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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF ARGENT ENERGY TRUST, ARGENT ENERGY (CANADA) HOLDINGS INC. and ARGENT ENERGY (US) HOLDINGS INC.
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS (SALE APPROVAL, DISTRIBUTION OF NET PROCEEDS AND STAY EXTENSION)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East 855-2nd Street SW Calgary, Alberta T2P 4K7 Attention: Kelsey Meyer / Sean Zweig Telephone No.: 403-298-3323 / 416-777-3254 Fax No.: 403-265-7219 Client File No.: 68859-14

Special Chambers Application Scheduled for the 25th day of April, 2016
before The Honourable Mr. Justice D. B. Nixon

TABLE OF CONTENTS

I. INTRODUCTION

1. At the outset of these proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), Argent Energy Trust (the "Trust"), Argent Energy (Canada) Holdings Inc. ("Argent Canada") and Argent Energy (US) Holdings Inc. ("Argent US", and together with the Trust and Argent Canada, "Argent" or the "Applicants") were granted an Initial Order that approved, among other things, a Sale Solicitation Process. The approval of the Sale Solicitation Process was confirmed at a comeback hearing; and objections to that process by the Ad Hoc Committee were heard and dismissed at that time. The court-approved Sale Solicitation Process continued, and was also recognized by the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division (the "US Bankruptcy Court") over the objections of the Ad Hoc Committee.

Initial Order granted February 17, 2016.

Amended and Restated Initial Order granted March 9, 2016.

Affidavit of Sean Bovingdon sworn April 14, 2016 (the "Bovingdon Affidavit No. 3), Exhibit "3".

2. The Sale Solicitation Process was conducted under the oversight of the Monitor in accordance with the Amended and Restated Initial Order, and nineteen conforming bids were received by the bid deadline. Argent now applies for approval of a sale of its assets (the "Transaction"), in accordance with the Sale Solicitation Process and as contemplated by a purchase and sale agreement between Argent US and BXP Partners IV, L.P. ("BXP" or the "Purchaser") made as of April 14, 2016 (the "Sale Agreement"), and vesting of those assets with the Purchaser. Argent also seeks a sealing Order over certain confidential evidence filed in support of its Application, an Order approving the distribution of the net proceeds of the Transaction, and an extension of the stay of these CCAA proceedings.

3. Unless otherwise defined herein, all capitalized terms used in this Brief have the same meanings as are defined in the Affidavit of Sean Bovingdon sworn February 16, 2016 (the "Bovingdon Affidavit No. 1"), the Affidavit of Sean Bovingdon sworn February 29, 2016 (the "Bovingdon Affidavit No. 2"), and the Affidavit of Sean Bovingdon sworn April 14, 2016 (the

"Bovingdon Affidavit No. 3, and together with the Bovingdon Affidavit No. 1 and the Bovingdon Affidavit No. 2, the "Bovingdon Affidavits").

4. The Monitor and the Syndicate support Argent's Application.

5. As is described in the Bovingdon Affidavits, Argent has pursued all possible alternatives to the Sale Solicitation Process, including continuing to pursue refinancing alternatives through the Durham Capital process. The Transaction, which is the best alternative resulting from the court-approved Sale Solicitation Process, is commercially reasonable, in the best interests of Argent and its stakeholders with an ongoing economic interest, and maximizes value in the circumstances.

6. Argent, through its counsel, has made numerous attempts to consult with the Ad Hoc Committee, and has responded quickly and fully to all reasonable information requests received from the Ad Hoc Committee since the granting of the Amended and Restated Initial Order. The Ad Hoc Committee seems to continue to oppose the Sale Solicitation Process (which, Argent, submits is *res judicata* in both Canada and the United States), and has indicated that it intends to oppose the approval of the Transaction, but still has not presented any alternatives to the Transaction (or to the Sale Solicitation Process).

7. Further, the Ad Hoc Committee has requested that the hearing of this Application be adjourned. In spite of the fact that Argent has proposed a reasonable schedule to accommodate the adjournment request of the Ad Hoc Committee, and has made all efforts to ensure that it can be implemented, the Ad Hoc Committee has refused to agree to the same, and insists instead on an extended adjournment that jeopardizes the closing of the Transaction, the Interim Financing, and these CCAA proceedings. As such, the Applicants submit that the adjournment request should be dismissed.

II. STATEMENT OF FACTS

A. Steps Taken since March 9, 2016

8. On March 9, 2016, the Amended and Restated Initial Order was granted, which, despite objections from the Ad Hoc Committee, upheld the Sale Solicitation Process. The stay of proceedings was extended to May 17, 2016.

Amended and Restated Initial Order granted March 9, 2016.

Order (Stay Extension) granted March 9, 2016.

9. Since March 9, 2016, the Applicants have been actively engaged in advancing the restructuring proceedings for the benefit of their stakeholders. The Applicants have acted with good faith and due diligence, and they and/or their counsel have, among other things:

(a) cooperated with the Monitor to facilitate its monitoring of the Applicants' business and operations;

(b) communicated, in some cases very extensively, with various stakeholder groups and/or their advisors, including the Syndicate, the Ad Hoc Committee, critical suppliers, trade creditors, employees, contractors and others;

(c) worked with the Monitor and OGAC to successfully pursue the Sale Solicitation Process which was approved in the Initial Order and further approved and confirmed in the Amended and Restated Initial Order;

(d) entered into a letter of intent and the Sale Agreement with BXP for sale of the assets of Argent US to BXP, in accordance with the terms of the Court-approved Sale Solicitation Process;

(e) continued to investigate alternative financing with Durham Capital as Argent's advisor;

(f) liaised with US counsel and attended in Court in the US regarding the Chapter 15 Proceedings under the U.S. Bankruptcy Code that were commenced in respect of Argent Canada and Argent US, including obtaining an Order for recognition of the CCAA proceedings from the US Bankruptcy Court (the "Recognition Order"), which (among other things) recognized the approval of the Sale Solicitation Process; and

(g) continued to operate and manage Argent's business in the ordinary course, subject to the terms of the Initial Order and the Amended and Restated Initial Order.

Bovingdon Affidavit No. 3, para. 10 and Exhibits "3" and "5" to "21".

10. Argent seeks an extension of the stay of proceedings granted by this Honourable Court to June 30, 2016. Such an extension will allow for the Transaction to close (if it is approved by this Honourable Court and the US Bankruptcy Court) and for a number of post-closing matters to be addressed.

B. The Sale Solicitation Process

11. OGAC was selected, through a competitive bid process, to assist Argent US and Argent Canada in soliciting and evaluating bids for the sale of (1) all of the equity of Argent US held by Argent Canada; or (2) some or all of Argent US' oil and gas properties. Under the oversight of the Monitor, OGAC and its Chief Executive Officer at the time, Harrison Williams, assisted Argent in carrying out the Sale Solicitation Process, and in marketing Argent to an extensive group of more than 12,000 potential bidders. Both OGAC and Mr. Williams have significant experience in the oil and gas acquisition and divestiture business; Mr. Williams has been in the business for over 25 years.

Affidavit of Harrison Williams sworn February 29, 2016 ("Williams Affidavit No. 1"), paras. 2, 4-7.

12. Based on his extensive experience in the industry, Mr. Williams was, and remains, confident that the Sale Solicitation Process, including the timelines therein, is reasonable and appropriate, and allowed Argent to maximize its value.

Williams Affidavit No. 1, para. 17.

13. The Sale Solicitation Process which led to the Transaction was approved by this Honourable Court on February 17, 2016 in the Initial Order, and again on March 9, 2016 in the Amended and Restated Initial Order. Further, the US Bankruptcy Court has granted foreign recognition in respect of the CCAA proceedings, and authorized the implementation of the

terms of the Initial Order and the Amended and Restated Initial Order, including the Sale Solicitation Process, by way of the Recognition Order.

Bovingdon Affidavit No. 3, para. 33, Exhibit "3".

14. The Monitor and the Syndicate both supported the approval of the Sale Solicitation Process. Objections to the Sale Solicitation Process, raised by the Ad Hoc Committee at the comeback hearing before this Honourable Court on March 8, 2016, were all dismissed.

Bovingdon Affidavit No. 3, para. 34.

15. The Sale Solicitation Process generated very significant interest. In total:

(a) over 12,000 potentially interested parties were contacted by OGAC and were sent the teaser;

(b) over 100 interested parties entered into confidentiality agreements allowing them to access the VDR;

(c) over 100 interested parties entered into the VDR;

(d) 7 potential bidders received data room presentations (at which OGAC engineers and geologists took the potential bidder through the data to explain the assets and the potential value); and

(e) 19 interested parties submitted conforming bids in accordance with the Sale Solicitation Process, six of which were for all (or substantially all) of the assets of Argent US.

Williams Affidavit No. 1, para. 10.

Bovingdon Affidavit No. 3, para. 10.

16. Following the Bid Deadline, and in accordance with the terms of the court-approved Interim Financing Credit Agreement and Sale Solicitation Process, bids received were reviewed by OGAC, the Monitor, Argent and the Syndicate. Argent and OGAC, under the

oversight of the Monitor, then worked with the bidders to maximize the value to Argent, by seeking and obtaining revised bid amounts.

Bovingdon Affidavit No. 3, paras. 11 and 12 and Confidential Exhibit "4".

Bovingdon Affidavit No. 1, Exhibit "19".

Schedule "A" to the Initial Order and to the Amended and Restated Initial Order, para. 8.

17. BXP was the Successful Bidder pursuant to (and as defined in) the Sale Solicitation Process. In accordance with the Sale Solicitation Process, Argent US and BXP entered into a letter of intent on April 4, 2016, and on April 14, 2016, executed the Sale Agreement.

Bovingdon Affidavit No. 3, paras. 30-32, Confidential Exhibits "19" and "20" and Exhibit "21".

18. The Monitor and the Syndicate both support the approval of the Transaction. Based on the results of the comprehensive Sale Solicitation Process, the Syndicate is Argent's fulcrum creditor, and supports the Transaction notwithstanding that it will not be repaid in full as a result of the Transaction. The Monitor is of the opinion that the proposed sale would be more beneficial to the creditors of Argent than a sale or disposition under a bankruptcy.

Bovingdon Affidavit No. 3, paras. 34-35, 39.

19. Given that the Transaction is a going concern sale of all of Argent's business, it is also a positive outcome for many of Argent's counterparties and other parties with which Argent has a commercial relationship.

Bovingdon Affidavit No. 3, para. 40.

20. BXP is not a related person to Argent, as defined in subsection 36(5) of the CCAA.

Bovingdon Affidavit No. 3, para. 41.

21. In the circumstances where Argent undertook a thorough Sale Solicitation Process that had been approved by the Court and that generated considerable interest and participation, the

proposed sale will maximize the value of the assets of Argent. Further, in consideration of the competitive and confidential negotiated bid process undertaken by Argent through the Sale Solicitation Process, and the number of bids received through that process, it is the opinion of Argent's President and CFO that the consideration to be received for the assets pursuant to the Transaction is reasonable and fair in the circumstances, taking into account fair market value. The board of directors of Argent US has exercised its business judgment and approved the Transaction.

Bovingdon Affidavit No. 3, paras. 37-38, 42 and Exhibit "22".

C. Communications with the Syndicate

22. Along with consulting with the Syndicate regarding the bids received through the Sale Solicitation Process, and regarding the selection of the Successful Bid as defined in the Sale Solicitation Process (as required pursuant to the Interim Financing Credit Agreement), Argent has provided the Syndicate with regular (and at least weekly) updates regarding these CCAA proceedings and the Sale Solicitation Process, and otherwise in accordance with the terms of the Interim Financing Credit Agreement.

Bovingdon Affidavit No. 3, paras. 13-14.

Bovingdon Affidavit No. 1, Exhibit "19", Sections 9.1(v) and 9.2(h) and (u).

D. Communications with the Ad Hoc Committee

23. The Bovingdon Affidavit No. 3 sets out the following information requests made by the Ad Hoc Committee through its counsel, and responded to by Argent or its counsel:

(a) March 18-19, 2016: Counsel for the Ad Hoc Committee requested that the Monitor provide information regarding bids that were received by the Bid Deadline. The Monitor forwarded the request to counsel for Argent. Argent's counsel responded to counsel to the Monitor that it would send counsel for the Ad Hoc Committee a redacted summary of the bids received (showing the purchase price and proposed assets to be purchased for each bid, but not identifying the names of any bidders), provided that counsel for the Ad Hoc

Committee confirmed that the Ad Hoc Committee would not attempt to bid or participate in any bid or otherwise attempt to directly or indirectly acquire the assets of Argent, and executed a non-disclosure agreement satisfaction to Argent to deal with non-disclosure of the information.

Similar terms were also agreed to by the Syndicate in the Credit Agreement (with respect to confidentiality) and in the Sale Solicitation Process (with respect to not bidding in the Sale Solicitation Process).

Bovingdon Affidavit No. 3, paras. 15-16, Exhibit "6".

Bovingdon Affidavit No. 1, Exhibit "19", section 13.3.

Schedule "A" to the Initial Order and to the Amended and Restated Initial Order, para. 8.

(b) March 21-25, 2016: Counsel for the Ad Hoc Committee advised the Monitor that it would agree to the confidentiality restriction, but that it would not agree to the restriction on participation. Counsel for Argent responded to counsel for the Ad Hoc Committee directly (rather than through the Monitor, as counsel for the Ad Hoc Committee had done) to set out its position regarding disclosure of information regarding the bids, including its concern that providing the information without an assurance that the Ad Hoc Committee would not bid on the assets could jeopardize the offers that had been received through the Sale Solicitation Process, as well as the integrity of the process itself. Counsel for Argent and counsel for the Ad Hoc Committee had a conference call on March 24, 2016, wherein counsel for the Ad Hoc Committee advised that it required the requested information in order to propose a restructuring plan. On March 25, 2016 (Good Friday), counsel for Argent advised counsel for the Ad Hoc Committee that it would disclose the amount of the highest bid received in the Sale Solicitation Process provided that:

(i) counsel for the Ad Hoc Committee, and, to the extent they wanted access to the information, the Ad Hoc Committee members were required to enter into a non-disclosure agreement satisfactory to Argent; and

(ii) counsel for the Ad Hoc Committee was required to confirm that the Ad Hoc Committee members would not participate as bidders in the Sale Solicitation Process (i.e. counsel for Argent no longer required that counsel for the Ad Hoc Committee confirm that the Ad Hoc Committee members would not attempt to directly or indirectly acquire the assets of Argent outside of the Sale Solicitation Process);

and provided counsel for the Ad Hoc Committee with a form of non-disclosure agreement.

Bovingdon Affidavit No. 3, paras. 17-21, 28, Exhibit "7" to "10".

(c) March 28, 2016: Despite counsel for the Ad Hoc Committee's repeated assertions that its requests were urgent, counsel for Argent did not hear from counsel for the Ad Hoc Committee until March 28, 2016, at which time counsel for the Ad Hoc Committee provided a signed non-disclosure agreement and, by subsequent email, confirmed that the Ad Hoc Committee members would not participate as bidders in the Sale Solicitation Process. Counsel for Argent accordingly provided counsel for the Ad Hoc Committee with the amount of the highest bid received in the Sale Solicitation Process, and confirmed that the bid did not contain any material deviations from the terms in the Sale Solicitation Process, that the only material condition would be court approval, and that upon signing of the Sale Agreement, the agreement would no longer be conditional upon environmental or title due diligence.

Bovingdon Affidavit No. 3, paras. 21-22 and Exhibits "11", "12" and Confidential Exhibit "13".

(d) March 28-30, 2016: Counsel for the Ad Hoc Committee requested, and counsel for Argent and Argent itself provided information as to the amounts owed to the Syndicate, including a sources and uses summary sheet, information regarding the progress of the Durham Capital Process, and updated reserve runs based on current strip pricing as well as actual interim financing amounts utilized versus the budget. Argent and its counsel provided all of this information to counsel for the Ad Hoc Committee by March 30, 2016. Two members of the Ad Hoc Committee also signed non-disclosure agreements during this time, and so were also permitted access to the confidential information that had been provided to their counsel.

Bovingdon Affidavit No. 3, paras. 23-27, Exhibits "14" and "16" and Confidential Exhibits "15" and "17".

(e) April 12-14, 2016: Despite the comments from counsel to the Ad Hoc Committee that the confidential information provided to him and to certain of his clients was required in order for them to propose a restructuring plan, from March 30, 2016 until April 12, 2016, neither counsel for Argent nor the Monitor heard anything further from counsel to the Ad Hoc Committee. On April 12, 2016, counsel for Argent contacted counsel for the Ad Hoc Committee to follow up with respect to the proposed Transaction. Further emails were exchanged in an attempt to find a time to speak. Counsel for the Ad Hoc Committee responded, in a chain of emails, summarized as follows:

(i) that there has been no dialogue between Argent and the Ad Hoc Committee (as set out in the Bovingdon Affidavit No. 2 and the Bovingdon Affidavit No. 3, there have been considerable communications between Argent's counsel and counsel for the Ad Hoc Committee, and repeated offers by Argent's counsel to discuss any proposed alternatives that the Ad Hoc Committee may have);

(ii) that Argent should not be entering into a sale agreement without having meaningful discussions with the Ad Hoc Committee (as set out in the

Bovingdon Affidavit No. 2 and the Bovingdon Affidavit No. 3, Argent and its counsel have made numerous attempts to communicate with the Ad Hoc Committee, and have repeatedly invited discussions; however, not once has the Ad Hoc Committee responded with any proposal that would address Argent's urgent liquidity situation, and in fact, since the Amended and Restated Initial Order was granted, and despite all information requested by counsel for the Ad Hoc Committee being provided to it, in a timely manner, the Ad Hoc Committee has not put forth any proposals whatsoever); and

(iii) that Argent is obligated to pursue other paths and has done nothing to create value for stakeholders (along with pursuing the Sale Solicitation Process and the Durham Capital process to seek refinancing, as described herein, as well as all of the alternatives pursued by Argent prior to the filing of these CCAA proceedings as described in the Bovingdon Affidavit No. 1, Argent has repeatedly advised counsel for the Ad Hoc Committee that it is willing to consider alternative proposals, none of which have been forthcoming).

Further, counsel for the Ad Hoc Committee continues to object to the Sale Solicitation Process, despite the fact that the Sale Solicitation Process was approved by this Honourable Court both in the Initial Order and, upon dismissing the Ad Hoc Committee's objections to the same at the comeback hearing on March 9, 2016, in the Amended and Restated Initial Order. The Ad Hoc Committee also objects to this Application proceeding on April 25th, despite the fact that the Ad Hoc Committee has been aware of the Sale Solicitation Process since February 17, 2016, knew that a sales process was being contemplated by Argent long before that, and, since March 30, 2016, has had all information that it requested from Argent in late March, including the amount of the highest bid received in the Sale Solicitation Process, so as to allow it to put forth a restructuring proposal (as was indicated by its counsel). Further, the Ad Hoc Committee was served with the materials in support of this Application on April 15, 2016 (three days earlier than required

by the Commercial Practice Note), and, pursuant to a non-disclosure agreement, received copies of the Confidential Exhibits to the Bovingdon Affidavit No. 3 and the Confidential Affidavit No. 2 of Harrison Williams on April 17, 2016 (Argent offered to provide them on April 15th, on the very same terms that were ultimately agreed to on April 17th).

Bovingdon Affidavit No. 3, paras. 15-28 and Exhibit "18".

Bovingdon Affidavit No. 2, paras. 10-16 and Exhibits "4" to "13".

24. Further information requests were made by counsel for the Ad Hoc Committee by letter dated April 18, 2016. Argent's counsel responded by letter dated April 19, 2016. As is set out in Argent's response to the letter, many of these information requests had already been made and responded to by Argent, in February 2016, through the exchange of letters between counsel in Canada and through responses to information requests and depositions made through the Chapter 15 Proceedings in the US Bankruptcy Court. Further, the requests, in many cases, were overly broad, unnecessary, and/or irrelevant. Argent has responded to all reasonable requests for information.

- Letter from Counsel for Argent to Counsel for the Ad Hoc Committee dated April 19, 2016. **[TAB A]**

25. Argent has accordingly made all efforts to respond to the queries and requests of the Ad Hoc Committee since the Amended and Restated Initial Order was granted on March 9, 2016. Despite that, the Ad Hoc Committee continues to attempt to disrupt the process, but refuses to present or discuss any viable alternatives to it. As is set out above and in the Bovingdon Affidavits, Argent has pursued all available alternatives, including continuing to pursue the Durham Capital process to seek refinancing alternatives. In the context of, among other things, Argent's default on the debt owed to its secured creditor, the Syndicate, the Transaction is the best alternative available to Argent and its stakeholders in the circumstances.

E. There are No Grounds to Delay this Application

26. The Ad Hoc Committee has not put forth any alternatives that would warrant any delay of the hearing of this Application. The Ad Hoc Committee has already objected to the Sale Solicitation Process, and those objections were dismissed at the comeback hearing on March 8 and 9, 2016. The Ad Hoc Committee has known of and been involved in Argent's exploration of restructuring alternatives since August 2015. It rejected the Wapiti Offer, made on or around October 30, 2015 for the acquisition of the shares or assets of Argent US, which would have been satisfactory to Argent and the Syndicate, and which would have paid the Syndicate in full, allowed the business of Argent US to continue as a going concern and resulted in material recovery for the unsecured debentureholders (some but not all of which are members of the Ad Hoc Committee). It has also refused to propose or discuss any alternatives to these CCAA proceedings that would address Argent's urgent liquidity crisis, despite numerous and repeated offers by Argent and its counsel to discuss the same. Despite the inability or refusal of the Ad Hoc Committee to present any alternatives, the Ad Hoc Committee continues to seek to disrupt the Sale Solicitation Process and this Application for approval of a sale that is the result of a competitive, negotiated bid process that generated considerable interest and nineteen conforming bids, and that the Applicants' fulcrum creditor is willing to accept.

Bovingdon Affidavit No. 1, para. 88.

Bovingdon Affidavit No. 2, para. 18.

27. Delaying the hearing of this Application would seriously prejudice Argent and its other stakeholders who do have an ongoing economic interest:

(a) pursuant to the Sale Solicitation Process, the Applicants were required to use their best efforts to schedule this Application for approval of a sale pursuant to the Sale Solicitation Process on or before April 30, 2016;

Bovingdon Affidavit No. 3, Exhibit 21, Section 8.03(a).

Schedule "A" to the Initial Order and to the Amended and Restated Initial Order, paras. 3(n) and (o) and 4(c)(ii).

(b) the Transaction is conditional upon approval of this Honourable Court and of the US Bankruptcy Court, and delay of the hearing of the Application could accordingly jeopardize the closing of the Transaction, which is required, pursuant to the Sale Agreement, to occur by May 31, 2016. Argent notes that appeal periods in relation to approval of this Transaction by this Honourable Court and by the US Bankruptcy Court, including the 14-day appeal period pursuant to the U.S. Bankruptcy Code, must be taken into account with respect to that May 31st deadline;

Bovingdon Affidavit No. 3, Exhibit "21", Section 9.01 and "Outside Date".

(c) if the Transaction is not approved by this Honourable Court and by the US Bankruptcy Court on or before May 17, 2016, there will be an event of default under the Interim Financing Credit Facility provided to Argent by the Syndicate, and the Syndicate could at that point cease to fund Argent and/or seek to appoint a receiver over the assets of Argent or otherwise bankrupt Argent.

Bovingdon Affidavit No. 1, Exhibit "19", Section 10.1(m).

28. Further, on April 8, 2016, at a hearing in the US Bankruptcy Court for the purpose of scheduling the hearing for approval of the Transaction by the US Bankruptcy Court, U.S. counsel for the Ad Hoc Committee counsel did not object to, and in fact consented to the scheduling of that hearing on April 27, 2016, and, when asked to advise what position it would be taking at that hearing, did not mention to the US Bankruptcy Court any intention to seek an adjournment in these CCAA proceedings for April 25, 2016, which certainly is something that Argent's US counsel would have expected counsel to the Ad Hoc Committee to inform the US Bankruptcy Court of at that hearing.

29. In addition, the Applicants submit that there is no reason for a delay of these proceedings:

(a) The Ad Hoc Committee has had the amount of the highest bid since March 28, 2016, and was aware since March 18, 2016, if not earlier, that the Applicants would be applying to seek approval of a sale transaction;

(b) Argent has responded to all reasonable information requests made by the Ad Hoc Committee, in a timely manner;

(c) The Applicants served their filed materials (including upon counsel to the Ad Hoc Committee) on April 15, 2016, three days before the deadline that would otherwise be required pursuant to the Commercial List practice;

(d) Further, and subject to the non-disclosure agreements previously entered into by the Ad Hoc Committee members and their counsel, Argent offered to provide the Confidential Exhibits to the Bovingdon Affidavit No. 3 and the Confidential Affidavit No. 2 of Harrison Williams to counsel for the Ad Hoc Committee on April 15, 2016 (counsel for the Ad Hoc Committee agreed to the applicability of the non-disclosure agreements on April 17, 2016 and the confidential materials were provided 22 minutes later);

(e) Counsel for Argent has made Mr. Bovingdon and Mr. Williams available for cross-examination on their Affidavits, and has also accommodated a request by the Ad Hoc Committee to examine a representative of Durham Capital, notwithstanding that Argent has no control over that individual and the Ad Hoc Committee had not served him with a Notice of Appointment to be Questioned as a witness or with conduct money as required under the Alberta *Rules of Court* (rule 6.8);

(f) The Ad Hoc Committee has had all opportunities to respond to this Application, or otherwise (and as its counsel had indicated in the conference call with counsel for Argent on April 24, 2016) to put together a form of restructuring proposal; no such proposal has been received and no further delay is warranted; and

(g) Notwithstanding Argent's position that an adjournment is not warranted, in an effort to resolve the dispute over the adjournment and accommodate the adjournment request of the Ad Hoc Committee, Argent proposed an adjournment schedule that would accommodate a seven-day adjournment of the hearing of this Application. The Ad Hoc Committee rejected this proposal, in favour of its request for an even lengthier adjournment that jeopardizes the closing of the Transaction, the repayment of the Interim Financing prior to its maturity pursuant to the Interim Financing Credit Agreement, and, accordingly, these CCAA proceedings in their entirety. The following deadlines are critical:

(i) Pursuant to the Interim Financing Credit Agreement, the Interim Financing is conditional upon approval of the Transaction by both this Honourable Court and the US Bankruptcy Court by May 17, 2016 (failing which, the Interim Financing Credit Agreement would be in default, and the Syndicate could bankrupt Argent or appoint a receiver over its assets);

(ii) Pursuant to the Sale Agreement, the Transaction must close by May 31, 2016 (failing which, Argent will be in breach of the Sale Agreement, in which case the Transaction may be jeopardized and may no longer be available to Argent);

(iii) Closing of the Transaction by May 31st will require that the Court Orders approving the Transaction be final, and as such, those Orders must be granted in sufficient time to allow the appeal periods in relation to those Orders (including a 14-day appeal period in the US) to expire;

(iv) If the Transaction does not close, that will jeopardize the employment opportunities being made available by the Purchaser to 17 of Argent's employees (12 field and 5 office);

(v) Pursuant to the Interim Financing Credit Agreement, the outside "Maturity Date" for the Interim Financing is June 3, 2016, such that if

the Transaction has not closed by that date, the Syndicate could bankrupt Argent or appoint a receiver over its assets);

(vi) Even if the Syndicate would be prepared to extend the maturity date of the Interim Financing Credit Agreement and the Purchaser were prepared to extent the closing date (neither of which Argent has any certainty or even comfort of), it is likely that the effective date of the transaction would change, which would likely result in a purchase price reduction.

As such, and particularly in the circumstances where Argent has attempted to accommodate the Ad Hoc Committee's adjournment request with a reasonable proposed schedule which was rejected, Argent submits that the adjournment request should be dismissed.

Bovingdon Affidavit No. 1, Exhibit "19", "Maturity Date" and Sections 3.1(a), 4.1, 10.1(a), (l) and (m).

Bovingdon Affidavit No. 3, Exhibit "21", Section 9.01 and "Outside Date".

- Letter from Counsel for Argent to Counsel for the Ad Hoc Committee dated April 19, 2016. **[TAB A]**

B. The Durham Capital Process

30. Since the granting of the Initial Order in these CCAA Proceedings on February 17, 2016, Durham Capital has continued to reach out to potential financing parties – both those contacted in advance of the filing of the CCAA application (the "CCAA Filing") and others. Argent has entered into further non-disclosure agreements with parties identified by Durham Capital, and Durham Capital has had recent and repeated contact with multiple potential financing parties.

Bovingdon Affidavit No. 3, para. 29.

31. After the CCAA filing, Durham Capital contacted all parties that were contacted prior to the filing to advise of the filing, that the process permitted Argent to seek debt financing

alternatives, and that parties should contact Durham Capital, Argent, the Monitor or OGAC if they had any interest in a debt re-financing or an asset purchase transaction. Several parties indicated to Durham Capital that they were working with third parties who were considering purchasing the assets through the Sale Solicitation Process.

