptcy or initial order, eligible financial contracts, and agreements that arise under a collective agreement. It also excludes agreements that are not assignable by reason of their nature. Both the case law and commentary have suggested that section 11.3(2) refers principally to personal service agreements.[10] The trickier issue, of course, is the question of what types of agreements constitute personal service agreements. While defined variously in the case law, perhaps the most compelling definition is that a personal service agreement is an agreement that is "based on confidences or considerations applicable to special personal characteristics, and cannot be usefully performed to or by another".[11] A common example of a personal service agreement is an independent contractor agreement, although the rationale for not assigning such an agreement — that the contractual relationship between the parties is predicated on characteristics specific to the parties, which cannot be meaningfully replicated — is arguably only applicable when the debtor is the independent contractor. In other words, it is not inconceivable to envision a court approving the assignment of an independent contractor agreement where the proposed assignee's business is substantially similar to that of the debtor such that the independent contractor counterparty could continue to perform the same work. In any event, Canadian courts have not considered this specific issue.

In *Ford Credit Canada Ltd v Welcome Ford Sales Ltd*,[12] the trustee in the bankruptcy of Welcome Ford sought an order assigning the rights and obligations of Welcome Ford under a dealership agreement to the prospective purchaser of Welcome Ford's assets. Ford, counterparty to the dealership agreement, argued that the agreement ought to be considered a personal service contract. In support of its argument, Ford pointed to the extensive due diligence process carried out by Ford in selecting Welcome Ford, as well as provisions of the agreements allowing Ford to reserve its rights to determine the necessary characteristics of dealers.[13] However, both the chambers judge and the Alberta Court of Appeal disagreed with this argument, with the former describing the agreement as "a rather standard commercial franchise which could be performed by virtually any business person and entity with some capital and experience in automotive retailing".[14] Clearly this finding was warranted, given that the dealership agreement was a franchise agreement — precisely the sort of agreement that could be performed by a number of parties, being standardized for that purpose. Looking beyond the *Ford Credit* decisions, however, the takeaway remains that in a commercial context, it will be difficult for a counterparty to establish that its agreement with the debtor is a personal service contract, because such a classification almost invariably suggests that the agreement cannot be performed by any other party — an unlikely scenario in most industries.

Moreover, parties cannot simply characterize an agreement as a personal service agreement in the wording of the contract and expect to be shielded from an assignment order. In *Ford Credit* the Alberta Court of Appeal noted that parties to an agreement cannot simply include "a clause describing [the agreement] as creating 'personal' obligations where the contract is, in fact, a commercial one which could be performed by many others than the contracting parties".[15] Similarly, including a term in the agreement to the effect that the agreement cannot be assigned by reason of its nature will not likely be persuasive to a court.[16] As in most instances, substance will prevail over form.

There is at least one other category of agreement that cannot be assigned by reason of its nature: non-executory contracts. Since section 11.3 of the *CCAA* contemplates the assignment of rights and obligations, an agreement that has been fully performed and no longer has ongoing rights or obligations cannot be assigned. However, any underlying interest or asset created by a non-executory contract may still be assigned.

2. — What Level of Evidence is Required to Establish that the Proposed Assignee is Able to Perform the Obligations under the Contract?

Pursuant to section 11.3(b), the proposed assignee's ability to perform the obligations under an agreement is a factor for the court to consider. The ability to perform — or lack thereof — may also be relevant to the appropriateness analysis discussed below. The issue of what information is required to satisfy this requirement is not fully resolved. In some instances, where obligations are strictly financial, it may be enough to provide financial statements. In other circumstances, depending on the significance, management meetings, business plans, industry or regulatory expertise and other materials could potentially be required. Ultimately this question is a factual inquiry as the question of performance might require far more than simply financial stability and could foreseeably depend on capabilities, expertise or otherwise. As such, whether the assignee has met the burden will presumably depend largely on the nature, monetary value and terms of the contract or contracts at issue.

3. — When Will a Court Find that it is "Appropriate" to Assign an Agreement?

Pursuant to section 11.3(c), the court must consider whether the assignment would be appropriate, which is probably the most all-encompassing and therefore important factor that a court will consider. Consideration of the appropriateness of an assignment introduces some notion of fairness, and ultimately involves the court weighing the merit of the counterparty's objections, which includes any detriment to the counterparty as a result of the assignment, against the benefit to creditors and stakeholders, or the importance of the assignment to the overall restructuring. While every case will be decided based on its facts, the jurisprudence provides some guidance for the way in which a court will consider these competing interests.

In *Re Ted Leroy Trucking Ltd*,[17] the Supreme Court of Canada stated the basis on which an order under the *CCAA* would be appropriate as follows:

> ... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.[18]

While the Supreme Court of Canada was referring to appropriateness under the *CCAA* as a whole, and not section 11.3 specifically, the analysis remains the same. In *Re Veris Gold Corp*,[19] Justice Fitzpatrick of the British Columbia Supreme Court, in a discussion of the appropriateness of an assignment order, stated that the twin goals that a court ought to be guided by are "assisting the reorganization process ... while also treating a counterparty fairly and equitably".[20]

While there is no set list of all of the factors that a court may consider in determining the appropriateness of an assignment, the following considerations appear to be significant:

(a) whether the proposed assignment is crucial to the deal either individually or collectively with other contracts;

(b) the nature of the contract and the degree of specialization required to perform under the contract by both parties;

(c) the relative significance of the contract to the counterparty and the potential impact of the assignment on it;

(d) where intellectual property is involved, the scope of the license granted, the significance of the intellectual property involved to each party, whether the assignee has development obligations under the contract and, if so, the assignee's ability to perform those obligations.

Where a contract contains a consent right to assignment, the counterparty's consent is not a precondition for the granting of an assignment order. However, the reasonableness of withholding consent may still be a relevant factor in determining whether the assignment is appropriate. If a court finds that consent is reasonably withheld, it must acknowledge that the assignment is a clear violation of the counterparty's contractual rights. If, on the other hand, the court determines that consent is unreasonably withheld, the counterparty's objection to the assignment of the agreement is considerably weaker. In order to determine whether a counterparty's withholding of consent is reasonable, Canadian courts have applied the following test:

> (a) The burden is on the party seeking consent to demonstrate that the refusal to consent was unreasonable. The question is not whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent.
>
> (b) Information available to the party refusing consent at the time of the refusal is relevant to the determination of reasonableness, not any subsequent facts or reasons.
>
> (c) A refusal will be unreasonable if it was designed to achieve a collateral purpose wholly unconnected with the bargain reflected in the terms of the agreement.
>
> (d) A probability that the proposed assignee will default in its obligations may be a reasonable ground for withholding consent.
>
> (e) The financial position of the assignee may be a relevant consideration.
> (f) The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case.[21]

Factor (c) above includes instances where the counterparty refuses consent because it believes it can obtain a better deal with an entity other than the proposed assignee.[22] A court will likewise be wary of an opportunistic counterparty merely using the restructuring as an opportunity to renegotiate more favourable terms with the assignee.

Courts have also determined that the commercial realities of the marketplace, the economic impact of the assignment on the counterparty, and the financial position of the proposed assignee are all important factors.[23] In *Exxonmobil Canada Energy v Novagas Canada Ltd*,[24] the Alberta Court of Queen's Bench found consent to be reasonably withheld and stressed the counterparty's "real and reasonable issues" that it had to consider in its assessment of the assignee as a future partner. The Court stated that the counterparty's concerns about the capabilities of the proposed assignee were simply "the same considerations that [the counterparty] considered in its decision to enter the Agreement with the financially solvent [debtor]", and that the very reason for the consent requirement in the agreement was to allow the counterparty to assess the suitability of any future contractual partners.[25] Consent will not be found to have been unreasonably withheld if the counterparty has not been given enough time or disclosure to conduct proper due diligence on the proposed assignee.

4. — To What Extent can the Debtor be in Default under the Agreement?

Section 11.3(4) of the *CCAA* reads:

> 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.[26]

The concept of "cure costs" is much more prevalent in US Chapter 11 proceedings than it is in Canada, but the essence of the idea is that if there are monetary amounts owing, the counterparty must be paid those costs to bring the contract into good standing before it can be assigned. There are at least two elements of this so-called cure costs provision that deserve discussion. The first is that it is not difficult to envision circumstances where it would be challenging to determine whether monetary defaults in relation to the agreement arose by reason only of the company's insolvency. The classic example is in the context of a commercial lease, where the debtor has been in rental arrears for some time before filing for protection under the *CCAA*. Since the failure to pay rent is typical of an insolvent enterprise, the argument could be made that the full amount of the arrears could be considered monetary defaults arising by reason of the company's insolvency. Section 11.3(4) specifically exempts those types of costs from the calculation of cure for the purposes of assignment.

The second issue formed the basis of some discussion in *Playdium*. Since the debtor is only expressly required to cure monetary defaults, technically speaking, the assignee may be in default under the contract as a result of non-monetary defaults under the agreement continuing post-assignment.[27] In an attempt to circumvent this scenario, debtors and assignees have sought to include broad terms in the vesting order in an attempt to restrict the instances in which a counterparty may

terminate as a result of pre-existing non-monetary defaults. However, courts have not always accepted this type of language, particularly where there have been counterparties present to object to the language being proposed in the order.[28] Further, it would often appear that the language is included as "belts and suspenders", as often no known non-monetary defaults for the target contracts exist. As such, it remains to be seen what resolution would be granted in a true "Playdium" type situation post-amendments. As stated in *Nexient*, the court must be "satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party".[29] It is therefore unlikely that when a counterparty objects strenuously but unsuccessfully to the assignment of its agreements, a court will also deny the counterparty its contractual remedies for breaches that continue post-assignment.

Additional, practical considerations limit the potential trouble that an assignee will find itself in on a lifting of the stay. First, since one of the factors that a court must consider is whether the assignee can perform the obligations under the agreement, it is unlikely that an assignee would not have the resources to swiftly rectify any defaults after the stay is lifted if faced with potential litigation for breach of contract. Second, both the assignee and the counterparty will typically be incentivized to find ways to make the new business work. The assignee will be motivated to cooperate with the counterparty because it just invested a significant amount of money and time obtaining the debtor's assets, and the counterparty will be motivated because it has just had a front row seat to what was likely a lengthy and expensive court process and may not be anxious to embark on one of its own.

A subsidiary consideration, related to the second item outlined above, is the extent to which a court will be willing to overlook the existence of non-monetary defaults. Despite the wording of section 11.3(4) providing that only monetary obligations must be cured, a court may be wary of assigning an agreement where a debtor has materially failed to perform non-monetary obligations, lest the assignee find itself assuming a grenade of an agreement that is ready to blow up as soon as the stay is lifted. There may also be non-monetary defaults in existence at the time of filing that are simply incurable, and it is not immediately clear how a Canadian court would treat such a situation.

IV. — CROSS-BORDER CONSIDERATIONS

A debtor's contracts may be similarly assigned by court order under the US *Bankruptcy Code*.[30] However, the US legislation deviates from its Canadian counterpart by providing that a debtor must also cure monetary defaults. Although the wording of § 365(b)(1)(A) of the US *Bankruptcy Code* is somewhat ambiguous in this respect, judicial authority exists for the proposition that a contract will not be assignable unless the debtor has cured material non-monetary defaults, other than those arising in relation to a real property lease.[31] In determining whether the existence of an incurable non-monetary default precludes assumption of an executory contract, the test is whether the default is "materially and economically significant" such that it will cause substantial economic detriment.[32] In addition to curing material non-monetary defaults, a debtor in the US must provide "adequate assurance" of future performance of the agreement with respect to the proposed assignee.[33] This requirement arguably places a greater burden on debtors and assignees in the US than in Canada, where the court must merely consider whether or not the assignee can fulfill its obligations under the agreement.

In cross-border files, the issues of which legal regime will apply to the analysis on the assignment of the contract may easily arise. Some of the complexities may hinge on factors such as: (a) the filing matrix of the debtors, *ie*, whether the debtors are cross-filed and if so, whether in plenary proceedings or a main/ancillary proceeding; (b) which debtor is a party to the contract; (c) whether the counter party is in another jurisdiction; (d) the governing law of the contract involved; and (e) whether there are property interests in the contract. All of these factors may complicate which court and what law applies to the determination of whether a contract should be assigned through a court process.

V. — CONCLUSION

As was stated at the outset, despite the fact that section 11.3 has been in force for a number of years, there are good reasons for the fact that there is little case law on the issue. Where the issues at hand are matters of business relationships, the right

solution is often a commercial one and not a legal one. Further, commercial judges are often prone to reminding parties of this fact and are not shy about encouraging a consensual resolution or prompting the monitor to try and broker one. However, there will hopefully be circumstances where the boundaries of this section do get tested, so that the section does not evolve to unnecessarily usurp the contractual rights of a counterparty. In particular, circumstances likely to test the boundaries of the section include instances where the contract at issue is of crucial importance to the counterparty but not the proposed assignee, where the proposed assignee has not provided sufficient evidence of its ability to perform and/or where performance under the contract requires more than just financial resources. That said, where such motions do proceed on a contested basis, the unstoppable force of the debtor's approval and vesting motion will often prevail over an objecting counterparty posing as an immovable object, particularly where it would seem that there is little commercial harm to that counterparty and its contract is crucial to the deal.

Footnotes

[*] Jennifer Stam is Counsel at Goldman, Sloan, Nash & Haber LLP. Evan Stitt is an associate at Gowling WLG (Canada) LLP.

[1] Broadly speaking, a "liquidating *CCAA*" involves a sale of the assets of the debtor in the absence of a plan. See, for example, *Re Nortel Networks Corporation*, 2009 CarswellOnt 4467 (Ont SCJ [Commercial List]).

[2] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [*CCAA*]. Equivalent provisions can be found in s 84.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [*BIA*].

[3] While introduced in 2005, these sections did not come into force until 2009.

[4] *Commercial Tenancies Act*, RSO 1990, c L.7.

[5] *Re Playdium Entertainment Corp*, 2001 CarswellOnt 3893, [2001] OJ No 4252 (Ont SCJ [Commercial List]) [*Playdium 1*], additional reasons 2001 CarswellOnt 4109, [2001] OJ No 4459 (Ont SCJ [Commercial List]).

[6] *Re Nexient Learning*, 2009 CarswellOnt 8071, 2009 OJ No 5507 (Ont SCJ) [*Nexient*].

[7] *Nexient*, *ibid* at para 56.

[8] *Ibid* at para 59.

[9] US *Bankruptcy Code*, 11 USC § 365.

[10] Legislative Summary of Bill C-12, "*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act* and chapter 47 of the *Statutes of Canada*, 2005" (14 December 2012), online: <https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c12&Parl=39&Ses=2&source=library_prb&Language=E#assignment>; Government of Canada, "Summary of Key Legislative Changes in Chapter 47 of the *Statutes of Canada, 2005*, and Chapter 36 of the *Statutes of Canada*, 2007. Available at: <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01782.html>.

[11] *Black Hawk Mining Inc v Manitoba (Provincial Assessor)*, 2002 MBCA 51 at para 82, citing with approval from *Maloney v Campbell*, 1897 CarswellOnt 18, 28 SCR 228 (SCC) at para 11.

[12] *Ford Credit Canada Ltd v Welcome Ford Sales Ltd*, 2010 ABQB 798 [*Ford Credit 1*], affirmed 2011 ABCA 158 [*Ford Credit 2*].

[13] *Ford Credit 1*, *ibid* at paras 57-58.

[14] *Ibid* at para 73.

[15] *Ford Credit 2*, *ibid* at para 50.

[16] *Ibid* at para 54.

[17] *Re Ted Leroy Trucking Ltd*, 2010 SCC 60.

[18] *Ibid* at para 70.

[19] *Re Veris Gold Corp*, 2015 BCSC 1204.

[20] *Ibid* at para 58.

[21] *1455202 Ontario Inc v Welbow Holdings Ltd*, 2003 CarswellOnt 1761 (Ont SCJ) at para 9; *1550988 Ontario Ltd v Burnford Realty Ltd*, 2017 ONSC 2582 (Ont SCJ), additional reasons 2017 ONSC 4407, 2017 CarswellOnt 11107 (Ont SCJ); *Suncor Energy Products Inc v 2054889 Ontario Ltd*, 2010 ONSC 6159 (Ont SCJ [Commercial List]), additional reasons 2010 ONSC 7112, 2010 CarswellOnt 9957 (Ont SCJ [Commercial List]).

[22] *Playdium 1*, *supra* note 5 at para 31.

[23] *Re Hayes Forest Services Ltd*, [2009] BCJ No 1725 (BCSC); *Ford Credit 1*, *supra* note 11.

[24] *Exxonmobil Canada Energy v Novagas Canada Ltd*, 2002 ABQB 455.

[25] *Ibid* at para 54.

[26] *CCAA*, *supra* note 2, s 11.3(4). An almost identical provision is contained at s 84.1(5) of the *BIA*, *supra* note 2.

[27] *Playdium 1*, *supra* note 5 at para 29.

[28] *Re Golftown Canada Holdings Inc* (27 October 2016), Doc CV-16-11527-00CL (Ont SCJ [Commercial List]) Assignment Order; *Re TBS Acquireco Inc*, 2013 ONSC 4663 (Ont SCJ [Commercial List]) at para 24.

[29] *Nexient*, *supra* note 6 at para 59.

[30] US *Bankruptcy Code*, 11 USC.

[31] *In re Empire Equities Capital Corp*, 405 BR 687, 690-91 (Bankr SDNY, 2009).

[32] *In re Joshua Slocum*, 922 F2d 1081, 1092 (3d Cir, 1990).

[33] US *Bankruptcy Code*, 11 USC § 365(f)(1).

TAB 28

CITATION: Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 6354
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20221114

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	)	*Jeremy Dacks and Marc Wasserman*, Counsel to the Just Energy Group
	)	*Tim Pinos, Ryan Jacobs and Alan Merskey*, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
– and –	)	
	)	
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG	)	*David H. Botter and Sarah Link Schultz*, U.S. Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
	)	*Heather L. Meredith and James D. Gage*, Canadian Counsel to the Agent and the Credit Facility Lenders
	)	*Howard A. Gorman and Ryan E. Manns*, Counsel for Shell Energy North American (Canada) Inc. and Shell Energy North America (U.S.)
	)	*Danielle Glatt*, Counsel to U.S. Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.* and Counsel to U.S. Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*
	)	*David Rosenfeld and James Harnum*, Counsel for Haidar Omarali in his capacity

MARKETING LLC JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT.	)	as Representative Plaintiff in *Omarali v. Just Energy*
	)	*Robert Kennedy*, Counsel for BP Energy Company and certain of its affiliates
	)	*Jessica MacKinnon*, Counsel for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
	)	*Bevan Brooksbank*, Counsel for Chubb Insurance Co. of Canada
Applicants	)	
– and –	)	*Alexandra McCawley*, Counsel for Counsel to Fortis BC Energy Inc.
MORGAN STANLEY CAPITAL GROUP INC.	)	*Robert I. Thornton*, *Rebecca Kennedy*, *Rachel B. Nicholson* and *Puya Fesharaki*, Counsel to FTI Consulting Canada Inc., as Monitor
Respondents	)	
	)	*John F. Higgins*, U.S. Counsel to FTI Consulting Canada Inc., as Monitor
	)	*Ganesh Yadav*, self-represented
	)	*Mohammad Jaafari*, self-represented
	)	**HEARD:** November 2, 2022

ENDORSEMENT

MCEWEN J.

[1] The Applicants (collectively the "Just Energy Entities") bring a motion seeking approval of a going-concern sale transaction (the "Transaction") for their business. They seek to implement the Transaction through a proposed draft reverse vesting order (the "RVO") and other related relief.

[2] The Just Energy Entities provided the court with two draft orders in furtherance of their position. The first is the RVO for the Transaction. The second is an order (the "Monitor's Order")

- maintaining the aforementioned regulatory and licensing relationships across Canada and the U.S.;

- satisfying or assuming in full all secured claims and priority payables;

- preserving U.S. tax attributes and tax pools; and

- permitting the Just Energy Entities to exit these proceedings with a significantly deleveraged balance sheet and a U.S. $250 million new credit facility bringing an end to the *CCAA* proceedings aside from the limited matters related to the Residual Cos.

[57] As discussed, the Transaction does not provide any recovery for unsecured creditors or shareholders. I accept the submissions of the Just Energy Entities, however, that this is not a result of the RVO structure. Rather, this reflects the fact that the Just Energy Entities' value, as tested through the market through the SISP and through previous marketing attempts over three years, is not high enough to generate value for the unsecured creditors and shareholders. This was also the situation in *Black Rock Metals Inc.* (see paras. 109, 120). I agree with the comments in *Black Rock Metals Inc.* wherein Chief Justice Paquette stated that the unsecured creditors and shareholders are therefore not in a worse position with the reverse vesting order than they would have been under a traditional asset sale. Either way, they have no economic interest because the purchase price would not generate any value for the unsecured creditors and shareholders.