Bovingdon Affidavit No. 3, para. 29.

32. According to Durham Capital, the feedback is that since the hedges were terminated by the Syndicate (as described in the Bovingdon Affidavit #1), potential financing parties are only willing to loan on an amount less than the PDP PV-10 value, even if they obtain a significant equity stake as well. Such an amount is not sufficient to repay the Syndicate in full. Notwithstanding that, Durham Capital has continued to be in regular contact with potential financing parties and has continued to try to find debt solutions for Argent despite the challenging low commodity price and forward curve outlook.

Bovingdon Affidavit No. 3, para. 29.

C. Proposed Distribution of Net Proceeds

33. Assuming that the Transaction is approved, and closing of the Transaction occurs as planned, Argent also seeks an Order authorizing the distribution of the net proceeds of sale from the Transaction. The proposed form of Order is attached as Schedule "B" to the Application filed April 15, 2016, and seeks a distribution by the Monitor of the net proceeds of sale from the Transaction to the Agent for the Syndicate, in an amount not exceeding the maximum amount of the Syndicate's secured obligations owing by the Applicants under the Credit Agreement, subject to a holdback of funds for the following:

(a) completion costs incurred as part of the Transaction or as necessary to complete the CCAA proceedings or the ancillary recognition proceedings in the US Bankruptcy Court, in accordance with the wind-down budget attached as Schedule "A" to the proposed form of Order, which has been reviewed and approved by the Monitor and the Syndicate (the "Completion Costs");

(b) an amount necessary to satisfy claims or potential claims under the Charges, as ordered and defined in paragraph 41 of the Amended and Restated Initial Order

(including the Administration Charge, the Ad Hoc Committee First Charge, the Interim Lender's Charge, the Directors' Charge, and the KERP and KEIP Charge, collectively referred to as the "Post-Filing Expenses");

(c) the amounts claimed in relation to liens shown on Schedule "B" to the proposed form of Order, and the amounts of any other liens registered against the assets of Argent US (collectively, the "Liens") on or before the Closing Date, as defined in the Sale Agreement, without prejudice to all rights and remedies of Argent US in relation to those Liens, including all rights to challenge their validity, priority and amounts. Until very recently, the Syndicate was the sole secured creditor of Argent. Counsel for Argent only very recently became aware of mines and minerals Liens that were registered against certain assets of Argent US, in the months of March and April 2016, and further, of tax claims against Argent US made in those same months. As such, the amounts of the Liens will form part of the holdback from the distribution of the net proceeds of the Transaction to the Syndicate, pending resolution of the validity, priority and amounts of the Liens;

(d) an amount necessary to satisfy cure payments up to the amount of US $739,599.68, or as otherwise agreed upon by the Monitor, the Syndicate and Argent, or as otherwise determined by the Court, in respect of all contracts assumed by and assigned to the Purchaser from Argent US pursuant to the Sale Agreement and the US Bankruptcy Court's Order approving the assumption and assignment of the Contracts, in accordance with Section 365 of the U.S. Bankruptcy Code (the "Cure Costs"); and

(e) an amount necessary to satisfy all secured tax claims asserted against Argent US. (the "Tax Claims"), without prejudice to all rights and remedies of Argent US to challenge the validity, priority, and amounts of those claims. As noted above, these Tax Claims were only recently made against Argent US.

34. Otherwise, the proposed form of Order seeks a direction authorizing and empowering the Monitor, on instruction from the Applicants and without further Order of the Court, to disburse the amounts owing by the Applicants in respect of the Completion Costs, the Post-

Filing Expenses and the Cure Costs, and, subject to objection by the Syndicate, which can be resolved by agreement or by further Order of the US Bankruptcy Court, the Liens and the Tax Claims.

35. The Syndicate, which is Argent's fulcrum creditor and will not be paid in full as a result of the Transaction, is the only creditor of Argent with an economic interest in the Transaction (subject to the determination of the validity, priority and amounts of the Liens and the Tax Claims, the amounts of which will be reserved from the net proceeds of the sale). The Syndicate supports the proposed form of Distribution Order.

III. DISCUSSION

A. This Court has Jurisdiction to Approve the Transactions

36. This Court has the jurisdiction to approve a sale of all or substantially all of the assets of a debtor company in a CCAA proceeding in the absence of a plan of arrangement, where the sale is in the best interests of the stakeholders generally.

- *Bloom Lake, g.p.l. (Arrangement Relatif à)*, 2015 QCCS 1920 [*Bloom Lake*], at para 27, citing *AbitibiBowater Inc. (Arrangement relatif à)*, 2009 QCCS 6460, per Hamilton J. **[TAB 1]**

- *Re Nortel Networks Corp* (2009), 55 CBR (5th) 229 (Ont SCJ [Commercial List]) at paras. 35-40 and 48, per Morawetz J. **[TAB 2]**

37. The Transaction is in the best interest of stakeholders generally. The consideration to be received by Argent pursuant to the Sale Agreement is fair and reasonable in the circumstances, and the Transaction is supported by the Syndicate as the creditor with the sole economic interest.[1]

B. The Transaction Satisfies the Requirements for Court Approval

38. In *Royal Bank v Soundair Corp.*, the Ontario Court of Appeal articulated the principles governing sale approval applications by receivers, which apply equally to sale approval applications under the CCAA: (1) whether there has been a sufficient effort made to get the

[1] Subject to the validity and priority of the Liens and the Tax Claims; the full amounts of which will be reserved from the net proceeds of the Transaction pending determination of the validity, priority and amounts of those Liens and Tax Claims.

best price, and the receiver has not acted improvidently; (2) the interests of all the parties; (3) the efficacy and integrity of the process by which offers are obtained; and (4) whether there has been unfairness in the working out of the process.

- *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (Ont CA) [*Soundair*], at para 20, per Galligan J.A. **[TAB 3]**

- *Bloom Lake, supra*, at para 27, citing *AbitibiBowater Inc. (Arrangement relatif à)*, 2009 QCCS 6460 **[TAB 1]**

39. Section 36(3) of the CCAA, enacted after *Soundair* was decided, now sets out six non-exhaustive factors that must be considered in approving a sale transaction, which are applied in conjunction with the *Soundair* principles:

> 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.
>
> …
>
> (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.

- CCAA, s 36(1), (3) **[TAB 4]**

- *Nelson Education Limited, (Re)*, 2015 ONSC 5557 [*Nelson Education*], at para 38, per Newbould J. **[TAB 5]**

- *Bloom Lake, supra*, at para 26, citing *White Birch Paper Holding Company (Arrangement relatif à)*, at paras 48-49 **[TAB 1]**

40. The Transaction satisfies the *Soundair* principles, meets the statutory requirements for approval by this Honourable Court, and is in the best interests of the creditors generally.

1. The Sale Solicitation Process was reasonable and sufficient effort was made to get the best price

41. The Sale Solicitation Process has already been approved by this Honourable Court, and constituted a broad, thorough and comprehensive canvassing of the relevant market for Argent US and its assets. The Sale Solicitation Process was objectively reasonable.

Initial Order granted February 17, 2016.

Amended and Restated Initial Order granted March 9, 2016.

Bovingdon Affidavit No. 3, para. 10.

- *Bloom Lake, supra*, at para 39 **[TAB 1]**

42. The efforts of OGAC and Argent to obtain higher bids after the initial bids had been submitted was an appropriate and effective process in the circumstances, and was overseen by the Monitor. This two-step process engaged the broadest possible set of potential bidders in the first round and generated competitive bidding during negotiations amongst the final bidders. The Sale Solicitation Process has been robust and appropriate, and the timelines have been appropriate, are within the bounds of a normal process, and are bolstered by the current market conditions where at the time that the process was ongoing, there was a lack of quality oil and gas assets available on the market. As such, there is no evidence that an extended time frame for the Sale Solicitation Process would have resulted in offers being received that would be materially better than the offers that were received.

Williams Affidavit No. 1, para. 15.

43. A broad set of potential bidders were identified and engaged in the Sale Solicitation Process, with teasers sent to over 12,000 potential bidders, over 100 interested parties signing confidentiality agreements and entering the VDR, 7 potential bidders receiving data room presentations, and 19 bidders submitting conforming bids, six of which were for all (or substantially all) of Argent's assets.

Williams Affidavit No. 1, para. 10 and Exhibit "5".

Bovingdon Affidavit No. 3, para. 10.

44. The Applicants made considerable efforts to get the best price. They began to canvass the market for sales, investment and financing or refinancing opportunities before the CCAA Filing, and engaged OGAC and Harrison Williams, both of whom have a wealth of experience and knowledge in the oil and gas asset and divestiture business, to assist with the Sale Solicitation Process. OGAC and Mr. Williams actively marketed Argent to a broad set of potential bidders during the Sale Solicitation Process, and Mr. Williams advised that the Sale Solicitation Process was well-received, and that the response was within the top ten percent of deals that he had been involved with, in his 25 years in the business, in terms of participant activity (as at February 29, 2016).

Williams Affidavit No. 1.

45. The purchase price in the Sale Agreement with BXP is appropriate to accept. In the business judgment of Argent US's board of directors, and in consideration of the competitive and confidential negotiated bid process undertaken by Argent through the Sale Solicitation Process, the purchase price is fair and reasonable and represents fair market value. In determining whether to approve a sale under the CCAA, the business judgment of the debtor company and its advisors is to be given weight.

Bovingdon Affidavit No. 3, para. 42, Exhibit "22".

- *Soundair, supra*, para 24 **[TAB 3]**
- *Bloom Lake*, supra, at para 28 **[TAB 1]**

46. The Monitor and the Syndicate supported the approval of the Sale Solicitation Process. As the Sale Solicitation Process was approved by this Honourable Court in the Initial Order on February 17, 2016, was confirmed (and objections to it dismissed) by this Honourable Court on March 9, 2016, and was acknowledged as part of the Recognition Order granted by the US Bankruptcy Court on March 11, 2016, the Applicants submit that this criteria – whether the sale process was reasonable – has been met. Since those Orders were granted, Argent, OGAC and the Monitor have proceeded in accordance with the court-approved Sale Solicitation Process.

47. To permit the Ad Hoc Committee to delay or prevent the closing of the Transaction would damage the integrity and fairness of the Sale Solicitation Process and be contrary to the interests of the Applicants' stakeholders that do have an ongoing economic interest in Argent. It should also be taken into account that the Ad Hoc Committee had the opportunity to submit restructuring proposals in relation to the Applicants since at least mid-February 2016, and was aware of the Applicants' dwindling cash position, the position of the Applicants' secured creditor, and the progress of the Sale Solicitation Process.

1. The Monitor approves of the Sale Solicitation Process and believes the Transaction is more beneficial to the Applicants' creditors than a disposition under a bankruptcy

48. As stated above, the Monitor supported the approval of the Sale Solicitation Process. The Monitor has advised that it also supports the proposed sale, and is of the opinion that the proposed sale would be more beneficial to the creditors of Argent than a sale or disposition under a bankruptcy.

Bovingdon Affidavit No. 3, paras. 34-35.

2. The Applicants' creditors were consulted

49. Before and during the Sale Solicitation Process, the Applicants consulted extensively with both the Syndicate and the Ad Hoc Committee.

50. The Syndicate confirmed in the Sale Solicitation Process that it would not participate in that process as a bidder. Pursuant to the Interim Financing Credit Agreement, the Syndicate agreed to keep information regarding bids received through the Sale Solicitation Process

confidential. Further, Argent agreed to a number of reporting requirements as part of the Interim Financing Credit Agreement. The Applicants therefore reported regularly to the Syndicate and its advisors as to the progress of the Sale Solicitation Process, and have consulted with the Syndicate on the bids received.

Schedule "A" to the Initial Order and to the Amended and Restated Initial Order.

Bovingdon Affidavit No. 1, Exhibit "19", Sections 9.1 and 13.1.

51. Members of the Ad Hoc Committee and their counsel have been provided with confidential information in relation to the Transaction, subject to their executing non-disclosure agreements approved by Argent and confirming that they will not submit bids pursuant to the Sale Solicitation Process. All confidential information that has been requested by the Ad Hoc Committee has been provided to it, usually within a day of the request, and by March 30, 2016 or earlier.

52. After responding to the Ad Hoc Committee's information requests and, upon hearing nothing further from counsel for the Ad Hoc Committee between March 30 and April 12, 2016, counsel for Argent followed up with counsel to the Ad Hoc Committee on April 12, 2016, and was advised that the Ad Hoc Committee intended to oppose this Application, notwithstanding that it had not presented any alternatives and had not sought to have any discussions with Argent or its advisors since March 30, 2016. Further, on April 8, 2016, at a hearing in the US Bankruptcy Court for the purpose of scheduling the hearing for approval of the Transaction by the US Bankruptcy Court, U.S. counsel for the Ad Hoc Committee counsel did not object to, and in fact consented to the scheduling of that hearing on April 27, 2016, and when asked by the Court as to the position it would be taking at that hearing, did not mention to the US Bankruptcy Court any intention to seek an adjournment in these CCAA proceedings for April 25, 2016, which certainly is something that Argent's US counsel would have expected counsel to the Ad Hoc Committee to inform the US Bankruptcy Court of.

3. The Transaction will have a positive effect on the Applicants' stakeholders and creditors, and the consideration to be paid for the assets is reasonable and fair

53. The Syndicate, as the only creditor with an ongoing economic interest in the Applicants,[2] is supportive of Argent's decision to enter into the Sale Agreement with BXP.

54. Although the Transaction will not provide recovery to the Ad Hoc Committee or other unsecured creditors of Argent, there is no reasonable alternative solution now available that would provide a recovery for those creditors, given the senior secured position of the Syndicate. The current value of the Applicants' business and assets is unfortunately insufficient to realize a recovery for these creditors in any circumstance.

55. In the opinion of Argent US's board of directors and the Monitor, the purchase price in the Sale Agreement is fair and reasonable in the circumstances, and represents fair market value in the circumstances for the assets being sold.

56. As the fulcrum creditor, the Syndicate is the only creditor with an ongoing economic interest in the Transaction.[3]

C. Sealing Order

57. The Applicants seek a sealing order with respect to the Confidential Exhibits to the Bovingdon Affidavit No. 3 (the "Confidential Exhibits"), and the Confidential Affidavit No. 2 of Harrison Williams sworn April 14, 2016 ("Williams Affidavit No. 2").

58. The Confidential Exhibits are described in that Affidavit as follows:

(a) Confidential Exhibit "4" is a summary chart showing, on an anonymous basis, the amounts of the initial bids received through the Sale Solicitation Process and the revised bid amounts, as a result of the efforts of Argent and OGAC in working with the bidders;

(b) Confidential Exhibits "13" and "15" are emails from Argent's counsel to counsel for the Ad Hoc Committee dated March 28 and March 29, 2016. Confidential

[2] Subject to the interests of the Lien and Tax Claims claimants, who will also be paid, subject to determinations as to the validity, priority an amounts of those claims.
[3] *Ibid.*

Exhibit "13" includes the purchase price for the assets. Confidential Exhibit "15" includes an allocation summary as to how the purchase price for the assets was expected to be allocated, and accordingly discloses the purchase price;

(c) Confidential Exhibit "17" is an email from Argent to counsel for the Ad Hoc Committee dated March 30, 2016, which includes the updated reserve runs based on current strip pricing (and accordingly indicates the value of Argent's reserves);

(d) Confidential Exhibits "19" and "20" are the letter of intent and the Sale Agreement between Argent US and BXP. These exhibits include the purchase price for the assets as well as the amount of the deposit. The Sale Agreement has now been executed, and a redacted copy of the Sale Agreement (redacted with respect to the purchase price and the amount of the deposit) is included at Exhibit "21" to the Affidavit (without exhibits or schedules).

59. The Williams Affidavit No. 2 includes the following confidential information:

(a) details of the bids received, including the amounts of initial bids and of revised bids received as a result of the efforts of OGAC and Argent to obtain higher bids;

(b) the efforts of OGAC to obtain higher bids;

(c) information regarding contingencies with respect to financing to support the bids.

60. The confidential information included in the Confidential Exhibits and in the Williams Affidavit No. 2 has been provided to the Monitor, the Syndicate, and the Ad Hoc Committee and its counsel, subject (in the case of the Syndicate and the Ad Hoc Committee) to non-disclosure agreements. As such, Argent submits that none of Argent's stakeholders are prejudiced by the requested sealing order.

61. A sealing order is necessary in the circumstances, in order to prevent serious harm to the important commercial interests of the Applicants and their stakeholders, as well as BXP.

Such an order is also necessary and justified to protect the integrity of the Sale Solicitation Process, and to ensure that Argent is not prejudiced if the Transaction does not close for any reason.

1. Sealing orders are commonly granted in Canadian insolvency proceedings

62. The request for sealing, and the sealing of, confidential information is an extremely common practice in Canadian insolvency proceedings. In general, the rationale for sealing information related to bids, sales agreements and purchase prices is generally that such information is commercially sensitive and its disclosure could cause harm to stakeholders and the integrity of the sales process, and may prejudice any continuation of the sales process that might occur if a proposed transaction does not close. Sealing the information thus protects the integrity of the Sale Solicitation Process and the proposed transaction.

- *SkyPower Corp (Re)*, 2009 CarswellOnt 9415 (Ont SCJ) [*SkyPower*], at para 14, per Morawetz J. **[TAB 6]**
- *PCAS Patient Care Automation Services Inc (Re)*, 2012 ONSC 3367 [*PCAS*], at para 69, per Brown J. **[TAB 7]**

63. Regional Senior Justice Morawetz of the Ontario Commercial List has held on numerous occasions that price and bid information is commercially sensitive and ought to be sealed because its disclosure would be harmful to the debtor's stakeholders and creditors.

- *Target Canada Co (Re)*, 2015 ONSC 1487, at paras 26-30 **[TAB 8]**
- *Comstock Canada Ltd (Re)*, 2014 ONSC 493, at para 16 **[TAB 9]**
- *SkyPower*, *supra*, at para 14 **[TAB 6]**

64. Similarly, in *Re PCAS Patient Care Automation Services Inc.*, Justice Brown of the Ontario Commercial List (as he then was) held that the information sought to be sealed in that case, namely the financial terms of each bid for the applicants' assets, the materials filed by and correspondence with each bidder, "…clearly met the criteria for a sealing order set out in [*Sierra Club*]", and ordered that the information be sealed "[i]n order to protect the integrity of the SISP and the proposed sales transaction…".

- *PCAS, supra*, at para 69 **[TAB 7]**

65. This Honourable Court consistently grants sealing orders in relation to sale price information, and even sales process information where the *Sierra Club* test is met. In *Re GasFrac*, Justice Eidsvik granted two applications to seal materials appending certain asset purchase agreements sought to be approved by the Court. The applicants argued that these materials contained commercially sensitive information that, if disseminated, could adversely affect the Company's operations and the sale and investment solicitation process, and that the sealing order was the least restrictive method to protect such commercially sensitive information.

- *GasFrac Energy Services Inc et al (Re)*, Notice of Application filed March 10, 2015, Alberta Court of Queen's Bench Court File No. 1501-00396 [*GasFrac*], paras 17-19 **[TAB 10]**

- *GasFrac, supra*, Approval & Vesting Order of the Honourable Justice K. M. Eidsvik, granted March 16, 2015, para 23 **[TAB 11]**

- *GasFrac, supra*, Notice of Application filed March 24, 2015, paras 18-20 **[TAB 12]**

- *GasFrac, supra*, Approval Order of the Honourable Justice K. M. Eidsvik, granted March 26, 2015, para 14 **[TAB 13]**

66. Similarly, in *Re Verity Energy Ltd*, Justice Yamauchi granted an order sealing a confidential appendix to the monitor's report, which contained a copy of the asset purchase agreement sought to be approved by the Court in that matter.

- *Verity Energy Ltd (Re)*, Restricted Court Access Order of the Honourable Justice K. D. Yamauchi, granted October 16, 2015, Court File No. 1501-04191 **[TAB 14]**

67. In The Matter of Laricina Energy Ltd. et al., on July 22, 2015, this Court granted an Order containing sealing provisions that went beyond sealing the purely financial terms of an asset purchase agreement. The Order directed the sealing of information pertaining to assets being marketed, the proposed marketing process for those assets, a confidential information memorandum, and a non-redacted copy of a term sheet agreement concluded between the debtors and one of their creditors. The basis for the debtor's request for the broad sealing

provisions of the July 22 Order was "…to ensure that such information does not adversely impact Laricina's Marketing Process or its recovery of receivables from third parties…".

- Affidavit of Glen C. Schmidt, sworn July 3, 2015 and filed July 6, 2015, In the Matter of a Plan of Compromise or Arrangement of Laricina Energy Ltd., Court File No. 1501-03351 [*Re Laricina Energy*], paras 7-9, 27, and 47 **[TAB 15]**

- Order (Second Cash Repayment, Marketing Process and Sealing Order) of the Honourable Mr. Justice S. J. LoVecchio, granted July 22, 2016, filed July 23, 2016, In the Matter of a Plan of Compromise or Arrangement of Laricina Energy Ltd., Court File No. 1501-03351, paras 5-9 **[TAB 16]**

2. The legal test for a sealing order

68. The test for determining whether otherwise public Court documents ought to be sealed was established by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, where the Court held that sealing orders should only be granted when (1) an order is needed to prevent serious risk of harm to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

- *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 (SCC), at para 53 **[TAB 17]**

(a) An order is needed to prevent risk of harm to important interests and there are no reasonable alternative measures

69. In determining whether there is a serious risk of harm, the factors to be considered include: (i) the need to demonstrate that the information was provided with a reasonable expectation of being kept confidential, and has been kept confidential; and (ii) the need to establish on the balance of probabilities that the applicant's proprietary, commercial or scientific interests could reasonably be harmed by disclosure.

- *Ibid*, at para 60 **[TAB 17]**

(i) Expectation and maintenance of confidentiality

70. The Sale Agreement includes a covenant of confidentiality, at Section 6.01, pursuant to which the Purchaser has agreed not to disclose the terms of the Sale Agreement or other information or documents obtained in connection with the Sale Agreement (which would include the value of Argent's reserves) without the written consent of Argent US. As such, there is an expectation of confidentiality as between Argent and BXP. Further, in the circumstances where the Syndicate and the Monitor have reviewed and commented upon the form of the Sale Agreement, that expectation extends to the Syndicate and the Monitor as well.

Bovingdon Affidavit No. 2, Exhibit "21", Section 6.01.

71. Both the Syndicate and the Ad Hoc Committee have agreed to keep the Confidential Exhibits and the Williams Affidavit No. 2 confidential, subject to non-disclosure agreements that they have entered into. As such, the confidential information has been provided with an expectation that it be kept confidential, and as far as the Applicants are aware, has been kept confidential.

Bovingdon Affidavit No. 1, Exhibit "19", section 13.3.

(ii) There is a reasonable risk of harm to important interests

72. The interests at stake are important. The Applicants, their stakeholders, the Syndicate as the fulcrum creditor and BXP all have significant commercial interests at risk. All of these parties have a significant economic interest in the Sale Solicitation Process and the Transaction, in light of the Applicants' present financial situation, the effort and cost of the Sale Solicitation Process to all parties, and the effect of the Transaction on the parties. These interests are important in light of the purposes of the CCAA, which have been deemed to include, in appropriate circumstances, effecting a sale of a debtor company. There is also an overarching interest in ensuring that sales processes like this one, of an insolvent company is, and is seen to be, fair and reasonable in terms of how participants in the process are treated. Finally, but not least, the preservation of confidential documents governed by confidentiality obligations "constitutes a sufficiently important commercial interest".

- *Anvil Range Mining Corp (Re)*, 2002 CarswellOnt 2254 (Ont CA), at para 32, 36 and 37 **[TAB 18]**

- *Sierra Club, supra*, at paras 55 and 59 **[TAB 17]**

73. On a balance of probabilities, there is a reasonable risk of harm to these important commercial interests. If the purchase price, deposit information, financing contingencies, and value of Argent's reserves is disclosed, and the Transaction does not close, it is foreseeable that any continuation of the Sale Solicitation Process would be prejudiced by bidders knowing the value placed on the assets. This in turn would have a negative impact on the Applicants and their stakeholders, who have an interest in ensuring the highest value possible is received for the Applicants' assets.

(b) The salutary effects of the order outweigh its deleterious effects

74. The proportionality stage of the *Sierra Club* test requires the Court to weigh the beneficial effects of a confidentiality order against the negative effects of the order. When considering the salutary effects of a particular confidentiality order, the Court must consider not only the reduction in the risk of economic damage being inflicted upon the parties, but also the principles of fundamental justice that the order sought will promote.

- *Ibid*, at para 69 **[TAB 17]**

75. As stated, the confidentiality order sought will reduce the risk of economic damage to the Applicants, their stakeholders including the Syndicate, and BXP. It will also promote principles of fundamental justice, including the Applicants' right to a fair hearing and the search for truth.

- *Ibid*, at paras 70-72 **[TAB 17]**

76. The Applicants' right to a fair hearing depends on the protection of the confidential information in question. The purchase price (including the deposit amount) and value of Argent's assets (including its reserves) are essential to the Applicants' ability to satisfy the criteria set out in s. 36 of the CCAA, and the test in *Royal Bank of Canada v Soundair*; however, without a confidentiality order, the Applicants risk tainting the integrity of the sales process, another significant factor in the test under s. 36 and *Soundair*. Similarly, the order

sought will promote the search for truth, as it will facilitate this Court's access to relevant documents in a judicial proceeding.

- *Ibid*, paras 71-72 **[TAB 17]**

77. The information sought to be sealed in the present case is highly sensitive commercial and competitive information. The Applicants, the Court, the Monitor, BXP, the Syndicate, as fulcrum creditor, and the Ad Hoc Committee are all privy to the information. As such, the deleterious effect of the order sought are further minimized.

78. For all of the foregoing reasons, a sealing order in relation to the Confidential Exhibits and the Williams Affidavit No. 2 is justified and appropriate.

D. Proposed Distribution

79. Argent submits that the proposed distribution of the net proceeds of sale from the Transaction, as described above and in the form of Order attached as Schedule "B" to the Application, will ensure that the Syndicate is paid (in part), in accordance with its security, with funds reserved to address all other potential claims that take, or make take, priority to that security.

80. Subject to determinations as to the validity of the Liens and the Tax Claims (the amounts of which will be reserved from the net proceeds of sale from the Transaction, pending determination of the validity, priority and amounts of the same), the Syndicate is the sole secured creditor of Argent and is entitled to receive the net proceeds, subject to the Completion Costs, the Post-Filing Expenses and the Cure Costs, each of which will be reserved from the net proceeds, for distribution by the Monitor upon instruction from the Applicants. Otherwise, Argent proposes to distribute the net proceeds to the Syndicate.

81. The Completion Costs include the amount of US $500,000 required to be held in escrow pursuant to Section 9.02(a)(v) of the Sale Agreement, applicable sales taxes, transfer taxes, legal and other costs, expenses and disbursements of Argent US and the Monitor, including all amounts due and payable to OGAC in accordance with the letter agreement between OGAC and Argent, and other usual completion costs incurred as part of the Transaction or necessary to complete these CCAA proceedings or the U.S. proceedings. A

wind-down budget for those latter costs is attached as Schedule "A" to the form of Distribution Order, and has been reviewed and approved by the Monitor and by the Syndicate.

82. The Post-Filing Expenses include the priority charges created and defined pursuant to paragraph 41 of the Amended and Restated Initial Order. Amounts for the Administration Charge, the Ad Hoc Committee First Charge, the Interim Financing Charge, the Directors' Charge and the KERP and KEIP Charge will all be reserved from the net proceeds of sale distributed to the Syndicate. As the Syndicate will not recover the full amount of its security as a result of the Transaction, there will be no distribution pursuant to the Ad Hoc Committee Second Charge, which is subordinate to the Syndicate's security.

83. The Cure Costs are amounts required to satisfy cure payments in relation to contracts assumed by and assigned to BXP from Argent US, as required pursuant to section 365 of the U.S. Bankruptcy Code. The Sale Agreement is conditional upon approval of the Transaction by the US Bankruptcy Court, and that approval also requires approval of the assumption and assignment to BXP of the Contracts, as defined in the Sale Agreement. Section 365 of the U.S. Bankruptcy Code requires that cure payments be made in relation to defaults under contracts to be assumed and assigned by a purchaser; the proposed form of Distribution Order reserves funds to account for these payments.

Bovingdon Affidavit No. 3, Exhibit "21", s. 2.01, 4.01, 7.02(b).

- U.S. Bankruptcy Code, s. 365 **[TAB 19]**

84. As such, the proposed form of Distribution Order ensures that the net proceeds of sale from the Transaction are, upon closing of the same, distributed in an efficient manner that ensures that the sufficient amounts are reserved to address all claims that are or may be in priority to the Syndicate's security, as well as all amounts required to complete these CCAA proceedings and the corresponding proceedings pursuant to the U.S. Bankruptcy Code.

E. Stay Extension

1. Statutory Requirements

85. The current stay of proceedings expires on May 17, 2016. The Applicants are seeking an extension of the stay period up to and including June 30, 2016.

86. Section 11.02(2) of the CCAA gives the court discretion to grant or extend a stay of proceedings:

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

- *CCAA*, s. 11.02(2) **[TAB 4]**

87. Pursuant to section 11.02(3) of the CCAA, to exercise its discretion to extend the stay of proceedings, the Court must be satisfied that: (i) circumstances exist that make the order appropriate, and (ii) the applicant has acted, and is acting, in good faith and with due diligence during the CCAA proceedings.

- *CCAA*, s. 11.02(3) **[TAB 4]**

2. Actions in Good Faith and with Due Diligence

88. As is described in further detail in this Bench Brief and in the Bovingdon Affidavit No. 3, Argent has acted in good faith and with due diligence since the previous stay extension was granted on March 9, 2016. Argent has taken the following steps:

(a) cooperated with the Monitor to facilitate its monitoring of the Applicants' business and operations;

(b) communicated, in some cases very extensively, with various stakeholder groups and/or their advisors, including the Syndicate, the Ad Hoc Committee, critical suppliers, trade creditors, employees, contractors and others;

(c) worked with the Monitor and OGAC to pursue the Sale Solicitation Process which was approved in the Initial Order and further approved and confirmed in the Amended and Restated Initial Order;

(d) entered into a letter of intent and the Sale Agreement with BXP for sale of the assets of Argent US to BXP, in accordance with the terms of the Court-approved Sale Solicitation Process;

(e) continued to investigate alternative financing, with Durham Capital as Argent's advisor;

(f) liaised with US counsel and attended in Court in the US regarding the Chapter 15 Proceedings under the U.S. Bankruptcy Code that were commenced in respect of Argent Canada and Argent US, including obtaining an Order for recognition of the CCAA proceedings from the US Bankruptcy Court (the "Recognition Order"), which (among other things) recognized the approval of the Sale Solicitation Process; and

(g) continued to operate and manage Argent's business in the ordinary course, subject to the terms of the Initial Order and the Amended and Restated Initial Order.

Bovingdon Affidavit No. 3, paras. 10, 13-28 and Exhibits "3" and "5" to "21".

2. Circumstances Exist that make a Stay Extension Order Appropriate

89. Argent seeks to extend the stay of proceedings to June 30, 2016, which will allow for the Transaction to close (if it is approved by this Honourable Court and the US Bankruptcy Court) and for a number of post-closing matters to be addressed. These post-closing matters include, but are not limited to:

(a) Distribution by the Monitor of the net proceeds of sale from the Transaction, in accordance with the proposed form of Distribution Order. In addition to the distributions to the Syndicate to be made upon closing, distributions in relation to the Completion Costs, the Post-Filing Expenses, the Liens (if any), the Cure Costs, and the Tax Claims (if any) will require efforts by Argent and the Monitor, amongst others, to determine and distribute.

(b) In particular, pursuant to section 9.02(c) and (d) of the Sale Agreement, a process is set out for determination as between Argent US and BXP of the final accounting statement setting out adjustments and pro-rating amounts as set out in that article of the Sale Agreement, which involves a 90-day post-closing period for preparation of the same, a seven-day response period followed by a five-day period to reach an agreement on the same, or otherwise timelines for referral of any disputes regarding the final accounting statement to the US Bankruptcy Court.

(c) Winding down the CCAA proceedings. As is more particularly detailed in the wind-down budget attached as Schedule "A" to the form of Distribution Order, Argent projects that the wind-down of the CCAA proceedings will extend beyond September 2016, with much of the wind-down to be completed by September.

(d) Addressing the continued status of Argent, and of Computershare as the Trustee of the Trust (as contemplated by the wind-down budget).

(e) Addressing applications on behalf of Argent US for tax refunds, which would need to be applied for and are anticipated to take several months for the taxing authorities to process.

90. As such, Argent submits that the requested extension of the stay of proceedings to June 30, 2016 is reasonable and appropriate, in the circumstances.

IV. RELIEF SOUGHT

91. Argent respectfully seeks the following Orders:

(a) the Sale Approval and Vesting Order, in the form attached as Schedule "A" to the Application, which includes a sealing Order in relation to the Confidential Exhibits and the Williams Affidavit No. 2;

(b) the Distribution Order, in the form attached as Schedule "B" to the Application; and

(c) the Stay Extension Order, in the form attached as Schedule "C" to the Application.

Calgary, Alberta
April 21, 2016

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Estimated Time for
Argument: 45 minutes

BENNETT JONES LLP

Per: _____

Kelsey Meyer / Sean Zweig
Counsel for the Applicants,
Argent Energy Trust, Argent Energy (Canada) Holdings Inc. and Argent Energy (US) Holdings Inc.

V. TABLE OF AUTHORITIES

A

Kelsey Meyer

From: Sean Zweig
Sent: 19 April 2016 9:01 PM
To: Jwadden@goodmans.ca; Chadwick, Robert
Cc: Kelsey Meyer; Harinder Basra; Sean Bovingdon (sbovingdon@argentenergytrust.com); Steve Hicks; Helkaa, Deryck; Olver, Dustin; Sean F. Collins (scollins@mccarthy.ca); MacLeod, Walker W.; Philip Eisenberg; 'Golden, Steven'; David Patton
Subject: Argent
Attachments: Letter to J Wadden and R Chadwick Apr 19 2016.pdf; Letter to Mr. Chadwick and Mr. Baulke - April 15, 2016.pdf

Please see the attached letter.

Sean Zweig
Partner, Bennett Jones LLP

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P. 416 777 6254 | F. 416 863 1716
E. zweigs@bennettjones.com

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Tel: 403.298.3100 Fax: 403.265.7219

Kelsey Meyer
Partner
Direct Line: 403.298.3323
e-mail: meyerk@bennettjones.com
Our File No.: 68859.14

April 15, 2016

VIA EMAIL

Mr. Robert Chadwick
Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Mr. Ryan Baulke
Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Dear Mr. Chadwick and Mr. Baulke:

Re: **Court of Queen's Bench Action No. 1601-01675**
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 Arrangement of Argent Energy Trust, Argent Energy (Canada) Holdings Inc. and Argent Energy (US) Holdings Inc.

We write further to the service letter and materials served upon you today in support of the Application of Argent Energy Trust, Argent Energy (US) Holdings Inc., and Argent Energy (Canada) Holdings Inc., to be heard on April 25, 2016. You will note upon reviewing those materials that there are certain exhibits of the Affidavit No. 3 of Sean Bovingdon that are confidential, and further, that the Applicants seek a Sealing Order over the Confidential Affidavit No. 2 of Harrison Williams sworn in support of the Application. It is our view that the non-disclosure agreements previously entered into by your firm and by your clients would also extend to those confidential exhibits and Mr. Williams' Confidential Affidavit No. 2. As such, if you would please confirm that you and your clients acknowledge and agree that the non-disclosure agreements already executed by you and by your clients apply to the confidential exhibits and to Confidential Affidavit No. 2 of Harrison Williams, we will provide copies of the same to you.

Yours truly,

BENNETT JONES LLP

Kelsey Meyer

KM/ag

cc: Sean Zweig & Harinder Basra, Bennett Jones LLP (via email)
Sean Bovingdon & Steven Hicks, Argent Energy (via email)

Bennett Jones

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Our File No.: 68859.14

April 19, 2016

VIA EMAIL

Mr. Jason Wadden, and Mr. Robert Chadwick
Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Dear Sirs:

Re: In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended (the "CCAA")

And in the Matter of a Plan of Arrangement of Argent Energy Trust (the "Trust"), Argent Energy (Canada) Holdings Inc. ("Argent Canada") and Argent Energy (US) Holdings Inc. ("Argent US", and together with the Trust and Argent Canada, "Argent")

We have your letter of April 18, 2016. Please be advised that as the above-noted proceedings are filed in Alberta, the Alberta Court processes apply, including the Commercial Practice Note with respect to deadlines for filing of materials. We have previously advised Mr. Chadwick of this; however, despite that, your office continues to ignore those rules and insist that the filing deadlines are whatever you decide them to be. At the comeback hearing on March 8, 2016 Mr. Chadwick asked the Court to incorporate alternative service procedures into the Amended and Restated Initial, and that request was dismissed by Mr. Justice Nixon.

To confirm, we filed our materials in support of the Application to be heard on April 25, 2016, which seeks, among other things, a Sale Approval and Vesting Order in relation to the assets of Argent US, on April 15, 2016, three days in advance of the deadline pursuant to the Commercial Practice Note. Further, at the same time, we sent a letter to Mr. Chadwick and Mr. Baulke advising that we were willing to provide them with the confidential exhibits to the Affidavit No. 3 of Sean Bovingdon as well as the Confidential Affidavit No. 2 of Harrison Williams, both sworn on April 14, 2016 in support of the Application, provided that Goodmans LLP and your clients (if they also wanted to receive the confidential information) acknowledged and agreed that the non-disclosure agreements already executed by Goodmans LLP and by your clients applied to the confidential exhibits and to the Confidential Affidavit No. 2 of Harrison Williams. A copy of that letter is

attached. The filed Application materials and the letter were delivered to Mr. Chadwick and Mr. Baulke by email on April 15th at 3:35 p.m. MT and 3:41 p.m. MT, respectively. Notwithstanding that, Mr. Chadwick only agreed to the application of the non-disclosure agreements to the confidential exhibits and the Confidential Affidavit No. 2 of Harrison Williams on Sunday, April 17, 2016, at 11:37 a.m. MT. The confidential exhibits and Confidential Affidavit No. 2 of Harrison Williams were then emailed to him and Mr. Baulke 22 minutes later at 11:59 a.m. MT on Sunday, April 17, 2016. As such, your office is the cause of the delay in receiving the confidential information, which we were willing to provide you on April 15, 2016, on the very same terms as were ultimately agreed to by your office on April 17, 2016.

Your letter advises that "the Ad Hoc Committee has significant concerns with the unacceptable path Argent has taken in connection with its restructuring, including the sale solicitation process." As you know though, the Sale Solicitation Process has been approved by the Alberta Court of Queen's Bench not once, but twice, including in consideration and dismissal of objections raised by your office to the Sale Solicitation Process at the comeback hearing on March 8, 2016. Further, the U.S. Bankruptcy Court has also approved the Sale Solicitation Process in its Recognition Order over the objection of your US co-counsel.

Adjournment Request

There is no reason whatsoever for an adjournment of the hearing scheduled for April 25, 2016. The Court-approved Sale Solicitation Process has always contemplated that the sale approval application would occur on or before April 30, 2016, and Mr. Chadwick and Mr. Baulke have known the amount of the highest bid received through the Sale Solicitation Process since March 28, 2016. Further, as of March 18, 2016, Mr. Chadwick and Mr. Baulke were made aware that the Applicants would be seeking approval of the sale on April 25, 2016. Despite that, and despite our office and our clients responding to all information requests made by your clients, since the Amended and Restated Initial Order was granted, usually within 24 hours of receiving those requests, your office did absolutely nothing to discuss or address its position with respect to the proposed sale approval Application until you sent your letter yesterday evening.

However, in the interest of resolving this matter, our clients are prepared to agree to an adjournment of the April 25, 2016 application on the following basis:

1. The Application scheduled for 10:00 a.m. on April 25, 2016 will be adjourned to May 3 from 11:30 a.m. to 12:30 p.m. and from 2:00 p.m. to 3:30 p.m., and on May 4 from 10:30 a.m. to 12:30 p.m. and from 3:00 p.m. to 4:30 p.m., on the Commercial List before Mr. Justice Nixon, which adjournment will be peremptory upon you and your clients;

2. The U.S. Court application for approval of the sale, among other things, currently scheduled for April 27, 2016 will be adjourned to a date on or before May 11, 2016, which adjournment will be peremptory upon you and your clients;

3. Questioning of Mr. Bovingdon and Mr. Williams on their Affidavits will be completed on April 21, 2016, in Calgary;

4. Questioning of the representative of Durham Capital will be completed between 10:00 a.m. and 11:30 a.m. on April 22, 2016, in Calgary;

5. You will file any Affidavit material that you intend to rely upon for the purposes of the May 3 and 4, 2016 Application by April 25, 2016, and you will make any such affiant available for questioning on or before April 28, 2016, in Calgary; and

6. All Briefs in relation to the Application on May 3 and 4, 2016 will be filed and served by April 28, 2016.

Please respond at your earliest convenience regarding this proposed adjournment schedule.

Requests for Questioning

With respect to your request to cross-examine Mr. Bovingdon and Mr. Williams on their Affidavits, both Mr. Bovingdon and Mr. Williams will make themselves available for cross-examination in Calgary on April 21, 2016, as requested. As previously requested, please confirm that you will commence your examinations on Thursday at 10:00 a.m., and which witness you wish to proceed with first. We note that Mr. Bovingdon is already committed to a meeting at 1:00 p.m. on that date, but is otherwise available. Mr. Williams is not available on April 22nd and Mr. Bovingdon is not available after 10:30 a.m. on April 22nd.

With respect to the representative of Durham Capital, our clients have no control over this individual's availability or schedule, and we are advised that you have not served a Notice of Appointment for Questioning or conduct money upon him. Further, your clients have known of the Durham Capital process for months, and could have requested to examine this representative (and served him with a Notice of Appointment and Conduct Money) any time after February 17, 2016. His name is Ross Robertson.

Despite having not been served in accordance with the Alberta Rules of Court, Mr. Robertson has advised that he is willing to attend Questioning on April 22nd, here at our office, between 10:00 a.m. and 11:30 a.m. Please confirm that you will proceed at that time.

We understand that you will book the Court Reporter for the Questionings, and that they will occur at our offices in Calgary. We will book a breakout room for you.

Document Requests

Finally, you have requested production of a number of documents, many of which have already been requested through the U.S. Chapter 15 process (we note that a number of those information requests were dismissed) or otherwise from the Applicants. Further, it appears that a number of these information requests have already been requested and responded to. In particular:

1. Your request for copies of all proposals, bids, term sheets, letters of intent or other written documentation of any kind, including related correspondence (collectively, "Documentation") received or delivered by Argent in the past 12 months with respect to a sale, refinancing, investment or other restructuring proposal in respect of Argent is largely

duplicative of a request previously made by your office in a letter dated February 19, 2016 (request #7), and responded to by our office on February 23, 2016. This letter, and the documents provided in response to the information requests in that letter, is included as Exhibit "15" to Mr. Bovingdon's Affidavit No. 2, and further details are set out in the Affidavit itself. Further, you have the confidential summary of bids received through the Sale Solicitation Process, which was marked as Confidential Exhibit "4" to Mr. Bovingdon's Affidavit No. 3. See also your information requests made to Argent US and Argent Canada (request #9 in each case) in the U.S. Chapter 15 proceedings, which are largely duplicative of this request. Otherwise, your requests are overly broad and unnecessary and are for confidential information received by third parties.

2. Your request for all documentation received by Argent or Durham with respect to interim financing. Interim financing is already in place and has been approved by the Court, and your clients objections in relation to it have been dismissed by the Court. The Interim Financing Credit Agreement is disclosed in Mr. Bovingdon's Affidavit No. 1, and the Monitor has commented in its First Report that its terms are reasonable. As such, your request for Documentation regarding other interim financing proposals is irrelevant. Further, see your information requests made to Argent US and Argent Canada (request #4 in each case) in the U.S. Chapter 15 proceedings, which are largely duplicative of this request.

3. Your request for "copies of all valuations, appraisals, and/or other similar reports in respect of Argent or its assets prepared in the past 12 months." See your letter of February 19, 2016 (request #8), where you requested "copies of any valuations, appraisals and/or reports on the nature or quality of any of the CCAA Applicants' assets in the last 12 months", and our response to that request in our letter of February 23, 2016.

4. Your request for a list of all parties contacted by Durham in respect of a Restructuring Proposal or Interim Financing Proposal and all related correspondence. This information is confidential and unnecessary. Argent will not be providing it.

5. You have requested all reports to the board of directors of the Argent entities delivered in the past 12 months relating to Restructuring Proposals, DIP Proposals, the Sale Solicitation Process, other restructuring initiatives and discussions or developments between Argent and the lending Syndicate under the Credit Agreement. There are no such written reports.

6. Your letter requests copies of the minutes of any board meeting conducted by an Argent entity in the past 6 months (redacted as necessary). In addition to the information requests made to Argent US and Argent Canada (request #7 in each case) in the U.S. Chapter 15 proceedings, Argent has already provided these to you in its February 23, 2016 letter, in response to your letter of February 19, 2016 (request #5). Further, the resolution of Argent US for approval of the sale is attached as Exhibit 22 to Mr. Bovingdon's Affidavit No. 3.

7. Your request for "all correspondence (including all letters and emails), presentations, information or other written materials exchanged or provided between Argent and the Syndicate and their respective advisors relating to the Credit Agreement (including defaults

under the Credit Agreement), the hedge agreements, interim financing arrangements, the Interim Loan, the CCAA proceedings, Restructuring Proposals, the Sale Solicitation Process and other restructuring or refinancing initiatives." Not only is this request duplicative of other requests made in the same letter, but all relevant documents in relation to this request have been provided, in particular, in the Affidavits of Mr. Bovingdon. The request is overly broad and unnecessary. If you have a more specific request, we will consider it.

Particularly in the circumstances where your letter requests documents and information that have already been provided to you in response to previous requests, it appears to us and our clients that these documentary requests are simply an attempt to delay the Application for approval of the sale and vesting of the assets.

Yours truly,

BENNETT JONES LLP

Sean Zweig

For: Kelsey Meyer

Enclosure
cc: Bennett Jones LLP, Attention: Sean Zweig and Harinder Basra
Argent Energy Trust, Attention: Sean Bovingdon and Steve Hicks
FTI Consulting Canada Inc., Attention: Deryck Helkaa and Dustin Olver
McCarthy Tétrault LLP, Attention: Sean Collins and Walker Macleod
Locke Lord LLP, Attention: Phil Eisenberg, Steven Golden and David Patton

TAB 1

2015 QCCS 1920
Cour supérieure du Québec

Bloom Lake, g.p.l., Re

2015 CarswellQue 4072, 2015 QCCS 1920, 27 C.B.R. (6th) 1, J.E. 2015-830, EYB 2015-251727

In the matter of the companies' creditors arrangement act, r.s.c. 1985, c. C-36, as amended: Bloom lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited and Cliffs Québec Iron mining ULC, Petitioners, and The bloom lake iron ore mine limited partnership and Bloom lake railway company limited, Mises en cause, and FTI Consulting Cananda Inc., Monitor, and 9201955 Canada inc., Mise en cause, and Eabametoong first nation, Ginoogaming first nation, Constance Lake first nation and Long Lake # 58 first nation, Aroland first nation and Marten Falls first nation, Objectors, and 8901341 Canada inc. and Canadian Development And Marketing Corporation, Interveners

Hamilton J.C.S.

Heard: 24 april 2015
Judgment: 27 april 2015
Docket: C.S. Qué. Montréal 500-11-048114-157

Counsel: Me Bernard Boucher, Me Sébastien Guy, Me Steven J. Weisz for Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited, Cliffs Quebec Iron Mining ULC, The Bloom Lake Iron Ore Mine Limited Partnership, Bloom Lake Railway Company Limited
Me Sylvain Rigaud, Me Chrystal Ashby for FTI Consulting Canada Inc.
Me Jean-Yves Simard, Me Sean Zweig for 9201955 Canada Inc.
Me Stéphane Hébert, Me Maurice Fleming for Eabametoong First Nation Ginoogaming First Nation, Constance Lake First Nation and Long Lake # 58 First Nation, Aroland First Nation, Marten Falls First Nation
Me Sandra Abitan, Me Éric Préfontaine, Me Julien Morissette for 8901341 Canada inc. Canadian Development and Marketing Corporation

Subject: Civil Practice and Procedure; Insolvency; Public

Headnote

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

Sellers, who were parent company and affiliates of petitioners, sought to sell interests in chromite mining projects in Ring of Fire mining district — Sellers executed initial Share Purchase Agreement (SPA) with N, which made provision for "superior proposal" mechanism allowing sellers to accept unsolicited, superior offer from third party — Petitioners commenced motion for issuance of approval and vesting order with respect to initial SPA — C made unsolicited, superior offer — Sellers developed supplemental bid process giving C and N chance to submit their best and final offers — Sellers ultimately accepted N's higher bidding offer and entered into revised SPA with N — Petitioners amended their motion to seek issuance of approval and vesting order with respect to revised SPA — Ruling was made on petitioners' amended motion — Motion was granted — Sale process was fair, reasonable and efficient within s. 36(3)(a) of Companies' Creditors Arrangement Act — There was no legal requirement that sale process be approved in advance — Sellers had no obligation to accept C's unsolicited and superior offer and to terminate initial SPA — Initial SPA permitted sellers to terminate it, but did not require them to do so — Sellers' supplemental bid process was very reasonable and fair, and in best interests of creditors — N submitted its offer in compliance with rules, and there was no fundamental flaw in process such as parties having unequal access to information or one party seeking to amend its offer after it had knowledge of other offers.

Aboriginal law --- Miscellaneous

Sellers, who were parent company and affiliates of petitioners, sought to sell interests in chromite mining projects in Ring of Fire mining district — Sellers executed initial Share Purchase Agreement (SPA) with N, which made provision for "superior proposal" mechanism allowing sellers to accept unsolicited, superior offer from third party — Petitioners commenced motion for issuance of approval and vesting order with respect to initial SPA — First Nations bands filed objection to motion — Following C's unsolicited superior offer and supplemental bidding process, sellers accepted N's highest bidding offer and entered into revised SPA with N — Petitioners amended their motion to seek issuance of approval and vesting order with respect to revised SPA, but First Nations bands maintained their objection — Ruling was made on petitioners' amended motion — Motion was granted — It was not clear to what extent First Nations bands had knowledge of sale process and could have participated — There was no evidence to suggest that bands on their own could have made serious offer, or that they would have partnered with party that was not already identified and included in process — It was pure speculation whether First Nations would have presented offer in excess of N's offer — Sale of shares from one private party to another

did not trigger duty to consult First Nations — It was difficult to see how granting of two or three percent royalty impacted rights of First Nations bands.

Civil practice and procedure --- Parties — Standing

Parties had standing and their objections were not dismissed due to lack of interest or standing.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers

Vendeurs, qui représentaient la société mère et les filiales des pétitionnaires, voulaient vendre leurs intérêts dans les projets miniers de chromite dans le district minier du Cercle de Feu — Vendeurs ont signé avec N une convention d'achat d'actions prévoyant un mécanisme de [TRADUCTION] « propositions supérieures » qui permettait aux vendeurs d'accepter des offres supérieures non-sollicitées — Pétitionnaires ont déposé une requête en vue d'obtenir une ordonnance d'approbation et d'acquisition portant sur la convention — C a fait une offre supérieure non-sollicitée — Vendeurs ont élaboré un processus de soumissions supplémentaire permettant à C et N de présenter leurs meilleures offres finales — Vendeurs ont accepté l'offre supérieure de N et ont signé une convention d'achat d'actions révisée avec N — Pétitionnaires ont déposé une requête modifiée en vue de l'émission d'une ordonnance d'approbation et d'acquisition portant sur la convention révisée — Décision a été rendue à la suite du dépôt de la requête modifiée par les pétitionnaires — Requête a été accordée — Processus de vente a été équitable, raisonnable et efficace au regard de l'art. 36(3)a) de la Loi sur les arrangements avec les créanciers des compagnies — Il n'existait aucune obligation juridique de faire approuver la vente à l'avance — Vendeurs n'avaient pas l'obligation d'accepter l'offre supérieure non-sollicitée de C et de mettre fin à la convention initiale — Convention initiale autorisait les vendeurs à y mettre fin, mais ne l'exigeait pas — Processus de soumissions supplémentaire des vendeurs était très raisonnable et équitable, et dans le meilleur intérêt des créanciers — N a présenté son offre en conformité avec les règles, donc il n'y avait pas d'erreur fondamentale dans le processus qui aurait eu pour effet de rendre inégal l'accès des parties à l'information ou qui aurait fait en sorte qu'une partie modifie son offre après avoir eu connaissance d'autres offres.

Droit autochtone --- Divers

Vendeurs, qui représentaient la société mère et les filiales des pétitionnaires, voulaient vendre leurs intérêts dans les projets miniers de chromite dans le district minier du Cercle de Feu — Vendeurs ont signé avec N une convention d'achat d'actions prévoyant un mécanisme de [TRADUCTION] « propositions supérieures » qui permettait aux vendeurs d'accepter des offres supérieures non-sollicitées — Pétitionnaires ont déposé une requête en vue d'obtenir une ordonnance d'approbation et d'acquisition portant sur la convention — Bandes de Premières Nations ont soulevé une objection à l'encontre de la requête — Suite à l'offre supérieure et non-sollicitée de C et au processus de soumissions supplémentaire, vendeurs ont

accepté l'offre supérieure de N et ont signé une convention d'achat d'actions révisée avec N — Vendeurs ont accepté l'offre supérieure de N et ont signé une convention d'achat d'actions révisée avec N — Pétitionnaires ont déposé une requête modifiée en vue de l'émission d'une ordonnance d'approbation et d'acquisition portant sur la convention révisée, mais les bandes de Premières Nations ont maintenu leur objection — Décision a été rendue à la suite du dépôt de la requête modifiée par les pétitionnaires — Requête a été accordée — On ignorait ce que les bandes de Premières Nations savaient du processus de vente et dans quelle mesure elles auraient pu y participer — Il n'existait aucun élément de preuve laissant croire que les bandes auraient pu, d'elles-mêmes, faire une offre sérieuse ou qu'elles auraient pu s'entendre avec une partie au processus qui n'était pas déjà identifiée — Hypothèse selon laquelle les Premières Nations auraient pu présenter une offre supérieure à l'offre de N relevait de la pure spéculation — Vente d'actions d'une partie privée à une autre partie privée n'a pas déclenché l'obligation de consulter les Premières Nations — Il était difficile d'imaginer comment l'octroi de deux ou trois points de pourcentage en termes de redevances pouvait avoir un impact sur les droits des bandes de Premières Nations.

Procédure civile --- Parties — Intérêt pour agir

Objections des parties n'ont pas été rejetées en raison de leur manque d'intérêt ou d'intérêt pour agir.

Table of Authorities

Cases considered by *Hamilton J.C.S.*:

AbitibiBowater Inc., Re (2009), 2009 QCCS 6460, 2009 CarswellQue 14189 (C.S. Que.) — followed

AbitibiBowater Inc., Re (2010), 2010 QCCS 1742, 2010 CarswellQue 4082, 71 C.B.R. (5th) 220 (C.S. Que.) — considered

Anvil Range Mining Corp., Re (1998), 1998 CarswellOnt 5319, 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) — considered

Aveos Fleet Performance Inc./Aveos performance aéronautique inc., Re (2012), 2012 QCCS 4074, 2012 CarswellQue 8620 (C.S. Que.) — considered

BDC Venture Capital Inc. v. Natural Convergence Inc. (2009), 2009 ONCA 665, 2009 CarswellOnt 5535, 57 C.B.R. (5th) 186 (Ont. C.A.) — referred to

Boutiques San Francisco Inc., Re (2004), 2004 CarswellQue 753, [2004] R.J.Q. 965, 5 C.B.R. (5th) 197 (C.S. Que.) — referred to

Canadian Airlines Corp., Re (2000), 2000 ABQB 442, 2000 CarswellAlta 662, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission) (2010), 2010 SCC 43, 2010 CarswellBC 2867, 2010 CarswellBC 2868, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 54 C.E.L.R. (3d) 1, 9 B.C.L.R. (5th) 205, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council)* [2010] 4 C.N.L.R. 250, 406 N.R. 333, 325 D.L.R. (4th) 1, 11 Admin. L.R. (5th) 246, 293 B.C.A.C. 175, 496 W.A.C. 175, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council)* [2010] 2 S.C.R. 650, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council)* 225 C.R.R. (2d) 75 (S.C.C.) — followed

Consumers Packaging Inc., Re (2001), 2001 CarswellOnt 3482, 27 C.B.R. (4th) 197, 150 O.A.C. 384, 12 C.P.C. (5th) 208, [2001] O.T.C. 459 (Ont. C.A.) — referred to

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Skeena Cellulose Inc., Re (2002), 2002 BCSC 597, 2002 CarswellBC 1021, 34 C.B.R. (4th) 298 (B.C. S.C. [In Chambers]) — considered

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Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to

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White Birch Paper Holding Co., Re (2010), 2010 QCCA 1950, 2010 CarswellQue 11534, 72 C.B.R. (5th) 74 (C.A. Que.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Bankruptcy Code, 11 U.S.C.
Chapter 15 — referred to

Code civil du Québec, L.Q. 1991, c. 64
en général — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 36 — considered

s. 36(1) — considered

s. 36(3) — considered

s. 36(3)(a) — considered

s. 36(6) — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 35 — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359
Generally — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

RULING on petitioners' amended motion for issuance of approval and vesting order with respect to revised share purchase agreement.