[58] There is no other viable option being presented to this court. Further, it bears noting that the shareholders' interests amount to claims in equity. As noted in *Harte Gold Corp. (Re)*, at para. 64, shareholders have no economic interest in an insolvent enterprise and therefore they are not entitled to a vote in any plan. The portion of the order requested relating to the cancellation of the existing shares is, therefore, justified in the circumstances.

[59] The consideration to be received for the assets is fair and reasonable. The Just Energy Entities' business was extensively marketed both prior to and during the *CCAA*. There have been no offers, except that put forth by the Purchaser. Therefore, I accept that the consideration is fair and reasonable.

[60] While it is unfortunate that there is no recovery for unsecured creditors or shareholders, this is a function of the market. In this regard, it is noteworthy that PIMCO holds over U.S. $250 million in unsecured debt that it will not recover.

[61] There is also evidence above that the purchaser is paying more than the Just Energy Entities would be worth in a bankruptcy. Furthermore, the Monitor is satisfied that the consideration is fair in the circumstances.

Other considerations

[62] Based on the foregoing analysis of the s. 36(3) provisions, I am also satisfied that the criteria set out above in *Soundair* have been met: there has been a sufficient effort to obtain the best price; the debtor has not acted improvidently; the interests of the parties have been properly considered; the process has been carried out with efficacy and integrity; and there is no unfairness in the circumstances.

[63] The Transaction will provide for a fair and reasonable resolution of the Just Energy Entities' insolvency and obtain the best value for its assets. In sum, employment is preserved for most employees and energy will continued to be provided for approximately 950,000 customers.

Related relief

[64] With respect to the shareholdings in the Just Energy Entities, it is reasonable to cancel the existing shares and issue new common shares to the Purchaser via JEUS. Similar approaches have been used in other reverse vesting order transactions: see *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)*, at paras. 59-64. Since the existing shareholders have no economic interest in the company, there is no entitlement to recovery unless all creditors are paid in full: *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209, 70 C.B.R. (5th) 1.

[65] The *CBCA* provides that the share conditions of a *CBCA* corporation under *CCAA* protection can be changed by articles of reorganization. Section 191(1) of the *CBCA* recognizes that a "reorganization" includes a court order made under any Act of Parliament that affects the rights among the corporation, its shareholders and other creditors (see s. 191(1)(c)). This includes the *CCAA*: see *Canwest*, at para. 34; *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)*, at para. 61 (dealing with the equivalent provision of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16. (*OBCA*)).

[66] Pursuant to ss. 173, 176(1)(b) and 191(2) of the *CBCA*, courts have accepted that, under a *CCAA* proceeding, they can approve the cancellation of outstanding shares as part of a corporate reorganization that gives effect to a *CCAA* restructuring transaction and that the shareholders are not entitled to vote: see *Harte Gold Corp. (Re)*, at para. 62; *Black Rock Metals Inc.*, at para. 122; *Canwest*, at para. 34.

[67] There are also a number of other orders requested in the RVO that I have approved. I will briefly deal with the noteworthy ones below, as follows:

- It is appropriate that the RVO provides that all former employees of the Just Energy Entities be transferred to the Canadian Residual Cos. This will assist these former employees in relation to their entitlements under the *Wage Earner Protection Program Act*, S.C. 2005, c.47, s.1. Similar relief was granted in *Quest University (Re)*, which also involved a reverse vesting order.

- The releases sought are proportional in scope and consistent with releases granted in other similar *CCAA* proceedings. I have analyzed the factors set out by Penny J.

in *Harte Gold Corp. (Re)*, at paras. 81-86. As in that case, the releases are rationally connected to the purposes of the restructuring; the releasees contributed to the restructuring; the releases are not overly broad; the releases will enhance the certainty and finality of the Transaction; the releases benefit the Just Energy Entities, its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification; and all creditors on the service list were made aware of the releases sought and the nature and effect of the release.

- The specific relief in the RVO concerning the ongoing litigation with the Electric Reliability Council of Texas Inc. ("ERCOT") is fair and reasonable. The wording was negotiated with ERCOT and preserves the Just Energy Entities' and ERCOT's rights in the ongoing litigation between them as set out para. 11.

- Similarly, the paragraphs of the RVO concerning the Omarali Class Action are fair and reasonable and have been negotiated with the Omarali Class Action solicitors and are not prejudicial to the insurers noted therein.

- All remaining ancillary relief is fair and reasonable. I have simply touched upon the most significant ancillary relief above.

THE MONITOR'S ORDER

[68] As outlined, I granted the Monitor's Order.

[69] First, it is necessary that the Monitor carry on in order to implement the steps required with respect to the Residual Cos. in Canada and the U.S. and to implement the provisions of the RVO.

[70] Second, the stay extension to January 31, 2023 is also necessary given the steps that must be undertaken.

[71] I have reviewed the activities of the Monitor's reports and fees and they are fair and reasonable.

[72] Last, I agree that a sealing order should be issued with respect to confidential Exhibit "F" of Mr. Caiger's affidavit. Exhibit "F" is comprised of the four NOIs received by the Just Energy Entities. The NOIs contain confidential, commercially sensitive information regarding the identities of the four participants and their respective corporate, operational and financial information disclosed in support of the requirement of each NOI. Additionally, the NOIs contain confidential and commercially sensitive information regarding the scope and subject matter of each proposed bid. Dissemination of this information at this time, would pose a legitimate risk to the commercial interests of the SISP participants and the Just Energy Entities and their stakeholders should the Transaction fail to close. Thus, the public's interest in maintaining the confidentiality of this commercially sensitive information creates an important commercial interest. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada*

TAB 29

CITATION: Lydian International Limited (Re), 2020 ONSC 4006
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2020-07-10

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Elizabeth Pillon*, *Maria Konyukhova*, *Sanja Sopic*, and *Nicholas Avis*, for the Applicants

D. J. Miller and *Rachel Bergino*, for Alvarez & Marsal Inc.

Robert Mason and *Virginie Gauthier*, for Osisko Bermuda Limited

Pamela Huff and *Chris Burr*, for Resource Capital Fund VI L.P.

David Bish and *Michael Pickersgill*, for Orion Capital Management

Alexander Steele, for Caterpillar Financial Services (UK) Limited

Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)

John LeRoux, *Hasan Ciftehan*, *Mehmet Ali Ekingen and Atilla Bozkay*, each in their capacity as a Shareholders of Lydian International Limited

HEARD by ZOOM Hearing and DECIDED: **June 29, 2020**

REASONS RELEASED: **July 10, 2020**

ENDORSEMENT

[1] Lydian International Limited, Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (the "Applicants") bring this motion for an order (the "Sanction and Implementation Order"), among other things:

at para 92 (CanLII) CCAA at s. 5(1); *Re Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 61 and 70 (CanLII); *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at para 28-30 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 85-88 (CanLII).

[54] The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.

[55] The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

[56] The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

[57] The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

[58] The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*Re Metcalfe &Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 71 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 80-82 (CanLII).

TAB 30

COURT FILE NO.: CV-09-8257-00CL
DATE: 20091223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, As Amended

And in the Matter of a Plan of Compromise or Arrangement of Nexient Learning Inc. and Nexient Learning Canada Inc.

BEFORE: Mr. Justice H.J Wilton-Siegel

COUNSEL: *George Benchetrit*, for Nexient Learning Inc. and Nexient Learning Canada Inc.

Margaret Sims and *Arthi Sambasivan*, for Global Knowledge Network (Canada) Inc.

Catherine Francis, *David T. Ullman* and *Melissa McCready*, for ESI International Inc.

Lynne O'Brien, for the Monitor, RSM Richter Inc.

DATE HEARD: November 30, 2009

E N D O R S E M E N T

[1] On this motion, the applicants, Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, "Nexient") and Global Knowledge Network (Canada) Inc. ("Global Knowledge"), seek an order authorizing the assignment of a contract from Nexient to Global Knowledge on terms that would permanently stay the right of the other party to the contract, ESI International Inc. ("ESI"), to exercise rights of termination that arose as a result of the insolvency of Nexient. ESI is the respondent on the motion, which is brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") as a result of Nexient's earlier filing for protection under that statutue.

Background

The Parties

[2] Nexient Learning Inc. and Nexient Learning Canada Inc. are corporations incorporated under the laws of Canada.

[58] Moreover, Spence J. also considered a number of factors in assessing whether the relief was consistent with the purpose and spirit of the CCAA: whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were obtained; and whether there had been unfairness in the working out of the process.

Standard Applied On This Motion

[59] It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of CCAA proceedings, whether it is founded in section 11(4) of the CCAA or the Court's inherent jurisdiction, must be exercised sparingly. Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the CCAA proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

The Specific Legal Issue Presented On This Motion

[60] This motion raises an important issue concerning the extent of the authority of the Court to authorize the assignment of a contract in the face of an objection from the other party to the contract. ESI argues that a Court should not permit a purchaser under a "liquidating CCAA" to "cherry pick" the contracts it wishes to assume.

[61] Insofar as the result would be to prevent a debtor subject to CCAA proceedings from selling only profitable business divisions or would prevent a purchaser from deciding which business divisions it wishes to purchase, I do not think ESI's proposition is either correct or practical. The purpose of the CCAA is to further the continuity of the business of the debtor to the extent feasible. It does not, however, mandate the continuity of unprofitable businesses.

[62] However, the situation in which a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a continuing or multifaceted arrangement is more problematic. In many instances in which a purchaser wishes to discriminate among contracts with the same third party, the Court will not exercise its authority under the CCAA, or its inherent jurisdiction, to authorize an assignment and/or permanently stay termination rights based on insolvency defaults. In such circumstances, the purchaser must assume all contracts with the third party or none at all.

[63] There can be many reasons why it would be inappropriate or unfair to authorize the assignment of less than all of a debtor's contracts with a third party. In many instances, there is an interconnection between such contracts created by express terms of the contracts. Similarly, there may be an operational relationship between the subject-matter of such contracts even if there is no express contractual relationship. Courts are also reluctant to authorize an assignment

TAB 31

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *NextPoint Financial, Inc. (Re),* 2023 BCSC 2378

Date: 20231031
Docket: S235288
Registry: Vancouver

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

- and -

In the Matter of a Plan of Compromise and Arrangement of NextPoint Financial, Inc. and those parties listed on Schedule "A"

Before: The Honourable Justice Fitzpatrick

Oral Reasons for Judgment

Counsel for the Petitioner, NextPoint Financial, Inc.:	J.D. Bradshaw S. Arbor L. Huang, Articled Student
Counsel for The Monitor:	L. Hiebert
Counsel for Basepoint Capital:	M. Buttery D. Rosenblat
Counsel for First Century Bank, N.A.:	L. Williams A. Bowron
Counsel for Drake Enterprises Ltd.:	M. Sennott
Counsel for Chilmark:	K. Siddall
Place and Date of Hearing:	Vancouver, B.C. October 31, 2023
Place and Date of Judgment:	Vancouver, B.C. October 31, 2023

[20] Having received answers to the above questions, I am satisfied that the RVO is necessary in this case to preserve the attributes described by Mr. Kravitz. I am satisfied that the structure produces an economic result that is as favourable as the other viable alternative that was earlier proposed, namely an asset sale. I am also satisfied that no stakeholder is worse off under the RVO structure, as confirmed by the Monitor. Finally, I am satisfied that the consideration to be paid does reflect the value of the various attributes that are being transferred.

[21] Accordingly, I conclude that the RVO structure is justified in the circumstances.

[22] The third issue relates to the third-party releases. As counsel are well aware, that aspect of this application has generated quite a bit of discussion and questions from the Court. The third-party releases are set out at paras. 21-28 of the proposed order. The releases are intended to benefit the usual parties, namely the Monitor, and its counsel, the CRO. The releases also include the Interim Lender, Basepoint, who is the equivalent of what is described as the purchaser.

[23] Counsel for the Debtors and Basepoint have taken me through the various contributions that have been made by Basepoint in these proceedings, including Basepoint's support of the organization leading to the presently proposed transaction. In addition, Basepoint's counsel has pointed me to similar releases that were granted in the *Harte Gold* and *Just Energy Group* proceedings which included releases in favour of the purchasers.

[24] Basepoint's counsel has now provided me with revised release provisions that have cleaned up certain duplications in these paragraphs. Counsel have also highlighted why these paragraphs have been structured and drafted in a very expansive manner. I am advised that this is intended to accommodate the later application to be brought in the US Bankruptcy proceedings to recognize these provisions. As everyone here knows, the matter of third-party releases in the US is a matter of some uncertainty given differing US court decisions and, in fact, the issue is pending before the US Supreme Court in *Purdue Pharma*.

[25] Having considered the matter in light of the later submissions by counsel, I approve the release provisions that have been revised and put before me. I consider that they are justifiable as being consistent with Canadian jurisprudence, including the test as articulated and applied in *Harte Gold* at paras. 78-86, *Blackrock Metals* at paras. 125-132 and *Harte Gold* at paras. 78-86 and *Just Energy Group* at para. 67.

[26] I conclude that the releases sought, particularly with respect to the purchaser, are rationally connected to a restructuring and are reasonable, justified and appropriate in the circumstances.

[27] Accordingly, the order as sought by the Debtors, as amended, is granted.

"Fitzpatrick J."

TAB 32

Court of Queen's Bench of Alberta

Citation: Northmont Resort Properties Ltd v Reid, 2018 ABQB 1002

Date: 20181212
Docket: 1703 22524
Registry: Edmonton

Between:

Northmont Resort Properties Ltd

Respondent/Cross
Appellant (Plaintiff)

- and -

James Reid and Diane Reid

Appellant/Cross
Respondents (Defendants)

Reasons for Decision
of the
Honourable Mr. Justice J.J. Gill

Introduction

[1] A group of the Defendants appeal a decision by Young PCJ (***Northmont Resort Properties Ltd v Reid***, 2017 ABPC 249 (***Reid decision***) striking their Dispute Notes (the Provincial Court's version of a Statement of Defence) and counterclaims on the basis that they had already been finally decided in other litigation and therefore were *res judicata* and an abuse of process. She further granted the Plaintiff, Northmont Resort Properties Ltd, judgment against the Defendants in the amounts claimed in the Civil Claims. Northmont also cross appeals, alleging that Young PCJ erred by setting pre-judgment interest at the rate set in the *Interest Act*,

> ... 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.

[69] First, in my view, s. 36(6) of the CCAA can only be interpreted as applying to sales or disposition free and clear of **creditors' interests**. The clause refers to "security, charge or other restriction." Generally, one reads a list with specific items followed by a general expression, as limiting the general expression to the class of the specific items: ***Conseil scolaire francophone de la Colombie-Britannique v. British Columbia***, 2013 SCC 42 (at para 23); ***Consolidated Fastfrate Inc v Western Canada Council of Teamsters***, 2009 SCC 53 (at para 42). Thus, the list item "other restriction" should be interpreted as referring to restrictions in the nature of security interests or charges, and not as broadly expanded to include free and clear of any obligation imposed by statute for a purpose unrelated to the CCAA.

[70] Moreover, this interpretation is supported by the clear language of the second part of the provision:

> ... if it [the Court] does [authorize a sale or disposition], it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction **in favour of the creditor whose security, charge or other restriction is to be affected by the order**.
>
> (Emphasis added)

[71] Second, as noted by the McLennan Ross Respondents, Northmont's argument would effectively place Northmont in a better contractual position with the cross-respondents than they had been in with Fairmont. It is true that the CCAA may place successor entities in a better position than the insolvent corporation in terms of relationships with **creditors**, but there is nothing in the CCAA that suggests or requires that there be a similar change in the relationship between contracting parties. The purpose of the CCAA informs the interpretation of the legislation, and despite Northmont's assertion that the prospect of having to conform to the consumer protection provisions in the *Interest Act* was essential to the survival and restructuring of the Resort, there is nothing in the CCAA that suggests that courts can override statutory rights unrelated to the insolvency.

[72] Third, unlike s. 36 which deals with the assignment of assets generally, s.11.3 of the CCAA specifically deals with the assignment of agreements. Its language is much more limited. It requires the Court to consider a number of factors to determine whether the assignment of an agreement would be appropriate. That list of factors is not exhaustive, and includes such things as whether the monitor considers the assignment appropriate and whether the assignee can fulfill the obligations under the agreement.

[73] Further, s. 11.3 and the jurisprudence regarding counterparties' involvement with the assignment of agreements is directed towards the appropriateness of the assignee and its ability to meet the obligations under the agreement, not towards justifying extinguishing contractual or statutory rights. As noted in ***Nexient,*** any jurisdiction to interfere with contractual rights must be exercised sparingly and in a manner that meets the purpose and spirit of the CCAA (at para 59). That purpose is to further the "continuity of the business of the debtor to the extent feasible" (***Nexient*** at para 61). In ***Nexient,*** the issue was whether the assignee was required to acquire all of a debtor's contracts with a third party, where there was an interconnection among the

contracts, either express or implied. The Court held that it would be inappropriate if the result would be unfair to the counterparty.

[74] I conclude that the CCAA does not, either expressly or impliedly, authorize a Court to assign an agreement free of statutory limitations that are of general application and whose application is unrelated to the CCAA purpose of either continuing the debtor's business or transferring it to some other person who can carry it on.

[75] Based on this conclusion, it is unnecessary to examine whether the Vesting Order purported to assign the VIAs free and clear of the requirements of the *Interest Act*. However, in the interests of completeness, I will do so.

Interpreting the Vesting Order

[76] The Vesting Order lists in great detail the interests that are excluded from the assignment of the assets, stating that the assets are transferred free and clear of:

(a) estates,
(b) interests,
(c) licenses,
(d) rights,
(e) options,
(f) security interests (whether contractual, statutory or otherwise including security interests evidenced by registration pursuant to the Personal Property Security Act of the Province of Alberta or Province of British Columbia, or any other personal property registry system),
(g) security notices,
(h) hypothecs,
(i) mortgages,
(j) pledges,
(k) agreements,
(l) statements of claim,
(m) certificates of lis pendens,
(n) disputes,
(o) debts,
(p) trusts,
(q) deemed trusts (whether contractual, statutory or otherwise),
(r) liens whether contractual, statutory, or otherwise (including, without limitation, any statutory or builders' liens),
(s) taxes, and
(t) other rights, limitations, restrictions, interests and encumbrances...

[77] The first five items in the list - estates, interests, licenses, rights, and options – are proprietary interests in the assets. The next five - security interests, security notices, hypothecs, mortgages, and pledges are all interests held by creditors to secure a debt. The next four - agreements, statements of claim, certificates of *lis pendens*, disputes – are causes of action or potential causes of action. Debts are a subset of creditors' interests. Trusts, deemed trusts, liens and taxes are interests imposed on the asset arising from either common law or statute. The final basket clause must be interpreted within the context of the lengthy specific list.

TAB 33

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Peakhill Capital Inc. v. Southview Gardens Limited Partnership,* 2023 BCSC 1476

Date: 20230825
Docket: S-231065
Registry: Vancouver

Between:

Peakhill Capital Inc.

Petitioner

And

Southview Gardens Limited Partnership, Southview Gardens BT Ltd., Southview Gardens Properties Ltd., Zhen Yu Zhong, Junchao Mo, Coromandel Properties (2016) Ltd., Baystone Properties (2016) Ltd., and Coromandel Holdings Ltd.

Respondents

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for the Petitioner:	E. Laskin
Counsel for the Receiver, KSV Restructuring Inc.:	V. Tickle
Counsel for Cenyard Pacific Developments Inc.:	J. Schultz E. Newbery
Counsel for His Majesty the King in right of the Province of British Columbia:	O. James R. Power
Counsel for Cenyard Southview Gardens Ltd.:	A. Teasdale
Place and Date of Hearing:	Vancouver, B.C. August 4, 2023

Place and Date of Judgment: Vancouver, B.C.
August 25, 2023

Analysis of the Authorities Regarding RVOs

[31] The Applicants argue that the case law supports the issuance of an RVO to support tax-related objectives. There are a number of cases in which tax benefits have been cited as reasons for granting an RVO.