***Hamilton J.C.S.*:**

1 The Petitioners have made an Amended Motion for the Issuance of an Approval and Vesting Order with respect to the Sale of the Chromite Shares (#82 on the plumitif; the original motion was #65). Objections were filed by (1) six First Nation bands (#85, as amended at the hearing) and (2) 8901341 Canada Inc. and Canadian Development and Marketing Corporation (together, CDM) (#87).

CONTEXT

2 On January 27, 2015, Mr. Justice Castonguay issued an Initial Order placing the Petitioners and the Mises-en-cause under the protection of the *Companies' Creditors Arrangement Act*.[1] The ultimate parent of the Petitioners and the Mises-en-cause is Cliffs Natural Resources Inc. (Cliffs), which is neither a Petitioner nor a Mise-en-cause.

3 The Petitioner Cliffs Québec Iron Mining ULC (CQIM) owns, through two subsidiaries, a 100% interest in the Black Thor and Black Label chromite mining projects and a 70% interest in the Big Daddy chromite mining project. All three projects form part of the Ring of Fire, a mining district in northern Ontario.

4 Other entities related to Cliffs but which are not parties to the CCAA proceedings own other mining interests in the Ring of Fire.

5 The proposed transaction with respect to which the Petitioners are seeking an approval and vesting order involves the sale of those various interests, including in particular the sale of CQIM's shares in the subsidiaries described above.

6 Cliffs and its affiliates paid approximately US$350 million to acquire their interests in the Ring of Fire projects, and invested a further US$200 million in developing these projects.

7 By 2013, Cliffs had suspended all activities related to the Ring of Fire and began making general inquiries with potential interested parties with a view to selling its interests in the Ring of Fire. No material interest resulted from these efforts.

8 By September 2014, Cliffs's desire to sell its interests in the Ring of Fire was publicly known. [2] It hired Moelis & Company LLC to assist with the sale process for various assets including the Ring of Fire in October 2014. [3]

9 The sale process will be described in greater detail below. It resulted in the execution of a letter of intent with Noront on February 13, 2015. [4]

10 While the sellers were negotiating the Share Purchase Agreement with Noront, CDM sent an unsolicited letter of intent to acquire the Ring of Fire interests on March 14, 2015. [5] That letter of intent was analyzed by the sellers, Moelis and the Monitor and was rejected. [6] Two revised letters of intent followed and were also rejected. [7]

11 The sellers executed the initial Share Purchase Agreement with Noront on March 22, 2015, which provided for a price of US $20 million. [8] Noront issued a press release describing the transaction on March 23, 2015. [9]

12 The initial SPA provided in Section 7.1 a "Superior Proposal" mechanism that allowed the sellers to accept an unsolicited and superior offer from a third party.

13 On April 2, 2015, the Petitioners made a motion for the issuance of an approval and vesting order with respect to the initial SPA. Four First Nations bands who live and exercise their Aboriginal and treaty rights in and on the land and territories surrounding the Ring of Fire filed an objection to the motion. CDM did not. Instead, on April 13, 2015, CDM made an unsolicited offer for the interests in the Ring of Fire which included a purchase price of US $23 million. [10]

14 CDM's offer was considered by the sellers, Moelis and the Monitor to be a "Superior Proposal" as defined in Section 7.1 of the initial SPA. As a result, they advised Noront, [11] which expressed an interest in making a new offer.

15 The sellers, after consulting Moelis and the Monitor, developed the Supplemental Bid Process to give each party the chance to submit its best and final offer. [12]

16 Both Noront and CDM participated in the Supplemental Bid Process and submitted new offers, with Noront's offer at US $27.5 million and CDM's at US $25.275 million. [13]

17 The sellers accepted the Noront offer and entered into a revised SPA with Noront on April 17, 2015. [14] The Petitioners then amended their motion to allege the additional facts since April 2, 2015 and to seek the issuance of an approval and vesting order with respect to the revised SPA.

18 The First Nation bands maintained their objection (#85) [15] and CDM filed a Declaration of Intervention and Contestation with respect to the amended motion (#87).

POSITION OF THE PARTIES

19 The Petitioners argue that the revised SPA should be approved because:

1. the marketing and sales process was fair, reasonable, transparent and efficient;

2. the price offered by Noront was the highest binding offer received in the process;

3. CQIM exercised its commercial and business judgment with assistance from Moelis;

4. the Monitor assisted and advised CQIM throughout the process and recommends the approval of the motion.

20 Moreover, they argue that no creditor has opposed the motion, and that the First Nations bands and CDM do not have legal standing to oppose the motion.

21 The Monitor and Noront supported the position put forward by the Petitioners.

22 The First Nations bands argued the following points:

1. they have a legitimate interest and standing to contest the motion as an "other interested party" under Section 36 of the CCAA, because they have Aboriginal and treaty rights that are affected by the change in control of the Ring of Fire interests;

2. there was a duty on the part of the sellers and their advisers to consult with and advise the First Nations bands about the sale process. Instead, the First Nations bands were ignored and did not even learn of the existence of the sale process until March 23, 2015;

3. the sale process was not open, fair or transparent and did not recognize the rights of the First Nations bands;

4. there was no sales process order; and

5. there is no urgency and they should be given the opportunity to present an offer.

23 Finally, CDM argued as follows:

1. the sellers were required to accept the "Superior Proposal" made by CDM on April 13, 2015;

2. the Supplemental Bid Process did not treat the two parties fairly;

3. the Monitor's support of the process is not determinative;

4. it had the necessary interest to intervene in the CCAA proceedings and contest the motion.

ISSUES

24 The Court will analyze the following issues:

1. Was the sale process "fair, reasonable, transparent and efficient"?

In the context of the analysis of this issue, the Court will consider various sub-issues, including the business judgement rule, the importance of the Monitor's recommendation, and the interpretation of Section 7.1 of the initial SPA.

2. Do the First Nations bands have other grounds on which to object to the proposed transaction?

3. Do the First Nations bands and CDM have legal standing to raise there issues?

ANALYSIS

Was the sale process "fair, reasonable, transparent and efficient"?

25 Section 36 of the CCAA provides in part as follows:

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.

. . .

(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.

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, 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.

. . .

26 The criteria in Section 36(3) of the CCAA have been held not to be cumulative or exhaustive. The Court must look at the proposed transaction as a whole and decide whether it is appropriate, fair and reasonable:

> [48] The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.
>
> [49] The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA. [16]

27 Further, in the context of one of the asset sales in *AbitibiBowater*, Mr. Justice Gascon, then of this Court, adopted the following list of relevant factors:

[36] The Court has jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale of assets is in the best interest of the stakeholders generally.

[37] In determining whether to authorize a sale of assets under the CCAA, the Court should consider, amongst others, the following key factors:

- have sufficient efforts to get the best price been made and have the parties acted providently;
- the efficacy and integrity of the process followed;
- the interests of the parties; and
- whether any unfairness resulted from the working out process.

[38] These principles were enunciated in *Royal Bank v. Soundair Corp.* They are equally applicable in a CCAA sale situation. [17]

28 The Court must give due consideration to two further elements in assessing whether the sale should be approved under Section 36 CCAA:

1. the business judgment rule:

[70] That being so, it is not for this Court to second-guess the commercial and business judgment properly exercised by the Petitioners and the Monitor.

[71] A court will not lightly interfere with the exercise of this commercial and business judgment in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. This is certainly not a case where it should. [18]

2. the weight to be given to the recommendation of the Monitor:

The recommendation of the Monitor, a court-appointed officer experienced in the insolvency field, carries great weight with the Court in any approval process. Absent some compelling, exceptional factor to the contrary, a Court should accept an applicant's proposed sale process where it is recommended by the Monitor and supported by the stakeholders. [19]

29 Debtors often ask the Court to authorize the sale process in advance. This has the advantage of ensuring that the process is clear and of reducing the likelihood of a subsequent challenge. In the present matter, the Petitioners did seek the Court's authorization with respect to a sale process for their other assets, but they did not seek the Court's authorization with respect to the sale process for

the Ring of Fire interests because that sale process was already well under way before the CCAA filing. There is no legal requirement that the sale process be approved in advance, but it creates the potential for the process being challenged after the fact, as in this case.

30 The Court will therefore review the sale process in light of these factors.

(1) From October 2014 to the execution of the Noront letter of intent on February 13, 2015

31 The sale process began in earnest in October 2014 when Cliffs engaged Moelis.

32 Moelis identified a group of eighteen potential buyers and strategic partners, with the assistance of CQIM and Cliffs. The group included traders, resource buyers, financial sector participants, local strategic partners, and market participants, as well as parties who had previously expressed an interest in the Ring of Fire.

33 Moelis began contacting the potential interested parties to solicit interest in purchasing the Ring of Fire project. It sent a form of non-disclosure agreement to fifteen parties. Fourteen executed the agreement and were given access to certain confidential information.

34 Negotiations ensued with seven of the interested parties, and six were given access to the data room that was established in November 2014.

35 By January 21, 2015, non-binding letters of intent were received from Noront and from a third party. There were also two verbal expressions of interest, but neither resulted in a letter of intent.

36 The Noront letter of intent was determined by the sellers in consultation with Moelis and the Monitor to be the better offer. Moelis then contacted all parties who had indicated a preliminary level of interest to give them the opportunity to submit a letter of intent in a price range superior to the Noront letter of intent, but no such letter was received.

37 Negotiations continued with Noront and a letter of intent was executed with Noront on February 13, 2015. [20]

38 With respect to this portion of the process, CDM does not raise any issue but the First Nations bands complain that they were not included in the list of potential interested parties and were not otherwise consulted.

39 The Court will discuss the special status of the First Nations bands in the next section of this judgment. At this stage, it is sufficient to note that the sale process must be reasonable, but is not required to be perfect. Even if the initial list of eighteen potential buyers and strategic partners omitted some potential buyers, this is not a basis for the Court to intervene, provided that

the sellers, with Moelis and the Monitor, took reasonable steps.[21] The Court is satisfied that this test was met.

(2) From letter of intent to initial SPA

40 Between February 13, 2015 and March 22, 2015, the sellers negotiated the SPA with Noront and signed the initial SPA. In that same period, CDM expressed an interest in the Ring of Fire interests and sent three separate offers, all of which were refused by the sellers.

41 CDM does not contest the reasonability of the sellers' actions in this period. In fact, CDM did not contest the original motion to approve the initial SPA, but chose instead to make a new offer.

(3) The initial SPA and the "Superior Proposal"

42 The initial SPA with Noront dated March 22, 2015 provided for a purchase price of US $20 million.

43 Section 7.1 of the initial SPA allowed the sellers to pursue a "Superior Proposal", defined as an unsolicited offer from a third party which appeared to be more favourable to the sellers. In that eventuality, the sellers had the right to terminate the initial SPA upon reimbursing Noront's expenses up to $250,000.

44 CDM made a new offer on April 13, 2015.[22] The sellers, in consultation with their advisers and the Monitor, concluded that it was a Superior Proposal.

45 CDM argues that in those circumstances, the sellers had the obligation to terminate the initial SPA and to accept the CDM offer.

46 The Court does not agree.

47 On its face, the language in Section 7.1 is permissive and not mandatory. It says that the sellers "may" terminate the initial SPA and enter into an agreement with the new offeror. It does not require them to do so.

48 CDM argued that Section 7.1 does not provide for a right to match, which is found in other agreements of this nature. That may be true, but a right to match is different. Specific language would be necessary to contractually require the sellers to accept an offer from Noront that matched the new offer. No language was required to give Noront the right to make a new offer. Further, specific language would be required to remove the possibility of Noront making a new offer. There is no such language. It would be surprising to find such language: why would Noront give up the right to make another offer, and why would the sellers prevent Noront from making another offer? Any such language would be to the detriment of the two contracting parties and for the exclusive

benefit of an unknown third party. As the Monitor pointed out, Section 12.2 of the initial SPA specifies that the SPA is for the sole benefit of the parties and is not intended to give any rights, benefits or remedies to a third party.

49 As a result, the sellers had no obligation to accept the April 13 offer from CDM.

(4) The Supplemental Bid Process

50 Once the sellers, their advisers and the Monitor determined that the April 13 offer from CDM was a Superior Proposal, they had to decide how to manage the process. They had two interested parties and they decided to give them both the chance to make their best and final offer through a process that they created for the purpose, which is referred to as the Supplemental Bid Process. This was a very reasonable decision, in the best interests of the creditors, although probably not one that either offeror was very happy with.

51 The sellers, their advisers and the Monitor established a series of rules, and they sent the rules to the two offerors at the same time:

> 1. Each of the Bidders' best and final offer is to be delivered in the form of an executed Share Purchase Agreement (the "Final Bid"), together with a blackline mark-up against the March 22 SPA to show proposed changes.
>
> 2. Final Bids can remove section 7.1(d) and the related provisions of the March 22 SPA.
>
> 3. Final bids are to be received by Moelis by no later than 5:00 p.m. (Toronto time) on Wednesday, April 15, 2015 in accordance with paragraph 7 below.
>
> 4. Final Bids may be accompanied by a cover letter setting any additional considerations that the Bidder wishes to be considered in connection with its Final Bid but such cover letter should not amend or modify any of the terms and conditions contained in the executed SPA.
>
> 5. Final Bids will be reviewed by the Sellers in consultation with moelis and the Monitor. A determination of the Superior Proposal will be made as soon as practicable and communicated to the Bidders.
>
> 6. Any clarifications or other communications with respect to this process should be made in writing to the Sale Advisor, with a copy to the Monitor.
>
> 7. Final Bids are to be submitted to the Sale Advisor c/o Carlo De Giroloamo by email at **carlo.degirolamo@moelis.com**.

8. All initially capitalized terms used herein unless otherwise defined shall have the meanings given to them in the March 22 SPA. [23]

52 They declined a request from Noront to modify the rules. [24]

53 Both Noront and CDM decided to participate in the Supplemental Bid Process and both submitted offers.

54 All parties agree that the CDM offer was in compliance with the rules of the Supplemental Bid Process.

55 Noront's offer was received at 5:00 p.m. on April 15. [25] CDM argues that the offer was not in compliance with the rules:

- The cover email states that final approvals are still required (presumably from Franco-Nevada which was advancing the funds for the transaction and Resource Capital Fund (RCF) which was the principal lender to Noront) and that Noront expected to receive them within the next hour;

- The cover letter was not signed;

- The cover letter stated that the revised offer was effective only if the sellers received another offer; and

- The email did not include an executed SPA, but only a blackline mark-up of the SPA.

56 Subsequent to 5:00 p.m., Noront completed the requirements:

- At 5:34 p.m., Noront sent a signed cover letter. A paragraph was added to explain that "certain representations and warranties and conditions to the advance of the loan with Franco-Nevada have been reduced in order to provide certainty on Noront's financing" and that the signature pages for the SPA and the fully executed loan agreement would be sent separately; [26]

- At 8:50 p.m., Noront's counsel sent the executed SPA and the amended and restated loan agreement. The executed SPA included some changes described as "cleanup" and "not substantive" since 5:00 p.m. Among those changes, Noront deleted RCF from Exhibit C (Required Consents), suggesting that it had obtained that consent; [27]

• At 10:00 p.m., Moelis asked Noront for confirmation of the RCF consent and an executed copy of it, an explanation for the source of the additional funds, and clarification of the deadline for the vesting order; [28]

• At 10:35 p.m., Noront provided the executed RCF consent and an explanation of the funding; [29] and

• At 1:25 p.m. on April 16, Noront agreed to extend the date for the vesting order from April 20 to April 27. [30]

57 The Noront offer was the higher of the two offers in terms of the purchase price. The issue is whether these issues are such as to invalidate the process such that the Court should require the sellers to start over.

58 The Court considers that these issues are relatively minor and that they do not invalidate the process:

• Noront submitted its offer on time;

• The offer was not amended in any substantive way after 5:00 p.m. In particular, the purchase price was not amended;

• The lack of a signature on the cover letter was irrelevant;

• The condition that the revised offer was effective only if the sellers received another offer had already been fulfilled before Noront submitted its offer. Noront did not know this, but the sellers, Moelis and the Monitor did;

• The missing third party consents were not within Noront's control. Noront said at 5:00 p.m. that it expected to receive them within the next hour. In fact, it provided the consents to Moelis at 8:50 p.m.;

• The executed SPA was provided at 8:50 p.m. The delay appears to be related to the missing consents. There is no evidence that Noront was using this as a means to preserve an out from the offer; and

• The questions with respect to the source of the funding and the date were clarifications requested by Moelis for its evaluation of the offer and were not elements missing from the offer.

59 This is not a case where there is a fundamental flaw in the process, such as the parties having unequal access to information or one party seeking to amend its offer after it had knowledge of the other offers. The process was fair. It was not perfect, but the Courts do not require perfection.

(5) Conclusion

60 As a result, the Court concludes that the sale process was reasonable within Section 36(3)(a) of the CCAA. Moreover, the other factors in Section 36(3) favour the approval of the sale:

- The monitor approved the process and was involved throughout;
- The monitor filed a report with the Court in which he recommends the approval of the sale;
- The creditors were not consulted, but the motion and amended motion were served on the service list and no creditor has objected to the sale;
- The consideration appears to be fair, given that it is the result of a reasonable process. The Court gives weight to the business judgment of the sellers and their advisers.

61 For all of these reasons, the Court dismisses CDM's contestation of the motion.

62 There remain the issues raised by the First Nations bands.

2. Do the First Nations bands have other grounds on which to object to the transaction?

63 The First Nations bands raise issues of two natures.

64 First, they argue that they were denied the opportunity to participate in the sale process and they ask for time to examine the possibility of presenting an offer for the Ring of Fire interests.

65 Second, they argue that the transaction has an impact on their Aboriginal and treaty rights protected under Section 35 of the *Constitution Act, 1982.*

66 The Court has already concluded that the process of identifying potential buyers and strategic partners was reasonable.

67 Further, it is not clear to what extent the First Nations bands had knowledge of the sale process and could have participated. The September 17, 2014 newspaper article says that Cliffs is exploring alternatives including the possibility of selling its Ring of Fire interests.[31] That article refers to a letter which was sent to the First Nations bands in the area which again would have referred to a possible sale.

68 At the very latest, they knew about the potential sale when a press release was published on March 23, 2015.

69 Moreover, in its materials, CDM alleged that its final offer on April 15 "had the support of two of the most impacted First Nations communities", [32] which suggests that the First Nations bands had at lest some involvement in the sale process.

70 Nevertheless, the interest of the First Nations bands remains at a very preliminary level. Although the First Nations bands say that they have hired a financial adviser and that they want a delay to analyze the possibility of making an offer for the Ring of Fire interests, whether on their own or with a partner, there is no evidence to suggest that the bands on their own would make a serious offer, or that they would partner with a party that was not already identified by Moelis and included in the process. It is pure speculation as to whether they will ever present an offer in excess of the Noront offer. The Courts have rejected firm offers for greater amounts received after the sale process has concluded. [33] The Courts should also refuse to stop the sale process because a party arriving late might be interested in presenting an offer which might be better than the offer on the table.

71 The First Nations bands also plead that they have a special interest in this transaction because they live and exercise their Aboriginal and treaty rights guaranteed by the Constitution on the land and territories surrounding the Ring of Fire.

72 For the purposes of this motion, the Court will assume that to be true. It is nevertheless unclear to what extent a change of control of the corporations which own the interests in the Ring of Fire project impacts on those rights. The identity of the shareholders of the corporations does not change the rights of the First Nations bands or the obligations of the corporations in relation to the development of the project.

73 The First Nations bands pointed to two specific issues.

74 First, they argued that there was a duty to consult which was not respected. It is clear that as a matter of constitutional law, there is a duty to consult. It is equally clear that this duty lies on the Crown, not on private parties. [34] As a result, the Crown has a duty to consult when it acts, including when it sells shares in a corporation with interests that impact on the rights of the First Nations. [35] However, a sale of shares from one private party to another does not trigger the duty to consult. The First Nations bands also produced the Regional Framework Agreement between nine First Nation bands in the Ring of Fire area, including the six objectors, and the Ontario Crown. [36] Cliffs was not a party to this agreement, and the sale of the sellers' interests in the Ring of Fire project does not affect any party's rights and obligations under the agreement. It is indeed unfortunate that the First Nations bands were not included in the sale process, because they will have an important

role to play in the development of the Ring of Fire. But the failure to include them was not a breach of the duty to consult or of the Regional Framework Agreement.

75 Second, the First Nations bands gave as an example of how the proposed transaction might prejudice their rights a royalty arrangement which Noront appears to have entered into with Franco-Nevada as part of the financing for the proposed transaction. The press release announcing the initial transaction on March 23, 2015 provided:

> Franco-Nevada will receive a 3% royalty over the Black Thor chromite deposit and a 2% royalty over all of Noront's property in the region with the exception of Eagle's Nest, which is excluded. [37]

76 Assuming that the financing arrangements for the final transaction include a similar provision, which seems likely, the Court is unconvinced that it should refuse the approval of the transaction for this reason.

77 It is difficult to see how granting a 2 or 3% royalty impacts the rights of the First Nations bands, unless it is their position that they are entitled to a royalty of more than 97%. They did not advance such an argument during the hearing.

78 Further, the Court is not being asked to approve the financing arrangements between Noront and Franco-Nevada. If there is something in those financing arrangements that infringes on the rights of the First Nations bands, their rights and their remedies are not affected by the order that the Court is being asked to issue today.

79 For all of these reasons, the Court dismisses the objection made by the First Nations bands.

3. Interest or Standing

80 For the reasons set out above, the Court will dismiss CDM's contestation and the objection made by the First Nations bands. In principle, it is not necessary to deal with the issue of interest or standing. Also, given that the Court was given only a short delay to draft this judgment, it might not be wise to get too far into the issue.

81 However, all parties pleaded the question at length and the Court will therefore deal with it.

82 The Ontario authorities supporting the position that the "bitter bidder" has no interest or standing to challenge the approval motion are clear [38] and they have been followed in Québec. [39]

83 However, the issues which the Court must consider before approving a sale include the reasonableness of the sale process, which involves questions of the fairness and the integrity of the process.

84 A losing bidder is not seeking to promote the best interests of the creditors, but is looking to promote its own interest. It will seek to raise these issues, not because it has any particular interest in fairness or integrity, but because it lost and it wants a second kick at the proverbial can. The narrow technical ground on which the losing bidder is found to have no interest is that it has no legal or proprietary right in the property being sold.[40] The underlying policy reason is that the losing bidder is a distraction, with the potential for delay and additional expense.

85 However, if the losing bidder is excluded from the process, who will raise the issues of fairness and integrity? The creditors will not do so, because their interest is limited to getting the best price. Where there is a subsequent higher bid, their interest will be in direct conflict with the integrity of the sale process.

86 Perhaps the way to reconcile all of this is to exclude the losing bidder from the Court approval process and instead require the losing bidder to make its complaints and objections to the monitor. The monitor would then be required to report to the Court on any such complaints and objections. In this case, the Monitor's Fourth Report deals with the objection of the First Nations bands in fair and objective manner. However, because CDM filed its intervention after the Monitor filed his report, the Monitor's Fourth Report does not deal with the issues raised by CDM. In that sense, the CDM intervention was useful to the Court in exercising its jurisdiction under Section 36 of the CCAA.

87 The objection of the First Nations bands went beyond their status as losing bidders or excluded bidders, and included issues related to their Aboriginal and treaty rights guaranteed by the Constitution.

88 The case law on the interest or standing of the "bitter bidder" and the policy considerations underlying that case law have no application to these issues. The interest of the First Nations bands is closer to the interest of "social stakeholders" that have been recognized in a number of cases.[41]

89 Although the Court will dismiss the objections raised by the First Nations bands and CDM, it will not do so on grounds of a lack of interest or standing.

FOR THESE REASONS, THE COURT HEREBY:

90 *GRANTS* the Petitioners' Amended Motion for the Issuance of an Approval and Vesting Order (#82).

91 *ORDERS* that all capitalized terms in this Order shall have the meaning given to them in the Share Purchase Agreement dated as of March 22, 2015, as amended and restated as of April 17, 2015 (the "*Share Purchase Agreement*") by and among Petitioner Cliffs Québec Iron Mining ULC ("*CQIM*"), Cliffs Greene B.V., Cliffs Netherlands B.V. and the Additional Sellers, as vendors,

Noront Resources Ltd., as parent, and 9201955 Canada Inc., as purchaser (the "*Purchaser*"), a redacted copy of which was filed as Exhibit R-11 to the Motion, unless otherwise indicated herein.

SERVICE

92 *ORDERS* that any prior delay for the presentation of this Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

93 *PERMITS* service of this Order at any time and place and by any means whatsoever.

SALE APPROVAL

94 *ORDERS and DECLARES* that the transaction (the "*Transaction*") contemplated by the Share Purchase Agreement is hereby approved, and the execution of the Share Purchase Agreement by CQIM is hereby authorized and approved, *nunc pro tunc,* with such non-material alterations, changes, amendments, deletions or additions thereto as may be agreed to but only with the consent of the Monitor.

95 *AUTHORIZES and DIRECTS* the Monitor to hold the Deposit, *nunc pro tunc*, and to apply, disburse and/or deliver the Deposit or the applicable portions thereof in accordance with the provisions of the Share Purchase Agreement.

EXECUTION OF DOCUMENTATION

96 *AUTHORIZES and DIRECTS* CQIM and the Monitor to perform all acts, sign all documents and take any necessary action to execute any agreement, contract, deed, provision, transaction or undertaking stipulated in or contemplated by the Share Purchase Agreement (Exhibit R-12) and any other ancillary document which could be required or useful to give full and complete effect thereto.

AUTHORIZATION

97 *ORDERS and DECLARES* that this Order shall constitute the only authorization required by CQIM to proceed with the Transaction and that no shareholder approval, if applicable, shall be required in connection therewith.

VESTING OF THE AMALCO SHARES

98 *ORDERS and DECLARES* that upon the issuance of a Monitor's certificate substantially in the form appended as *Schedule "A"* hereto (the "*Certificate*"), all of CQIM's right, title and interest in and to the Amalco Shares shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all right, title, benefits, priorities, claims (including claims

provable in bankruptcy in the event that CQIM should be adjudged bankrupt), liabilities (direct, indirect, absolute or contingent), obligations, interests, prior claims, security interests (whether contractual, statutory or otherwise), liens, charges, hypothecs, mortgages, pledges, trusts, deemed trusts (whether contractual, statutory, or otherwise), assignments, judgments, executions, writs of seizure or execution, notices of sale, options, agreements, rights of distress, legal, equitable or contractual setoff, adverse claims, levies, taxes, disputes, debts, charges, rights of first refusal or other pre-emptive rights in favour of third parties, restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise (collectively, the "*Encumbrances*") by or of any and all persons or entities of any kind whatsoever, including without limiting the generality of the foregoing (i) any Encumbrances created by the Initial Order of this Court dated January 27, 2015 (as amended on February 20, 2015 and as may be further amended from time to time), and (ii) all charges, security interests or charges evidenced by registration, publication or filing pursuant to the Civil Code of Québec, the Ontario Personal Property Security Act, the British Columbia Personal Property Security Act or any other applicable legislation providing for a security interest in personal or movable property, and, for greater certainty, *ORDERS* that all of the Encumbrances affecting or relating to the Amalco Shares be expunged and discharged as against the Amalco Shares, in each case effective as of the applicable time and date of the Certificate.

99 *ORDERS and DIRECTS* the Monitor to file with the Court a copy of the Certificate, forthwith after issuance thereof.

100 *DECLARES* that the Monitor shall be at liberty to rely exclusively on the Conditions Certificates in issuing the Certificate, without any obligation to independently confirm or verify the waiver or satisfaction of the applicable conditions.

101 *AUTHORIZES and DIRECTS* the Monitor to receive and hold the Purchase Price and to remit the Purchase Price in accordance with the provisions of this Order.

102 *AUTHORIZES and DIRECTS* the Monitor to remit, following closing of the Transaction, that portion of the Purchase Price payable to the Non-Filing Sellers, to the Non-Filing Sellers in accordance with the Purchase Price Allocation described under Exhibit D of the Share Purchase Agreement (Exhibit R-12), as it may be amended by the Non-Filing Sellers, or as the Non-Filing Sellers may otherwise direct.

CANCELLATION OF SECURITY REGISTRATIONS

103 *ORDERS* the Québec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Order and the Certificate, to reduce the scope of or strike the registrations in connection with the Amalco Shares, listed in *Schedule "B"* hereto, in order to allow the transfer to the Purchaser of the Amalco Shares free and clear of such registrations.