[32] In *Port Capital Development (EV) Inc. (Re)*, 2022 BCSC 1464 *[Port Capital]*, Justice Fitzpatrick held:

> [58] Finally, I am satisfied that approval of the Solterra Offer in the form of an RVO is appropriate, just as it was in relation to the Solterra Backup Offer. In the *BCSC Sale Reasons*, I set out the reasons why such a structure would be beneficial, albeit in relation to Landa's offer:
>
> > [20] Landa Offer #1 was in the form of an asset purchase, although the parties allowed for the possibility of completion pursuant to a Reverse Vesting Order ("RVO"). That scenario was seen as beneficial in order to allow the existing Petitioners to continue under Landa's ownership and control while preserving existing contractual rights, such as the building permit (but not the pre-sale contracts). The RVO structure also avoided payment of substantial property transfer tax.
>
> [emphasis added]

[33] Further, in *Quest University Canada (Re)*, 2020 BCSC 1883 *[Quest]*, leave to appeal ref'd at 2020 BCCA 364, Justice Fitzpatrick cited two other cases in which courts found it appropriate to grant RVOs for tax planning purposes:

a) At para. 131, she cited *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]), in which an RVO was approved to implement an agreement "that 'effectively' transferred current tax losses and intellectual property to a purchaser"; and

b) At para. 136, she cited *Comark Holdings Inc*. (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]), wherein Justice Hainey granted the RVO involving a share sale that "preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business".

[34] Moreover, in *PaySlate Inc. (Re)*, 2023 BCSC 977 [*PaySlate #2*], Justice Walker held:

> [11] Necessity has also been established. Not only does the share acquisition contemplated by the RVO preserve PaySlate's tax attributes and SR&ED credits, from additional evidence adduced by PaySlate and discussed by the Proposal Trustee, it is clear that the RVO is also necessary to preserve PaySlate's cyber security and cyber insurance policies.
>
> [emphasis added]

[35] And in *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354 at para. 34 [*Just Energy*], the court held that one of the circumstances in which RVOs have been approved is where "maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction".

[36] The Province argues that, in those cases, the preservation of tax attributes or the saving of tax were not the only benefits arising from the RVOs which were granted. Further, it submits that an RVO is usually granted to preserve a going concern which would otherwise be lost.

[37] For example, in *Port Capital*, while the RVO structure did allow the parties to avoid property transfer tax, it also allowed the business to continue as a going concern and to preserve existing contractual rights such as a building permit.

[38] Similarly, in *PaySlate* #2, an RVO was granted to preserve the debtor's existing tax attributes, but it also preserved scientific research and experimental development tax credits, as well as cyber security and cyber insurance policies which would otherwise not be transferable.

[39] There is no doubt that a common use of RVOs is to preserve a going concern or to maintain licenses and permits which cannot be transferred easily: see *PaySlate #1* at para. 1, and *Harte Gold Corp. (Re)*, 2022 ONSC 653 *[Harte Gold]* at para. 71.

[40] It is also clear that the jurisprudence is replete with cautionary words regarding the granting of RVOs.

[41] In *PaySlate #1* at para. 87, Justice Walker held that "RVOs are not the norm and should only be granted in extraordinary circumstances".

[60] In my view, with respect, the Province's arguments on this issue are unpersuasive, for at least two reasons.

[61] First, I reiterate that in numerous cases, some of which are cited above, courts have granted RVOs which have conferred tax benefits on the parties in an insolvency proceeding. Those courts have already "blessed the objective of avoiding a tax liability", albeit in circumstances wherein the tax objective was not the only one. In all of these cases, it appears clear that the taxing authority became entitled to less tax than otherwise, either because tax credits or tax losses were preserved, or because taxes otherwise payable were avoided.

[62] Second, the Province's arguments on this issue appear to be based on the premise that the transfer of property by means of the sale of the corporate property owner's shares constitutes unlawful tax avoidance. However, it seems clear that, at least outside of the insolvency context, this proposition is not correct.

[63] To the extent that evidence on this point is required, the Applicants cite the Receiver's second report and an affidavit from an experienced corporate realtor for the proposition that it is common for a seller and purchaser to enter into a share purchase agreement for the sale of shares in a company whereby all of the issued and outstanding shares of the company are transferred by the seller to the purchaser so that the purchaser can own the seller company's real property. In particular, it is common for purchasers to acquire land in British Columbia by acquiring the shares of a nominee to avoid paying PTT.

[64] In a non-insolvency context, the parties would have been permitted to carry out the transfer of the property by means of the transfer of shares of the nominee company. Indeed, it seems evident that similarly situated parties in a non-insolvency context would have done so.

[65] Therefore, this is a tax liability which is readily avoided in a non-insolvency context. The Province has not been able to satisfactorily explain why, given that

TAB 34

Most Negative Treatment: Check subsequent history and related treatments.

2001 CarswellOnt 4109
Ontario Superior Court of Justice [Commercial List]

Playdium Entertainment Corp., Re

2001 CarswellOnt 4109, [2001] O.J. No. 4459, [2001] O.T.C. 828, 109 A.C.W.S. (3d) 683, 31 C.B.R. (4th) 309

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

In the Matter of a Plan of Compromise or Arrangement of Playdium Entertainment Corporation et al.

Spence J.

Heard: November 9, 2001
Judgment: November 15, 2001
Docket: 01-CL-4037

Proceedings: additional reasons to (2001), 18 B.L.R. (3d) 298 (Ont. S.C.J.)

Counsel: *Paul G. Macdonald*, for Covington Fund I Inc.
Gary C. Grierson, for Famous Players Inc.
Gavin J. Tighe, *B. Skolnik*, for Toronto-Dominion Bank
David B. Bish, for Playdium Entertainment Corporation

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by court
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues
Group of corporations which operated chain of cinemas was unable to arrive at viable plan while restructuring under Companies' Creditors Arrangement Act — Corporations, including bankrupt corporation, proposed transfer of assets to new corporation — Transaction would involve assignment of agreement with film distribution company — Corporations' application for court approval of assignment was granted and interim receiver was appointed — Creditors proposed that order appointing interim receiver contain certain provisions — Company submitted that form of order should be revised to provide that transfer of assets be made subject to any and all claims of company arising from contractual entitlements under agreement — Clause requested by company was not necessary — Pursuant to terms of assignment, company would continue to have same rights of action it currently had or that could subsequently arise against bankrupt corporation — Sections 11(4)(a), (b) and (c) of Act only provide for orders of negative injunctive effect, unless otherwise ordered by court, in respect of proceedings against bankrupt company — Circumstances of company with respect to agreement had not changed to company's detriment — In principle, change, occasioned only by change in ownership, did not involve materially greater or different obligations and was within jurisdiction of Act — Court prohibits any proceeding by company against bankrupt corporation except on terms such that proceeding be consistent with any assignment of agreement approved by court — Order on such terms conforms to requirements of s. 11(4)

(c) — If order did not bind company in positive manner, company could assert rights under agreement without being subject to corresponding obligations — Approval of proposed assignment was within court's jurisdiction and was proper exercise of jurisdiction — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11(4)(a), (b), (c).

Table of Authorities

Cases considered by *Spence J.*:

American Eco Corp., Re (October 24, 2000), Doc. 00-CL-3841 (Ont. S.C.J.) — considered

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]) — followed

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — considered

Smoky River Coal Ltd., Re, 1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 11(3) — considered

s. 11(4) — considered

s. 11(4)(a) — referred to

s. 11(4)(b) — referred to

s. 11(4)(c) — considered

ADDITIONAL REASONS to judgment reported at 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J.), disallowing film distribution company's proposed revision to form of order.

***Spence J.*:**

1 These reasons are supplemental to the reasons for decision which I released November 2, 2001. Reference is made to those reasons. The defined terms employed in those reasons are also used below.

2 Covington and TD Bank propose that the order appointing the interim receiver should contain, as regards the assignment of the Material Agreements (including the Techtown Agreement), the provisions set out in Part V, paragraphs 10 through 13, of the draft order now before the court.

3 This draft order is different from the form of order in the motion record but apparently not different in respect of the matter now in issue between Covington, TD Bank and Playdium on the one side and Famous Players on the other. The hearing on October 29 and 30 did not address the specific terms of the order but it did address the intended effect of the assignment of the Techtown Agreement. It was submitted that the assignment was intended to result in New Playdium, as assignee, becoming bound to perform the Playdium obligations under the agreement from and after the transfer date and becoming entitled to obtain performance by Famous Players of its obligations under the agreement from and after that date. Special provision has been made in respect of s.9(e) defaults, as referred to in the reasons for decision of November 2, 2001. The insolvency defaults of Playdium which led to the CCAA order are in effect stayed, which is not an issue.

The Issue

4 Famous Players now submits that the form of order should be revised to provide that the transfer of assets should, in effect, be made subject to "any and all claims of Famous Payers arising from its contractual entitlements under the Techtown Agreement".

the chambers judge will take account of the Appellants' arguments and ensure that their substantive contractual rights are protected.

24 Paragraph 72 of the *Luscar* decision appears to me not to intend a limitation on the scope of the authority of the court as characterized in paragraph 50, but rather as an expression of the need for caution as to the manner in which that jurisdiction is exercised.

25 It appears to me that the approach taken by courts to the CCAA in the decided cases to which I have been referred is consistent, in terms of the views expressed about the proper application of the Act and the decisions taken in the particular cases, with the approval that is sought here for the assignment of the Techtown Agreement.

Analysis

26 Section 11(4) of the CCAA, in subsections (a) (b) and (c), provides only for orders of a negative injunctive effect until otherwise ordered by the court, in respect of proceedings against the company, i.e. in this case, Playdium. However, the order sought is in effect to require Famous Players to be bound by an assignment of their agreement to New Playdium. It is not readily apparent how such an order could be made under s.11(4) (a)(b) or (c) of the CCAA and no other section of the Act has been mentioned as relevant.

27 Section 11(4)(c) warrants further consideration in this regard. Section 11(4) (c) does not require that an order be made only for a limited period, as s.11(4)(a) appears to do. By its terms it would seem to permit an order to prohibit the commencement of any action, suit or proceeding against Playdium on the basis of the Techtown Agreement including the purported assignment of the agreement to New Playdium. Such an order would seem to be legitimate in its formal compliance with s. 11(4) (c) but it would leave the matter of the status of the Techtown Agreement unresolved with respect to all concerned, unless it could go on, through an ancillary order, to give effective approval to the assignment.

28 Consideration must also be given to the words, in the opening part of s. 11(4) which provide that the court may make an order *on such terms as it may impose* (emphasis added).

29 It is instructive to compare s.11(4) of the CCAA with s.11(3). Section 11(3), relating to initial application court orders also provides that the order may be made on such terms as the court may impose, but the provision adds the qualification "effective for such period as the court deems necessary not exceeding thirty days".

30 It is relevant to the analysis of this issue that Famous Players is not a mere "third party" but is, as counsel said, a significant stakeholder. Under the proposed transaction, Famous Players will retain its rights against Playdium in respect of claims relating to the pre-transfer period and will be entitled to assert, in respect of the period from and after transfer, the same rights against New Playdium as it had against Playdium, including rights to terminate for default, except the insolvency default which occasioned and was the subject of the CCAA stay. So it is difficult to see how the circumstances of Famous Players in respect of the Techtown Agreement could be said to have changed to the detriment of Famous Players in any material way.

31 In substance, what will have happened, to put the matter in terms of s.11(4), is that Famous Players will have been prohibited from taking proceedings in respect of the Techtown Agreement except on and subject to the terms of the assignment to New Playdium and to make that order effective terms will have been imposed by the court which provide for the Techtown Agreement to be assigned by the required date to New Playdium on terms that assure to Famous Players the same rights against New Playdium as it had against Playdium for the post-transfer period and leave Famous Players with its rights against Playdium in respect of the pre-transfer period.

32 In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency

default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the court should not take such a restrictive view of the s. 11(4) jurisdiction.

33 Famous Players objects that the order is not only permanent but positive, i.e. rather than simply restraining Famous Players, the order places it under new obligations. It would be more precisely correct to say that the order places Famous Players under the same obligations as it had before but in favour of the new owners of the business. Moreover, the new owners are not third parties but rather the persons who have the remaining economic interests in Playdium.

34 In view of the remedial nature of the CCAA, it does not seem that in principle, a change of this kind, which is a change occasioned only by the ownership changes effected by the compromise itself and one that does not involve any materially greater or different obligations, should be regarded as beyond the jurisdiction created by the CCAA. This view is examined further below with respect to the issue of positive obligations.

The Imposition of Positive Obligations

35 The requested approval of the assignment can be analyzed conceptually as follows in terms of s. 11(4)(c). The court prohibits any proceedings by Famous Players against Playdium (and therefore against its assignees) except on the following terms, i.e., that any such proceeding must be consistent with any assignment of the Agreement approved by the court. It is a further term, or an order to give effect to the stated terms, that the court approves the assignment to New Playdium for this purpose. An order on these terms conforms to the requirements of s. 11(4)(c).

36 Famous Players objects that the order is also to have positive effect: i.e. it imposes obligations on Famous Players as distinct from merely staying proceedings by it. However, the order as analyzed above could not be effective unless the assignment binds all parties, i.e. Famous Players as well as New Playdium and Playdium.

37 Also, if the order could not bind Famous Players in a positive manner, the result would be that Famous Players could assert rights under the Agreement as assigned but would not be subject to the corresponding obligations under it. This would not be fair.

38 So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s.11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute.

39 Reference has been made in CCAA decisions to the inherent jurisdiction of the court in CCAA matters. The following excerpt from the decision of Farley J. in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List])at pp 184 and 185 is instructive:

> Certainly the non-bankruptcy courts of this country have exercised their inherent jurisdiction to bar claims against specified assets and receivers: see *Ultracare Management Inc. v. Gammon*, order of Austin J. dated October 19, 1993; *Liquidators of Wallace Smith Trust Co. Ltd. v. Dundalk Investment Corp. Ltd.*, order of Blair J. dated September 22, 1993. As MacDonald J. said in *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 at p. 93, [1992] 6 W.W.R. 331, 70 B.C.L.R. (2d) 6 (S.C.):
>
> > I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end: see *Winnipeg Supply & Fuel Co. v. Genevieve Mortgage Corp.*, [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160 (Man. C.A.), at p. 657 [W.W.R.].
> >
> > The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by *Halsbury's* (4th ed., vol. 37, para. 14) as:
> >
> > > ...the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so...

TAB 35

Court of King's Bench of Alberta

Citation: Prairiesky Royalty Ltd v Yangarra Resources Ltd, 2023 ABKB 11

Date: 20230106
Docket:1701 08362
Registry: Calgary

Between:

Prairiesky Royalty Ltd.

Plaintiff

- and -

Yangarra Resources Ltd.

Defendant

Reasons for Judgment
of the
Honourable Justice M.H. Bourque

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interest" or a "lessor's royalty". When a lessee or holder of the working interest in the *in situ* minerals grants an unencumbered share or interest in the minerals or petroleum substances produced to a party in exchange for money or other services, that interest is called an "overriding royalty" or a "gross overriding royalty" (hereinafter referred to as "GORs"; ***Dynex***, *infra*, at para 2).

[18] The concept of a GOR is concisely described in ***Curry v Athabasca Resources Inc***, 2022 SKKB 221 at para 41, citing Michael A Thackray, *Canadian oil and gas*, loose-leaf (Rel 186, Nov 2021) 3d ed, vol 1(Vancouver: LexisNexis, 2017) [Thackray] at § 7.67:

> The overriding royalty is the right to take, in kind or money, a share of future mineral production from a well without the obligation to pay a proportionate share of drilling or producing costs. The overriding royalty is limited to an interest in the production of specified substances from the land and does not include any of the possessory rights normally associated with a working interest. This type of royalty is extremely versatile and is used as a means of raising funds, providing incentives, or spreading risk by retaining an economic interest in a mineral prospect without retaining any associated liability (such as in a farmout). This versatility has led to a great variation in the language found in royalty agreements and a royalty agreement may consist of a two or three-sentence letter or a lengthy and complex document.

[19] The present case concerns a GOR granted by the lessee of Crown-owned minerals to a royalty company as consideration for the royalty company funding the acquisition of the lease.

1. Gross overriding royalties as interests in land

[20] The contemporary test for determining whether a royalty interest is an interest in land was articulated by Virtue J of this Court in ***Vandergrift v Coseka Resources Ltd***, 1989 CanLII 3163 (ABQB) at para 29, 67 Alta LR (2d) 17 [***Vandergrift***], and was later adopted by Major J, for a unanimous Supreme Court of Canada, in ***Bank of Montreal v Dynex Petroleum Ltd***, 2002 SCC 7 [***Dynex***], aff'g ***Bank of Montreal v. Enchant Resources Ltd.***, 1999 ABCA 363 [***Dynex ABCA***][1] at para 22 (the "***Dynex*** test"):

> …under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:
>
> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

[21] However, the question of whether royalties carved out of oil and gas leases can constitute interests in land has been debated since the earliest days of western Canada's oil and gas industry

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[1] The style of cause of the Alberta Court of Appeal decision is *Bank of Montreal v. Enchant Resources Ltd.*, whereas the style of cause *Bank of Montreal v. Dynex Petroleum Ltd.* was used for both the trial decision and the Supreme Court of Canada decision. As far as I am aware, the Supreme Court of Canada decision is always referred to as *Dynex*; however, the Court of Appeal decision is occasionally referred to as *Enchant*. To assist the reader and avoid confusion, I have defined the Court of Appeal decision as *Dynex ABCA*.

[61] With respect to the surrounding circumstances, courts must consider the facts that were known, or ought to have been known, by the parties at the time of contracting (***Sattva*** at paras 58, 60; ***IFP Technologies*** at para 83). This necessarily includes the genesis, aim, or purpose of the agreement; the nature of the relationship created by the agreement; and the nature or custom of the particular industry (***Sattva*** at para 48; ***IFP Technologies*** at para 83, ***Nexxtep Resources v Talisman Energy Inc***, 2013 ABCA 40 at para 33 [***Nexxtep Resources***]). By extension, courts must interpret royalty agreements according to sound commercial principles and business sense to avoid results that are unrealistic, absurd, or unreasonable with respect to the commercial realities of the industry (***IFP Technologies*** at para 88; ***Nexxtep Resources*** at para 35).

[62] Subjective evidence of the parties' intentions such as post-contract conduct is presumptively inadmissible (***IFP Technologies*** at para 87; ***Alberta Union of Provincial Employees v Alberta Health Services***, 2020 ABCA 4 at para 44; ***Accel*** at para 28). With respect to royalty agreements pertaining to freehold minerals, this includes the practice of registering a caveat with the land titles office or a security interest with the Personal Property Registry in relation to the royalty. Such post-contract conduct is only admissible where the words of an agreement "can be reasonably interpreted to have more than one meaning", resulting in ambiguity as to whether the parties intended for the royalty to be an interest in land (***Accel*** at para 28).

b) The core indicia of an interest in land

[63] Where a royalty agreement expressly states that the royalty in question constitutes an interest in land, is to be construed as an interest in land, or runs with the lands subject to the royalty or the underlying interest in land (an "Interest in Land Clause"), I find the foregoing jurisprudence suggests that such language creates a strong, but rebuttable presumption that the royalty is indeed an interest in land. After all, it is a cardinal principle of contract interpretation that the parties intend what they have said (***Canlin Resources Partnership v Husky Oil Operations Limited***, 2018 ABQB 24 at para 38, citing ***Ventas Inc v Sunrise Senior Living Real Estate Investment Trust***, 2007 ONCA 205 at para 24).

[64] A common thread since ***Dynex ABCA*** has been an emphasis on whether the royalty interest can last for the duration of the underlying estate (***Dynex ABCA*** at para 84; ***Manitok*** at para 24; ***Accel*** at para 51). If a royalty is drafted to extinguish before the underlying interest in land out of which the royalty was carved, it may rebut a presumption that the royalty itself is an interest in land. Conversely, if the royalty is drafted to run with the underlying interest in land in perpetuity, it will reinforce the nature of the royalty as an interest in land.

[65] Therefore, where the ***Dynex*** test distinguishes an interest in land from "a contractual right to a portion of the oil and gas substances recovered from the land", the distinction is between an interest in the produced resource that continues in perpetuity versus a contractual right to a portion of the produced resource as security for payment or performance of an obligation (see ***Accel*** at para 3). Whereas the former is capable of lasting for the duration of the underlying estate, a contractual right to security for payment or performance would extinguish upon repayment of the debt or performance of the obligation. This interpretation is supported by the policy reasons for upholding GORs as interests in land articulated in ***Dynex ABCA*** (at paras 35–36): a GOR that is capable of lasting for the duration of the underlying interest in land reflects an investment in "a particular piece of property", whereas a GOR designed to extinguish upon

repayment of a debt or performance of an obligation more closely reflects an investment in "a particular operator or company".

[66] The presence of an Interest in Land Clause in an agreement that creates a royalty capable of lasting for the duration of the underlying interest in land may be sufficient to satisfy the ***Dynex*** test. Whether or not ambiguity remains, the whole of the contract and the surrounding circumstances must nevertheless be considered to determine whether the parties intended the royalty to constitute an interest in land (***IFP Technologies*** at para 82). Still, courts cannot ignore the words chosen by the parties to a royalty agreement that clearly connote an intention to create an interest in land (***IFP Technologies*** at para 89; ***Hudson King v Lightstream Resources Ltd***, 2020 ABQB 149 at para 109). To rebut the presumption of an interest in land arising from the plain wording of a royalty agreement, the remaining indicia and the surrounding circumstances would have to significantly contradict the intention of the parties to create an interest in land and the ability of the royalty to last for the duration of the underlying estate.

B. Analysis

1. Whether the Crown Lease, out of which the 8% Royalty was carved, is an interest in land

[67] PrairieSky submits that the Crown Lease out which the 8% Royalty was carved is a working interest or a *profit à prendre* and, therefore, is unquestionably an interest in land capable of satisfying the second branch of the ***Dynex*** test. I agree (see ***Dianor*** at para 60; ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 at para 11 [***Grant Thornton***]).

[68] Nevertheless, Yangarra argues that, because the rights conferred on PrairieSky through the Crown Lease are limited to the working interest in the minerals and do not entail ownership of the minerals *in situ*, PrairieSky was only able to grant an interest in the Crown Lease pursuant to the maxim "*nemo dat quad non habet*" — a seller cannot confer a greater title than that which they hold (the "*nemo dat*" principle). Respectfully, this misapprehends the nature of royalty interests, the *nemo dat* principle, and the second branch of the ***Dynex*** test.

[69] First, GORs such as the 8% Royalty granted under the 2011 Royalty Agreement are non-operating interests that do not entail an independent ownership interest in the land or the underlying lease (***Dynex ABCA*** at para 43; ***Dianor*** at paras 39, 72). GORs confer an unencumbered share or interest in the resources extracted from the lands pursuant to the underlying working interest (***Dynex*** at para 2; ***Dianor*** at para 34). Moreover, as the Ontario Court of Appeal aptly stated in ***Dianor***: "royalty rights-holders have no interest in working the land, nor do holders of the working interest or the *profit à prendre* want their operations to be subject to the working rights of a royalty rights-holder" (at para 72). The 2011 Royalty Agreement is no different — it does not purport to confer on the royalty holder an ownership interest in the *in situ* minerals or a working interest in the minerals equivalent to the lessee's interest. It confers an interest in the grantor lessee's entitlement to the substances produced from the land.

[70] Second, a GOR is not a "greater" interest than a leasehold or working interest in the *in situ* minerals, nor is it equal to a working interest. It is a distinct interest derived from a leasehold or working interest. Carving a GOR out of mineral lease does not offend the *nemo dat* principle, nor does that principle elevate a GOR to a working interest on par with the underlying leasehold interest. In the words of Laskin J in ***Saskatchewan Minerals***: "[i]n principle, a mining lessee

TAB 36

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re),* 2020 BCSC 1883

Date: 20201202
Docket: S200586
Registry: Vancouver

In the Matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

- and -

In the Matter of the *SEA TO SKY UNIVERSITY ACT*, S.B.C. 2002, c. 54

- and -

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Sale Approval)

Counsel for the Petitioner:	J.R. Sandrelli V. Cross
Counsel for the Monitor PricewaterhouseCoopers Inc.:	V.L. Tickle
Counsel for Primacorp Ventures Inc.:	P. Rubin G. Umbach
Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.:	K. Jackson G. Nesbitt
Counsel for Southern Star Developments Ltd.:	P. Reardon K. Strong
Counsel for Vanchorverve Foundation:	C.D. Brousson
Counsel for Dana Hospitality LP:	D.V. Bateman

Counsel for Halladay Education Group:	D. Lawrenson
Counsel for Capilano University:	K. Mak
Counsel for Landrex Ventures Inc.:	J. D. West
Counsel for Quest University Faculty Union:	J. Sanders S. Rogers
Counsel for Bank of Montreal:	K. Davies
Counsel for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training:	A. Welch
Counsel for 1114586 B.C. Ltd.:	K.E. Siddall
Counsel for Association for the Advancement of Scholarship:	L. Hiebert
Place and Date of Hearing:	Vancouver, B.C. November 12-13, 16, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. November 16, 2020
Place and Date of Written Reasons:	Vancouver, B.C. December 2, 2020

RVO Jurisdiction and Authorities

[127] There is no dispute between the parties that this Court has authority to grant the RVO under its general statutory jurisdiction found in s. 11 of the *CCAA*.

[128] Quest has referred me to a number of decisions across Canada where courts have exercised that jurisdiction to grant an RVO in the context of sale approvals considered under s. 36 of the *CCAA*. I will review those decisions in some detail below to highlight the relevant circumstances.

[129] In *Re T. Eaton Co.* 2000 CarswellOnt 4502, 26 C.C.P.B. 295, the Ontario court granted such an order under its *CCAA* proceedings. There are no written reasons discussing the circumstances in that case. The only brief reference to that structure is found in Claims Officer Houlden's decision in *Eaton's* that addressed an unrelated issue. The agreed statement of facts before the Claims Officer provided:

> 5. The *CCAA* Plan contemplated that all of the assets of Eaton's which were not being retained by Eaton's under the Sears Agreement would be transferred to a new corporation, Distributionco Inc. ("Distributionco"). These assets would then be liquidated by Richter & Partners Inc. ("Richter") in its capacity as court-appointed liquidator of the estate and effects of Distributionco. Richter would then distribute the assets of Distributionco to unsecured creditors and others in accordance with priorities set out in the *CCAA* Plan.
>
> 6. Under the *CCAA* Plan, unsecured creditor claims against Eaton's are converted into a right to participate in distributions in the liquidation of Distributionco based on the amount of the creditor's claim against Eaton's. Accordingly, a critical initial step in the liquidation of Distributionco is the determination of the validity and amount of claims asserted against Eaton's. For this purpose the *CCAA* Plan establishes a Claims Procedure for the resolution of such claims, of which the parties to this matter are aware.

[130] It is unclear as to the basis upon which the court approved this structure in *Eaton's* although, as Southern Star notes, it was a transaction approved within the context of a *CCAA* Plan.

[131] More recently, this structure was approved in *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]). In those *CCAA* proceedings,

an agreement was approved that "effectively" transferred current tax losses and intellectual property to a purchaser. Justice Wilton-Siegel's endorsement stated:

> The Global Settlement contemplates implementation of a corporate reorganization by which the shares of Plasco will be transferred to an acquisition corporation owned by NSPG and CWP and the remaining assets of the applicants will be held by a new corporation, referred to as "New Plasco", which will assume all of the liabilities and obligations of Plasco. I am satisfied that the Court has authority under section 11 of the *CCAA* to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the *CCAA* insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise. For this purpose, I consider that the Global Settlement is analogous to such a plan in the context of these particular proceedings. …

[132] Justice Gouin granted an RVO in the *CCAA* proceedings of *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]). There are no written reasons from the court; however, the motion materials disclose that, under the transaction, the purchasers acquired substantially all the debtor's assets by purchasing 100% of the shares of one debtor company (SDCI, which held the acquired assets). In consideration, the purchaser released certain liabilities owed by the debtors and agreed to assume others.

[133] In *Stornoway Diamond*, to ensure the purchaser acquired the assets free and clear of all encumbrances, the debtors incorporated a new subsidiary (Newco), added Newco as an applicant in the *CCAA* proceedings, and transferred all liabilities, obligations, and unacquired assets of SDCI to Newco. The debtor's motion referred to this transaction as the only viable alternative to preserve the going concern value of the debtor. The debtor noted that the equity and "non-operational related unsecured claims" had no value. As in the RVO sought here, the court's order included familiar aspects found in sanction orders, including releases.

[134] An RVO was also approved in the *CCAA* proceedings of *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]). Approval was sought in the context of preserving valuable cannabis licenses. Justice Hainey's brief endorsement indicates that the relief was unopposed. The court

approved a sale of substantially all of the debtor's assets to the successful bidder under a share purchase agreement after a sales and investment solicitation process.

[135] Other information before me regarding the *Wayland Group* transaction is found in the applicant's factum. The factum refers to both *Plasco Energy* and *Stornoway Diamond*, while also referring to ss. 11 and 36(3) of the *CCAA* as the jurisdictional basis for the relief. The applicants argued that transferring certain assets and liabilities of the debtors into a "newco" would ensure that the purchaser acquired the underlying assets of the target company free and clear of all claims and encumbrances and allow the business to continue as a going-concern. They asserted that this was the "only way" to complete the sale to realize the value in the assets; it was also argued that this transaction was in the best interests of stakeholders and did not prejudice major creditors. In *Wayland Group*, the transaction value was only sufficient to repay the interim lender and perhaps some amount for the first secured creditor.

[136] The Ontario court again approved a similar RVO transaction in the *CCAA* proceedings of *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]). Justice Hainey granted the RVO while again indicating in a brief endorsement that the relief was unopposed. The share sale preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business. The purchaser was a related party who was making a credit bid for the assets.

[137] In *Comark Holdings*, the purchaser acquired all the issued and outstanding shares of the primary *CCAA* debtor and agreed to pay out all the secured debt and priority claims. The excluded assets, agreements, liabilities and encumbrances were transferred to another entity that became a debtor in the *CCAA* proceedings, with the result that the *CCAA* debtor held its assets free and clear of all claims and encumbrances and was then removed from the *CCAA* proceedings. The purchaser and the primary *CCAA* debtor then amalgamated. The new *CCAA* debtor (Newco) was authorized to make an assignment into bankruptcy. The monitor, along with the

principal secured creditors, including the interim lender, supported the transactions. As in *Plasco Energy*, *Stornoway Diamond* and *Wayland Group*, the debtors in *Comark Holdings* argued that this was the "only option" to preserve the business, that the value in that business would be lost in a liquidation and that the transaction was in the best interests of the stakeholders generally.

[138] Justice Conway granted an RVO in the *CCAA* proceedings of *Beleave Inc.* (September 18, 2020), Toronto, CV-20-00642097-00CL (Ont. S.C.J. [Comm. List]). As in *Wayland Group*, the preservation of valuable cannabis licenses were at stake. The motion was supported by the monitor and unopposed. Justice Conway stated in her brief endorsement:

> The Applicants seek approval of the transaction whereby . . . (the Purchaser) will acquire the operating business of the Applicants. The structure of the transaction is partly by share sale and partly by asset sale. The reason for the structure is to accommodate the licensing requirements of Health Canada. The order is structured as a reverse vesting order, in which excluded liabilities and assets will be transferred to "Residualco", which will then become one of the Applicants in the *CCAA* proceedings. Reverse vesting orders have been approved by the courts in other cases: see *Re Stornoway Diamond Corporation* . . . and *Re Wayland Group Corp*. . . .
>
> The transaction is the culmination of a stalking horse sales process approved by the court. The motion is unopposed. The Monitor recommends and supports the transaction in its Fourth Report. In particular, the Monitor states that the proposed transaction is economically superior to the estimated liquidation value of the Beleave Group's assets and operations, will allow the Purchaser to maintain operations and use of the Cannabis licenses and will provide for continued employment for a majority of the existing employees. In my view, the transaction satisfies s. 36(3) of the *CCAA* and the *Soundair* test and should be approved.

[139] In *Beleave*, the RVO included releases of claims similar to that granted in other RVO decisions. These provisions were also consistent generally with sanction orders and are similar to the relief sought by Quest here.

[140] Even more recently, the Alberta court approved an RVO structure in the *CCAA* proceedings of *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.Q.B.). Justice Eidsvik approved the RVO structure as part of a sale approval. No written reasons of the court are available, however, the monitor's bench brief discloses the relevant facts.

[141] As in the above cases, the transaction addressed in *JMB Crushing* arose from a sale and investment solicitation process that yielded only one offer, with the RVO described as a critical component. The underlying intention was to preserve the value of the paid up capital and regulatory permits in the *CCAA* debtor.

[142] In *JMB Crushing*, the monitor relied on the orders granted in *Plasco Energy*, *Stornoway Diamond*, *Wayland Group* and *Beleave*, arguing that the RVO structure was justified in those circumstances:

> 24. In recent *CCAA* proceedings, where it was not practical to compromise amounts owed to creditors through a traditional plan of compromise and arrangement, but it was critical to the viability of a transaction to "cleanse" the debtor company, such that a prospective purchaser may: (i) utilize non-transferrable regulatory licenses (by way of amalgamation or the purchase of the shares of the debtor company); or, (ii) make use of tax attributes of the debtor company, such as [paid up capital], Courts have recently approved and utilized reverse vesting orders to achieve such objectives.
>
> 25. The purpose of a reverse vesting order is to transfer and vest all of the assets and liabilities of a debtor company, which are not subject to a sale, to another company within the same *CCAA* proceedings. The cleansed debtor company is then able to: (i) be utilized by a purchaser as a go-forward vehicle, without any concern regarding creditors and obligations that may otherwise be "laying in the weeds"; and, (ii) allow the purchaser to make use of the debtor company's tax attributes and non-transferrable regulatory licenses. This approach is necessary in situations where the parties would otherwise be unable to preserve the value of significant assets that are subject to restraints on alienation and to provide a corresponding realizable benefit for creditors and stakeholders.

[143] In *JMB Crushing*, the monitor further justified the RVO structure in asserting that the debtor's secured creditors would suffer a shortfall even with such measures. The monitor stated that the unsecured creditors had no economic interest in the transaction and there was no reasonable prospect of any recovery to them. The debtor did not intend to undertake a claims process or present a plan to its unsecured creditors.

[144] By pure coincidence, another and perhaps more compelling authority came to the attention of the parties during this hearing.

[145] On November 11, 2020, the Québec Court of Appeal dismissed an application for leave to appeal the granting of an RVO by Gouin J. of the Québec Superior Court on October 15, 2020: *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218; leave to appeal denied *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488. The Court of Appeal's decision is in English; Gouin J.'s decision is in French and no English translation was available. As such, all references to *Nemaska Lithium* will be to the QCCA.

[146] All counsel agree that Gouin J.'s decision in *Nemaska Lithium* is the first time a Canadian court has granted an RVO in contested *CCAA* proceedings.

[147] In *Nemaska Lithium* (at para. 5), the court stated that the RVO allowed the purchaser to carry on the operations of the Nemaska Lithium entitles (mining in James Bay) by maintaining existing permits, licenses and authorizations. This goal was accomplished via a credit bid for the shares in Nemaska Lithium in return for assumption of the secured debt. At para. 22, the court refers to the intention of the "residual companies" to later present a plan of arrangement to the "remaining creditors", but the details are not disclosed.

[148] In denying leave to appeal in *Nemaska Lithium*, the court stated that an appeal would hinder the progress of the proceedings. More relevant to this application were the court's comments on the legitimacy of the position of the only objecting creditor, Cantore, and the court's rejection that it was appropriate to allow Cantore to exercise a veto in the restructuring:

> [38] As it turns out, the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at $8,160 million out of a total value of provable claims of $200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors'' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?
>
> [39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in the first instance.

[149] Similar to Cantore's position in the *Nemaska Lithium* restructuring, Southern Star and Dana's objections to the RVO are grounded in the assertion it will negate their effective veto on the Plan (and hence the Primacorp transaction) by which they seek to leverage further concessions. For obvious reasons, those concessions can only come about at a cost to other stakeholders, whose interests remain to be addressed.

Discussion

[150] Quest, with the support of the Monitor, submits that the Primacorp transaction satisfies s. 36 of the *CCAA* and that the Court should grant the RVO pursuant to ss. 11 and 36 of the *CCAA*.

[151] As with the structures approved in the above *CCAA* proceedings, the RVO has certain aspects that Southern Star says are objectionable. Those include primarily: (i) the addition of Guardian as a petitioner in the *CCAA* proceeding; (ii) the vesting of the Excluded Liabilities and Excluded Contracts in Guardian; (iii) Quest's exit from this *CCAA* proceeding; and (iv) the release of Quest in respect of the Excluded Liabilities and Excluded Contracts.

[152] Essentially, unsecured claims against Quest and minor assets are transferred to Guardian and Quest continues as a going concern after having transferred the bulk of its assets to Primacorp free and clear of any encumbrances (save for certain Retained Liabilities). Quest no longer requires approval of the Plan by the creditors and the Court to complete the Primacorp transaction.

[153] At para. 19, the QCCA in *Nemaska Lithium* referred to Gouin J.'s comment that s. 36 of the *CCAA* allows the court a broad discretion to consider and, if appropriate, grant relief that represents an innovative solution to any challenges in a proceeding. Justice Gouin considered that approving an RVO structure was such an innovative solution. Indeed, this is the history of *CCAA* jurisprudence under the court's broad statutory discretion and court approval of innovative solutions continues to this time.

Callidus, I conclude that Southern Star and Dana are working actively against the goals of the *CCAA* by their opposition to the RVO.

[171] I do not consider that an RVO structure would be generally employed or approved in a *CCAA* restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the *CCAA*.

[172] Here, in these complex and unique circumstances, I conclude that it is appropriate to exercise my discretion to allow the RVO structure. Quest seeks this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. I have considered the balance between the competing interests at play. This transaction is unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group, a group that includes Southern Star and Dana.

[173] The structure also allows Quest to continue its operations in partnership with Primacorp, a result that will avoid the devastating social and economic consequences that will be visited upon the stakeholders if this transaction is not approved. Ironically, the continuation of Quest's operations will also benefit Southern Star in the future through the continued payment of rent for two of the Residences. Other potential benefits may also arise if Southern Star and Quest are later able to come to terms once the pandemic has receded and students return to campus.

THE PRIMACORP TRANSACTION

[174] Quest applies for the granting of the RVO in favour of Primacorp pursuant to s. 36(1) of the *CCAA*.

TAB 37

Court of Queen's Bench of Alberta

Citation: ENTREC Corporation (Re), 2020 ABQB 751

Date: 20201203
Docket: 2001 06423
Registry: Calgary

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

AND

In the Matter of the Compromise or Arrangement of ENTREC Corporation, Capstan Hauling Ltd., ENTREC Capital Corp., ENTREC Cranes & Heavy Haul Inc., ENTREC Holdings Inc., ENT Oilfield Group Ltd., and ENTREC Services Ltd.

Applicants

Endorsement
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] On November 24, 2020, I issued an oral decision granting an order terminating the *Companies' Creditors Arrangement Act* ("CCAA") proceedings of the Applicants (the "CCAA termination order"). The CCAA termination order allowed, among other relief, the release of all third party claims against the Applicants' current and former directors and officers, except for claims covered by an applicable insurance policy of the Applicants and claims that cannot be released under section 5.1(2) of the CCAA.

[2] Given that a release of third party claims against directors and officers in a situation where there will not be a plan of arrangement arising from the CCAA proceedings is unusual, I

take this opportunity to give written reasons on that issue, and emphasize that the relief with respect to the directors and officers was granted in the specific circumstances of this case.

II. Analysis

[3] While section 11 of the CCAA confers on this Court broad discretionary power to grant a variety of orders, the breadth of this authority is not without limits. With the remedial objectives of the CCAA in mind, the Court must determine whether the applicant has demonstrated the three baseline considerations: namely, (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: *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10 at para 49.

[4] Appropriateness is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA: *Callidus* at para 50. Due diligence, in turn, stipulates that to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights: *Callidus* at para 51.

[5] The Applicants submitted that there are no provisions within the CCAA that expressly limit this Court's jurisdiction to grant the release of third party claims against the directors and officers. In fact, section 5.1 of the CCAA contemplates the possibility of provision for the compromise of claims against directors of a company in the context of a compromise and arrangement of the company.

[6] Further, the Applicants indicated that there is a recent judicial trend in which CCAA courts have exercised their discretion to grant a release of claims against directors and officers of a debtor company in the absence of a plan of arrangement. More specifically, they directed me to three orders from Ontario and Quebec: *In the Matter of Companies' Creditors Arrangement Act, and in the Matter of Golf Town Canada Holdings Inc, et al*, (March 29, 2019), CV-16-11527-00CL (ONSC) [*Golf Town*]; *In the Matter of the Companies' Creditors Arrangement Act, and in the Matter of RCR International Inc et al*, (May 9, 2018), 500-11-053555-179 (QCCS) [*RCR International*]; and *In the Matter of the Companies' Creditors Arrangement Act, and in the Matter of Beleave Inc et al*, (September 18, 2020), CV-20-00642097-00CL (ONSC) [*Beleave*].