104 *ORDERS* that upon the issuance of the Certificate, CQIM shall be authorized and directed to take all such steps as may be necessary to effect the discharge of all Encumbrances registered against the Amalco Shares, including filing such financing change statements in the Ontario Personal Property Registry ("*OPPR*") as may be necessary, from any registration filed against CQIM in the OPPR, provided that CQIM shall not be authorized or directed to effect any discharge that would have the effect of releasing any collateral other than the Amalco Shares, and CQIM shall be authorized to take any further steps by way of further application to this Court.

105 *ORDERS* that upon the issuance of the Certificate, CQIM shall be authorized and directed to take all such steps as may be necessary to effect the discharge of all Encumbrances registered against the Amalco Shares, including filing such financing change statements in the British Columbia Personal Property Security Registry (the "*BCPPR*") as may be necessary, from any registration filed against CQIM in the BCPPR, provided that CQIM shall not be authorized or directed to effect any discharge that would have the effect of releasing any collateral other than the Amalco Shares, and CQIM shall be authorized to take any further steps by way of further application to this Court.

CQIM NET PROCEEDS

106 *ORDERS* that the proportion of the Purchase Price payable to CQIM in accordance with the Share Purchase Agreement (the "*CQIM Net Proceeds*") shall be remitted to the Monitor and shall be held by the Monitor pending further order of the Court.

107 *ORDERS* that for the purposes of determining the nature and priority of the Encumbrances, the CQIM Net Proceeds shall stand in the place and stead of the Amalco Shares, and that upon payment of the Purchase Price by the Purchaser, all Encumbrances shall attach to the CQIM Net Proceeds with the same priority as they had with respect to the Amalco Shares immediately prior to the sale, as if the Amalco Shares had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

VALIDITY OF THE TRANSACTION

108 *ORDERS* that notwithstanding:

a) the pendency of these proceedings;

b) any petition for a receiving order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") and any order issued pursuant to any such petition; or

c) the provisions of any federal or provincial legislation;

the vesting of the Amalco Shares contemplated in this Order, as well as the execution of the Share Purchase Agreement pursuant to this Order, are to be binding on any trustee in bankruptcy that may be appointed, and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, as against CQIM, the Purchaser or the Monitor, and shall not constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

LIMITATION OF LIABILITY

109 *DECLARES* that, subject to other orders of this Court, nothing herein contained shall require the Monitor to take control, or to otherwise manage all or any part of the Purchased Shares. The Monitor shall not, as a result of this Order, be deemed to be in possession of any of the Purchased Shares within the meaning of environmental legislation, the whole pursuant to the terms of the CCAA.

110 *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.

CONFIDENTIALITY

111 *ORDERS* that the unredacted Initial Purchase Agreement filed with the Court as Exhibit R-3, the summary of the two LOIs filed with the Court as Exhibit R-8, the unredacted Share Purchase Agreeement filed with the Court as Exhibit R-12 and the unredacted blackline of the Share Purchase Agreement showing changes from the Initial Purchase Agreement filed with the Court as Exhibit R-16 shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of the Court.

GENERAL

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

113 *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 this 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 Petitioners and Mises-en-cause. 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.

114 *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 this Order.

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

116 *THE WHOLE WITHOUT COSTS.*

Order accordingly.

APPENDIX

SCHEDULE "A"

FORM OF CERTIFICATE OF THE MONITOR

SUPERIOR COURT (Commercial Division)

C A N A D A

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

File: No:

500-11-048114-157

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

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUEBEC IRON MINING ULC

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

-and-

9201955 CANADA INC.

Mise-en-cause

-and-

THE REGISTRAR OF THE REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS

Mise-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

CERTIFICATE OF THE MONITOR

RECITALS

A. Pursuant to an initial order rendered by the Honourable Mr. Justice Martin Catonguay, J.S.C., of the Superior Court of Québec, [Commercial Division] (the "*Court*") on January 27, 2015 (as amended on February 20, 2015 and as may be further amended from time to time, the "*Initial Order*"), FTI Consulting Canada Inc. (the "*Monitor*") was appointed to monitor the business and financial affairs of the Petitioners and the Mises-en-cause (together with the Petitioners, the "*CCAA Parties*").

B. Pursuant to an order (the "*Approval and Vesting Order*") rendered by the Court on <*>, 2015, the transaction contemplated by the Share Purchase Agreement dated as of March 22, 2015, as amended and restated as of April 17, 2015 (the "*Share Purchase Agreement*")

by and among Petitioner Cliffs Québec Iron Mining ULC ("*CQIM*"), Cliffs Greene B.V., Cliffs Netherlands B.V. and the Additional Sellers (as defined therein), as vendors, Noront Resources Ltd., as parent, and 9201955 Canada Inc., as purchaser (the "*Purchaser*") was authorized and approved, with a view, *inter alia*, to vest in and to the Purchaser, all of CQIM's right, title and interest in and to the Amalco Shares.

C. Each capitalized term used and not defined herein has the meaning given to such term in the Share Purchase Agreement.

D. The Approval and Vesting Order provides for the vesting of all of CQIM's right, title and interest in and to the Amalco Shares in the Purchaser, in accordance with the terms of the Approval and Vesting Order and upon the delivery of a certificate (the "*Certificate*") issued by the Monitor confirming that the Sellers and the Purchaser have each delivered Conditions Certificates to the Monitor.

E. In accordance with the Approval and Vesting Order, the Monitor has the power to authorize, execute and deliver this Certificate.

F. The Approval and Vesting Order also directed the Monitor to file with the Court, a copy of this Certificate forthwith after issuance thereof.

THEREFORE, THE MONITOR CERTIFIES THE FOLLOWING:

A. The Sellers and the Purchaser have each delivered to the Monitor the Conditions Certificates evidencing that all applicable conditions under the Share Purchase Agreement have been satisfied and/or waived, as applicable.

B. The Closing Time is deemed to have occurred on at <TIME> on <*>, 2015.

THIS CERTIFICATE was issued by the Monitor at <TIME> on <*>, 2015.

FTI Consulting Canada Inc., in its capacity as Monitor of the CCAA Parties, and not in its personal capacity.

By:

Name:

Nigel Meakin

SCHEDULE "B"

REGISTRATIONS TO BE REDUCED OR STRICKEN

Nil.

[NTD: Updated searches will be run before motion is heard to confirm no registrations in Quebec.]

8453339.6

Footnotes

1 R.S.C. 1985, c. C-36, as amended.

2 An article from the Globe & Mail dated September 17, 2014 was produced as Exhibit R-7.

3 The CCAA Parties formally engaged Moelis by engagement letter dated March 23, 2015, and the Court approved the engagement of Moelis by order dated April 17, 2015.

4 Exhibit R-9.

5 Exhibit R-17.

6 Exhibit R-18.

7 Exhibits R-19 to R-22.

8 Exhibit R-3 (redacted) and R-4 (unredacted).

9 The press release was provided to the Court during argument and was not given an exhibit number.

10 Exhibit R-23.

11 Exhibit R-24.

12 Exhibits R-25 and R-26.

13 Exhibits R-29 and R-30.

14 Exhibit R-11 (redacted) and R-12 (unredacted).

15 It was amended at the hearing to add two First Nations bands as objectors.

16 *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.) (leave to appeal refused: 2010 QCCA 1950 (C.A. Que.), par. 48-49.

17 *AbitibiBowater Inc., Re*, 2009 QCCS 6460 (C.S. Que.), par. 36-38. See also *White Birch*, *supra* note 16, par. 53-54, and *Aveos Fleet Performance Inc./Aveos performance aéronautique inc., Re*, 2012 QCCS 4074 (C.S. Que.), par. 50.

18 *AbitibiBowater Inc., Re*, 2010 QCCS 1742 (C.S. Que.), par. 70-71. See also *White Birch Paper Holding Co., Re*, 2011 QCCS 7304 (C.S. Que.), par. 68-70.

19 *AbitibiBowater*, *supra* note 17, par. 59. See also *White Birch*, *supra* note 18, par. 73-74.

20 Exhibit R-9.

21 *Terrace Bay Pulp Inc., Re*, 2012 ONSC 4247 (Ont. S.C.J. [Commercial List]), par. 48.

22 Exhibit R-23.

23 Exhibits R-25 and R-26.

24 Exhibit CDM-1.

25 Exhibit R-30A.

26 Exhibit CDM-3.

27 Exhibit CDM-4.

28 Exhibit CDM-4.

29 Exhibit CDM-4.

30 Exhibit CDM-4.

31 Exhibit R-7.

32 Declaration of Intervention and Contestation (#87), par. 30.

33 See, for example, *Boutiques San Francisco Inc., Re*, [2004] R.J.Q. 965 (C.S. Que.), par. 11-25; *AbitibiBowater*, *supra* note 18, par. 72-73.

34 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.), par. 35, 56; *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43 (S.C.C.), par. 79.

35 *Skeena Cellulose Inc., Re*, 2002 BCSC 597 (B.C. S.C. [In Chambers]), par. 14.

36 Exhibit O-1.

37 *Supra*, note 9.

38 *Crown Trust Co. v. Rosenberg* [1986 CarswellOnt 235 (Ont. H.C.)], 1986 CanLII 2760, p. 43; *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467 (Ont. C.A.), par. 24-26, 30; *Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], 2001 CanLII 6708, par. 7; *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 665 (Ont. C.A.), par. 7-8.

39 *AbitibiBowater*, *supra* note 18, par. 81-88; *White Birch*, *supra* note 16, par. 55-56.

40 Purchasers generally do not have a proprietary interest in the property they are buying.

41 *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.), par. 95; *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* [1998 CarswellOnt 3346 (Ont. Gen. Div. [Commercial List])], 1998 CanLII 14907, par. 50; *Anvil Range Mining Corp., Re*, 1998 CarswellOnt 5319 (Ont. Gen. Div. [Commercial List]), par. 9; *Skydome Corp., Re*, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]), par. 6-7.

End of Document

TAB 2

2009 CarswellOnt 4467
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4467, [2009] O.J. No. 3169, 179 A.C.W.S. (3d) 265, 55 C.B.R. (5th) 229

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

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

Morawetz J.

Heard: June 29, 2009
Written reasons: July 23, 2009
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
J. Carfagnini, J. Pasquariello for Monitor, Ernst & Young Inc.
M. Starnino for Superintendent of Financial Services, Administrator of PBGF
S. Philpott for Former Employees
K. Zych for Noteholders
Pamela Huff, Craig Thorburn for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P., Matlin Patterson Opportunities Partners (Cayman) III L.P.
David Ward for UK Pension Protection Fund
Leanne Williams for Flextronics Inc.
Alex MacFarlane for Official Committee of Unsecured Creditors
Arthur O. Jacques, Tom McRae for Felske & Sylvain (de facto Continuing Employees' Committee)
Robin B. Schwill, Matthew P. Gottlieb for Nortel Networks UK Limited
A. Kauffman for Export Development Canada
D. Ullman for Verizon Communications Inc.
G. Benchetrit for IBM

Subject: Insolvency; Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIV Administration of estate
XIV.6 Sale of assets
XIV.6.f Jurisdiction of court to approve sale

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court

Headnote

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

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Table of Authorities

Cases considered by *Morawetz J.*:

Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership (2009), 2009 BCCA 319, 2009 CarswellBC 1738 (B.C. C.A.) — followed

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.) — referred to

Boutiques San Francisco Inc., Re (2004), 2004 CarswellQue 10918, 7 C.B.R. (5th) 189 (C.S. Que.) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co. (2008), 2008 CarswellOnt 4046, 45 C.B.R. (5th) 87 (Ont. S.C.J.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — distinguished

Consumers Packaging Inc., Re (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

PSINET Ltd., Re (2001), 28 C.B.R. (4th) 95, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]) — considered

Residential Warranty Co. of Canada Inc., Re (2006), 2006 ABQB 236, 2006 CarswellAlta 383, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 393 A.R. 340, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 4084, 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) — referred to

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — referred to

Winnipeg Motor Express Inc., Re (2008), 2008 CarswellMan 560, 2008 MBQB 297, 49 C.B.R. (5th) 302 (Man. Q.B.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.
s. 363 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — referred to

s. 11(4) — considered

MOTION by company for approval of bidding procedures for sale of business and asset sale agreement.

Morawetz J.:

Introduction

1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst &

Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

4 The following are my reasons for granting these orders.

5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

6 The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

Background

8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

Issues and Discussion

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.). ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial, supra*, at paras. 43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Residential Warranty Co. of Canada Inc., Re* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra, Re PSINet, supra, Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], *supra, Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

36 In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> ...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

37 Similarly, in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra*, at paras. 43, 45.

38 Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

39 In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.), *Winnipeg Motor Express Inc., Re* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership*, 2009 BCCA 319 (B.C. C.A.).

46 At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):
>
> > The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]
>
> 25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged...
>
> 26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose"

> of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16.

Disposition

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

Motion granted.

End of Document

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Debtors and creditors

VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver

Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver

Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained

an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

Per Galligan J.A.: 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. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

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 assets to them.

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

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.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

(c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 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.

15 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.

16 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, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.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.

17 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?

18 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 do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 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.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had 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. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court 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. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> 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 and function of the Receiver both in the perception of receivers 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.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *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.) , at p. 11 [C.B.R.]:

> 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.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the

922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg* , supra, and *Re Selkirk* , supra (Saunders J.). However, as Saunders J. pointed out in *Re Beauty Counsellors* , supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* , supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said 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. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical* .

[Emphasis added.]

46 It is my opinion that 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.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were

anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing 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. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* , supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in

these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets 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 made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act* , R.S.O. 1980, c. 137, and the *Environmental Protection Act* , R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the

OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

McKinlay J.A. **:**

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

Goodman J.A. **(dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree

with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 In *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.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that 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. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron* , supra, quoted by Galligan J.A. in his reasons. In *Cameron* , the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10 million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an

Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had

been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them* ."

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer con stitutes proximately two thirds of the

contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

116 In *Re Beauty Counsellors of Canada Ltd.* , supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent that it knew that CCFl was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

End of Document

TAB 4

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

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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.

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.

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 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.

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,

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.

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.

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 trente 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.

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) 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

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

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) 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).

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).

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

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

(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

a) la compensation des obligations entre la compagnie et les autres parties au contrat;

b) toute opération à l'égard de la garantie financière afférente, notamment :

(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,

(ii) la compensation, ou l'affectation de son produit ou de sa valeur.

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).

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).

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.

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.

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.

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 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

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

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.

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

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.

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 :

TAB 5

2015 ONSC 5557
Ontario Superior Court of Justice [Commercial List]

Nelson Education Ltd., Re

2015 CarswellOnt 13576, 2015 ONSC 5557, 258 A.C.W.S. (3d) 465, 29 C.B.R. (6th) 140

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

In the Matter of a Plan of Compromise or Arrangement of Nelson Education Ltd. and Nelson Education Holdings Ltd., Applicants

Newbould J.

Heard: August 13, 27, 2015
Judgment: September 8, 2015
Docket: CV15-10961-00CL

Counsel: Benjamin Zarnett, Jessica Kimmel, Caroline Descours for Applicants
Robert W. Staley, Kevin J. Zych, Sean Zweig for First Lien Agent and the First Lien Steering Committee
John L. Finnigan, D.J. Miller, Kyla E.M. Mahar for Royal Bank of Canada
Orestes Pasparaskis for Monitor

Subject: Insolvency

Headnote

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

Education publishing company obtained protection under Companies' Creditors Arrangement Act ("CCAA") — Bank was one of 22 first lien lenders, second lien lender and agent for second lien lenders — Credit bid for sale of substantially all assets to newly incorporated entity owned by first ranked secured lenders, if approved, would results in second lien lenders receiving nothing on outstanding loans — Company brought motion for approval of sale; bank brought motion for order that amounts owing to it and portion of consent fee be paid by company prior to sale — Company's motion granted; bank's motion dismissed — Normally, sale process is undertaken after court approves proposed sale methodology with monitor participating in process and reporting to court — While none of this occurred, sale or investment sales process ("SISP") and credit bid sale transaction met requirements of CCAA — SISP was typical and consistent with processes that had been approved by court in many CCAA proceedings — Results of SISP showed that no interested parties could offer price sufficient to repay amounts owing to first lien lenders — Intercreditor agreement governed, and led to conclusion that order in favour of bank as second lien agent was not appropriate as payment would reduce collateral subject to rights of first lien lenders in that collateral.

Table of Authorities

Cases considered by *Newbould J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — followed

Brainhunter Inc., Re (2009), 2009 CarswellOnt 7627 (Ont. S.C.J. [Commercial List]) — referred to

Cruden v. Bank of New York (1992), 957 F.2d 961 (U.S. C.A. 2nd Cir.) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2014), 2014 ONSC 6973, 2014 CarswellOnt 17291, 20 C.B.R. (6th) 171, 17 C.C.P.B. (2nd) 10 (Ont. S.C.J. [Commercial List]) — referred to

Rainbow v. Swisher (1988), 72 N.Y.2d 106, 531 N.Y.S. 775, 527 N.E.2d 258 (U.S. N.Y. Ct. App.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 36(3) — considered

MOTION by company for approval of sale; MOTION by bank for order that amounts owing to it and portion of consent fee be paid by company prior to sale.

***Newbould J.*:**

1 The applicants Nelson Education Ltd. ("Nelson") and Nelson Education Holdings Ltd. sought and obtained protection under the CCAA on May 12, 2015. They now apply for approval of the sale of substantially all of the assets and business of Nelson to a newly incorporated entity to be owned indirectly by Nelson's first ranked secured lenders (the "first lien lenders") pursuant to a credit bid made by the first lien agent. Nelson also seeks ancillary orders relating to the sale. The effect of the credit bid, if approved, is that the second lien lenders will receive nothing for their outstanding loans.

2 RBC is one of 22 first lien lenders, a second lien lender and agent for the second lien lenders. At the time of its motion to replace the Monitor, RBC did not accept that the proposed sale should be approved. RBC now takes no position on the sale approval motion other than to oppose certain ancillary relief sought by the applicants. RBC also has moved for an order that certain amounts said to be owing to it and their portion of a consent fee should be paid by Nelson prior to the completion of the sale. The applicants and the first lien lenders oppose the relief sought by RBC.

Nelson business

3 Nelson is a Canadian education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country.

4 The business and assets of Nelson were acquired by an OMERS entity and certain other funds from the Thomson Corporation in 2007 together with U.S. assets of Thomson for U.S. $7.75 billion, of which US$550 million was attributed to the Canadian business. The purchase was financed with first lien debt of approximately US$311.5 million and second lien debt of approximately US$171.3 million.

5 The maturity date under the first lien credit agreement was July 3, 2014 and the maturity date under the second lien credit agreement was July 3, 2015. Nelson has not paid the principal balances owing under either loan. It paid interest on the first lien credit up to the filing of this CCAA application. It has paid no interest on the second lien credit since April 2014. As of the filing date, Nelson was indebted in the aggregate principal amounts of approximately US$269 million, plus accrued interest, costs and fees, under the first lien credit agreement and approximately US$153 million, plus accrued interest, costs and fees, under the second lien credit agreement.

6 Because these loans are denominated in U.S. dollars, the recent decline in the Canadian dollar against the United States dollar has significantly increased the Canadian dollar balance of the loans. Nelson generates substantially all of its revenue in Canadian dollars and is not hedged against currency fluctuations. Based on an exchange rate of CAD/USD of 1.313, as of August 10, 2015, the Canadian dollar principal balances of the first and second lien loans are $352,873,910 and $201,176,237.

7 According to Mr. Greg Nordal, the CEO of Nelson, the business of Nelson has been affected by a general decline in the education markets over the past few years. Notwithstanding the industry decline over the past few years, Nelson has maintained strong EBITDA over each of the last several years.

Discussions leading to the sale to the first lien lenders

8 In March 2013, Nelson engaged Alvarez & Marsal Canada Securities ULC ("A&M"), the Canadian corporate finance arm of Alvarez & Marsal to assist it in reviewing and considering potential strategic alternatives. RBC, the second lien agent also engaged a financial advisor in March 2013 and the first lien steering committee engaged a financial advisor in June 2013. RBC held approximately 85% of the second lien debt.

9 Commencing in April 2013, Nelson and its advisors entered into discussions with stakeholders including the RBC as second lien agent, the first lien steering committee and their advisors. Nelson sought to achieve as its primary objective a consensual transaction that would be supported by all of the first lien lenders and second lien lenders. These discussions took place until September 2014. No agreement with the first lien lenders and second lien lenders was reached.

10 In April 2014, Nelson and the second lien lenders agreed to two extensions of the cure period under the second lien credit agreement in respect of the second lien interest payment due on March 31, 2014, to May 30, 2014. In connection with these extensions, Nelson made a partial payment of US$350,000 in respect of the March interest payment and paid certain professional fees of the second lien lenders. Nelson requested a further extension of the second lien cure period beyond May 30, 2014, but the second lien lenders did not agree. Thereafter, Nelson defaulted under the second lien credit agreement and failed to make further interest payments to the second lien lenders.

11 The first lien credit agreement matured on July 3, 2014. On July 7, 2014, Nelson proposed an amendment and extension of that agreement and solicited consent from its first lien lenders. RBC, as one of the first lien lenders was prepared to consent to the Nelson proposal, being a consent and support agreement, but no agreement was reached with the other first lien lenders and it did not proceed.

12 In September, 2014, Nelson proposed in a term sheet to the first lien lenders a transaction framework for a sale or restructuring of the business on the terms set out in a term sheet dated September 10, 2014 and sought their support. In connection with the first lien term sheet, Nelson entered into a first lien support agreement with first lien lenders representing approximately 88% of the principal amounts outstanding under the first lien credit agreement. The consenting first lien lenders comprised 21 of the 22 first lien lenders, the only first lien lender not consenting being RBC. Consent fees of approximately US$12 million have been paid to the consenting first lien lenders.

13 The first lien term sheet provided that Nelson would conduct a comprehensive and open sale or investment sales process (SISP) to attempt to identify one or more potential purchasers of, or investors in, the Nelson business on terms that would provide for net sale or investment proceeds sufficient to pay in full all obligations under the first lien credit agreement or that was otherwise acceptable to first lien lenders holding at least 66 2/3% of the outstanding obligations under the first lien credit agreement. If such a superior offer was not identified pursuant to the SISP, the first lien lenders would become the purchaser and purchase substantially all of the assets of Nelson in exchange for the conversion by all of the first lien lenders of all of the debt owing to them under the first lien credit agreement into a new first lien term facility and for common shares of the purchaser.

14 In September 2014, the company engaged A&M to assist with the SISP. By that time, A&M had been advising the Company for over 17 months and had gained an understanding of the Nelson Business and the educational publishing industry. The SISP was structured as a two-phase process.

15 Phase 1 involved (i) contacting 168 potential purchasers, including both financial and strategic parties located in Canada, the United States and Europe, and 11 potential lenders to ascertain their potential interest in a transaction, (ii) initial due diligence and (iii) receipt by Nelson of non-binding letters of interest ("LOIs"). The SISP provided that interested parties could propose a purchase of the whole or parts of the business or an investment in Nelson.

16 Seven potential purchasers submitted LOIs under phase 1, six of which were offers to purchase substantially all of the Nelson business and one of which was an offer to acquire only the K-12 business. Nelson reviewed the LOIs with the assistance of its advisors, and following consultation with the first lien steering committee and its advisors, invited five of the parties that submitted LOIs to phase 2 of the SISP. Phase 2 of the SISP involved additional due diligence, data room access and management presentations aimed at completion of binding documentation for a superior offer.

17 Three participants submitted non-binding offers by the deadline of December 19, 2014, two of which were for the purchase of substantially all of the Nelson business and one of which was for the acquisition of the K-12 business. All three offers remained subject to further due diligence and reflected values that were significantly below the value of the obligations under the first lien credit agreement.

18 On December 19, 2014, one of the participants advised A&M that it required additional time to complete and submit its offer, which additional time was granted. An offer was subsequently submitted but not ultimately advanced by the bidder.

19 Nelson, with the assistance of its advisors, maintained communications throughout its restructuring efforts with Cengage Learnings, the company that has the U.S. business that was sold by Thomson and which is a key business partner of Nelson. Cengage submitted an expression of interest for the higher education business that, even in combination with the offer received for the K-12 business, was substantially lower than the amount of the first lien debt. In February 2015, Cengage and Nelson terminated discussions about a potential sale transaction.

20 Ultimately, phase 2 of the SISP did not result in a transaction that would generate proceeds sufficient to repay the obligations under the first lien credit agreement in full or would otherwise be supported by the first lien lenders. Accordingly, with the assistance of A&M and its legal advisors, and in consultation with the first lien steering committee, Nelson determined that it should proceed with the sale transaction pursuant to the first lien support agreement.

Sale transaction

21 The sale transaction is an asset purchase. It will enable the Nelson business to continue as a going concern. It includes:

> (a) the transfer of substantially all of Nelson's assets to a newly incorporated entity to be owned indirectly by the first lien lenders;
>
> (b) the assumption by the purchaser of substantially all of Nelson's trade payables, contractual obligations and employment obligations incurred in the ordinary course and as reflected in its balance sheet, excluding some

obligations including the obligations under the second lien credit agreement and an intercompany promissory note of approximately $102.3 million owing by Nelson to Nelson Education Holdings Ltd.;

(c) an offer of employment by the purchaser to all of Nelson's employees; and

(d) a release by the first lien lenders of all of the indebtedness owing under the first lien credit agreement in exchange for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the purchaser, and (ii) the obligations under a new US$200 million first lien term facility to be entered into by the Purchaser.

22 The relief sought by the applicants apart from the approval of the sale transaction involves ancillary relief, including authorizing the distribution from Nelson's cash on hand to the first lien lenders of outstanding fees and interest, effecting mutual releases of parties associated with the sale transaction, and deeming a shareholders' rights agreement to bind all shareholders of the purchaser. This ancillary relief is opposed by RBC.

Analysis

(i) Sale approval

23 RBC says it takes no position on the sale, although it opposes some of the terms and seeks an order paying the second lien lenders their pre-filing interest and expense claims. Whether RBC is entitled to raise the issues that it has requires a consideration of the intercreditor agreement of July 5, 2007 made between the agents for the first lien lenders and the second lien lenders.

24 Section 6.1(a) of the intercreditor agreement provides that the second lien lenders shall not object to or oppose a sale and of the collateral and shall be deemed to have consented to it if the first lien claimholders have consented to it. It provides:

> The Second Lien Collateral Agent on behalf of the Second Lien Claimholders agrees that it will raise no objection or oppose a sale or other disposition of any Collateral free and clear of its Liens and other claims under Section 363 of the Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) if the First Lien Claimholders have consented to such sale or disposition of such assets and the Second Lien Collateral Agent and each other Second Lien Claimholder will be deemed to have consented under Section 363 of the Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) to any sale supported by the First Lien Claimholders and to have released their Liens in such assets.
>
> (underlining added)

25 Section 6.11 of the intercreditor agreement contained a similar provision. RBC raises the point that for these two sections to be applicable, the first lien claimholders must have consented to the sale, and that the definition of first lien claimholders means that all of the first lien lenders must have consented to the sale. In this case, only 88% of the first lien lenders consented to the sale, the lone holdout being RBC. The definition in the intercreditor agreement of first lien claimholder is as follows:

> "**First Lien Claimholders**" means, at any relevant time, the holders of First Lien Obligations at that time, including the First Lien Collateral Agent, the First Lien Lenders, any other "Secured Party" (as defined in the First Lien Credit Agreement) and the agents under the First Lien Loan Documents.

26 The intercreditor agreement is governed by the New York law and is to be construed and enforced in accordance with that law. The first lien agent filed an opinion of Allan L. Gropper, a former bankruptcy judge in the Southern District of New York and undoubtedly highly qualified to express proper expert opinions regarding the matters in issue. Mr. Gropper did not, however, discuss the principles of interpretation of a commercial contract under New York law, and in the absence of such evidence, I am to take the law of New York so far as contract interpretation is concerned as the same as our law. In any event, New York law regarding the interpretation of a contract would appear to be the same as our law. See *Cruden v. Bank of New York*, 957

F.2d 961 (U.S. C.A. 2nd Cir. 1992) and *Rainbow v. Swisher*, 72 N.Y.2d 106, 531 N.Y.S. 775, 527 N.E.2d 258 (U.S. N.Y. Ct. App. 1988). Mr. Gropper did opine that the sections in question are valid and enforceable in accordance with their terms. [1]

27 The intercreditor agreement, like a lot of complex commercial contracts, appears to have a hodgepodge of terms piled on, or added to, one another, with many definitions and exceptions to exceptions. That is what too often appears to happen when too many lawyers are involved in stirring the broth. It is clear that there are many definitions, including a reference to First Lien Lenders, which is defined to be the Lenders as defined in the First Lien Loan Documents, which is itself a defined term, meaning the First Lien Credit Agreement and the Loan Documents. The provisions of the first lien credit agreement make clear that the Lenders include all those who have lent under that agreement, including obviously RBC.