[7] In *Golf Town*, *RCR International*, and *Beleave*, the courts involved granted the release of claims against directors and officers because the applicants successfully demonstrated that the release was in the best interests of the debtor company and its stakeholders. In particular, in each case, the Court was satisfied that the directors and officers had acted in good faith, the release would facilitate the distribution of the applicants' remaining estate, the release would enhance the efficiency of the CCAA proceedings, and the release was nevertheless restricted by section 5.1(2) of the CCAA.

[8] The Applicants' position is that the evidence and reasons in support of the release of claims against directors and officers in these three cases are substantially identical to the ones put forward in the present case. Specifically, the Applicants advanced the following factors that support the relief sought:

(a) The directors and officers provided critical direction leading up to the filing of the present CCAA proceedings;

(b) They were instrumental in administering the sale and investment solicitation process ("SISP") for the benefit of the Applicants' stakeholders;

(c) The directors and officers played an integral role in identifying and facilitating potential transactions to explore during the SISP process;

(d) The transactions approved by this Court resulted in the sale of substantially all of the Applicants' assets;

(e) The transactions approved by this Court resulted in the preservation of a significant number of jobs both in Canada and the U.S.;

(f) The releases will facilitate a monetary distribution of up to $1.5 million to the Applicants' major secured creditor, which funds would otherwise be held back for the charge to secure indemnity in favour of the directors and officers;

(g) The key employee retention and incentive plan approved by this Court contemplated that the Applicants would seek a Court-ordered release of claims against the directors and officers;

(h) Creditors and stakeholders of the Applicants were put on notice of the Applicants' intention to apply for a release of claims against the directors and officers;

(i) The Applicants implemented enhanced notice provisions with respect to the release, which included mailing two letters to all known creditors of the Applicants as well as their current and former employees in both Canada and the U.S.;

(j) The releases will not affect claims against directors and officers that are covered by an applicable insurance policy of the Applicants;

(k) The releases are subject to limitations under section 5.1(2) of the CCAA, which provides for an exception to the release of claims that relate to contractual rights of creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors;

(l) The releases would provide certainty and finality of the CCAA proceedings in the most efficient manner;

(m) A syndicate of lenders, as the Applicants' senior secured creditor, will suffer a substantial shortfall on the amounts owing to it, and as a result, a claims bar process and plan of arrangement would be cost-prohibitive;

(n) The CEO of the Applicants is not aware of any claim or proceeding in either Canada or the U.S. with respect to the directors or officers;

(o) The CEO is not aware of any party who has opposed or expressed an intention to oppose the releases and no one appeared at the hearing to oppose the releases;

(p) The Applicants' stakeholders had nearly two months to consider the terms of the release;

(q) Throughout the CCAA proceedings, the directors and officers acted in good faith and with due diligence; and

(r) The Monitor and agent in the present CCAA proceedings support the release.

[9] In granting the CCAA termination order, I accepted these as valid reasons to grant the releases, despite the fact that they would not be subject to a vote by creditors as part of a plan of arrangement. In the specific factual matrix of the case at hand, I am satisfied that the release of

third party claims against the directors and officers, subject to certain limitations, will further the policy objectives underlying the CCAA.

III. Conclusion

[10] While the CCAA termination order was granted, this endorsement serves to place a particular emphasis on the fact that the release of claims against the directors and officers was granted in the specific circumstances of the present case.

Heard on the 24th day of November, 2020.
Dated at the City of Calgary, Alberta this 3rd day of December, 2020.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Rick T.G. Reeson Q.C.
Miller Thomson LLP
for the Applicants

Kelsey J. Meyer
Bennett Jones LLP
for Wells Fargo Capital Finance Corporation Canada as agent

Howard A. Gorman, Q.C.
Norton Rose Fulbright Canada LLP
for the Monitor

Kent A. Rowan Q.C.
Ogilvie LLP
for the directors and officers

TAB 38

CITATION: Re Green Relief Inc.
2020 ONSC 6837
COURT FILE NO.: CV-20-00639217-00CL
DATE: 20201109

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GREEN RELIEF INC.** (the "**Applicant**")

BEFORE: Koehnen J.

COUNSEL: C *Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell,* for the Applicant

Peter Osborne, Christopher Yung for the directors Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel.

Mark Abradjian for Tony Battaglia in his capacity as shareholder and creditor

David Ward for 2650064 Ontario Inc.

Alex Henderson for Susan Basmaji

Gavin Finlayson for Auxley Cannabis Group Inc. and Kolab Project Inc.

Anton Granic on his own behalf

Rory McGovern, for Steve LeBlanc

Alan Dick and Adrienne Boudreau for Thomas Saunders

Steven Weisz and Amanda McInnis for Lyn Mary Bravo

Brian Duxbury for Warren Bravo

Alex Henderson for Susan Basmaji

Robert Kennaley, Joshua W. Winter for Henry Schilthuis and Mark Lloyd

Danny Nunes, for the Monitor

HEARD: November 2 and 3, 2020

ENDORSEMENT

[1] The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.

[2] For the reasons set out below, I:

a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.

b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.

c. Decline to extend the benefit of the release to Susan Basmaji.

I. The Sale Transaction

[3] Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.

[4] 265 Co. will pay $5,000,000 for the common shares. Approximately $1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will

[23] While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

[24] The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

[25] Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.

[26] At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.* 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

[27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

(a) Whether the claims to be released are rationally connected to the purpose of the plan;

(b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.

[28] As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

[29] In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian*, it warrants separate identification on the facts of the case before me.

[30] The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

The Quality of the Claims being Released

[31] As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.

[32] On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.

[33] This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.

[34] This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

TAB 39

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely

distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

IN AGREEING TO SELL TO OEL?

Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

TAB 40

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate *Appellants*

v.

Kevin Donovan and Toronto Star Newspapers Ltd. *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee *Interveners*

Succession de Bernard Sherman et fiduciaires de la succession et Succession de Honey Sherman et fiduciaires de la succession *Appelants*

c.

Kevin Donovan et Toronto Star Newspapers Ltd. *Intimés*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Association canadienne des libertés civiles, Centre d'action pour la sécurité du revenu, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, Réseau juridique VIH et Mental Health Legal Committee *Intervenants*

INDEXED AS: SHERMAN ESTATE *v.* DONOVAN

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

Present: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public

RÉPERTORIÉ : SHERMAN (SUCCESSION) *c.* DONOVAN

2021 CSC 25

N° du greffe : 38695.

2020 : 6 octobre; 2021 : 11 juin.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Brown, Rowe, Martin et Kasirer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Tribunaux — Principe de la publicité des débats judiciaires — Ordonnances de mise sous scellés — Limites

interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at

discrétionnaires à la publicité des débats judiciaires — Intérêt public important — Vie privée — Dignité — Sécurité physique — Décès inexpliqué d'un couple important suscitant une vive attention chez le public et amenant les fiduciaires des successions à demander la mise sous scellés des dossiers d'homologation — Les préoccupations en matière de vie privée et de sécurité physique soulevées par les fiduciaires des successions constituent-elles des intérêts publics importants qui sont à ce point sérieusement menacés qu'ils justifient le prononcé d'ordonnances de mise sous scellés?

Un couple important a été retrouvé mort dans sa résidence. Les décès apparemment inexpliqués ont suscité un vif intérêt chez le public. À ce jour, l'identité et le mobile des personnes responsables demeurent inconnus, et les décès font l'objet d'une enquête pour homicides. Les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense provoquée par les événements en sollicitant des ordonnances visant à mettre sous scellés les dossiers d'homologation. Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par un journaliste qui avait rédigé des articles sur le décès du couple, ainsi que par le journal pour lequel il écrivait. Le juge de première instance a fait placer sous scellés les dossiers d'homologation, concluant que les effets bénéfiques des ordonnances de mise sous scellés sur les intérêts en matière de vie privée et de sécurité physique l'emportaient sensiblement sur leurs effets préjudiciables. La Cour d'appel à l'unanimité a accueilli l'appel et levé les ordonnances de mise sous scellés. Elle a conclu que l'intérêt en matière de vie privée qui avait été soulevé ne comportait pas la qualité d'intérêt public, et qu'il n'y avait aucun élément de preuve d'un risque réel pour la sécurité physique de quiconque.

Arrêt : Le pourvoi est rejeté.

Les fiduciaires des successions n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important en vertu du test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires. Par conséquent, les ordonnances de mise sous scellés n'auraient pas dû être rendues. La publicité des débats judiciaires peut être source d'inconvénients et d'embarras, mais ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption de publicité des débats. Cela dit, la diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte

serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them.

à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important et un tribunal peut faire une exception au principe de la publicité des débats judiciaires si elle est sérieusement menacée. Dans la présente affaire, on ne peut pas dire que le risque pour la vie privée et pour la sécurité physique est suffisamment sérieux.

Les procédures judiciaires sont présumées accessibles au public. La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de la démocratie canadienne. On dit souvent de la liberté de la presse de rendre compte des procédures judiciaires qu'elle est indissociable du principe de publicité. Le principe de la publicité des débats judiciaires s'applique dans toutes les procédures judiciaires, quelle que soit leur nature. Les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L'obtention d'un certificat de nomination à titre de fiduciaire d'une succession en Ontario est une procédure judiciaire qui met en cause la raison d'être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l'administration de la justice par la transparence —, de sorte que la forte présomption de publicité s'applique.

Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir la présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger d'autres intérêts publics lorsqu'ils entrent en jeu. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir ce qui suit : (1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et (3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps et s'étend désormais en général aux intérêts publics importants. L'étendue de cette catégorie transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l'atteinte aux valeurs fondamentales de notre société qu'une publicité absolue des procédures judiciaires pourrait causer. Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants, les tribunaux doivent faire preuve de prudence

Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their

et avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires lorsqu'ils les constatent. Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné. En revanche, la conclusion sur la question de savoir si un risque sérieux menace cet intérêt est une conclusion factuelle qui est nécessairement prise eu égard au contexte. Le fait de constater un intérêt important et celui de constater le caractère sérieux du risque auquel cet intérêt est exposé sont donc en théorie des opérations séparées et qualitativement distinctes.

La vie privée a été défendue en tant que considération fondamentale d'une société libre et son importance pour le public a été reconnue dans divers contextes. Bien que la vie privée d'une personne soit d'une importance primordiale pour celle-ci, la protection de la vie privée est également dans l'intérêt de la société dans son ensemble. La vie privée ne saurait donc être rejetée en tant que simple préoccupation personnelle : il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public.

Cependant, si la vie privée est définie trop largement, la reconnaissance d'un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité. La vie privée des personnes sera menacée dans de nombreuses procédures judiciaires. De plus, la vie privée est une notion complexe et contextuelle, de sorte qu'il est difficile pour les tribunaux de la mesurer. La reconnaissance d'un intérêt important à l'égard de la notion générale de vie privée serait donc irréalisable.

Le caractère public de l'intérêt en matière de vie privée consiste plutôt à protéger les gens contre la menace à leur dignité. La dignité en ce sens comporte le droit de présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée; il s'agit de l'expression de la personnalité ou de l'identité unique d'une personne. Cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée, tout en permettant de maintenir la forte présomption de publicité des débats.

Se fondant sur la dignité, la vie privée sera sérieusement menacée dans des circonstances limitées. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte à la publicité des débats judiciaires. La dignité ne sera sérieusement menacée que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats sont suffisamment sensibles ou privés pour que l'on puisse démontrer que la publicité porte atteinte de

integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. Il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. La mesure dans laquelle les renseignements sont diffusés et font déjà partie du domaine public, ainsi que la probabilité que la diffusion se produise réellement, peuvent avoir une incidence sur le caractère sérieux du risque. Il incombe au demandeur de démontrer que la vie privée, considérée au regard de la dignité, est sérieusement menacée; cela permet d'établir un seuil, tributaire des faits, compatible avec la présomption de publicité des débats.

Il existe également un intérêt public important dans la protection des personnes contre un préjudice physique, mais une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour cet intérêt public important. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt public important est sérieusement menacé, car il est possible d'établir l'existence d'un préjudice objectivement discernable sur la base d'inférences logiques. Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. Le simple fait d'invoquer un préjudice physique grave n'est donc pas suffisant.

Il faut démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

Cases Cited

Applied: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; **referred to:** *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R.

En l'espèce, le risque pour l'intérêt public important en matière de vie privée, défini au regard de la dignité, n'est pas sérieux. Les renseignements contenus dans les dossiers d'homologation ne révèlent rien de particulièrement privé ni de très sensible. Il n'a pas été démontré qu'ils toucheraient au cœur même des renseignements biographiques des personnes touchées d'une manière qui minerait leur contrôle sur l'expression de leur identité. De plus, le dossier ne démontre pas l'existence d'un risque sérieux de préjudice physique. Les fiduciaires des successions ont demandé au juge de première instance d'inférer non seulement le fait qu'un préjudice serait causé aux personnes touchées, mais également qu'il existe une ou des personnes qui souhaitent leur faire du mal. Déduire tout cela en se fondant sur les décès et sur les liens unissant les personnes touchées aux défunts ne constitue pas une inférence raisonnable, mais une conjecture.

Même si les fiduciaires des successions avaient réussi à démontrer l'existence d'un risque sérieux pour la vie privée, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Comme dernier obstacle, les fiduciaires des successions auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emportaient sur ses effets préjudiciables.

Jurisprudence

Arrêt appliqué : *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522; **arrêts mentionnés :** *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332; *Khuja c. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403; *R. c. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567; *Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113; *R. c. Oakes*,

dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three

qu'il y a un « risque sérieux » pour cette dimension de sa vie privée liée à sa dignité. Pour l'application du test des limites discrétionnaires à la publicité des débats judiciaire, le demandeur doit donc démontrer que les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles pour que l'on puisse dire qu'ils touchent au cœur même des renseignements biographiques de la personne et, dans un contexte plus large, qu'il existe un risque sérieux d'atteinte à la dignité de la personne concernée si une ordonnance exceptionnelle n'est pas rendue.

[36] En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtent pas ce caractère si sensible qu'on pourrait dire qu'ils touchent à l'identité fondamentale des personnes concernées; les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés met en jeu la dignité des personnes touchées. Je ne suis donc pas convaincu que l'atteinte à leur vie privée soulève un risque sérieux pour un intérêt public important, comme l'exige *Sierra Club*. De plus, comme je tenterai de l'expliquer, il n'y avait pas de risque sérieux que les personnes visées subissent un préjudice physique en raison de la levée des ordonnances de mise sous scellés. Par conséquent, la présente affaire n'est pas un cas où il convient de rendre des ordonnances de mise sous scellés ni aucune ordonnance limitant l'accès aux dossiers judiciaires en cause. Dans les circonstances, la question de l'admissibilité des nouveaux éléments de preuve du Toronto Star est théorique. Je suis d'avis de rejeter le pourvoi.

A. *Le test des limites discrétionnaires à la publicité des débats judiciaires*

[37] Les procédures judiciaires sont présumées accessibles au public (*MacIntyre*, p. 189; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567, par. 11).

[38] Le test des limites discrétionnaires à la publicité présumée des débats judiciaires a été décrit comme une analyse en deux étapes, soit l'étape de la nécessité et celle de la proportionnalité de l'ordonnance proposée (*Sierra Club*, par. 53). Après un examen, cependant, je constate que ce test repose sur trois conditions préalables fondamentales dont une

prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*,

personne cherchant à faire établir une telle limite doit démontrer le respect. La reformulation du test autour de ces trois conditions préalables, sans en modifier l'essence, aide à clarifier le fardeau auquel doit satisfaire la personne qui sollicite une exception au principe de la publicité des débats judiciaires. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que :

(1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important;

(2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et

(3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires — par exemple une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage — pourra dûment être rendue. Ce test s'applique à toutes les limites discrétionnaires à la publicité des débats judiciaires, sous réserve uniquement d'une loi valide (*Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188, par. 7 et 22).

[39] Le pouvoir discrétionnaire est ainsi structuré et contrôlé de manière à protéger le principe de la publicité des débats judiciaires, qui est considéré comme étant constitutionnalisé sous le régime du droit à la liberté d'expression garanti par l'al. 2b) de la *Charte* (*Nouveau-Brunswick*, par. 23). Reposant sur la liberté d'expression, le principe de la publicité des débats judiciaires est l'un des fondements de la liberté de la presse étant donné que l'accès aux tribunaux est un élément essentiel de la collecte d'information. Notre Cour a souvent souligné l'importance de la publicité pour maintenir l'indépendance et l'impartialité des tribunaux, la confiance du

at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[40] The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that

public à l'égard de leur travail et sa compréhension de celui-ci, et, au bout du compte, la légitimité du processus (voir, p. ex., *Vancouver Sun*, par. 23-26). Dans l'arrêt *Nouveau-Brunswick*, le juge La Forest a expliqué que la présomption en faveur de la publicité des débats judiciaires était devenue « [TRADUCTION] "l'une des caractéristiques d'une société démocratique" » (citant *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), p. 119), qui « fait en sorte que la justice est administrée de manière non arbitraire, conformément à la primauté du droit [. . .], situation qui favorise la confiance du public dans la probité du système judiciaire et la compréhension de l'administration de la justice » (par. 22). Le caractère fondamental de ce principe pour le système judiciaire sous-tend la forte présomption — quoique réfutable — en faveur de la tenue de procédures judiciaires publiques (par. 40; *Mentuck*, par. 39).

[40] Le test fait en sorte que les ordonnances discrétionnaires ne soient pas assujetties à une norme moins exigeante que la norme à laquelle seraient assujetties des dispositions législatives qui limiteraient la publicité des débats judiciaires (*Mentuck*, par. 27; *Sierra Club*, par. 45). À cette fin, la Cour a élaboré un cadre d'analyse par analogie avec le test de l'arrêt *Oakes*, que les tribunaux utilisent pour déterminer si une limite imposée par un texte de loi à un droit garanti par la *Charte* est raisonnable et si sa justification peut se démontrer dans le cadre d'une société libre et démocratique (*Sierra Club*, par. 40, citant *R. c. Oakes*, [1986] 1 R.C.S. 103; voir également *Dagenais*, p. 878; *Vancouver Sun*, par. 30).

[41] La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps. Dans l'arrêt *Dagenais*, le juge en chef Lamer a parlé de la nécessité d'un risque « que le procès soit inéquitable » (p. 878). Dans *Mentuck*, le juge Iacobucci a étendu cette condition à un risque « pour la bonne administration de la justice » (par. 32). Enfin, dans *Sierra Club*, le juge Iacobucci, s'exprimant encore une fois au nom de la Cour à l'unanimité, a reformulé le test de manière à englober tout risque sérieux pour un « intérêt important, y compris un intérêt commercial, dans le contexte d'un litige » (par. 53). Il a en

case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

même temps précisé que l'intérêt important doit être exprimé en tant qu'intérêt public. Par exemple, à la lumière des faits de cette affaire, le préjudice causé à un intérêt commercial particulier n'aurait pas été suffisant, mais « l'intérêt commercial général dans la protection des renseignements confidentiels » constituait un intérêt important en raison de son caractère public (par. 55). Cette conclusion est compatible avec le fait que ce test a été élaboré à l'égard de la jurisprudence relative à l'arrêt *Oakes*, laquelle met l'accent sur l'objectif « urgen[t] et rée[l] » d'un texte de loi d'application générale (*Oakes*, p. 138-139; voir également *Mentuck*, par. 31). L'expression « intérêt important » vise donc un large éventail d'objectifs d'intérêt public.

[42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[42] Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants pour l'application de ce test, je partage l'opinion du juge Iacobucci, exprimée dans *Sierra Club*, selon laquelle les tribunaux doivent faire preuve de « prudence » et « avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires », même à la toute première étape lorsqu'ils constatent les intérêts publics importants (par. 56). Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné (par. 55). En revanche, la conclusion sur la question de savoir si un « risque sérieux » menace cet intérêt est une conclusion factuelle qui, pour le juge qui examine le caractère approprié d'une ordonnance, est nécessairement prise eu égard au contexte. En ce sens, le fait de constater, d'une part, un intérêt important et celui de constater, d'autre part, le caractère sérieux du risque auquel cet intérêt est exposé sont, en théorie du moins, des opérations séparées et qualitativement distinctes. Une ordonnance peut donc être refusée du simple fait qu'un intérêt public important valide n'est pas sérieusement menacé au vu des faits de l'affaire ou, à l'inverse, parce que les intérêts constatés, qu'ils soient ou non sérieusement menacés, ne présentent pas le caractère public important requis sur le plan des principes généraux.

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of

[43] Le test énoncé dans *Sierra Club* continue d'être un guide approprié en ce qui a trait à l'exercice du pouvoir discrétionnaire des tribunaux dans des

"important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

[44] Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of

affaires comme en l'espèce. L'étendue de la catégorie d'« intérêt important » transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l'atteinte aux valeurs fondamentales de notre société qu'une publicité absolue des procédures judiciaires pourrait causer (voir, p. ex., P. M. Perell et J. W. Morden, *The Law of Civil Procedure in Ontario* (4e éd. 2020), par. 3.185; J. Bailey et J. Burkell, « Revisiting the Open Court Principle in an Era of Online Publication : Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information » (2016), 48 *R.D. Ottawa* 143, p. 154-155). Parallèlement, cependant, l'obligation de démontrer l'existence d'un risque sérieux pour un intérêt important établit un seuil valable nécessaire au maintien de la présomption de publicité des débats. S'ils devaient tout simplement mettre en balance les avantages et les effets négatifs de l'imposition d'une limite à la publicité des débats judiciaires, les décideurs appelés à examiner les incidences concrètes pour les personnes qui comparaissent devant eux pourraient avoir du mal à accorder un poids suffisant aux effets négatifs moins immédiats sur le principe de la publicité des débats. Une telle pondération pourrait échapper à un contrôle efficace en appel. À mon avis, le cadre d'analyse fourni par les arrêts *Dagenais*, *Mentuck* et *Sierra Club* demeure approprié et devrait être confirmé.

[44] Enfin, je rappelle que le principe de la publicité des débats judiciaires s'applique dans toutes les procédures judiciaires, quelle que soit leur nature (*MacIntyre*, p. 185-186; *Vancouver Sun*, par. 31). Je suis en désaccord avec les fiduciaires dans la mesure où ils affirment, dans leurs arguments sur les effets négatifs des ordonnances de mise sous scellés, que l'homologation successorale en Ontario ne fait pas intervenir le principe de la publicité des procédures judiciaires ou que la publicité de ces procédures n'a pas de valeur pour le public. Les certificats que les fiduciaires ont demandés au tribunal sont délivrés sous le sceau de ce tribunal, portant ainsi l'imprimatur du pouvoir judiciaire. La décision du tribunal, même si elle est rendue dans un contexte non contentieux, aura une incidence sur des tiers, par exemple en déterminant l'écrit testamentaire qui constitue un testament valide (voir *Otis c. Otis* (2004), 7 E.T.R. (3d) 221 (C.S. Ont.), par. 23-24). Contrairement

TAB 41

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada *Respondents*

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada *Intimés*

INDEXED AS: SIERRA CLUB OF CANADA *v.* CANADA (MINISTER OF FINANCE)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.

RÉPERTORIÉ : SIERRA CLUB DU CANADA *c.* CANADA (MINISTRE DES FINANCES)

Référence neutre : 2002 CSC 41.

Nº du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

by the government triggered s. 5(1)(*b*) of the *Canadian Environmental Assessment Act* ("*CEAA*"), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for production of the confidential documents on the ground, *inter alia*, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL's application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles because a confidentiality order will have a negative effect on the s. 2(*b*) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

l'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)*b*) de la *Loi canadienne sur l'évaluation environnementale* (« *LCÉE* ») exigeant une évaluation environnementale comme condition de l'aide financière, et que le défaut d'évaluation entraîne l'annulation des ententes financières. ÉACL dépose un affidavit qui résume des documents confidentiels contenant des milliers de pages d'information technique concernant l'évaluation environnementale du site de construction qui est faite par les autorités chinoises. ÉACL s'oppose à la communication des documents demandée par Sierra Club pour la raison notamment qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Les autorités chinoises donnent l'autorisation de les communiquer à la condition qu'ils soient protégés par une ordonnance de confidentialité n'y donnant accès qu'aux parties et à la cour, mais n'imposant aucune restriction à l'accès du public aux débats. La demande d'ordonnance de confidentialité est rejetée par la Section de première instance de la Cour fédérale. La Cour d'appel fédérale confirme cette décision.

Arrêt : L'appel est accueilli et l'ordonnance demandée par ÉACL est accordée.

Vu le lien existant entre la publicité des débats judiciaires et la liberté d'expression, la question fondamentale pour la cour saisie d'une demande d'ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression. La cour doit s'assurer que l'exercice du pouvoir discrétionnaire de l'accorder est conforme aux principes de la *Charte* parce qu'une ordonnance de confidentialité a des effets préjudiciables sur la liberté d'expression garantie à l'al. 2*b*). On ne doit l'accorder que (1) lorsqu'elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque, et (2) lorsque ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires. Trois éléments importants sont subsumés sous le premier volet de l'analyse. Premièrement, le risque en cause doit être réel et important, être bien étayé par la preuve et menacer gravement l'intérêt commercial en question. Deuxièmement, l'intérêt doit pouvoir se définir en termes d'intérêt public à la confidentialité, mettant en jeu un principe général. Enfin le juge doit non seulement déterminer s'il existe d'autres options raisonnables, il doit aussi restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to pass the first branch of the test as long as certain criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the *CEAA*, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a *Charter* right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies

En l'espèce, l'intérêt commercial en jeu, la préservation d'obligations contractuelles de confidentialité, est suffisamment important pour satisfaire au premier volet de l'analyse, pourvu que certaines conditions soient remplies : les renseignements ont toujours été traités comme des renseignements confidentiels; il est raisonnable de penser que, selon la prépondérance des probabilités, leur divulgation compromettrait des droits exclusifs, commerciaux et scientifiques; et les renseignements ont été recueillis dans l'expectative raisonnable qu'ils resteraient confidentiels. Ces conditions sont réunies en l'espèce. La divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de ÉACL et il n'existe pas d'options raisonnables autres que l'ordonnance de confidentialité.

À la deuxième étape de l'analyse, l'ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de ÉACL à un procès équitable. Si ÉACL divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Le refus de l'ordonnance obligerait ÉACL à retenir les documents pour protéger ses intérêts commerciaux et comme ils sont pertinents pour l'exercice des moyens de défense prévus par la *LCÉE*, l'impossibilité de les produire empêcherait ÉACL de présenter une défense pleine et entière. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable est un principe de justice fondamentale. L'ordonnance permettrait aux parties et au tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu, favorisant ainsi la recherche de la vérité, une valeur fondamentale sous-tendant la liberté d'expression. Il peut enfin y avoir un important intérêt de sécurité publique à préserver la confidentialité de ce type de renseignements techniques.

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires et donc sur la liberté d'expression. Plus l'ordonnance porte atteinte aux valeurs fondamentales que sont (1) la recherche de la vérité et du bien commun, (2) l'épanouissement personnel par le libre développement des pensées et des idées et (3) la participation de tous au processus politique, plus il est difficile de justifier l'ordonnance. Dans les mains des parties et de leurs experts, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, et donc pour aider la cour à parvenir à des conclusions de fait exactes. Compte tenu de leur nature hautement technique, la production des documents confidentiels en vertu de l'ordonnance demandée favoriserait mieux l'importante valeur de la recherche de la vérité, qui

both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; **referred to:** *AB Hassle v. Canada (Minister of National Health and*

sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le refus de l'ordonnance.

Aux termes de l'ordonnance demandée, les seules restrictions ont trait à la distribution publique des documents, une atteinte relativement minime à la règle de la publicité des débats judiciaires. Même si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, la deuxième valeur fondamentale, l'épanouissement personnel, ne serait pas touchée de manière significative. La troisième valeur joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection, de sorte que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés. Toutefois la portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires. Les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. Ses effets bénéfiques l'emportent sur ses effets préjudiciables, et il y a lieu de l'accorder. Selon la pondération des divers droits et intérêts en jeu, l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de ÉACL à un procès équitable et à la liberté d'expression, et ses effets préjudiciables sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes.

Jurisprudence

Arrêts appliqués : *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76; *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Keegstra*, [1990] 3 R.C.S. 697; **arrêts mentionnés :** *AB Hassle c.*

demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(*b*) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, at para. 22.

(3) Adapting the *Dagenais* Test to the Rights and Interests of the Parties

Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

51 Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

52 Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2*b*) de la *Charte* : *Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit perçue comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22.

(3) Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties

53 Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

Comme dans *Mentuck*, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un « intérêt commercial important ». Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape

TAB 42

Third Eye Capital Corporation v. Dianor Resources Inc.
[Indexed as: Third Eye Capital Corp. v. Dianor Resources Inc.]

Ontario Reports

Court of Appeal for Ontario,
Pepall, Lauwers and Huscroft JJ.A.
March 15, 2018

141 O.R. (3d) 192 | 2018 ONCA 253

Case Summary

Mining law — Royalties — Respondent's mineral claims subject to gross overriding royalty ("GORs") — Respondent and grantor of mineral claims clearly intending that GORs would create interest in land and run with land — GORs registered on title — Motion judge erring in finding that GORs did not constitute interest in land and that claims did not continue to be subject to GORs after they were transferred to appellant.

Dianor was an insolvent company in respect of which the court had appointed a receiver under s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). Dianor's main asset was a group of mining claims which it obtained under a Crown land agreement and a patented land agreement made with 381 Inc. The claims were subject to a "gross overriding royalty" ("GORs") in favour of 381 Inc. Both agreements stated that the parties intended the GORs to create an interest in and to run with the land. Notices of the GORs were registered on title. The GORs were subsequently transferred to 235. The supervising judge made an order approving a bid process for the sale of Dianor's mining claims. Third Eye was the successful bidder. At the request of the receiver, the motion judge approved the sale of the mining claims to Third Eye and granted a vesting order that purported to extinguish the GORs. 235 asked that the property vested in Third Eye be subject to the GORs. The motion judge held that the GORs did not run with the land or grant 235 an interest in the lands over which Dianor held the mineral rights. He held that ss. 11(2), 100 and 101 of the *CJA* gave him the jurisdiction to grant a vesting order in the assets to be sold to Third Eye on such terms as were just, including the authority to dispense with the royalty rights. 235 appealed, seeking to set aside the motion judge's order [page193] and to obtain an order that the GORs constituted an interest in land, along with consequential relief. 235 did not seek a stay of the vesting order pending appeal, and the vesting order was registered on title.

Held, the GORs constituted an interest in land.

A royalty interest can be an interest in land if (1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the resources recovered from the land; and (2) the interest out of which the royalty is carved is itself an interest in land. Dianor's interests in the claims were working interests or *profits à prendre*, which the common law unquestionably

recognizes as interests in land. The GORs were carved out of Dianor's interests. The Crown land agreement and the patented land agreement expressly stated that the parties intended the GORs to create an interest in and to run with the land. The motion judge erred in finding that the GORs did not constitute interests in land that ran with the land. He made three legal errors in his analysis. The first error was that he did not examine the parties' intentions from the royalty agreements as a whole, along with the surrounding circumstances. The second error was in holding that in order to qualify as an interest in land, the royalty agreements had to give 235 the right to enter the property and explore and extract minerals. The third error was in holding that the interest out of which the royalty was carved was not an interest in land because it was expressed in the agreements as only a right to share in revenues produced from minerals extracted from the lands.

If the motion judge had jurisdiction to vest out the GORs, then 235 was not entitled to a remedy. But if he lacked that jurisdiction, then remedies might be available to 235, including rectification of the register under ss. 159 and 160 of the *Land Titles Act*, R.S.O. 1990, c. L.5. Because the issues of jurisdiction and remedy were not adequately argued by the parties, additional submissions on those issues were required. In particular, further submissions were requested on whether and under what circumstances a Superior Court judge, acting under s. 100 of the *CJA* and s. 243 of the *BIA*, has jurisdiction to extinguish a third party's interest in land using a vesting order.

Bank of Montreal v. Dynex Petroleum Ltd., [2002] 1 S.C.R. 146, [2001] S.C.J. No. 70, 2002 SCC 7, 208 D.L.R. (4th) 155, 281 N.R. 113, J.E. 2002-230, 299 A.R. 1, 19 B.L.R. (3d) 159, 30 C.B.R. (4th) 168, 1 R.P.R. (4th) 1, 111 A.C.W.S. (3d) 156, affg [1999] A.J. No. 1463, 1999 ABCA 363, 182 D.L.R. (4th) 640, [2000] 2 W.W.R. 693, 74 Alta. L.R. (3d) 219, 255 A.R. 116, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 179, 93 A.C.W.S. (3d) 950, **apld**

1565397 Ontario Inc. (Re), [2009] O.J. No. 2596, 54 C.B.R. (5th) 262, 81 R.P.R. (4th) 214, 178 A.C.W.S. (3d) 124 (S.C.J.); *Anglo Pacific Group PLC c. Ernst & Young Inc*., [2013] Q.J. No. 9084, 2013 QCCA 1323, 2013EXP-2717, J.E. 2013-1467, [2013] R.J.Q. 1264, EYB 2013-225348; *Bank of Montreal v. Dynex Petroleum Ltd*., [2003] A.J. No. 349, 2003 ABQB 243, 1 C.B.R. (5th) 188, 121 A.C.W.S. (3d) 1160 (Q.B.); *Blue Note Caribou Mines Inc. (Re)*, [2010] N.B.J. No. 252, 2010 NBQB 91, 91 R.P.R. (4th) 86, 356 N.B.R. (2d) 236, 186 A.C.W.S. (3d) 594 [Leave to appeal to N.B.C.A. refused [2010] N.B.J. No. 267, 360 N.B.R. (2d) 67, 69 C.B.R. (5th) 298, 191 A.C.W.S. (3d) 376 (C.A.)]; *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355, [2004] O.J. No. 2744, 242 D.L.R. (4th) 689, 188 O.A.C. 97, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 23 R.P.R. (4th) 64, 132 A.C.W.S. (3d) 215 (C.A.); *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703, [1971] S.C.J. No. 136, 23 D.L.R. (3d) 573, [1972] 2 W.W.R. 108; *St. Andrew Goldfields Ltd. v. Newmont Canada Ltd*., [2011] O.J. No. 2147, 2011 ONCA 377, 201 A.C.W.S. (3d) 691, 282 O.A.C. 106, affg [2009] O.J. No. 3266, 179 A.C.W.S. (3d) 826 (S.C.J.); [page194] *Vandergrift v. Coseka Resources Ltd*., [1989] A.J. No. 255, 67 Alta. L.R. (2d) 17, 95 A.R. 372, 15 A.C.W.S. (3d) 36 (Q.B.), **consd**

Other cases referred to

the appellant relies were prepared after *Dynex*. [page207]

(a) *The Dynex test*

[59] I repeat for convenience the test prescribed in *Dynex*, at para. 22, for determining whether a royalty right is an interest in land:

1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and

2) the interest, out of which the royalty is carved, is itself an interest in land.

[60] Dianor's interests in the claims were working interests or *profits à prendre*, which the common law unquestionably recognizes as interests in land. The GORs were carved out of Dianor's interests. The second element in the *Dynex* test is plainly met in this case.

[61] In my view, the first element is also met. The Crown land agreement and the patented land agreement expressly state that the parties intend the GOR to create an interest in and to run with the land. To repeat for convenience, s. 4.1 of each of the agreements states:

> 4.1. It is the intent of the parties hereto that the GOR shall constitute a covenant and an interest in land running with the Property and the Mining Claims and all successions thereof or leases or other tenures which may replace them, whether created privately or through governmental action, and including, without limitation, any leasehold interest.

[62] Apart from the plain language of the agreements, in considering the surrounding context, the original GOR-holder took steps to register its royalty rights: notices of the GORs were registered on title to the patented lands under s. 71 of the *LTA* and on the unpatented mining claims under the *Mining Act*.

[63] I agree with the Court of Appeal of Alberta in *Dynex*, at para. 73, that the court must "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances". Doing so in this instance makes plain their mutual intention to constitute the GORs as interests in land. It is express in the agreements (based on the general principles of contractual interpretation), and the royalty rights-holder took care to register the interests on title.

[64] I observe that the same result was reached with less supporting evidence in *Blue Note Mining Inc. v. Fern Trust (Trustee of)*, [2008] N.B.J. No. 360, 2008 NBQB 310, 337 N.B.R. (2d) 116, affd [2009] N.B.J. No. 75, 2009 NBCA 17, 342 N.B.R. (2d) 151. One issue was whether a net profit interest constituted a continuing interest in land that bound the purchaser. The motion judge [page208] determined that the agreement creating the interest did not contain the typical words "found in a conveyance of an interest in land": at para. 34. The only relevant words were "grant" and "in the mine". However, the motion judge held (and the Court of Appeal affirmed) that this was sufficient to grant an interest in land.

[65] The contractual terms are not necessarily determinative of whether an interest in land was intended; the language does not require magic words to demonstrate the parties' intention. However, these words were present in the agreements. In my view, the appellant's GORs

TAB 43

COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508
DATE: 20190619
DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Ontario Ltd. (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

[108] The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

[109] Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

[110] If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the

proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

[111] Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

[112] While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 2 is instructive:

> … [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest.

TAB 44

In the Court of Appeal of Alberta

Citation: Trican Well Service Ltd v Delphi Energy Corp, 2020 ABCA 363

Date: 20201015
Docket: 2001-0183-AC
Registry: Calgary

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

**And in the Matter of a Plan of Compromise or Arrangement of
Delphi Energy Corp. and Delphi Energy (Alberta) Limited**

Between:

Trican Well Service Ltd. and Ensign Drilling Inc.

Applicants

- and -

Delphi Energy Corp. and Delphi Energy (Alberta) Limited

Respondents

- and -

PricewaterhouseCoopers Inc. and Luminus Management LLC

Interested Parties

**Reasons for Decision of
The Honourable Madam Justice Marina Paperny**

Application for Leave to Appeal

recovery, and the second lien noteholders with deficiencies will see the conversion of their secured debt to equity.

[18] It is worth nothing that the trade creditors could have opted into the convenience class had they so chosen. Moreover, the second lien noteholders will see the secured portion of their claims converted from debt to equity, but their deficiencies are subject to the same 2.4 cents on the dollar that the trade creditors will receive under the Plan.

[19] A review of the transcript makes clear that the supervising judge understood the situation of the various creditors. She was alive to the fact that, if the trade creditors were given their own class, they could veto the Plan. She understood that if the convenience class was removed, the vote would have passed regardless.

[20] The matter of classification is discretionary, as was the supervising judge's determination that the overall Plan was fair and reasonable in the circumstances. The proposed issue on appeal is clearly of importance to the applicants, as if they were successful on appeal they would be in a position to veto the Plan. However, given the degree of deference that would be paid to the decision of the supervising judge on issues of classification, I am not persuaded that this ground of appeal has a likelihood of success.

Second proposed ground of appeal: Failure to meet the statutory requirements under s. 5.1(2)

[21] The applicants accept that a plan may compromise some claims against directors by capping them to proceeds under insurance policies. However, they submit that statutorily protected claims against directors must be exempted from any compromise in light of s 5.1(2), which excludes claims based on allegations of misrepresentation or wrongful or oppressive conduct. The applicants submit the Sanction Order irrevocably limits such protected claims to the unspecified proceeds of insurance policies which, they say, is statutorily prohibited. The applicants also submit that Delphi failed to put the insurance policies into evidence before the supervising judge.

[22] Delphi submits that the Plan does not compromise the claims against directors, but merely channels financial recovery to available insurance proceeds, and that this is consistent with the practice of *CCAA* courts across Canada, including in Alberta[1].

[23] There is clear authority for Delphi's proposition, although I was not directed to any appellate authority considering the issue. In my view, the merit of this proposed ground of appeal depends on whether Delphi's position, that the claim in this case is not being compromised,

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[1] *In the matter of a plan of compromise or arrangement of Connacher Oil and Gas Limited*, 2019 Plan Sanction Order of Justice Dario (16 July 2019) Calgary 1601-06131 (ABQB) at para 31; *In the matter of a plan of compromise or arrangement of Sino-Forest Corporation*, Plan Sanction Order of Justice Morawetz (10 December 2012) Toronto CV-12-9667-00CL (ONSC) at para 37; *Allen Vanguard Corporation (Re)*, 2011 ONSC 5017 at paras 26-27 and 78.