28 Under section 8.02(d) of the first lien credit agreement, more than 50% of the first lien lenders (the "Required Lenders") may direct the first lien agent to exercise on behalf of the first lien lenders all rights and remedies available to. In this case 88% of the first lien lenders, being all except RBC, directed the first lien agent to credit bid all of the first lien debt. This credit bid was thus made on behalf of all of the first lien lenders, including RBC.

29 While the definition of First Lien Claimholders is expansive and refers to both the First Lien Collateral Agent (the first lien agent) and the First Lien Lenders, suggesting a distinction between the two, once the Required Lenders have caused a credit bid to be made by the First Lien Collateral Agent, RBC in my view is taken to have supported the sale that is contemplated by the credit bid.

30 It follows that RBC is deemed under section 6.11 of the intercreditor agreement to have consented to the sale supported by the first lien claimholders. It is nevertheless required that I determine whether the sale and its terms should be approved. It is also important to note that no sale agreement has been signed and it awaits an order approving the form of Asset Purchase Agreement submitted by Nelson in its motion materials.

31 This is an unusual CCAA case. It involves the acquisition of the Nelson business by its senior secured creditors under a credit bid made after a SISP conducted before any CCAA process and without any prior court approval of the SISP terms. The result of the credit bid in this case will be the continuation of the Nelson business in the hands of the first lien lenders, a business that is generating a substantial EBITDA each year and which has been paying its unsecured creditors in the normal course, but with the extinguishment of the US $153 million plus interest owed to the second lien lenders.

32 Liquidating CCAA proceedings without a plan of arrangement are now a part of the insolvency landscape in Canada, but it is usual that the sale process be undertaken after a court has blessed the proposed sale methodology with a monitor fully participating in the sale process and reporting to the court with its views on the process that was carried out [2] . None of this has occurred in this case. One issue therefore is whether the SISP carried out before credit bid sale that has occurred involving an out of court process can be said to meet the *Soundair* [3] principles and that the credit bid sale meets the requirements of section 36(3) of the CCAA.

33 I have concluded that the SISP and the credit bid sale transaction in this case does meet those requirements, for the reasons that follow.

34 Alvarez & Marsal Canada Inc. was named the Monitor in the Initial Order over the objections of RBC, but shortly afterwards on the come-back motion by RBC, was replaced as Monitor by FTI Consulting Inc. The reasons for this change are contained in my endorsement of June 2, 2015. There was no suggestion of a lack of integrity or competence on the part of A&M or Alvarez & Marsal Canada Inc. In brief, the reason was that A&M had been retained by Nelson in 2013 as a financial advisor in connection with its debt situation, and in September 2014 had been retained to undertake the SISP process that has led to the sale transaction to the first lien lenders. I did not consider it right to put Alvarez & Marsal Canada Inc. in the position of providing independent advice to the Court on the SISP process that its affiliate had conducted, and that it would be fairer to all concerned that a different Monitor be appointed in light of the fact that the validity of the SISP process was going to be front and centre in the application of Nelson to have the sale agreement to the first lien lenders approved. Accordingly FTI was appointed to be the Monitor.

35 FTI did a thorough review of all relevant facts, including interviewing a large number of people involved. In its report to the Court the Monitor expressed the following views:

> (a) The design of the SISP was typical of such marketing processes and was consistent with processes that have been approved by the courts in many CCAA proceedings;
>
> (b) The SISP allowed interested parties adequate opportunity to conduct due diligence, both A&M and management appear to have been responsive to all requests from potentially interested parties and the timelines provided for in the SISP were reasonable in the circumstances;
>
> (c) The activities undertaken by A&M were consistent with the activities that any investment banker or sale advisor engaged to assist in the sale of a business would be expected to undertake;
>
> (d) The selection of A&M as investment banker would not have had a detrimental effect on the SISP or the value of offers;
>
> (e) Both key senior management and A&M were incentivised to achieve the best value available and there was no impediment to doing so;
>
> (f) The SISP was undertaken in a thorough and professional manner;
>
> (g) The results of the SISP clearly demonstrate that none of the interested parties would, or would be likely to, offer a price for the Nelson business that would be sufficient to repay the amounts owing to the first lien lenders under the first lien credit agreement
>
> (h) The SISP was a thorough market test and can be relied on to establish that there is no value beyond the first lien debt.

36 The Monitor expressed the further view that:

> (a) There is no realistic prospect that Nelson could obtain a new source of financing sufficient to repay the first lien debt;
>
> (b) An alternative debt restructuring that might create value for the second lien lenders is not a viable alternative at this time;
>
> (c) There is no reasonable prospect of a new sale process generating a transaction at a value in excess of the first lien debt;
>
> (d) It does not appear that there are significant operational improvements reasonably available that would materially improve profitability in the short-term such that the value of the Nelson business would increase to the extent necessary to repay the first lien debt and, accordingly, there is no apparent benefit from delaying the sale of the business.

37 *Soundair* established factors to be considered in an application to approve a sale in a receivership. These factors have widely been considered in such applications in a CCAA proceeding. They are:

> (a) whether sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently;
>
> (b) whether the interests of all parties have been considered;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process.

38 These factors are now largely mirrored in section 36(3) of the CCAA that requires a court to consider a number of factors, among other things, in deciding to authorize a sale of a debtor's assets. It is necessary to deal briefly with them.

(a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances. In this case, despite the fact that there was no prior court approval to the SISP, I accept the Monitor's view that the process was reasonable.

(b) Whether the monitor approved the process leading to the proposed sale or disposition. In this case there was no monitor at the time of the SISP. This factor is thus not strictly applicable as it assumes a sale process undertaken in a CCAA proceeding. However, the report of FTI blessing the SISP that took place is an important factor to consider.

(c) Whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy. The Monitor did not make such a statement in its report. However, there is no reason to think that a sale or disposition under a bankruptcy would be more beneficial to the creditors. The creditors negatively affected could not expect to fare better in a bankruptcy.

(d) The extent to which the creditors were consulted. The first lien steering committee was obviously consulted. Before the SISP, RBC, the second lien lenders' agent, was consulted and actively participated in the reconstruction discussions. I take it from the evidence that RBC did not actively participate in the SISP, a decision of its choosing, but was provided some updates.

(e) The effects of the proposed sale or disposition on the creditors and other interested parties. The positive effect is that all ordinary course creditors, employees, suppliers and customers will be protected. The effect on the second lien lenders is to wipe out their security and any chance of their loans being repaid. However, apart from their being deemed to have consented to the sale, it is clear that the second lien lenders have no economic interest in the Nelson assets except as might be the case some years away if Nelson were able to improve its profitability to the point that the second lien lenders could be paid something towards the debt owed to them. RBC puts this time line as perhaps five years and it is clearly conjecture. The first lien lenders however are not obliged to wait in the hopes of some future result. As the senior secured creditor, they have priority over the interests of the second lien lenders.

There are some excluded liabilities and a small amount owing to former terminated employees that will not be paid. As to these the Monitor points out that there is no reasonable prospect of any alternative solution that would provide a recovery for those creditors, all of whom rank subordinate to the first lien lenders.

(f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. The Monitor is of the view that the results of the SISP indicate that the consideration is fair and reasonable in the circumstances and that the SISP can, and should, be relied on for the purposes of such a determination. There is no evidence to the contrary and I accept the view of the Monitor.

39 In the circumstances, taking into account the *Soundair* factors and the matters to be considered in section 36(3) of the CCAA, I am satisfied that the sale transaction should be approved. Whether the ancillary relief should be granted is a separate issue, to which I now turn.

(ii) Ancillary claimed relief

(a) Vesting order

40 The applicants seek a vesting order vesting all of Nelson's right, title and interest in and to the purchased assets in the purchaser, free and clear of all interests, liens, charges and encumbrances, other than the permitted encumbrances and assumed

liabilities contemplated in the Asset Purchase Agreement. It is normal relief given in an asset sale under the CCAA and it is appropriate in this case.

(b) Payment of amounts to first lien lenders

41 As a condition to the completion of the transaction, Nelson is to pay all accrued and unpaid interest owing to the first lien lenders and all unpaid professional fees of the first lien agent and the first lien lenders outstanding under the first lien credit agreement. RBC does not oppose this relief.

42 If the cash is not paid out before the closing, it will be an asset of the purchaser as all cash on hand is being acquired by the purchaser. Thus the first lien lenders will have the cash. However, because the applicant is requesting a court ordered release by the first lien lenders of all obligations under the first lien credit agreement, the unpaid professional fees of the first lien agent and the first lien lenders that are outstanding under the first lien credit agreement would no longer be payable after the closing of the transaction. Presumably this is the reason for the payment of these prior to the closing.

43 These amounts are owed under the provisions of the first lien credit agreement and have priority over the interests of the second lien lenders under the intercreditor agreement. However, on June 2, 2015 it was ordered that pending further order, Nelson was prevented from paying any interest or other expenses to the first lien lenders unless the same payments owing to the second lien lenders. Nelson then chose not to make any payments to the first lien lenders. It is in effect now asking for an order nunc pro tunc permitting the payments to be made. I have some reluctance to make such an order, but in light of no opposition to it and that fact that it is clear from the report of the Monitor that there is no value in the collateral for the second lien lenders, the payment is approved.

(c) Releases

44 The applicants request an order that would include a broad release of the parties to the Asset Purchase Agreement as well as well as other persons including the first lien lenders.

45 The Asset Purchase Agreement has not been executed. In accordance with the draft approval and vesting order sought by the applicants, it is to be entered into upon the entry of the approval and vesting order. The release contained in the draft Asset Purchase Agreement in section 5.12 provides that the parties release each other from claims in connection with Nelson, the Nelson business, the Asset Purchase Agreement, the transaction, these proceedings, the first lien support agreement, the supplemental support agreement, the payment and settlement agreement, the first lien credit agreement and the other loan documents or the transactions contemplated by them. Released parties are not released from their other obligations or from claims of fraud. The release also does not deal with the second lien credit agreement or the second lien lenders.

46 The first lien term sheet made a part of the support agreement contained terms and conditions, but it stated that they would not be effective until definitive agreements were made by the applicable parties and until they became effective. One of the terms was that there would be a release "usual and customary for transactions of this nature", including a release by the first lien lenders in connection with "all matters related to the Existing First Lien Credit Agreement, the other Loan Documents and the transactions contemplated herein". RBC was not a party to the support agreement or the first lien term sheet.

47 The release in the Asset Purchase Agreement at section 5.12 provides that "each of the Parties on behalf of itself and its Affiliates does hereby forever release...". "Affiliates" is defined to include "any other Person that directly or indirectly...controls...such Person". The party that is the purchaser is a New Brunswick numbered company that will be owned indirectly by the first lien lenders. What instructions will or have been given by the first lien lenders to the numbered company to sign the Asset Purchase Agreement are not in the record, but I will assume that the First Lien Agent has or will authorize it and that RBC as a first lien lenders has not and will not authorize it.

48 Releases are a feature of approved plans of compromise and arrangement under the CCAA. The conditions for such a release have been laid down in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) at paras. 43 and 70. Third party releases are authorized under the CCAA if there is a reasonable connection between

the third party claim being compromised in the plan and the restructuring achieved by the plan. In *Metcalfe*, Blair J.A. found compelling that the claims to be released were rationally related to the purpose of the plan and necessary for it and that the parties who were to have claims against them released were contributing in a tangible and realistic way to the plan [4] .

49 While there is no CCAA plan in this case, I see no reason not to consider the principles established in *Metcalfe* when considering a sale such as this under the CCAA, with any necessary modifications due to the fact that it is not a sale pursuant to a plan. The application of those principles dictates in my view that the requested release by the first lien lenders should not be ordered.

50 The beneficiaries of the release by the first lien lenders are providing nothing to the first lien lenders in return for the release. The substance of the support agreement was that Nelson agreed to try to fetch as much as it could through a SISP but that if it could not get enough to satisfy the first lien lenders, it agreed to a credit bid by the first lien lenders. Neither Nelson nor the first lien agent or supplemental first lien agent or any other party gave up anything in return for a release from the first lien lenders. So far as RBC releasing a claim that it may have as a first lien lender against the other first lien lenders, nothing has been provided to RBC by the other first lien lenders in return for such a release. RBC as a first lien lender would be required to give up any claim it might have against the other parties to the release for any matters arising prior to or after the support agreement while receiving nothing in return for its release.

In the circumstances, I decline to approve the release by the first lien lenders requested by the applicants to be included in the approval and vesting order.

(d) Stockholders and Registration Rights Agreement

51 The applicants seek to have a Stockholders and Registration Rights Agreement declared effective and binding on all persons entitled to receive common shares of Purchaser Holdco in connection with the transaction as though such persons were signatories to the Stockholders and Registration Rights Agreement.

52 The Stockholders and Registration Rights Agreement is a contract among the purchaser's parent company, Purchaser Holdco, and the holders of Purchaser Holdco's common shares. After implementation of the transaction, the first lien lenders will be the holders of 100% of the shares of Purchaser Holdco. The Stockholders and Registration Rights Agreement was negotiated and agreed to by Purchaser Holdco and the First Lien Steering Committee (all first lien lenders except RBC). The First Lien Steering Committee would like RBC to be bound by the agreement. The evidence of this is in the affidavit of Mr. Nordal, the President and CEO of Nelson, who says that based on discussions with Mr. Chadwick, the First Lien Steering Committee requires that all of the first lien lenders to be bound to the terms of the Stockholders and Registration Rights Agreement. This is of course double hearsay as Mr. Chadwick acts for Nelson and not the First Lien Steering Committee.

The effect of what is being requested is that RBC as a shareholder of Purchaser Holdco would be bound to some shareholder agreement amongst the shareholders of Purchaser Holdco. While the remaining 88% of the shareholders of Purchaser Holdco might want to bind RBC, I see nothing in the record that would justify such a confiscation of such shareholder rights. I agree with RBC that extending the Court's jurisdiction in these CCAA proceedings and exercising it to assist the purchaser's parent company with its corporate governance is not appropriate. The purchaser and its parent company either have the contractual right to bind all first lien lenders to terms as future shareholders, or they do not.

RBC Motion

(a) Second lenders' pre-filing interest and second lien agent's fees

53 RBC seeks an order that directing Nelson to pay to RBC in its capacity as the second lien agent the second lien interest outstanding at the filing date of CDN$1,316,181.73 and the second lien fees incurred prior to the filing date of US $15,365,998.83.

54 Mr. Zarnett in argument conceded that these amounts are owed under the second lien credit agreement. There are further issues, however, being (i) whether they continue to be owed due to the intercreditor agreement (ii) whether RBC is entitled under the intercreditor agreement to request the payment and (iii) whether RBC is entitled to be paid these under the intercreditor agreement before the first lien lenders are paid in full.

55 There is a distinction between a lien subordination agreement and a payment subordination agreement. Lien subordination is limited to dealings with the collateral over which both groups of lenders hold security. It gives the senior lender a head start with respect to any enforcement actions in respect of the collateral and ensures a priority waterfall from the proceeds of enforcement over collateral. It entitles second lien lenders to receive and retain payments of interest, principal and other amounts in respect of a second lien obligation unless the receipt results from an enforcement step in respect of the collateral. By contrast, payment subordination means that subordinate lenders have also subordinated in favour of the senior lender their right to payment and have agreed to turn over all money received, whether or not derived from the proceeds of the common collateral [5] . The intercreditor agreement is a lien subordination agreement, as stated in section 8.2.

56 Nelson and the first lien agent say that RBC has no right to ask the Court to order any payments to it from the cash on hand prior to the closing of the transaction. They rely on the language of section 3.1(a)(1) that provides that until the discharge of the first lien obligations, the second lien collateral agent will not exercise any rights or remedies with respect to any collateral, institute any action or proceeding with respect to such remedies including any enforcement step under the second lien documents. RBC says it is not asking to enforce its security rights but merely asking that it be paid what it is owed and is permitted to receive under the intercreditor agreement, which does not subordinate payments but only liens. It points to section 3.1(c) that provides that:

> (c) Notwithstanding the foregoing (i.e. section 3.1(a)(1)) the Second Lien Collateral Agent and any Second Lien Claimholder may (1)... and may take such other action as it deems in good faith to be necessary to protect its rights in an insolvency proceeding" and (4) may file any... motions... which assert rights... available to unsecured creditors...arising under any insolvency... proceeding.

57 My view of the intercreditor agreement language and what has occurred is that RBC has not taken enforcement steps with respect to collateral. It has asked that payments owing to it under the second lien credit agreement up to the date of filing be paid.

58 Payment of what the second lien lenders are entitled to under the second lien credit agreement is protected under the intercreditor agreement unless it is as the result of action taken by the second lien lenders to enforce their security. Section 3.1(f) of the intercreditor agreement provides as follows:

> (f) Except as set forth is section 3.1(a) and section 4 to the extent applicable, nothing in this Agreement shall prohibit the receipt by the Second Lien Collateral Agent or any Second Lien Claimholders of the required payments of interest, principal and other amounts owed in respect of the Second Lien Obligations or receipt of payments permitted under the First Lien Loan Documents, including without limitation, under section 7.09(a) of the First Lien Credit Agreement, so long as such receipt is not the direct or indirect result of the exercise by the Second Lien Collateral Agent or any Second Lien Claimholders of rights or remedies as a secured creditor (including set off) or enforcement in contravention of this Agreement. ... (underlining added).

59 Section 3.1(a) prohibits the second lien lenders from exercising any rights or remedies with respect to the collateral before the first liens have been discharged. Section 4 requires any collateral or proceeds thereof received by the first lien collateral agent from a sale of collateral to be first applied to the first lien obligations and requires any payments received by the second

lien lenders from collateral in connection with the exercise of any right or remedy in contravention of the agreement must be paid over to the first lien collateral agent.

60 It do not agree with the first lien collateral agent that payment to RBC before the sale closes of amounts owing pre-filing under the second lien credit agreement would be in contravention of section 4.1. That section deals with cash from collateral being received by the first lien collateral agent in connection with a sale of collateral, and provides that it shall be applied to the first lien obligations until those obligations have been discharged. In this case, the cash on hand before any closing will not be received by the first lien collateral agent at all. It will be received after the closing by the purchaser.

61 The first lien collateral agent has made a credit bid on behalf of the first lien lenders. Pursuant to section 3.1(b), that credit bid is deemed to be an exercise of remedies with respect to the collateral held by the first lien lenders. Under the last paragraph of section 3.1(c), until the discharge of the first lien obligations has occurred, the sole right of the second lien collateral agent and the second lien claimholders with respect to the collateral is to hold a lien on the collateral pursuant to the second lien collateral documents and to receive a share of the proceeds thereof, if any, after the discharge of the first lien obligations has occurred. That provision is as follows:

> Without limiting the generality of the foregoing, unless and until the discharge of the First Lien Obligations has occurred, except as expressly provided in Sections 3.1(a), 6.3(b) and this Section 3.1(c), the sole right of the Second Lien Collateral Agent and the Second Lien Claimholders with respect to the Collateral is to hold a Lien of the Collateral pursuant to the Second Lien Collateral Documents for the period and to the extend granted therein and to receive a share of the proceeds thereof, if any, after the Discharge of First Lien Obligations has occurred.

62 RBC points out that its rights under section 3.1(f) to receive payment of amounts owing to the second lien lenders is not subject to section 3.1(c) at all. It is not suggested by the first lien collateral agent that this is a drafting error, but it strikes me that it may be. The provision at the end of section 3.1(c) is inconsistent with section 3.1(f) as section 3.1(c) is not an exception to section 3.1(f).

63 Both the liens of the first lien lenders and the second lien lenders are over all of the assets of Nelson. Cash is one of those assets. Therefore if payment were now made to RBC from that cash, the cash would be paid to RBC from the collateral for amounts owing under the second lien credit agreement before the obligations to the first lien lenders were discharged. The obligations to the first lien lenders will be discharged when the sale to the purchaser takes place and the first lien obligations are cancelled.

64 There is yet another provision of the intercreditor agreement that must be considered. It appears to say that if a judgment is obtained in favour of a second lien lender after exercising rights as an unsecured creditor, the judgment is to be considered a judgment lien subject to the intercreditor agreement for all purposes. Section 3.1(e) provides:

> (e) Except as otherwise specifically set forth in Sections 3.1(a) and (d), the Second Lien Collateral Agent and the Second Lien Claimholders may exercise rights and remedies as unsecured creditors against the Company or any other Grantor that has guaranteed or granted Liens to secure the Second Lien Obligations in accordance with the terms of the Second Lien Loan Documents and applicable law; provided that in the event that any Second Lien Claimholder becomes a judgment creditor in respect of Collateral as a result of its enforcement of its rights as an unsecured creditor with respect to the Second Lien Obligations, **such judgment Lien** shall be subject to the terms of this Agreement for all purposes (including in relation to the First Lien Obligations) as the other Liens securing the Second Lien Obligations are subject to this Agreement. (Emphasis added).

65 What exactly is meant by a "judgment Lien" is not stated in the intercreditor agreement and is not a defined term. If an order is made in this CCAA proceeding that the pre-filing obligations to the second lien collateral agent are to be paid from the cash on hand that Nelson holds, is that a "judgment Lien" meaning that it cannot be exercised before the first lien obligations are discharged? In this case, as the first lien obligations will be discharged as part of the closing of the transaction, does that mean that once the order is made approving the sale and the transaction closes, the cash on hand will go to the purchaser and

the judgment Lien will not be paid? It is not entirely clear. But the section gives some indication that a judgment held as a result of the second lien agent exercising rights as an unsecured creditor cannot be used to attach collateral contrary to the agreement if the first lien obligations have not been discharged.

66 I have been referred to a number of cases in which statements have been made as to the need for the priority of secured creditors to be recognized in CCAA proceedings, particularly when distributions have been ordered. While in this case we are not dealing with a distribution generally to creditors, the principles are well known and undisputed. However, in considering the priorities between the first and second lien holders in this case, the intercreditor agreement is what must govern, even with all of its warts.

67 In this case, the cash on hand held by Nelson is collateral, and subject to the rights of the first lien lenders in that collateral. An order made in favour of RBC as second lien agent would reduce that collateral. The overall tenor of the intercreditor agreement, including section 3.1(e), leads me to the conclusion that such an order in favour of RBC should not be made. I do say, however, that the issue is not at all free from doubt and that no credit should be given to those who drafted and settled the intercreditor agreement as it is far from a model of clarity. I decline to make the order sought by RBC.

68 I should note that RBC has made a claim that that Nelson and the first lien lenders who signed the First Lien Support Agreement acted in bad faith and disregarded the interests of the second lien lenders under the intercreditor agreement. RBC claims that the first lien lenders induced Nelson to breach the second lien credit agreement and that this breach resulted in damages to the second lien agent in the amounts of US$15,365,998.83 on account of interest and CDN$1,316,181.73 on account of fees. RBC says that these wrongs should be taken into account in considering whether the credit bid should be accepted and that the powers under section 11 of the CCAA should be exercised to order these amounts to be paid to RBC as second lien agent.

69 I decline to do so. No decision on this record could be possibly be made as to whether these wrongs took place. The claim for inducing breach of contract surfaced in the RBC factum filed just two days before the hearing and it would be unfair to Nelson or the first lien lenders to have to respond without the chance to fully contest these issues. Moreover, even the release sought by the applicants would not prevent RBC or any second lien lender from bringing an action for wrongs committed. RBC is able to pursue relief for these alleged wrongs in a separate action.

(b) Consent fee

70 The first lien lenders who signed the First Lien Support Agreement were paid a consent fee. That agreement, and particularly the term sheet made a part of it, provided that those first lien lenders who signed the agreement would be paid a consent fee.

71 RBC contends that because the consent fee was calculated for each first lien lender that signed the First Lien Support Agreement on the amount of the loans that any consenting first lien lenders held under the first lien credit agreement, the consent fee was paid on account of the loans and thus because all first lien lenders were to be paid equally on their loans on a pro rata basis, RBC is entitled to be paid its share of the consent fees.

72 Section 2.14 of the first lien credit agreement provides in part, as follows:

> If, other than as expressly provided elsewhere herein, **any Lender shall obtain on account of the Loans made by it,** or the participations in L/C Obligations and Swing Line Loans held by it, **any payment** (whether voluntary, involuntary, through the exercise of any right of setoff, or otherwise) **in excess of its ratable share** (or other share contemplated hereunder) thereof, such Lender shall immediately (a) notify the Administrative Agent of such fact, and (b) purchase from the other Lenders such participations in the Loans made by them and/or such subparticipations in the participations in L/C Obligations or Swing Line Loans held by them, as the case may be, as shall be necessary to cause such purchasing Lender to share the excess payment in respect of such Loans or such participations, as the case may be, pro rata with each of them ... [emphasis added].

73 RBC says that while the section refers to a first lien lender obtaining a payment "on account" of its loan, U.S. authorities under the U.S. Bankruptcy Code have held that the words "on account of" do not mean "in exchange for" but rather mean "because of." As the consent payments are calculated on the amount of the loan of any first lien lender who signed the term sheet, RBC says that they were made because of their loan and thus RBC is entitled to its share of the consent fees that were paid by virtue of section 2.14 of the first lien credit agreement.

74 I do not accept that argument. The consent fees were paid because the consenting first lien lenders signed the First Lien Support Agreement. The fact that their calculation depended on the amount of the loan made by each consenting first lien lender does not mean they were made because of the loan. RBC declined to sign the First Lien Support Agreement and is not entitled to a consent fee.

Conclusion

75 An order is to go in accordance with these reasons. As there has been mixed success, there shall be no order as to costs.

Company's motion granted; bank's motion dismissed.

Footnotes

1 I do not think that Mr. Gropper's views on what particular sections of the agreement meant is the proper subject of expert opinion on foreign law. Such an expert should confine his evidence to a statement of what the law is and how it applies generally and not express his opinion on the very facts in issue before the court. See my comments in *Nortel Networks Corp., Re* (2014), 20 C.B.R. (6th) 171 (Ont. S.C.J. [Commercial List]) para. 103.

2 See *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) at paras. 35-40 and *Brainhunter Inc., Re*, [2009] O.J. No. 5207 (Ont. S.C.J. [Commercial List]) at paras. 12-13.

3 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

4 This case does not involve a plan under the CCAA. One of the reasons for this may be that pursuant to section 6.9(b) of the intercreditor agreement, in the event the applicants commence any restructuring proceeding in Canada and put forward a plan, the applicants, the first lien lenders and the second lien lenders agreed that the first lien lenders and the second lien lenders should be classified together in one class. The second lien lenders agreed that they would only vote in favour of a plan if it satisfied one of two conditions, there was no contractual restriction on their ability to vote against a plan.

5 See 65 A.B.A. Bus Law. 809-883 (May 2010).

End of Document

TAB 6

2009 CarswellOnt 9415
Ontario Superior Court of Justice [Commercial List]

SkyPower Corp., Re

2009 CarswellOnt 9415

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

In the Matter of a Plan of Compromise or Arrangement of SkyPower Corp.

Morawetz J.

Judgment: October 27, 2009
Docket: 09-8321-00CL

Counsel: Robert Chadwick, Fred Myers, Cathy Costa, for Applicant
G. Smith & C. Costa, for Applicant
M. McNaughton, for KPMG Inc.
R. Askew, for Cad-Fairview
J. Bunting, for Nordback
J. MacDonald, for HSH Nordback Syndicate
K. Mak, for Lehman Bros.
S. Laubman, for Sean Edison
M. Weinczoh, for Golden Assoc.
R. Stabile, for CIM Group
K. McEachern, for West L.B.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Table of Authorities

Cases considered by *Morawetz J.*:

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Morawetz J.:

1 Counsel to the Applicant advised that two orders were being sought namely the stay extension to November 30/09 and the approveal of the sale of the Applicants Solar business to 1495359 Alberta ULC (the "Purchaser"), an affiliate of CIM Group, the Applicant's DIP lender. The motions were not opposed.

2 The portion of the motion relating to an authorization to draw an increased amount under the DIP facility did not proceed.

Stay Extension

3 A sales process was authorized on Aug 25/09. The sales process is progressing.

4 The third report of the Monitor provides a summary of the process to date. The Monitor has been actively involved in the process, in part due to the fact that the proposed transaction on the solar business is between the Applicant and an affiliate of the DIP lender.

5 I am satisfied having reviewed the record and having heard submission that the applicant continues to work in good faith and with due diligence such that the xtension to November 30, 2009 is awarded. The projected cash flow did contemplate on increase DIP facility.

6 The Court was advised that the Applicant has decided that the Development Expense of $3.318 million scheduled for the week of Nov 29/09 will not be incurred. In the event the situation changes, counsel advised that a further court application will he made. Based in this representation I am satisfied that there should be sufficient availability in the DIP Facility to permit operations to continue during the extension period.

7 Accordingly an order shall issue in the form presented extends the stay to November 30, 2009.

Approval of Sale to Purchase

8 The details of the proposed transaction relating to the Solar Business are set out in the Adler affidavit and the Third Report of the Monitor.

9 In addition, the Applicant filed separately a copy of the Sale purchase Agreement which disclosed the purchase price. The Monitor also filed a 2 page summary of the various offer received for the sales Business. This summary also contained comments of the Monitor which composed the various offers and the reasons why the Monitor recommended approval of the transactions with the purchaser. Having reviewed the complete record and having heard submissions and upon being advised that the secured creditors support the proposed transaction.

10 I am satisfied that the transaction provides for a reasonable outcome for affected stakeholders in the circumstances. I am also satisfied that the parties have conducted the sales process in accordance with guidelines set forth in *Royal Bucks v. Soundarin*. I specifically note that, with one exception, all competing offers to that of the purchaser, were significantly lower. With respect to the one offer that was not substantially lower, I accept the Monitor's recommendation and that of the Applicant that the offer of the purchaser is preferable and should be accepted.

11 The proposed schedules to the agreement have been amended in non-material areas. These proposed changes are acceptable.

12 I am also satisfied that proposed amendments to the draft order relating to landlord issues and secured creditors issues are acceptable.

13 The proposed transaction with the purchaser for the Sales Business is approved. It goes without further comment that nothing in this endorsement is intended to impact on any parties rights with respect to any sale approval motion relating to other assets of the Applicant.

14 The Applicant has also requested that Sale Agreement be sealed on the basis that it contains sensitive price information, the disclosure of which could be harmful to the stakeholders. Likewise, the Monitor has requested that the 2 page summary of offers also be sealed for the same reason. I am satisfied that the disclosure of this informations could be harmful to the stakeholders. Having considered the "sealing tests" as set out ion the *Sierra Club of Canada v. Canada (Minister of Finance)* [2002 CarswellNat 822 (S.C.C.)] decision of the S.C.C., I am satisfied that these two documents should be sealed pending further order.

15 An order giving effect to the foregoing is to be issued in the form presented.

End of Document

TAB 7

2012 ONSC 3367
Ontario Superior Court of Justice [Commercial List]

PCAS Patient Care Automation Services Inc., Re

2012 CarswellOnt 7248, 2012 ONSC 3367, 216 A.C.W.S. (3d) 551, 91 C.B.R. (5th) 285

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 PCAS Patient Care Automation Services Inc. and 2163279 Ontario Inc. Applicants

D.M. Brown J.

Heard: June 5-6, 2012
Judgment: June 9, 2012
Docket: CV-12-9656-00CL

Counsel: S. Babe, I. Aversa for Applicants
M. Wasserman, J. MacDonald for Monitor, PricewaterhouseCoopers Inc.
J. Porter, A. Shepherd for 2320714 Ontario Inc., the DIP Lender
B. O'Neill for Castcan Investments (secured creditor)
R.M. Slattery for Royal Bank of Canada (secured creditor)
M. Laugesen, G. Finlayson for Successful Bidder, DashRx, LLC
C. Besant for Walgreen Co.
A. Scotchmer for Lanworks Inc.
P. Saunders for himself and other shareholders
B. Jaffe for Merge, a potential bidder
S-A. Wilson for Dan Brintnell, a shareholder

Subject: Insolvency; Corporate and Commercial; Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

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

Section 67 of Financial Administration Act (FAA) does not apply to rights created by court order, including lending charge granted over all of company's property pursuant to s. 11.2(1) of Companies' Creditors Arrangement Act (CCAA) — Lender's charge created by order under CCAA is not transaction under s. 67 of FAA.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Bank of Montreal v. i Trade Finance Inc. (2011), 17 P.P.S.A.C. (3d) 250, 77 C.B.R. (5th) 231, 332 D.L.R. (4th) 193, (sub nom. *i Trade Finance Inc. v. Webworx Inc.)* 416 N.R. 166, (sub nom. *i Trade Finance Inc. v. Webworx Inc.)* 276 O.A.C. 141, (sub nom. *i Trade Finance Inc. v. Bank of Montreal)* [2011] 2 S.C.R. 360, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, 2011 SCC 26 (S.C.C.) — considered

Beauty Counsellors of Canada Ltd., Re (1986), 1986 CarswellOnt 171, 58 C.B.R. (N.S.) 237 (Ont. S.C.) — referred to

Cargill Ltd. v. Ronald (Trustee of) (2007), 2007 MBQB 102, 2007 CarswellMan 191, [2007] 8 W.W.R. 366, 32 C.B.R. (5th) 169, (sub nom. *Ronald (Bankrupt), Re)* 216 Man. R. (2d) 138 (Man. Q.B.) — referred to

Christensen, Re (1961), 2 C.B.R. (N.S.) 324, 1961 CarswellOnt 50 (Ont. S.C.) — referred to

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — referred to

Front Iron & Metal Co., Re. (1980), 36 C.B.R. (N.S.) 317, 1980 CarswellOnt 198 (Ont. Bktcy.) — referred to

Marzetti v. Marzetti (1994), [1994] 7 W.W.R. 623, (sub nom. *Marzetti v. Marzetti (Bankrupt))* 155 A.R. 340, (sub nom. *Marzetti v. Marzetti (Bankrupt))* 73 W.A.C. 340, 116 D.L.R. (4th) 577, [1994] 2 S.C.R. 765, 5 R.F.L. (4th) 1, 26 C.B.R. (3d) 161, 20 Alta. L.R. (3d) 1, (sub nom. *Marzetti v. Marzetti (Bankrupt))* 169 N.R. 161, [1998] B.P.I.R. 732, 1994 CarswellAlta 942, 1994 CarswellAlta 346 (S.C.C.) — considered

McKay & Maxwell Ltd., Re (1927), 8 C.B.R. 534, 1927 CarswellNS 5 (N.S. T.D.) — referred to

PCAS Patient Care Automation Services Inc., Re (2012), 2012 CarswellOnt 4733, 2012 ONSC 2423 (Ont. S.C.J. [Commercial List]) — referred to

PCAS Patient Care Automation Services Inc., Re (2012), 2012 ONSC 2714 (Ont. S.C.J. [Commercial List]) — referred to

PCAS Patient Care Automation Services Inc., Re (2012), 2012 ONSC 2778, 2012 CarswellOnt 5675 (Ont. S.C.J. [Commercial List]) — referred to

PCAS Patient Care Automation Services Inc., Re (2012), 2012 ONSC 2840, 2012 CarswellOnt 5922 (Ont. S.C.J. [Commercial List]) — referred to

PCAS Patient Care Automation Services Inc., Re (2012), 2012 CarswellOnt 6629, 2012 ONSC 3147 (Ont. S.C.J. [Commercial List]) — referred to

Profitt v. A.D. Productions Ltd. (Trustee of) (2002), (sub nom. *Profitt v. A.D. Productions Ltd. (Bankrupt))* 157 O.A.C. 356, (sub nom. *Profitt v. Wasserman, Arsenault Ltd.)* 2002 G.T.C. 1162, 2002 CarswellOnt 922, 32 C.B.R. (4th) 94 (Ont. C.A.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — distinguished

Selkirk, Re (1986), 1986 CarswellOnt 172, 58 C.B.R. (N.S.) 245 (Ont. S.C.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Torstar Corp. v. ITI Information Technology Institute Inc. (2002), 207 N.S.R. (2d) 9, 649 A.P.R. 9, 36 C.B.R. (4th) 114, 2002 NSSC 200, 2002 CarswellNS 335 (N.S. S.C. [In Chambers]) — referred to

White Birch Paper Holding Co., Re (2010), 2010 CarswellQue 10954, 2010 QCCS 4915, 72 C.B.R. (5th) 49 (C.S. Que.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 6(5)(a) — considered

s. 11 — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

s. 36(1) — considered

s. 36(2) — considered

s. 36(3) — considered

s. 36(6) — considered

s. 36(7) — considered

Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

Financial Administration Act, R.S.C. 1985, c. F-11
s. 67 — considered

APPLICATION by debtor companies under *Companies' Creditors Arrangement Act* for orders approving agreement of purchase and sale between debtor companies and purchaser, vesting purchased assets in purchaser and distributing sale proceeds, together with related orders including termination of proceedings under Act.

***D.M. Brown J.*:**

I. Request for sale approval, vesting and distribution orders under the CCAA

1 PCAS Patient Care Automation Services Inc. and 2163279 Ontario Inc. move under the *Companies' Creditors Arrangement Act* for orders approving the agreement of purchase and sale between the Applicants and DashRx, LLC ("DashRx") dated May 29, 2012 (the "Purchase Agreement"), vesting the Purchased Assets in DashRx and distributing the sale proceeds, together with certain other related orders, including the termination of this *CCAA* proceeding.

2 At the continuation of the hearing on June 6, 2012, I granted the requested orders. These are my reasons for so doing.

II. The proposed sale

A. The sales and investor solicitation process

3 The Applicants are healthcare technology companies which were developing an automated pharmacy dispensing platform. They were in the pre-commercialization phase of operations and encountered financing difficulties. The Initial Order under the *CCAA* was made by Morawetz J. on March 23, 2012; it appointed PricewaterhouseCoopers Inc. as Monitor.

4 The subsequent history of this matter is set out my previous Reasons. [1]

5 On May 14, 2012, I approved a sale and investor solicitation process ("SISP"). The Applicants developed the SISP with the assistance of the Monitor, the Monitor's agent, PricewaterhouseCoopers Corporate Finance Inc. ("PwCCF") and the DIP Lender. The SISP sought to maximize stakeholder value either through (i) a going concern sale of the Applicants' business and assets or (ii) new investment and a plan of compromise or arrangement. The SISP set out the procedural and substantive requirements for a qualified purchase or investment bid (a "Qualified Bid").

6 A feature of the approved SISP was the DIP Lender's "stalking horse" bid under which the DIP Lender would pay the Stalking Horse Price by a release of the DIP Indebtedness and the assumption of the outstanding senior secured claims. The terms of the Stalking Horse Bid were not required to be emulated in other Qualified Bids; the Stalking Horse Bid served to set a floor price in the SISP. The Stalking Horse Agreement was posted in the Applicants' data-room.

7 The SISP was conducted by the Applicants with the support and assistance of the Monitor. Under the terms of the SISP, bids were due by 12:00 p.m. on May 24, 2012. Two bids, including the DashRx bid, were received before the Bid Deadline, and one further bid was received on May 24, 2012, but after the Bid Deadline. These three bids were reviewed in a series of meetings held by the Applicants, the DIP Lender, the Monitor and their counsel on May 24 and May 25, 2012.

8 In a Confidential Appendix to its Seventh Report the Monitor described the financial terms of each bid and disclosed the materials filed by each bidder, as well as the written communications with each bidder.

B. The Unsuccessful Bids

9 As described in detail in the evidence, the bid submitted by Unsuccessful Bidder 1 was received the evening of May 24, but provided no cash consideration to the Applicants. On the evening of May 25, 2012, Applicants' counsel sent a letter to Unsuccessful Bidder 1 advising that its bid was not a Qualified Bid and that certain additional details would need to be provided before it could be considered a Qualified Bid. Unsuccessful Bidder 1 did not respond to the request for clarification and its bid was not treated as a Qualified Bid.

10 By letter dated May 23 Unsuccessful Bidder 2 offered to buy PCAS for cash. On May 23 the Applicants wrote to Unsuccessful Bidder 2 about how it would need to alter its bid to satisfy the requirements for a Qualified Bid in the SISP. Notwithstanding follow-up communications, Unsuccessful Bidder 2 did not respond to the Applicants' inquiries until Sunday, May 27, 2012 and it did not provide any material new information. The bid by Unsuccessful Bidder 2 therefore was not treated as a Qualified Bid under the SISP.

C. The Successful Bid

The purchaser

11 DashRx is a Delaware limited liability corporation formed by a large, California-based investment fund to purchase the assets of the Applicants. The fund's Investment Manager has approximately US$500 million in assets under management, almost exclusively in the health care and pharmaceutical sectors.

12 On May 24, 2012, prior to the bid deadline, DashRx submitted a version of the Purchase Agreement. It was the only bid received in the form of a formal asset purchase agreement. DashRx also remitted a cash deposit to the Monitor.

13 The Investment Manager had been performing due diligence and engaging in talks with the Applicants for several months prior to the commencement of the *CCAA* proceedings with an aim to investing in or purchasing PCAS. A major U.S. retail pharmacy chain, Walgreen Co. is participating in the Successful Bid as a substantial investor in DashRx. Walgreen was the potential large U.S. customer identified in previous evidence in this proceeding.

14 The Monitor requested that it be allowed to reveal the name of the Investment Manager; the latter expressed a strong preference that its identity not be disclosed. Against that background the Monitor reported that it had requested independent evidence of the financial position of the Investment Manager:

> [T]he Monitor has received additional information regarding the Investment Manager and is satisfied that the Purchaser should have the financial wherewithal to close the transaction. The Purchaser and Walgreens have shown their commitment by jointly paying the deposit and agreeing to fund the operating needs of the Company to June 6, 2012 (with a cap of $250,000). The Monitor also notes that Walgreens' participation provides another source of financial support to the Purchaser.

15 By May 27, 2012, following further negotiations and an enhancement of the DashRx bid to permit some recovery for unsecured creditors, the material terms of the DashRx Purchase Agreement were settled to a point that the Applicants, in consultation with the DIP Lender and the Monitor, were prepared to recognize the Purchase Agreement as a Qualified Bid, as a bid superior to the Stalking Horse Bid, and to identify it as the Successful Bid under the SISP, subject to final negotiation of the APA.

16 The Purchase Agreement was finalized, executed and delivered by the parties on June 1, 2012. DashRx committed to provide $250,000 to fund the Applicants' operations from May 31, 2012 until closing on June 6. That funding was received on May 31, 2012.

Purchased and Excluded Assets

17 Under the Purchase Agreement the purchaser will acquire Purchased Assets on an "as is, where is" basis. Certain tax credit entitlements are treated as Excluded Assets.

The purchase price and consideration

18 The consideration payable under the Purchase Agreement is a combination of the assumption of secured liabilities, cash, and the issuance of secured and unsecured convertible promissory notes to the Applicants' creditors, including unsecured creditors. The Applicants do not expect that there will be any surplus proceeds from the transaction for PCAS shareholders.

19 The cash portion of the purchase price is designated for:

> (i) distribution in payment of all statutory priority claims, comprised of approximately $235,000 in accrued and unpaid vacation pay;
>
> (ii) distribution to the DIP Lender to be used by the DIP Lender:
>
> > a. first, to obtain the consent of the Senior Secured Creditors, RBC and Castcan, to the discharge of their security interests and charges over the Purchased Assets and to obtain their consent for the issuance of an approval and vesting order in respect of the Sale Agreement; and,
> >
> > b. as to the balance, in partial satisfaction of the DIP Indebtedness;
>
> (iii) payment of the amounts payable under the court-approved key employee retention plan; and

(iv) payment of $100,000 to the Applicants, in trust for a trustee in bankruptcy to be appointed in respect of the Applicants, and the other direct and indirect subsidiaries of PCAS, to pay for the costs of administering their anticipated bankruptcies

20 The non-cash portion of the purchase price in the transaction will be comprised of:

(i) the assumption of the secured obligations to IBM;

(ii) interest-bearing promissory notes issued in favour of the DIP Lender, secured against the assets of DashRx and ranking junior only to the secured assumed obligations to IBM ("Secured Note"); and,

(iii) interest-bearing unsecured promissory notes issued to the Applicants, in trust, for the pool of unsecured creditors of the Applicants ("Unsecured Note").

21 At the commencement of the hearing on June 5 one unsecured creditor, Lanworks, raised concerns about the lack of transparency regarding the terms of the Unsecured Notes. The details of the terms of the Notes had been placed in the Monitor's Confidential Appendix. Prior to the resumption of the hearing on June 6 Lanworks was provided with information about the terms of the Unsecured Note, as a result of which Lanworks indicated that it neither consented to nor opposed the orders sought. The terms of the Secured and Unsecured Notes were finalized by the time of the continuation of the hearing on June 6.

Proposed releases

22 In its Seventh Report the Monitor noted that under the terms of the Purchase Agreement certain claims against former employees of the Applicants were included in the Purchased Assets and the Agreement required the Applicants to deliver a broad release in favour of the Purchaser and related parties. The Monitor observed that the releases were negotiated as part of the comprehensive arrangements in respect of the transactions contemplated by the Agreement.

Proposed occupancy agreements

23 A condition of the Sale Agreement was that PCAS provided DashRx with post-Closing occupancy and access to the Applicants' leased premises at 2440 Winston Park Drive. DashRx will pay all rent and other occupancy costs and will indemnify the Applicants. The Applicants are seeking approval of, and authorization to enter into, an occupancy agreement with DashRx.

III. The proposed distribution of sale proceeds

24 The Applicants seek an order under which the sale proceeds would be distributed to the following persons or groups:

(i) To use $235,315 to satisfy statutory priority claims relating to employee accrued and unpaid vacation pay claims;

(ii) To pay the cash component of the purchase price to the DIP Lender to be used by the DIP Lender (i) to obtain the consent of the secured creditors, RBC and Castcan Investments Inc., to discharge their security interests and charges over the Purchased Assets and (ii) as to the balance, to make partial repayment of the DIP Lending Facility;

(iii) To distribute $261,000 to the beneficiaries of the KERP Charge; and,

(iv) To pay $100,000 to PwC, the proposed Trustee in Bankruptcy, for fees in connection with the anticipated bankruptcies of the Applicants.

Payment to the DIP Lender

25 The only parties claiming interests in priority to the DIP Lender are IBM, RBC and Castcan. The Purchaser will assume the liability for IBM. As to RBC and Castcan, at the time the DIP Lending Facility was put in place the DIP Lender negotiated a Pari Passu Agreement with RBC and Castcan. An issue arose concerning the validity of the security taken by Castcan in

respect of certain assets, specifically Harmonized Sales Tax Refunds (the "HST Refunds"). I will discuss that issue in more detail below. For present purposes, suffice it to say that the Applicants propose that upon paying out the claims of the Senior Secured Creditors from the cash proceeds received on Closing, the DIP Lender will be subrogated to and/or take an assignment of the Senior Secured Creditor's claims. The Applicants are expected to receive sizable tax credit entitlements within a matter of weeks. Those entitlements are Excluded Assets under the Purchase Agreement. As a result, any claims on them will not be vested out by operation of the proposed Approval and Vesting Order.

26 Against this background the Applicants seek an order authorizing and directing them, and any Trustee, to distribute to the DIP Lender amounts equal to any specified tax credit entitlements received. Such distributions would enable the DIP Lender to recoup part of the purchase price it will flow through to one of the Senior Secured Creditors — Castcan - on Closing.

27 If the aggregate amount of all tax credit entitlements received by the Applicants/Trustee post-Closing and distributed to the DIP Lender end up being less than the aggregate amount that the DIP Lender paid to RBC and Castcan out of the cash proceeds of the Transaction on Closing, then the DIP Lender will be issued an Additional Secured Note to cover the difference. The amount of the Additional Secured Note will come out of the pool of funds otherwise set aside for the unsecured creditors of the Applicants. The Unsecured Note therefore will be less than the total pool of possible proceeds for unsecured creditors, and an additional Unsecured Note will be issued to the Trustee for the benefit of the unsecured creditors once the face amount of the Additional Secured Note is known.

28 Although the DIP Indebtedness is not being paid out in full on Closing, the DIP Lender has consented to the payments of cash on account of the KERP and the future costs of bankruptcy estate administration.

29 Under the Initial Order the Directors' Charge ranked ahead of the KERP Charge. The Applicants asked the Court to terminate the Directors' Charge. Those benefiting from the Directors' Charge did not oppose that request.

KERP employees

30 The KERP originally benefitted twenty employees and allowed for a total maximum allocation of $500,000. The KERP was to be paid in the following installments: (i) 20% upon the raising of $8,000,000 for funding the DIP Facility, and PCAS receiving the authorization of this Court to borrow up to or in excess of that amount; (ii) 20% at the midway mark of the SISP; and, (iii) the balance of 60% upon the earliest of (i) the closing of a sale of all or substantially all of the assets, property and undertaking of the Applicants, or (ii) Court approval and sanction of a plan of arrangement or compromise in the *CCAA* Proceedings.

31 The commitment under the DIP Facility never reached $8 million, so the initial payment was not made. The second scheduled 20% payment was made on May 25, 2012. Payment of the 60% balance will be made from the cash proceeds on closing. Due to attrition, only sixteen employees remain in the KERP. The final 60% installment payable from the transaction proceeds will total $242,100, resulting in total KERP payments of $322,800.

IV. Positions of the Parties

32 The Senior Secured Creditors supported the orders sought by the Applicants. The Monitor recommended that the Court grant the orders. As noted, one unsecured creditor, Lanworks, sought to obtain further information and, on so doing, advised that it neither consented to nor opposed the orders sought. No other creditors appeared on the return of the motion.

33 The hearing of the motion started at 4:45 p.m. on June 5, 2012. At that time Mr. Peter Saunders, a shareholder, stated that he appeared on behalf of himself and other shareholders. He read a statement which expressed concern about the bidding process, and Mr. Saunders indicated that he and other shareholders would be meeting with counsel at 8:00 a.m. on June 6. Over the opposition of the Applicants and the Purchaser, I adjourned the hearing to June 6 at 10:00 a.m.

34 On June 6 Mr. Saunders returned, but without counsel. Ms. Wilson appeared for the first time on behalf of another shareholder, Mr. Dan Brintnell, and asked to make submissions. Also, Mr. Jaffe appeared on behalf of a potential bidder,

Merge, which had not participated in the SISP and asked for leave to submit an offer. What then transpired was described in the following portions of my handwritten endorsement of June 6:

> This is the continuation of the approval/vesting/distribution motion commenced yesterday @ 4:45 p.m. At yesterday's hearing I asked questions of counsel for the applicants, Monitor and DIP lender on certain points and was provided answers.
>
> . . .
>
> Yesterday Mr. Peter Saunders, a shareholder, on behalf of himself and some other SHs, read a statement dated June 5/12 expressing concern about the bidding process. Mr. Saunders indicated they would be meeting counsel today @ 8 a.m. I adj'd the matter to 10 a.m. today to facilitate that meeting. This morning Mr. Saunders advised that counsel was unable to meet them; they plan to meet this afternoon. Mr. Saunders indicated that their counsel would like a 5-day adjm't of this motion.
>
> I will not grant the requested adjm't. By reasons dated May 14/12 I approved the SISP. By reasons dated May 28 I granted an extension of the stay until June 6. Both Reasons made clear the urgent nature of the SISP in the particular circumstances of these companies. No appeal was taken from, nor stay sought in respect of, either order. The public portion of the present motion materials provide detailed information about the conduct of the SISP and the bids. The portions sought to be sealed meet the test in *Sierra Club*. From previous motions I am aware that the applicants have communicated frequently with shareholders; the Monitor has posted all materials on its website.
>
> I am satisfied in the circumstances reasonable notice of this motion and the SISP has been given to all affected parties. The shareholders have not previously participated; that was their choice. It is unreasonable for them to seek to adjourn matters at this stage. The applicants run out of money tomorrow; the shareholders offer no concrete alternative.
>
> After writing these Reasons, on my return to Court, I was advised by counsel for Merge that they only learned of the sale process on May 30 and now wish to tender an Offer. I did not accept the Offer. The SISP was an open and transparent process. The OCA in *Soundair* spoke about the need to maintain the integrity of a court-approved sale process. [2] I am not prepared to accept an offer at this late stage. I note [that] Merge did not have counsel at yesterday's hearing.
>
> Ms. Wilson appeared for a SH, Dan Brintnell. After obtaining instructions, Ms. Wilson advised she had no further submissions.

V. Analysis of the proposed sale transaction

A. Guiding legal principles

35 In most circumstances resort is made to the *CCAA* to "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets" and to create "conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all". The reality, however, is that "reorganizations of differing complexity require different legal mechanisms." This has led courts to recognize that the *CCAA* may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership, or to wind-up or liquidate it. [3]

36 The portions of section 36 of the *CCAA* relevant to this proposed sale to a non-related person are as follows:

> 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.
>
> (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.

(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.

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, 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.

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

B. Consideration of the factors

Was notice of the application given to the secured creditors who are likely to be affected by the proposed sale or disposition?

37 The applicants have satisfied this requirement. The Purchaser will assume the liability owing to IBM Canada. The other two secured creditors, RBC and Castcan, support the proposed transaction.

The reasonableness of the process leading to the proposed sale

38 The SISP was approved by this Court by order made May 14, 2012. In my Reasons of that date I stated:

> Given the extensive efforts to date by management of the applicants to solicit interest in the business and given the liquidity crunch facing the applicants, I was satisfied that the proposed SISP would result, in the specific circumstances of this case, in a fair, transparent and commercially efficacious process which should allow a sufficient opportunity for interested parties to come forward with a superior offer and thereby optimize the chances of securing the best possible price for the assets up for sale or the best possible investment in the continuing operations of the applicants. For those reasons I approved the SISP. [4]

39 Although the applicants took the lead in running the SISP, the evidence disclosed that the Monitor was involved in all stages of the process.

40 Before the commencement of these *CCAA* proceedings, members of the PCAS Board of Directors had engaged in separate dialogues with a significant number of parties who were interested in either investing in the DIP Lender to provide financing to the Applicants, purchasing the assets of the Applicants, or buying PCAS. During the SISP PCAS, with the assistance of PwCCF and the Monitor, (i) ran an electronic due diligence data-room, (ii) identified 184 potential bidders from around the globe and contacted 164 of them, (iii) developed a "teaser" which was circulated to 121 of the identified parties, as well as a confidential information memorandum which was posted to the data room and sent to the all of the 18 interested parties who had executed a non-disclosure agreement, (iv) conducted site tours at its Premises, with the Monitor in attendance, for seven potential bidders, (v) developed a non-reliance letter for Qualified Bidders to sign in order to be able to review third-party review of the PCAS technology prepared for the Board and facilitated meetings with the authors of the Technology Review at the request of two potential bidders.

41 In its Sixth Report dated May 28, 2012 the Monitor described in detail the steps taken up until that point of time in conducting the SISP. The Monitor provided updated information in its Seventh Report dated June 1, 2012. In its Confidential Appendix to the Seventh Report the Monitor presented detailed, un-redacted information about the bids which were tendered, the resulting communications with the bidders, and its comparative evaluation of the bids.

42 I am satisfied that the SISP run by the Applicants, with the extensive involvement of the Monitor, complied with the terms of the SISP approved in my May 14 Order.

43 As mentioned, on the continuation of the approval hearing on June 6 counsel appeared for a potential bidder, Merge, seeking to submit an offer on behalf of his client. In *Royal Bank v. Soundair Corp.*, in the context of an approval motion for a sale by a court-appointed receiver, Galligan J. considered the approach which a court should take where a second offer was made after a receiver had entered into an agreement of purchase and sale. He cited two judgments by Saunders J. which had held that the court should consider the second offer, if constituting a "substantially higher bid",5 and Galligan J.A. continued:

> What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.
>
> If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court. [5]

44 In the present case I departed from the process described in the *Soundair* case and declined to accept Merge's offer for consideration. The facts in *Soundair* are quite distinguishable. In the *Soundair* case the second bidder had secured a court order permitting it to make an offer. By contrast, in the present case the court had approved a SISP which set a May 24, 2012 bid deadline. All other bids complied, or came very close to complying, with that court-approved deadline. Merge contended that it did not learn of the bidding process until May 30, a week after the bid deadline. The prompt posting of all court orders on the Monitor's website, when combined with Merge's delays in pursuing an offer after learning of this proceeding make it completely unreasonable for Merge to expect that a court would grant it leave to submit an offer for consideration. The court-approved SISP would be stood on its head were that allowed.

45 Moreover, as was apparent from the Monitor's detailed narration of the consideration given to the bids which were filed on or just after the court-approved bid deadline, time was spent during the SISP process for discussions amongst the Applicants, the Monitor and the bidders to ascertain whether their bids constituted Qualified Bids. The stay of proceedings in this case was set to expire on June 6, the date Merge came forth in court with its offer. The only cash available for Applicants' operations through to June 6 was the advance of $250,000 by the Purchaser to the Applicants on May 31. The Applicants stated that they would be out of funds by day's end on June 6 or early on June 7. Consequently, there was no realistic prospect that any offer tendered on June 6 could receive a measured consideration while the companies continued to operate.

46 Finally, Merge did not tender its offer at the commencement of the approval motion on June 5. Its counsel made no submissions that day nor signed the counsel sheet. The only reason I adjourned the hearing to June 6 was to afford some shareholders a brief opportunity to consult with counsel. I made it clear on the record on June 5 that hearing from those shareholders was the only order of business for June 6. Merge did not come forth until the resumption of the hearing on June 6. In those circumstances it was difficult to treat Merge's proffer of a bid as a serious one.