TAB 45

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Veris Gold Corp. (Re),
2015 BCSC 1204

Date: 20150710
Docket: S144431
Registry: Vancouver

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

And

In the matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44

And

In the matter of the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Veris Gold Corp., Queenstake Resources Ltd., Ketza River Holdings, and Veris Gold USA, Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Monitor, Ernst & Young Inc.:	J. Sandrelli T. Jeffries
Counsel for Deutsche Bank A.G.:	D. Vu
Counsel for Moelis & Company:	C. Ramsay S. Irving K. Mak
Counsel for Whitebox Advisors LLC, WBox 2014-1 Ltd.:	K. Jackson D. Toigo

Counsel for the Attorney General of Nevada:	R. Morse N. Vaartunou A/S
Counsel for Nevada Cement:	C. Ramsay K. Mak
Counsel for NV Energy:	C. Brousson J. Bradshaw A/S
Counsel for Government of Yukon:	J. Porter
Counsel for AIG:	K. Siddall
Counsel for Linde LLC:	S. Ross
Place and Date of Hearing:	Vancouver, B.C. May 28, 2015
Place and Date of Judgment:	Vancouver, B.C. July 10, 2015

> (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.

[23] A more general test has been restated, as discerned from the above factors, namely to consider the transaction as a whole and decide "whether or not the sale is appropriate, fair and reasonable": *Re White Birch Paper Holding Co.*, 2010 QCCS 4915 at para. 49, 72 C.B.R. (5th) 49, leave to appeal ref'd 2010 QCCA 1950.

[24] In addition, the principles identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are helpful in considering whether to approve a sale:

1. Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;

2. The interests of all parties;

3. The efficacy and integrity of the process by which offers were obtained; and

4. Whether there has been any unfairness in the sales process.

[25] Various authorities support that, in considering the test under s. 36 of the *CCAA*, the principles of *Soundair* remain relevant and indeed overlap some of the specific factors set out in s. 36(3): *Re Canwest Publishing Inc.*, 2010 ONSC 2870 at para. 13; *White Birch* at para. 50; *Re PCAS Patient Care Automation Services Inc.*, 2012 ONSC 3367 at para. 54.

Discussion

(a) *CCAA* Factors

[26] I am more than satisfied that the factors set out in s. 36(3) of the *CCAA* support the granting of the order approving the Agreement with WBVG.

[27] I have already outlined the extensive process by which Veris Gold's assets were exposed to the market by Moelis in accordance with the court-approved sales

> (5) The applicant is to send a copy of the order to every party to the agreement.

[49] The Monitor's report and recommendations are in support of approval of these assignments. These approvals are part of the Monitor's overall recommendations in favour of the Agreement. WBVG has indicated its willingness to continue the operations of Veris Gold in Nevada on a going concern basis. The participation of WBox and Mr. Sprott lend credibility to its ability to do so, while performing any obligations under these contracts.

[50] In that context, it is appropriate that WBVG obtain the benefit of contracts that will facilitate its ability to continue these operations. Indeed, some of the contracts are critical or necessary for future operations.

[51] In addition, the Agreement contemplates the payment of "cure costs" which are defined in the Agreement in relation to statutory obligations arising under both s. 11.3(4) of the *CCAA* and s. 365(b)(1) of the *Bankruptcy Code* where the assignment of contracts is approved. Cure costs are defined in the Agreement as follows:

> "Cure Cost" means, as applicable with respect to any Seller, (i) any amounts or assurances required by Section 365(b)(1) of the U.S. Bankruptcy Code under any applicable Designated Seller Contract or (ii) any amounts required to satisfy monetary defaults in relation to the applicable Designated Seller Contract pursuant to Section 11.3 of the CCAA.

[52] Each of the Designated Seller Contracts and related anticipated cure costs are set out in a schedule to the Agreement. Pursuant to the Agreement, such cure costs are payable on closing. The order sought provides that upon payment, and upon assignment:

> 10. … the Required Assigned Contracts [aka the Designated Seller Contracts] shall be deemed valid and binding and in full force and effect at the Closing, and the Purchaser shall enjoy all of the rights and benefits under each such Required Assigned Contract as of the applicable date of assumption.

TAB 46

In the Court of Appeal of Alberta

Citation: Wiebe v Weinrich Contracting Ltd, 2020 ABCA 396

Date: 20201109
Docket: 1903-0139-AC
Registry: Edmonton

Between:

Roy Wiebe and Parkland Aerospace Corp

Appellants
(Defendants)

- and -

Weinrich Contracting Ltd

Respondent
(Plaintiff)

- and -

Parkland Airport Development Corporation, Deloitte Restructuring Inc, and 2155734 Alberta Ltd

Not Parties to the Appeal

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Ritu Khullar
The Honourable Madam Justice Dawn Pentelechuk

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice S.D. Hillier
Dated the 17th day of April, 2019
Filed the 14th day of June, 2019

(Docket: 1603-20319; 1603-12839)

[***Century Services***]. Farley J in ***Lehndorff General Partner Ltd, Re***, 17 CBR (3d) 24, 1993 CarswellOnt 183 at para 5 (Ont Gen Div [Commercial List]), expressed a similar view:

> It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

[27] In furtherance of these remedial objectives, the *CCAA* provides "broad and flexible authority" permitting a court to make a wide range of orders necessary to support a company's reorganization. All insolvency proceedings in Canada are based on the single proceeding model, described by Professor Wood in *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2009):

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

[28] To achieve this, the *CCAA* expressly provided, as at the relevant time, that a court may issue and extend a stay of proceedings against the debtor company while a compromise is sought:

> **11.02(1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[29] Stays of proceedings against the debtor company are common and are included in the initial commercial template order in *CCAA* proceedings in Alberta.[1]

[30] The *CCAA* has been described as "skeletal in nature"; that is, legislation not "contain[ing] a comprehensive code that lays out all that is permitted or barred": ***Metcalfe & Mansfield Alternative Investments II Corp (Re)***, 2008 ONCA 587, 92 OR (3d) 513, at para 44, *per* Blair JA). Thus, decisions of the court are frequently based on discretionary grants of jurisdiction grounded in the broad language of s 11 of the *CCAA*:

> 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 [emphasis added].

[31] This broad and flexible authority means a high degree of deference is afforded to a supervising judge making a discretionary decision in the *CCAA* context. An appellate court may intervene if there was an error in principle or the discretion was exercised unreasonably: ***9354-9186 Québec inc v Callidus Capital Corp***, 2020 SCC 10 at para 53 [***Callidus***]. It may also intervene if there was a breach of procedural fairness, if the breach had a negative impact on affected parties' rights: ***Sun Indalex Finance, LLC v United Steelworkers***, 2013 SCC 6, [2013] 1 SCR 271 at paras 73-74 (*per* Deschamps J) and paras 275-276 (*per* LeBel J, dissenting, but not on whether the duty of procedural fairness applies to *CCAA* proceedings).

[32] While the *CCAA* provides no express authority to grant a stay of proceedings against third parties other than the debtor company, such orders are quite common. Orders have also been granted *releasing* claims against third parties as part of approving a plan of arrangement. In short, "[c]ases support the view that third-party rights may be affected by a stay order": ***Luscar Ltd v Smoky River Coal Limited***, 1999 ABCA 179, 237 AR 326 at para 60. If it is just and convenient

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[1] Available here: https://albertacourts.ca/qb/areas-of-law/commercial/templates-and-forms. See appellants' factum at paras 62, 65.

TAB 47

CITATION: Zayo Inc. v. Primus Telecommunications Canada Inc., 2016 ONSC 5251
COURT FILE NO.: CV-16-11257-00CL
DATE: 20160818

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PRIMUS TELECOMMUNICATIONS CANADA INC., PRIMUS TELECOMMUNICATIONS, INC. AND LINGO, INC.

BEFORE: Justice Penny

COUNSEL: *Maria Konyukhova* and *Vlad Calina* for the Primus Entities

Steve Weisz and *Aryo Shalviri* for FTI Consulting Canada Inc. in its capacity as Monitor of the Primus Entities

Matthew Gottlieb and *Larissa Moscu* for the Moving Party, Zayo Inc.

Jason Wadden for the Purchaser, Birch Communications Inc.

Matthew Milne-Smith and *Natasha MacParland* for the Lending Syndicate (BMO as Agent)

HEARD: August 9, 2016

ENDORSEMENT

Overview

[1] This motion, brought by Zayo Inc., is for an order that FTI Consulting Canada, in its capacity as court-appointed Monitor for the applicants, pay Zayo the amount of $1,228,799.81 from proceeds of sale of the applicants' assets. This amount represents the applicants' (pre-CCAA filing) arrears owed to Zayo in relation to agreements assigned by the applicants, with Zayo's consent, to Birch Communications Inc. in an asset purchase transaction which closed on April 1, 2016. The transaction was approved by orders of this Court made on February 25, 2016 and March 2, 2016 and certified completed by the Monitor on April 1, 2016.

[2] Initially on January 25 and formally no later than March 2, 2016, Zayo unequivocally consented to the assignment of its contracts with the applicants to Birch.

[3] Zayo argues that the process by which its consent to the assignment of its contracts with the applicants was obtained was not transparent or fair. Had the process been transparent and fair, Zayo says, it would have refused its consent in the absence of full satisfaction of its pre-filing arrears and would, as a result, ultimately have been paid those arrears as a condition of the assignment of its contracts. Zayo relies on s. 11 of the CCAA which provides that the court may, in the context of CCAA proceedings, "make any order that it considers appropriate in the circumstances."

[4] This motion, therefore, engages the application and scope of the discretion of the court under s. 11 of the CCAA. The issue for determination is whether that discretion should be exercised, in the particular circumstances of this case, to order payment out of the proceeds of sale of the applicants' assets, to Zayo of the full amount of its pre-filing arrears under the assigned contracts.

[5] For the reasons that follow, I have concluded that the discretion afforded the court under s. 11 of the CCAA does not encompass an order for the payment of Zayo's pre-filing arrears. Accordingly, Zayo's motion is dismissed.

Background

[6] The applicants (collectively Primus) carried on business in Canada and the United States reselling telecommunications services. Thus, Primus purchased telecommunication services for resale from other (often large) telecommunications companies, including Allstream (now Zayo), Bell, Telus and the like. In late 2014, Primus ran into financial difficulty. It was unable to satisfy its obligations to creditors, including a syndicate of secured creditors represented in these proceedings by the Bank of Montréal. After February 2015, Primus operated under the forbearance of its syndicate of secured lenders.

[7] Primus conducted a privately structured and supervised pre-filing sales and investor solicitation process in consultation with a financial advisor and with the oversight of FTI (in its capacity as the proposed Monitor). Birch emerged as the successful bidder.

[8] On January 19, 2016, Primus entered into an asset purchase agreement with Birch, conditional on court approval. Primus sought and obtained protection under the CCAA pursuant to an Initial Order granted by this Court on the same day.

[9] The APA contemplated that Birch would assume certain Primus contracts with third parties. Because of Primus's financial difficulties, many of these contracts were in arrears. The APA contemplated the possibility that payment of such arrears might be required in order to effect the assignment of some of these contracts. These payments were defined as "cure costs." The APA contemplated that there would be negotiations regarding either the payment or settlement of these cure costs. Those negotiations with counterparties, if they occurred, could only be conducted in the presence of a representative of each of Primus, Birch and the Monitor.

[10] The first $3 million of cure costs were to be treated as a reduction in the purchase price. Cure costs in excess of $3 million were to be split equally between Birch and Primus.

[11] Birch had the right to insist upon the assignment of any contract which it considered essential. Birch also had the right, however, to waive this right at any time and to remove any contract from the list of essential or assumed contracts.

[12] Primus was obliged to use commercially reasonable efforts to obtain consents to the assignment of the identified contracts. The APA set out a two-step process for Primus to follow. First, Primus was obliged to use all commercially reasonable efforts to obtain a counterparty's consent to the assignment of any required contract. Second, Primus was required to bring a motion under s. 11.3 of the CCAA seeking court-ordered assignment of essential contracts, but only with respect to contracts for which *consent* to assignment could not be obtained by a particular date.

[13] Section 11.3 of the CCAA provides that the court may make an order assigning the rights and obligations of the debtor under an agreement to any person who is specified by the court and agrees to the assignment. In deciding to make such an order, the court must 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 obligation; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

[14] Section 11.3(4) of the CCAA imposes a further restriction on a court-ordered assignment. It provides that the court may not make an order requiring an assignment unless it is satisfied that all monetary defaults in relation to the agreement will be remedied.

[15] Initially, the essential contracts list identified by Birch had approximately 300 contracts. From January to the end of February 2016, the list underwent significant reduction. By the end of the review process, the number on the essential contracts list had been reduced to 209 contracts. Ultimately, consents to assign in respect of 117 essential contracts were obtained from 93 contract counterparties, including Zayo. Of these, two parties demanded payment of pre-filing amounts. The assignment order of this court, ultimately obtained on March 2, 2016, provided for the assignment of the remaining 92 contracts with 35 counterparties and for the payment of aggregate cure costs in respect of those contracts of about $4.5 million.

[16] Obtaining consents from what turned out to be over 120 counterparties was a substantial and time-consuming job. A main reason for the pre-filing SISP was to reduce the risk of value erosion as word of the Primus insolvency, and possible service interruptions and other disruptions, got out. Thus, the timeframe for concluding a transaction was necessarily compressed. In consultation with its own professional advisors, the Monitor and the purchaser,

Primus drafted a template letter to be delivered to all counterparties to the contracts in respect of which consent was required to be sought.

[17] The consent letters advised the recipient that:

(i) Primus had sought protection under the CCAA;

(ii) Primus ran the SISP and selected Birch as the successful bidder;

(iii) the APA contemplated the assignment of their contract with one of one of the Primus entities to Birch;

(iv) at the time, the transaction was anticipated close in late February; and

(v) the motion materials for the approval investing order would be available on the Monitor's website.

[18] The consent letter requested the recipient's consent to assign its contract to Birch by a specified date and advised that, if consent was not received by that date, Primus would seek relief under s. 11.3 of the CCAA, with motion materials being served only on those parties who did not provide consent. The text of the letter said:

> We hope to have received consents from all counterparties to the Assumed Contracts by January 29, 2016. However, to the extent any consent with respect to any of the Assumed Contracts is not received by January 29, 2016, in order to ensure that all Assumed Contracts are assigned to the Purchaser, the Primus Entities will rely on the provisions of section 11.3 of the CCAA, which gives the court the jurisdiction to order the assignment of a contract without consent on certain terms and conditions set forth in section 11.3 of the CCAA. The Primus Entities will be seeking an order for the assignment of any Assumed Contracts for which consent to assign has not been given at a motion currently scheduled to be heard February 17, 2016. *If we have not received your consent by January 29, 2016, we will serve you with notice of the motion* as well as the motion materials in connection with this request and evidence in support thereof. [emphasis added]

[19] The consent letters also expressly advised all recipients that Birch would only be responsible for obligations arising under the assigned contract arising after the closing of the purchase transaction.

[20] The dates in the consent letter for completion of the assignments had to be changed as a result of circumstances having nothing to do with this motion. The substance of the letter and the process described, however, remained the same.

[21] By April 1, 2016 all conditions under the APA were fully satisfied and the transaction closed. Birch acquired the assets of Primus for about $44 million. Among other things, the Monitor came into receipt of the sale proceeds and delivered a certificate certifying that the

transaction had been completed to the satisfaction of the Monitor. The Monitor then commenced dispersing the proceeds in accordance with the payment scheme provided in the distribution order of this court which had been made on February 25, 2016. The exact amount of the proceeds has not been finalized but it is expected that the proceeds will be insufficient to satisfy outstanding obligations owing to the syndicate of secured lenders and that no distributions will be made in respect of $20 million owed to Primus's subordinate secured creditor, Manulife.

[22] This motion for payment of Zayo's pre-filing arrears out of the proceeds of sale was first initiated on May 13, 2016. It is opposed by Primus, Birch, the secured lenders and the Monitor.

The Zayo Consent

[23] Prior to these events, Primus had a lengthy business relationship with Allstream Inc. which spanned over 15 years. Allstream was a wholly-owned subsidiary of Manitoba Telecom Services. Allstream sold wholesale telecommunications services to Primus which Primus then resold as part of its business, including long-distance phone, local internet and voice over internet protocol services. Primus had telecom supply contracts with a number of Allstream entities and for a number of services.

[24] In November 2015, Zayo acquired Allstream from MTS for $465 million. This was only one of about 30 acquisitions made by Zayo between 2007 and 2016.

[25] Because Zayo acquired a number of Allstream entities with Primus contracts, Zayo received three copies of the virtually identical consent request letter; one on January 22, 2016, another on January 26 2016 and a third on January 28, 2016. These consent request letters were sent to three senior Allstream executives, depending on which person or entity was identified in the relevant contract as the point of contact for all notices, etc.

[26] These letters were brought to the attention of Ms. Julie Wong Barker, a lawyer with the Zayo (Allsream) legal department.. Ms. Wong Barker was Senior Legal Counsel at Zayo Canada Inc. She has a B.A. and an M.A. and graduated with distinction from McGill University Law School. She was called to the Bar of Ontario in 2007. She worked for a major Bay Street Toronto law firm for two years and, following a maternity leave, joined Allstream as legal counsel in 2011. She became Senior Legal Counsel a few months later and has worked in the Allstream/Zayo Toronto legal department since then.

[27] Ms. Wong Barker became aware that Primus had filed for CCAA protection on the day the Initial Order was granted, January 19, 2016. Ms. Wong Barker deposed that she is not "well-versed" with the CCAA process and that, as a result, she searched for information on the internet and discovered that the Monitor was FTI.

[28] Ms. Wong Barker sent an email to the Monitor on January 21, 2016, indicating that Allstream was a significant supplier to and creditor of Primus. Her email states:

> Please kindly confirm that we will be added to any creditor's list and provided with all required notices accordingly. Further to that, pls kindly advise when the proof of claim forms will it be available, or kindly email it to me?

[29] On the following day, the Monitor replied, saying:

> Hello Julie,
>
> We confirm that Allstream Inc. is included on the list of known creditors and as such, you will be receiving a "Notice to Creditors" document in the mail in the coming days. At this time, there is no claims process approved by the Court so there is no proof of claim forms that need to be submitted. Any status updates will be posted on the website listed below.

The Monitor's email provided the URL link to the Monitor's Primus website (containing all the documents filed with the Court) and invited Ms. Wong Barker to feel free to contact him if she had any further questions or wanted to discuss the matter.

[30] On January 26, 2016, Ms. Wong Barker sent one further email to the Monitor. In this communication, she asked who would be receiving the notice to creditors and at what address. She also asked when the asset purchase agreement between Primus and Birch would be available on the Monitor's website. She asked whether the two documents could be emailed to her and, once again, inquired about whether there would be a claims process.

[31] Later the same day, the Monitor responded that the notice to creditors had been mailed to Allstream's Wellington Street address and that a copy of that document was also available on the Monitor's Primus website. The Monitor went on to indicate that a copy of the asset purchase agreement was not available "as it is not a public document yet." The Monitor reiterated that a claims process had not been initiated as no process had been approved by the court. Finally, the Monitor once again referred Ms. Wong Barker to the website for any status updates regarding the CCAA proceedings and invited any further questions.

[32] The evidence is that these were the only two communications between Ms. Wong Barker and the Monitor and that Ms. Wong Barker made no further inquiries of the Monitor regarding these CCAA proceedings. There is no suggestion, and certainly no evidence, that anything the Monitor said to Ms. Wong Barker in these email communications was in any way incorrect.

[33] On January 25, 2016, Ms. Wong sent to Primus a letter from the Allstream president in which Allstream and MTS advised they were consenting to the assignment of contracts between them and Primus. The Allstream consent letter went on to request a reciprocal consent from Primus in respect of certain contracts between MTS and Primus, so that the MTS contracts could be assigned to Allstream and MTS be released from any future obligation under these contracts.

[34] Further draft consent letters, and negotiations over the consolidation and wording of revised consent letters took place between February 5 and March 2, 2016, at which time Ms.

Wong Barker confirmed that a revised and executed form of consent to the assignment had been finalized.

The Zayo Argument

[35] Zayo's argument falls into three basic categories:

(1) the inadequacy of the form of consent request letter sent by Primus to Zayo. The complaint is, in essence, that the consent request letter was misleading because it omitted any explanation of the process under s. 11.3 of the CCAA and failed to disclose the provision for "cure costs" in the APA or to advise Zayo that it might have gained bargaining leverage regarding payment of its pre-filing arrears under s. 11.3(4) if it were to withhold its consent and force Primus to move before the court under s. 11.3(1);

(2) the failure to send Zayo a copy of the APA; and

(3) the failure of the Monitor/Primus to serve Zayo with the s. 11.3 motion materials filed to obtain the assignment order and the related failure to place Zayo on the e-service list for receipt of all Court material.

[36] The starting point for these arguments is the decision of the Supreme Court of Canada in *Ted Leroy Trucking (Century Services) Ltd., Re*, [2010] 3 S.C.R. 379. In that case the court observed that the incremental exercise of discretion under conditions aptly described as "the hothouse of real-time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs. It is frequently said that the remedial purpose of the CCAA is to avoid or ameliorate the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations by attempting to reorganize the financial affairs of the debtor under court supervision. The Supreme Court held that in pursuing this purpose, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. The supervising court should be mindful that the chance for successful reorganization is enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[37] The moving party also relies on the decision of G.B. Morawetz R.S.J. in *Target Canada Co.*, 2016 ONSC 316 where he said (at para. 72):

> It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner.

[38] Specifically, under s. 11.3 of the CCAA, the court should consider whether an assignment will meet the twin goals of assisting the reorganization process while also treating the counterparty fairly and equitably, *Veris Goldcorp., Re,* 2015 BCSC 1204.

[39] Zayo argues that in this case, the process for obtaining Zayo's consent to the assignment of its contracts to the purchaser, Birch, was neither transparent nor fair. Zayo says it was a counterparty to a number of essential contracts with Primus and that the business carried on by Primus could not continue as a going concern without these contracts. Birch, it says, therefore needed those contracts and would not have disclaimed them had Zayo not provided its consent to the assignment. In that scenario, Zayo argues that s. 11.3(4) would have required payment in full of its arrears.

[40] Zayo argues that the consent request letters, however, intentionally omitted any reference to "cure costs". In the APA, cure costs are defined as the costs necessary to pay pre-filing arrears in order to compel an assignment of an essential contract under s. 11.3.

[41] Ms. Wong Barker's evidence was that she did not understand that she was waiving any right to be paid Zayo's arrears when Zayo, through her, consented to the assignment of its contracts. Nothing in the consent request letters sent to Zayo even mentioned cure costs and they did not indicate that cure costs would not be paid to counterparties who consented to the assignment of their contracts. Ms. Wong Barker's evidence is, further, that Zayo would not have consented to the assignment of its contracts had it been aware that it would be considered to be waiving any rights to be paid to its arrears.

[42] Zayo also argues that the APA was unavailable for review before the consent deadline. The APA contemplated payment of pre-filing arrears ("cure costs") for essential contracts assigned by court order on of a motion under s. 11.3 of the CCAA. Zayo argues that it was unfair for Primus to demand that Zayo consent to assign its contracts without providing it with a copy of the APA.

[43] Finally, Zayo argues that it should have been served with the motion material filed in support of the motion for the assignment order. In this regard, Zayo also argues that it ought to have been placed on the e-service list, which would have resulted in all motion materials being served on it.

[44] Zayo relies on the 2015 decision in *Veris Gold,* where Fitzpatrick J. concluded that it was "not apparent" that the counterparties to the contract which was sought to be ordered to be assigned under s. 11.3, did, in fact, receive a copy of the application materials. She held that the "best practice… is to serve all counterparties to the particular contracts that are sought to be assigned, whether they are on the service list or not", *Veris Gold, supra,* paras. 59-61.

[45] In this case, Primus served the motion record for the assignment order on counterparties whose consent was still outstanding as of February 9 to 16, 2016. Because Zayo had delivered its initial consents well before February 9, 2016, it was not named in or served with the motion to require the assignment of the non-consenting parties' contracts.

[46] Zayo argues that it had an interest in the motion and that, had it been served with the assignment order motion record, it would have become aware of the "cure costs" provisions of the APA and the possibility that withholding its consent might lead to the payment of some or all of its pre-filing arrears. It also argues that, at the very least, it could have attended at the motion and advised the court that its intention had always been to be paid the pre-filing arrears owed by Primus.

[47] On the question of causation, Zayo asserts that, had it withheld its consent to the assignment of the Zayo contracts, then, at the assignment motion, Zayo would have recovered all of the arrears owed by Primus by virtue of the application of s. 11.3(4) of the CCAA. Zayo relies for this argument on the evidence of Primus, embedded in the language of the APA, that Birch regarded the Zayo contracts as "essential". Zayo also relies on the consent request letter, which stated that if consents were not forthcoming, Primus *would* move for an order requiring the assignment of the Zayo contracts under s. 11.3.

[48] While conceding that the consent request letter mentioned s. 11.3 of the CCAA, Ms. Wong Barker deposed that she looked at s. 11.3 at the time but did not understand it to mean that Zayo's consent to the assignment would foreclose any claim to pre-filing arrears.

[49] Finally, Zayo argues that no party will suffer prejudice if the motion is granted. This argument is premised on the assumption that Primus and/or Birch would have known the total amount of arrears owed by Primus to Zayo as of the date of the CCAA filing and would have paid this entire amount to Zayo had Zayo refused to consent to the assignment and been a party to the assignment order motion. Zayo's submits that it is not prejudicial for a party to be required to pay an amount that otherwise would have been payable. Thus, Zayo argues, there is no substantive prejudice to Primus, Birch or the secured lenders because, had all relevant facts been known to Zayo at the time, the arrears would have been paid and both reflected in the purchase price under the APA and reflected in the amounts received by the Monitor available to satisfy the secured lenders.

[50] Zayo, therefore, argues that this Court should not condone a process that results in a counterparty to an essential contract being financially disadvantaged for having cooperated with the debtor and consented to the assignment of that essential contract.

Analysis

[51] A great deal of the written and oral argument was devoted to the question of whether this Court has the jurisdiction to make the order sought by the Zayo in this case. There is no doubt that s. 11 is a broad grant of discretion. It is not, however, without limits. Specifically, the s. 11 authority is "subject to the restrictions set out in this Act". Further, the common law applies to the CCAA without modification unless the common law rule is "ousted" by the language of the CCAA, *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610 at 614.

[52] In the view I take of the matter, it is not necessary to resolve the legal question of jurisdiction. I say this because, assuming the jurisdiction is available, I would not exercise it to

grant the relief sought by Zayo in the circumstances of this case. I say this for the following reasons.

The Consent Request Letters

[53] The centerpiece of Zayo's argument is that the consent request letters sent by Primus were misleading, or perhaps more precisely, lacked transparency and were unfair. Zayo argues that the consent request letters did not disclose the details of the APA and the "cure costs" regime embedded in the APA. Nor did the letters provide sufficient explanation for the recipient to understand that bargaining leverage vis-à-vis pre-filing arrears might be gained by refusing to consent to the assignment of contracts because of the provisions of s. 11.3(4).

[54] I am not satisfied that the consent request letters were either unfair or lacked transparency. There were over 300 contracts outstanding, with well over 100 counterparties. Most of the counterparties, including Zayo/Allstream, were large, sophisticated telecommunications companies. There is no question Zayo/Allstream was a sophisticated party. Zayo acquired Allstream in late 2015 for $465 million. Allstream's revenues exceeded $640 million. This is more than 10 times what Primus earned. Every counterparty received the same form of letter. No other counterparty appears to have had any difficulty with the consent request letter or the decision to consent or not to consent. A large number of counterparties appear to have consented.

[55] Ms. Wong Barker worked in a legal department at Allstream comprised of about half a dozen lawyers. At least two other lawyers in the department had supervisory or other involvement in the Primus CCAA proceedings. Ms. Wong Barker, who carried the ball in the Primus CCAA proceedings, was an exceptional student and graduated with distinction from one of Canada's leading law schools. She went to Allstream with experience at a Bay Street law firm, and had worked there for about five years when Primus commenced its CCAA proceedings. Ms. Wong Barker admitted that CCAA litigation is a highly specialized area with which she was not familiar and that she chose not to seek advice from another lawyer with CCAA experience.

[56] Allstream received three consent request letters. The initial consent provided by Zayo on January 25, 2016 was not agreeable to Primus and there were extensive negotiations over various drafts, such that the form of the consent was not actually finalized until March 2, 2016. Part of the negotiation involved Allstream obtaining reciprocal consents from Primus to the assignment of MTS contracts with Primus to Allstream and the release of MTS from further obligation under those contracts. I do not accept Ms. Wong Barker's evidence that these reciprocal consents were just part of the consents requested by Primus. It is clear that Allstream took this opportunity to put its own house in order due to the sale of Allstream by MTS to Zayo just a few months earlier.

[57] Nothing in the consent request letters is incorrect. The APA was not disclosed initially because it was not yet in the public realm. The evidence is that the APA was posted on the Monitor's website no later than February 3, 2016. Zayo was repeatedly advised to check the Monitor's website for new and updated information. Ms. Wong Barker admitted she did not do

so until late in the piece and, in any event, did not see the APA when she did so, although it is clear that the APA was, by that time, available.

[58] The consent request letters did make explicit reference to s. 11.3 of the CCAA and a possible motion if consents were not forthcoming. Ms. Wong Barker deposed that she looked at that section of the CCAA. She appears to have misunderstood its meaning and effect. Her review of s. 11.3(4) in particular did not, in any event, cause her to consider whether court-ordered, as opposed to consent, assignments might *require* payment of pre-filing arrears. It is important to remember that contract formation and enforcement is, in essence, an objective, not a subjective, exercise. Ms. Wong Barker's subjective understanding and misconception of the assignment process wa, in any event, not known to Primus, Birch or the Monitor.

[59] Zayo argues that, as a matter of policy, debtors ought not to be given incentives to be stingy with the disclosure of material information. I do not disagree with this proposition. However, by the same token, creditors or other stakeholders ought not to be given incentives to be less than duly diligent in the protection of their commercial interest and the assessment of their options in real-time insolvency proceedings. In any event, I do not find "policy" arguments particularly helpful in the context of this case.

[60] The Supreme Court of Canada in *Century Services* emphasized the importance of appropriateness and good faith in the conduct of CCAA proceedings, to be sure. It is significant, however, particularly given the acknowledged "hothouse of real-time litigation" aspect of CCAA proceedings and the underlying remedial purpose of avoiding bankruptcy liquidation, that "due diligence" is also a baseline consideration, *Century Services, supra*, para. 70.

[61] Commercial parties do not have an obligation to provide each other with legal advice in the ordinary course of their dealings. Rather, they are entitled to pursue their own economic self-interest to the best of their ability. Contract and commercial law assumes that parties are vigilant in the pursuit of their own interests. It is not illegitimate for a party to bargain hard and advance its own interest. The general rule, with very limited exceptions, is that sophisticated parties will be held to the bargains they make. The mere fact that a bargain proves to be improvident is no basis to relieve the counterparty of its contractual obligations absent the application of one of these limited exceptions. Generally speaking, courts will only relieve a party of the consequences of a poor bargain in circumstances of unconscionability, unilateral mistake, misrepresentation or duress.

[62] Here, I have already found as a matter fact that there was no misrepresentation. I also find, as matter of fact, that the preconditions for the application of the doctrine of unilateral mistake are not met. This is because, put simply, neither Primus nor the Monitor were aware of Zayo's misunderstanding of the assignment process and no advantage was taken of Zayo's mistaken understanding. The parties were both clearly sophisticated players in the telecommunications business and had comparable bargaining power. Zayo had every opportunity to speak with independent legal counsel and had realistic alternatives to the consent ultimately given. There was no duress.

[63] The consent request letters were, in my view, both fair and transparent. Every counterparty was given the same information. Every counterparty was advised to check the Monitor's website for new and updated information. The information necessary to put counterparties on notice of the issues was provided. There was no obligation to provide legal advice or to highlight the possible choices counterparties might make to improve their bargaining leverage. All the counterparties had ample time and every opportunity to obtain professional advice and to consider their options. Zayo, with the benefit of a good-sized legal department, in fact did so.

Disclosure of the APA

[64] I have already dealt in substance with the availability of the APA. The Monitor responded promptly to Ms. Wong Barker's request for a copy by advising that it was not yet publicly available. The Monitor did not promise to provide a hard copy of the APA to Ms. Wong Barker when it became available. Ms. Wong Barker was advised to check the Monitor's website on an ongoing basis. Within days of her request, the APA was, in fact, posted on the Monitor's website. Zayo was also invited, repeatedly, to call the Monitor with any additional questions. After January 26, 2016, however, Zayo had no further communication with the Monitor. If Zayo wanted to review the APA before finalizing its consent, it was incumbent upon Zayo to insist upon that step or take the necessary action to ensure that it was able to do so.

Service

[65] Zayo also complains that service was deficient and that it ought to have been served with the assignment order motion record. Had this been done, it argues, it would have discovered all about the cure costs and the fact that a number of counterparties were likely to be paid some or all of their pre-filing arrears.

[66] The proper analysis of this issue begins with the Initial Order, which governs the procedure for notice and service in this CCAA proceeding. The Initial Order adopts the e-service protocol of the Commercial List. Under that protocol, any party that has delivered a notice of appearance, any party that should be served in accordance with the Rules and any party who has filed a request for electronic service must be placed on the e-service list. Stakeholders who wish to be placed on the e-service list in order to receive service of court documents in a timely and efficient manner "shall email to the E-service List Keeper" a duly completed request for electronic service in the prescribed form.

[67] The evidence on this motion is that Zayo at no time filed a notice of appearance in this proceeding or submitted a request for electronic service. Zayo asked the Monitor to be placed on the list of creditors and that was done. Zayo received the relevant notice shortly thereafter. As noted above, the Monitor also, on two occasions, specifically advised Zayo to review the Monitor's website for new and updated information.

[68] The motion material for the approval and vesting order (which contained the APA) was posted on the Monitor's website on February 3, 2016. The motion material for the assignment

order appears to have been posted on the Monitor's website on or shortly after February 16, 2016.

[69] Neither of the aforementioned motion records were served on Zayo because the Rules did not require service and Zayo had neither appeared nor asked to be placed on the e-service list. In particular, the assignment order motion was only in respect of counterparties to contracts which Birch insisted be assigned and for which no consent had been obtained. The cutoff date for consent was, ultimately, between February 9 and 16, 20156. Because Zayo/Allstream had already consented to the assignment of its contracts, neither Allstream nor any Allstream contracts were included in the motion for the assignment order. Not being a party to that motion or having asked to be placed on the e-service list, Zayo was not entitled to service and was not served.

[70] Zayo's reliance on the *Veris Gold* case is misplaced. That case involved a failure to serve a counterparty whose contract *was* going to be assigned by virtue of a court order and whose interest under s. 11.3(4) was clearly engaged. Even though the party had not appeared and did not ask to be placed on an e-service list, Fitzpatrick J. held that the party ought to have been served since its interest was directly engaged by the relief sought.

[71] That is, with respect, not the situation here. In the present case, by virtue of its consent, Zayo's contracts did not form any part of the subject matter of the assignment order motion. Ms. Wong Barker was aware of, and presumably read, the Initial Order. It was open to Zayo to request that it be served with all court filings. It did not do so. It was advised to consult the Monitor's website for new and updated material. The motion material in support of the approval and vesting order and the assignment order were posted on the Monitor's website in a timely manner. Specifically, both motion records were posted on the Monitor's website at least several days prior to March 2, 2016 when the consent documents between Zayo and Primus were ultimately finalized and the assignment order was made. Ms. Wong Barker admitted that she looked on the Monitor's website and found this material but it is not clear when she did so. What is clear is that she did not spend sufficient time with the material to find any of the information that Zayo now says was critical to it.

[72] I find, therefore, that Zayo was entitled to request e-service of all court filings but did not do so. Zayo was placed on the creditors list, as it requested, and received all relevant notices in that regard. Zayo, having consented to the assignment of its contracts, was not affected by, and therefore not entitled to notice of, the motion for the assignment order. There was, in the circumstances, no failure of service or notice on the part of the debtor or the Monitor.

Prejudice

[73] Zayo argues, finally, that the order for payment of its $1.2 million out of the proceeds of sale should be made because it would not prejudice anyone. Distribution issues in this case are a zero sum game because, on the evidence, there is certain to be a shortfall. Zayo argues, however, that if it had not consented to the assignment of its contract it would have been a party to the

assignment order motion and would have been paid in full. Thus, other parties seeking distribution from the proceeds of sale would be no worse off now, if the order sought is made, than they would have been if the assignment order had been made in respect of Zayo's contracts in the first place.

[74] Given my disposition of the issues above, the fate of Zayo's motion does not turn on this issue. However, because many of the issues are intertwined, it seems appropriate to deal with this issue as well.

[75] The principal flaws in Zayo's argument are the assumptions that:

(a) Zayo had a right to have its contract assigned by a court order; and

(b) Zayo would have been paid its pre-filing arrears in full.

[76] Under the terms of the APA, Birch had the right to add to and take away from the list of essential contracts. The evidence is very clear that the essential contract list was in a state of flux for several weeks and that, in the end, almost 100 contracts were removed from the list of contracts that Birch initially wanted to take on.

[77] The assignment process envisioned under s. 11.3 is a debtor driven, not creditor or counterparty driven process. Section 11.3(1) begins "on application by a debtor company…" Thus, a counterparty cannot require an insolvent debtor to assign its contract to a purchaser. Section 11.3 envisions a market-driven process under which a purchaser, in consultation with the debtor and the monitor, may decide (after possible negotiations with the counterparties) which contracts it wants and needs and which it does not. The APA in this case specifically required that any negotiations with counterparties had to be conducted in the presence of not only the debtor and Monitor but Birch as well.

[78] I agree with the responding parties to this motion that it cannot now be known what Birch might have done, what negotiations might have taken place or what monetary threshold Zayo and Birch might have had for keeping or disclaiming the contract, if Zayo had declined its consent to the assignment of its contracts.

[79] Zayo argues that this "infinite possibilities" argument is not available to the respondents on this motion because there is no evidence to support it. Zayo argues that the only evidence is that: a) Zayo's contracts *were* on the essential contracts list; b) the consent request letter told Zayo that, in the absence of its consent, a motion *would be* brought for an order assigning its contracts under s. 11.3; and c) the assignment order provided for the assignment of 92 essential contracts with 35 counterparties along with payment of cure costs in the aggregate amount of $4,518,997.51. Neither Birch nor anyone else filed any evidence on what they would have done had Zayo not provided its consent.

[80] Notwithstanding Mr. Gottlieb's forceful argument on this point, I do not think the record is so devoid of evidence as he makes out. Birch did have the right to remove contracts from the list and did so – almost 100 were dropped from the list. Over 90 contract counterparties granted consent to assign without making their consent conditional on payment of pre-filing amounts. The consent request letter, stating that a motion would be brought under s. 11.3 in the absence of consent to the assignment, was a statement of present intention, not an enforceable promise.

[81] There is also evidence that negotiations took place around the amounts of any payment of pre-filing arrears. As the Supreme Court made clear in *Century Services*, much of what actually happens under CCAA proceedings depends upon the parties' negotiations. In those negotiations, parties to service contracts must weigh the risks of insisting upon their desired position (i.e., they may get nothing if the contract is disclaimed) against the benefits of a future income stream due to the assignment of their contract from an insolvent party to a new, more robust, entity.

[82] It is entirely understandable, and fair, for Birch not to have filed evidence purporting to say what it would have done had Zayo not provided its consent. This is because, having been deprived (by virtue of Zayo's consent) of the opportunity to consider that scenario, negotiate with Zayo and weigh the costs and the benefits of each available option, Birch could not now know what it would have done. Any attempt to purport to say otherwise would inevitably involve speculation.

[83] There is a further complication in that the APA sets a ceiling of $3 million on cure costs which are deducted from the purchase price. Above $3 million, the cure costs of court-ordered assignments under s. 11.3 are shared equally between Primus and Birch. This too would have been a relevant factor in Birch's approach to any discussion about payment of Zayo's pre-filing arrears and formed the basis of two prior orders of the Court.

[84] I am unable to agree with Zayo's submission that no amendment of the approval and vesting order or of the assignment order would be required. It seems to me that both orders were premised on Zayo's consent to assignment of its contracts. The relief sought by Zayo on this motion would require a variation of the approval and vesting order as well as the assignment order. Given that the transaction has now closed, and the Monitor has issued its certificate, the additional complication of the allocation of the shortfall resulting from a payment to Zayo as between Primus and Birch would also have to be resolved. This is a situation, in my view, where the proverbial egg cannot be unscrambled.

[85] For these reasons, I conclude that prejudice would be suffered by, at the very least, the syndicate of secured lenders and Birch were the relief sought on this motion to be granted.

Conclusion

[86] For the foregoing reasons, Zayo's motion for an order requiring payment by the Monitor of Zayo's pre-filing arrears out of the proceeds of the sale to Birch is dismissed.

Costs

[87] I encourage the parties to seek an accommodation on costs. Failing agreement, any party seeking costs shall do so by filing a brief written submission, not to exceed two typed, double-spaced pages, together with a Bill of Costs within 10 days of the release of these Reasons. Anyone wishing to respond to such a request shall do so by filing a brief written submission, subject to the same page limit, within a further 10 days.

Penny J.

Date: August 18, 2016