47 In sum, the compliance of the Applicants with the court-approved SISP and the unreasonableness of the timing of Merge's offer led me to conclude that the process leading to the proposed sale was reasonable.

Did the Monitor approve the process leading to the proposed sale or disposition?

48 In its Fifth Report dated May 11, 2012 the Monitor recommended approving the SISP.

Did the Monitor file with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy?

49 In its Seventh Report the Monitor set out at some length its views about the proposed sale transaction:

> The Monitor is of the view that the transaction contemplated by the APA meets the factors set out in section 36(3) of the *CCAA*. As previously described in the Fifth Report and the Sixth Report, the Monitor is of the view that an expedited SISP was likely the only viable process to maximize the value of the Company for the benefit of its stakeholders given the Company's dire liquidity situation.
>
> The APA provides for a going concern sale of the Company's business that maintains some Canadian operations and should allow for some continued employment.
>
> The Company and the DIP Lender developed the SISP in consultation with Monitor and, in the Monitor's view, the Company implemented a fair, transparent and efficient SISP in the circumstances in accordance with the Orders of this Court and the Court's reasons for decision dated May 14, 2012. Given the Company's liquidity situation, the necessity of implementing an expedited SISP and the bids received, it is the Monitor's view that the price obtained for the Company's assets is fair and reasonable in the circumstances. In addition, as reported in the Second Report, the Monitor is of the view that it is unlikely that a Trustee would have been able to appropriately take possession, market and sell the technology, intellectual property and other assets of the Company as a result of the Company having effectively no cash, limited accounts receivable and few unencumbered assets available to be monetized quickly in liquidation.

The Monitor recommended approving the Successful Bid.

To what extent were the creditors consulted?

50 The record disclosed that discussions had taken place with the secured creditors. Appropriate notice was given by the Applicants of all steps taken to seek approval of the DIP Lending Facility, the various extensions of the stay and approval of the SISP. As noted, only one unsecured creditor appeared at the approval hearing and its information questions were answered.

What are the effects of the proposed sale or disposition on the creditors and other interested parties?

51 As summarized by the Monitor in its Seventh Report:

> The APA does not provide for any recovery for the Company's shareholders. The APA provides as follows:
>
> a) statutory priority claims are paid in full in cash.
>
> b) The beneficiaries of the KERP are to be paid in full and in cash.
>
> c) The claim of the DIP Lender will be partially satisfied through a combination of cash and interest bearing secured notes convertible at maturity into cash or common shares of the Purchaser.
>
> d) The Company's unsecured creditors will receive their pro rata share of a pool of interest bearing unsecured notes convertible at maturity into cash or common shares of the Purchaser.

e) The Company will assume the Assumed Liability [IBM].

In addition, the APA also provides funding for a bankruptcy of the Company or a continuation of the CCAA Proceedings in respect of the Company. As described in further detail below, it is anticipated that the Company will be assigned into bankruptcy and that the entitlement of the unsecured creditors to the unsecured convertible notes will be determined through the statutory claims process provided under the *Bankruptcy and Insolvency Act* ... It is anticipated that one unsecured note will be provided to a trustee in bankruptcy to be appointed in respect of the Company.

Is the consideration to be received for the assets reasonable and fair, taking into account their market value?

52 In its Seventh Report the Monitor expressed its view that "the price obtained for the Company's assets is fair and reasonable in the circumstances". In the *Soundair* case Galligan J.A. stated:

> At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. [6]

So, too, in this case. Although no valuation was filed in respect of the companies' assets, the evidence filed on previous motions disclosed that the applicants had made efforts for many months prior to initiating *CCAA* proceedings to secure further investment in or the sale of the companies. The state of the companies, and the potential business opportunity they offered, were extensively known. Notwithstanding the short SISP, the Monitor reported that contact was made with a large number of potentially interested parties. Only three bids resulted. Of those three, two were not treated as Qualified Bids. The record, especially the Monitor's Confidential Appendix, supported the selection of the DashRx offer as the Successful Bid. Against the backdrop of those efforts, I concluded that the proposed purchase price was fair and reasonable.

Does the proposed transaction satisfy the requirements of section 36(7) of the CCCA?

53 The applicants did not sponsor a pension plan for its employees. With the payment of the statutory priority claims from the proceeds of sale, obligations under section 6(5)(a) of the *CCAA* will be satisfied.

C. Conclusion

54 In sum, the proposed Purchase Agreement met the specific factors enumerated in section 36(3) of the *CCAA* and, when looked at as a whole in the particular circumstances of this case, represented a fair and reasonable transaction. [7] For those reasons I authorized the proposed Purchase Agreement and granted the vesting order which was sought.

VI. Analysis of the proposed distribution

55 The distribution of the sale proceeds proposed by the Applicants, and supported by the Monitor, was straight-forward, save for one issue — the validity of Castcan's security in respect of HST Refunds.

A. The Castcan security issue described

56 In its Seventh Report the Monitor described the Pari Passu Agreement which the DIP Lender had negotiated with two secured creditors, RBC and Castcan, at the time of putting in place the DIP Lending Facility:

> The Monitor has been advised that the DIP Lender entered into an agreement with Castcan and others, whereby the DIP Lender agreed that its claims against the Company would be subordinate to the claims of Castcan (the "Pari Passu Agreement"). Pursuant to the Pari Passu Agreement, Castcan has the right to be repaid in full before the DIP Lender receives any consideration for the amounts it advanced under the DIP Facility... The Monitor has been advised that the DIP Lender has agreed that its position will also be subordinate to RBC, as provided for in the Initial Order.

> Although the Purchaser was willing to assume the liabilities owed to RBC and Castcan, they both advised that they were not willing to become creditors of the Purchaser and wanted to be paid in cash in full on closing. In order to accommodate the secured creditors' requests, the DIP Lender has agreed to pay RBC and Castcan in full in cash from the amount payable to the DIP Lender pursuant to the terms of the APA. As a result of that payment, the DIP Lender will be subrogated to or take an assignment of the positions of RBC and Castcan in respect of their validly perfected and secured positions, subject to the lack of clarity in the law in respect of the Castcan Loan and Security discussed below.

57 The lack of clarity in the law in respect of the Castcan Loan stemmed from the assignment of Crown debts, on a full recourse basis, made in the March 6, 2012 Factor Agreement between Castcan and the Applicants. The Crown debts assigned to Castcan included certain Scientific Research and Experimental Development ("SR&ED") refundable tax credit entitlements, Ontario Innovation Tax Credit ("OITC") refunds and harmonized sales tax ("HST") refunds. The Applicants executed a GSA in favour of Castcan to secure the obligations owing to Castcan, including those under the Factor Agreement.

58 Counsel to the Monitor provided an opinion that the assignment of the SR&ED Tax Credits and the OITC Tax Credits under the Factor Agreement was valid and the security granted in each GSA in respect of such assignments was valid and enforceable.

59 Section 67 of the *Financial Administration Act (Canada)*, R.S.C. 1985, c. F-11 (the "*FAA*") provides as follows:

> Except as provided in this Act or any other Act of Parliament,
>
> (a) a Crown debt is not assignable; and
>
> (b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt.

In light of that section, counsel to the Monitor advised that the HST Refunds might not be assignable and that the security granted in respect of the HST Refunds might not be valid and enforceable because no provision in the *Excise Tax Act* (Canada) or the *FAA* exempted the HST Refunds from section 67 of the *FAA*.

60 Castcan took the position that certain provisions in the Factor Agreement entitled it, in any event, to receive the HST Refunds. The Monitor commented on part of the argument advanced by Castcan:

> Section 12 of the Factor Agreement provides that if any right or entitlement that, as a matter of law is not assignable, the Company will: (a) co-operate with Castan to provide the benefits of these Non-Assignable Rights to Castcan, including, holding them in trust; (b) enforce any rights of Castcan arising from these Non-Assignable Rights; (c) take all actions to ensure that the value of these Non-Assignable Rights are preserved; and (d) pay over to Castcan all monies collected in respect of these Non-Assignable Rights. One interpretation is that the obligations set out in Section 12 of the Factor Agreement with respect to the HST Refunds are enforceable and are secured by the GSAs. Another interpretation is that Section 12 simply gives rise to a claim in equity against the Company and that such an equitable claim may not be secured by the GSAs.
>
> The Monitor is of the view that there is strong argument that Castcan has a claim against the Company for unjust enrichment and, to the extent of such unjust enrichment, a Court may order that a constructive trust applies to the monies advanced by Castcan in respect of the HST Refunds.
>
> Given the provisions of the FAA and existing case law, counsel to the Monitor has advised that it cannot conclude with certainty that the obligations in the Factor Agreement in favour of Castcan with respect to the HST Refunds are secured by the GSAs. Accordingly, the Monitor is of the view that it is unclear whether any payment by the Company to Castcan in respect of the HST Refunds should be made in priority to other creditors.
>
> The Monitor is of the view that the equities clearly favour paying Castcan the full amount owed to it under the Factor Agreement, including the amounts in respect of the HST Refunds. The Monitor notes that Castcan paid $1,000,000 to the

> Company in good faith on a full recourse basis at a time when the Company was in dire need of liquidity. The vast majority of the amounts paid by Castcan were used to fund the Company's payroll. In the Monitor's view, it would be inequitable for the Company or any of its creditors to get a windfall at the expense of a creditor that provided value to the Company as a result of lack of clarity in the existing law and the wording of the Factor Agreement.

61 The Applicants proposed that upon paying out the claims of the Senior Secured Creditors from the cash proceeds received on closing, the DIP Lender would be subrogated to and/or take an assignment of the Senior Secured Creditor's claims. The Applicants also sought an order which provided, in part, that they, or the proposed Trustee, pay to the DIP Lender any tax credit entitlements received in respect of the HST Refund, notwithstanding section 67 of the *FAA*. The Monitor explained the rationale for this request:

> The DIP Lender is of the view that since there is likely no secondary market for the secured convertible notes, the net present value of the secured convertible notes is less than the face value of such notes. As a result, the DIP Lender is taking the position that the consideration it is receiving is insufficient to satisfy the full amount of the DIP Lender's claim against the Company. The DIP Lender is also of the view that the DIP Lender's Charge should continue to secure the obligations owing to the DIP Lender as a result of its shortfall after distribution of the proceeds to it on closing of the transaction contemplated by the APA. The Monitor supports the DIP Lender's views.
>
> The DIP Lender is also of the view that the value of the notes should be discounted by an amount that is at least as great as the amount of the HST Refunds in order to permit the proceeds of the HST Refunds once received by the estate to be paid to the DIP Lender on account of its DIP Charge. The Monitor supports the DIP Lender's views with respect to the DIP Lender's Charge. Accordingly, the Monitor is of the view that the DIP Lender's Charge should remain effective over all of the Excluded Assets until such time as such refunds are received and become proceeds of the estate and the DIP Lender is repaid in full.
>
> The parties with an economic interest in the proceeds of the transaction and the Tax Credit Entitlements have agreed to the arrangement with the DIP Lender described above with respect to the HST Refunds. Such an arrangement will permit the DIP Lender to satisfy its obligations under the Pari Passu Agreement while still receiving the consideration that was agreed to be paid to it pursuant to the APA.

B. Legal analysis

62 Section 67 of the *FAA* provides that "no transaction purporting to be an assignment of a Crown debt is effective" except as provided in that Act or any other federal Act. In *Marzetti v. Marzetti* the Supreme Court of Canada held that under section 67 "a purported assignment of a Crown debt is rendered absolutely ineffective, as between debtor and creditor, and as between assignor and assignee." [8] The Court of Appeal, in *Profitt v. A.D. Productions Ltd. (Trustee of)*, held that purported assignments of federal sales tax refunds were invalid. [9]

63 In their factum the Applicants pointed to several cases which they contended might limit the application of the decisions in *Marzetti* and *Profitt*. [10] Castcan had submitted to the Monitor that several provisions of the Factor Agreement operated to give it priority to the HST Refund notwithstanding the *Marzetti* and *Profitt* decisions. I did not need to address those points to decide the motion. Assuming, for purposes of argument, the ineffectiveness of Castcan's security as it related to the HST Refund, that refund would constitute property of the Applicants. Pursuant to the Initial Order the DIP Lender was granted a charge on the "Property" of the Applicants which was defined as the Applicants' "current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof". The "Property" of the applicants included their entitlement to the HST Refund. Accordingly, in the event of a failure of Castcan's security, the DIP Lender would be entitled to the HST Refund.

64 Section 67 of the *FAA* does not prevent such a result since it only renders ineffective any "*transaction* purporting to be an assignment of a Crown debt". The DIP Lender's Charge created by the Initial Order was not such a "transaction". As the Supreme Court of Canada pointed out in *Bank of Montreal v. i Trade Finance Inc.*, rights which result from a court order are

not rights stemming from a "transaction". [11] Section 67 of the *FAA* does not apply to rights created by a court order, including a DIP lending charge granted over all of a company's property pursuant to section 11.2(1) of the *CCAA*.

65 Since the DIP Lender would be entitled to the HST Refund in the event of a defect in Castcan's security, it was open to the DIP Lender to agree, with Castcan, as a matter of contract, that Castcan should receive full payout as contemplated by the Pari Passu Agreement.

66 As to the Applicants' request for an order that they, or the proposed Trustee, pay to the DIP Lender any tax credit entitlements received in respect of the HST Refund, I was satisfied that it was appropriate to exercise my discretion under section 11 of the *CCAA* to make such an order. I accepted the Monitor's view that the DIP Lender was entitled to be repaid in full upon the conclusion of the *CCAA* proceedings and that its charge should continue to secure the obligations to it as a result of the shortfall after distribution of the transaction proceeds. The use of the Secured Note to repay the DIP Lender entails a risk that the DIP Lender might not receive full repayment of its DIP Lending Facility. Consequently, I accepted the Monitor's view that it would be appropriate to discount the value of the note by an amount equal to the HST Refund. Such a result promotes, in part, the remedial purposes of the *CCAA* by ensuring that DIP lenders, whose role often is critical to the successful completion of a re-organization, can advance interim financing with the reasonable assurance of receiving repayment of their DIP loans.

67 As to the distribution of $100,000 of the sales proceeds to fund bankruptcy proceedings involving the Applicants, I accepted the Monitor's view that since no further funds existed to continue the *CCAA* proceedings, a bankruptcy would serve as the most cost effective and efficient way in which to complete the winding-up of the companies' affairs, including establishing a mechanism to determine the quantum for unsecured claims.

68 For those reasons I approved the distribution of the sale proceeds proposed by the Applicants, as well as the related orders terminating the *CCAA* proceedings upon the Monitor filing its discharge certificate and approving the Monitor's Seventh Report and the activities described therein.

VII. Sealing order

69 The information contained in the Confidential Appendix to the Monitor's Seventh Report clearly met the criteria for a sealing order set out in *Sierra Club of Canada v. Canada (Minister of Finance)*. [12] In order to protect the integrity of the SISP and the proposed sales transaction, I granted an order that the appendix be sealed until the completion of the Purchase Agreement transaction.

Application granted.

Footnotes

1 April 20, 2012 (2012 ONSC 2423 (Ont. S.C.J. [Commercial List])); May 5, 2012 (2012 ONSC 2714 (Ont. S.C.J. [Commercial List])); May 8 (2012 ONSC 2778 (Ont. S.C.J. [Commercial List])); May 14, 2012 (2012 ONSC 2840 (Ont. S.C.J. [Commercial List])); May 28, 2012 (2012 ONSC 3147 (Ont. S.C.J. [Commercial List])).

2 *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). See in particular the Reasons of Galligan J.A. at pp. 7d to 10c.

3 See the cases summarized in *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]), para. 32.

4 2012 ONSC 2840 (Ont. S.C.J. [Commercial List]), para. 19. 5 *Selkirk, Re* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.); *Beauty Counsellors of Canada Ltd., Re* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.)

5 *Soundair, supra.*, pp. 9h-10c.

6 *Soundair, supra.*, p. 8g.

7 *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.), paras. 48 and 49.

8 [1994] 2 S.C.R. 765 (S.C.C.), para. 99.

9 (2002), 32 C.B.R. (4th) 94 (Ont. C.A.), para. 28.

10 *Cargill Ltd. v. Ronald (Trustee of)* (2007), 32 C.B.R. (5th) 169 (Man. Q.B.); *McKay & Maxwell Ltd., Re* (1927), 8 C.B.R. 534 (N.S. T.D.); *Christensen, Re* (1961), 2 C.B.R. (N.S.) 324 (Ont. S.C.); *Front Iron & Metal Co., Re.* (1980), 36 C.B.R. (N.S.) 317 (Ont. Bktcy.).

11 [2011] 2 S.C.R. 360 (S.C.C.), para. 30. See also, *Torstar Corp. v. ITI Information Technology Institute Inc.* (2002), 36 C.B.R. (4th) 114 (N.S. S.C. [In Chambers]), paras. 29 and 32.

12 [2002] 2 S.C.R. 522 (S.C.C.).

End of Document

TAB 8

2015 ONSC 1487
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 3261, 2015 ONSC 1487, 23 C.B.R. (6th) 314, 252 A.C.W.S. (3d) 9

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

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

G.B. Morawetz R.S.J.

Heard: March 5, 2015
Judgment: March 5, 2015
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, Tracy Sandler, Shawn Irving for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz for Target Corporation
D.J. Miller for Oxford Properties Group Inc.
Jeff Carhart for Hamilton Beach Corp. et al.
Alan Mark, Melaney Wagner for Monitor, Alvarez & Marsal Inc.
Leonard Loewith for Solutions 2 Go et al.
Aubrey Kauffman for Ivanhoe Cambridge Inc.
Ruzbeh Hosseini for Amskor Corporation
Sean Zweig for RioCan Management Inc. and Kingsett Capital Inc.
Lou Brzezinski, Alexandra Teoderescu for Thyssenkrupp Elevator (Canada) Limited, Advitek, Universal Studios Canada Inc., Nintendo of Canada, Ltd., and Bentall Kennedy (Canada) LP Group
Melvyn L. Solmon for ISSI Inc.

Subject: Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Retail chain store encountered financial difficulties and proceedings were engaged under Companies' Creditors Arrangement Act — Chain entered into agreement under which it was to surrender its interest in eleven leases to landlord entities in consideration for purchase price and certain other benefits — To enter into agreement, leases were withdrawn from auction and sale process — Sublessors, who were creditors, would require payment for breaking leases — Certain parties brought motion to approve sale — Motion granted — No indication debtor acted improvidently — Debtor, financial advisor and monitor felt lease transaction was in best interests of debtors and their stakeholders and that consideration received was reasonable, and this view was entitled to deference by court — Process for achieving sale was fair and reasonable — Actual price under agreement was commercially sensitive, and was ordered sealed.

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 68 C.B.R. (5th) 233, 2010 CarswellOnt 3509, 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

White Birch Paper Holding Co., Re (2010), 2010 CarswellQue 10954, 2010 QCCS 4915, 72 C.B.R. (5th) 49 (C.S. Que.) — referred to

White Birch Paper Holding Co., Re (2010), 72 C.B.R. (5th) 74, 2010 CarswellQue 11534, 2010 QCCA 1950 (C.A. Que.) — referred to

Statutes considered:

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

s. 36(3) — considered

MOTION to approve sale agreement in proceedings under Companies' Creditors Arrangement Act.

***G.B. Morawetz R.S.J.*:**

1 On February 11, 2015, Target Canada Co. ("TCC") received Court approval to conduct a real estate sales process (the "Real Property Portfolio Sales Process") to seek qualified purchasers for TCC's leases and other real property, to be conducted by the Target Canada Entities in consultation with their financial advisor, Lazard Fréres & Co., LLC (the "Financial Advisor") and their real estate advisor, Northwest Atlantic (Canada) Co. (the "Broker"), with the supervision and oversight of the Monitor.

2 The Applicants bring this motion to approve a lease transaction agreement (the "Lease Transaction Agreement") that has been negotiated in response to an unsolicited bid by certain landlords (Oxford Properties Corporation ("Oxford") and Ivanhoe Cambridge Inc. ("IC") and certain others, together the "Landlord Entities").

3 Under the Lease Transaction Agreement, TCC will surrender its interest in eleven leases (the "Eleven Leases") to the Landlord Entities in consideration for the purchase price and certain other benefits.

4 The Target Entities decided, after considering the likely benefits and risks associated with the unsolicited offer by the Landlord Entities, to exercise their right under the terms of the Real Property Portfolio Sales Process to withdraw the applicable leases from the bidding and auction phases of the process. The Target Canada Entities contend that the decision to exercise this right was made based on the informed business judgment of the Target Canada Entities with advice from the Financial Advisor and the Broker, in consultation and with the approval of the Monitor.

5 The Applicants submit that the process by which the decision was made to pursue a potential transaction with the Landlord Entities, and withdraw the Eleven Leases from the bidding and auction phases of the Real Property Portfolio Sales Process, was fair and reasonable in light of the facts and circumstances. Further, they submit that the process by which the benefits of the Lease Transaction Agreement were evaluated, and the Lease Transaction Agreement was negotiated, was reasonable in the circumstances.

6 The Applicants contend that the purchase price being offered by the Landlord Entities is in the high-range of value for the Eleven Leases. As such, the Applicants contend that the price is reasonable, taking into account the market value of the assets. Moreover, the Applicants submit that the estate of the Target Canada Entities will benefit not only from the value represented by the purchase price, but from the release of claims. That includes the potentially material claims that the Landlord Entities may otherwise have been entitled to assert against the estate of the Target Canada Entities, if some or all of the Eleven Leases had been purchased by a third party or disclaimed by the Target Canada Entities.

7 The Target Canada Entities submit that it is in their best interests and that of their stakeholders to enter into the Lease Transaction Agreement. They also rely on the Monitor's approval of and consent to the Target Canada Entities entering into the Lease Transaction Agreement.

8 The Target Canada Entities are of the view that the Lease Transaction Agreement secures premium pricing for the Eleven Leases in a manner that is both certain and efficient, while allowing the Target Canada Entities to continue the Inventory Liquidation Process for the benefit of all stakeholders and to honour their commitments to the pharmacy franchisees.

9 The terms of the Lease Transaction Agreement are set out in the affidavit of Mark J. Wong, sworn February 27, 2015, and are also summarized in the Third Report of the Monitor. The Lease Transaction Agreement is also summarized in the factum submitted by the Applicants.

10 If approved, the closing of the Lease Transaction Agreement is scheduled for March 6, 2015.

11 One aspect of the Lease Transaction Agreement requires specific mention. Almost all of TCC's retail store leases were subleased to TCC Propco. The Premises were then subleased back to TCC. The Applicants contend that these arrangements were reflected in certain agreements between the parties (the "TCC Propco Agreements"). Mr. Wong states in his affidavit that it is a condition of the Lease Transaction Agreement that TCC terminate any subleases prior to closing. TCC will also wind-down other arrangements with TCC Propco.

12 The Applicants contend that the TCC Propco Agreements have been terminated in accordance with their terms and an early termination payment is now owing as a result of this wind-down by TCC to TCC Propco, which, they contend, will be addressed within a claims process to be approved in due course by the Court. The claim of TCC Propco is not insignificant. This intercompany claim is expected to be in the range of $1.9 billion.

13 The relief requested by the Target Canada Entities was not opposed.

14 Section 36 of the CCAA sets out the applicable legal test for obtaining court approval where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding.

15 In deciding whether to grant authorization, pursuant to section 36(3), 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 its 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 asset is reasonable and fair, taking into account its market value.

16 The factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check list that must be followed in every sale transaction under the CCAA (see: *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.); leave to appeal refused 2010 QCCA 1950 (C.A. Que.).

17 The factors overlap, to a certain degree, with the *Soundair* factors that were applied in approving sale transactions under pre-amendment CCAA case law (see: *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]), citing *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) ("Soundair")).

18 I am satisfied, having reviewed the record and hearing submissions, that — taking into account the factors listed in s. 36(3) of the CCAA — the Lease Transaction Agreement should be approved. In arriving at this conclusion, I have taken the following into account: in the absence of any indication that the Target Canada Entities have acted improvidently, the informed business judgment of the Target Canada Entities (as supported by the advice of the Financial Advisor and the consent of the Monitor) that the Lease Transaction Agreement is in the best interests of the Target Canada Entities and their stakeholders is entitled to deference by this Court.

19 I am also satisfied that the process for achieving the Sale Transaction was fair and reasonable in the circumstances. It is also noted that the Monitor concurs with the assessment of the Target Canada Entities.

20 The Target Canada Entities, the Monitor and the Financial Advisor are all of the view that the consideration to be received by TCC is reasonable, taking into account the market value of the Eleven Leases.

21 I am also satisfied that the Transaction is in the best interest of the stakeholders.

22 The Applicants also submit that all of the other statutory requirements for obtaining relief under section 36 of the CCAA have been satisfied. Having reviewed the factum and, in particular, paragraphs 46 and 47, I accept this submission of the Applicants.

23 As referenced above, the relief requested by the Applicants was not opposed. However, it is necessary to consider this non-opposition in the context of the TCC Propco Agreements. The Applicants contend that the TCC Propco Agreements have been terminated in accordance with their terms, and that the early termination payment now owing as a result of this wind-down by TCC to TCC Propco will be addressed within a claims process to be approved in due course as part of the CCAA proceedings.

24 The Monitor's consent to the entering into of the Termination Agreement, and the filing of the Third Report, do not constitute approval by the Monitor as to the validity, ranking or quantum of the intercompany claim. Further, when the intercompany claims are submitted in the claims process to be approved the Court, the Monitor will prepare a report thereon

and make it available to the Court and all creditors. The creditors will have an opportunity to seek any remedy or relief with respect to the intercompany claim in the claims process.

25 In my view, it is necessary to stress the importance of the role of the Monitor in any assessment of the intercompany claim. It is appropriate for the Monitor to take an active and independent role in the review process, such that all creditors are satisfied with respect to the transparency of the process.

26 Finally, it is noted that the actual consideration is not disclosed in the public record.

27 The Applicants are of the view that the specific information relating to the consideration to be paid by the Landlord Entities and the valuation analysis of the Eleven Leases is sensitive commercial information, the disclosure of which could be harmful to stakeholders.

28 The Applicants have requested that Confidential Appendices "A" and "B" be sealed. Confidential Appendix "A" contains an unredacted version of the Lease Transaction Agreement. The Applicants request that this document be sealed until the closing of the transaction. The Applicants request that the transaction and valuation analysis as contained in Appendix "B" be sealed pending further order.

29 No party objected to the sealing requests.

30 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate, in the circumstances, to grant the sealing relief as requested by the Applicants.

31 In the result, the motion is granted. The approval and vesting order in respect of the Lease Transaction Agreement has been signed.

Motion granted.

End of Document

TAB 9

2014 ONSC 493
Ontario Superior Court of Justice [Commercial List]

Comstock Canada Ltd., Re

2013 CarswellOnt 18611, 2014 ONSC 493, 236 A.C.W.S. (3d) 818

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 Comstock Canada Ltd., CCL Equities Inc., and CCL Realty Inc., Applicants

Morawetz R.S.J.

Heard: December 9, 2013; December 13, 2013
Judgment: December 13, 2013
Docket: CV-13-10181-00CL

Counsel: Alex MacFarlane, Frank Lamie, for Applicants, Comstock Canada Ltd., CCL Equities Inc., CCL Realty Inc.
Harvey Chaiton, for Bank of Montreal
Demetrios Yiokaris, Adrian Scotchmer, for IBEWC of Ontario representing Locals IEBW105, 115, 120, 303, 353, 402, 530, 580, 586, 773, 804 and 1687
W. McNamara, for Brookfield and Great Lakes Power
Robin B. Schwill, Dira Milivojevic, for PricewaterhouseCoopers Inc., in its capacity as Monitor of the Comstock Group
M. Konyukhova, F. McElman, for AMEC
P. Zed, P. Dunn, for Potash Corporation
C. Kopach, for BBA
Brett Harrison, Adam Maerov, for HB Construction (Purchaser)
Jane Milton, for Rio Tinto Alcan Inc.
J.D. Marshall, for 3391205 Canada Inc. (Germain & Frere)

Subject: Insolvency; Contracts; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors

Comstock was granted protection under Companies' Creditors Arrangement Act (Can.) — SISP order was issued approving sale and investor solicitation process wherein monitor was authorized to market assets for sale and attract new investors — Monitor concluded SISP — Comstock and CCL Realty entered into sale agreement for sale of purchased assets — Motion was brought for approval of sale transaction contemplated by agreement of purchase and sale — Motion sought order vesting in purchaser seller's right, title and interest in property described in sale agreement — There was request to seal sale agreement appended as confidential appendix to monitor's report — Approval of monitor's report was also sought and

ancillary relief related to distribution of proceeds from sale of property in Sudbury — Transaction was not opposed by any party — Motion for approval of transaction and issuance of vesting order granted — Transaction was fair and reasonable in circumstances — Sale agreement in appendix contained commercially sensitive information and was to be sealed pending closing of transaction — Request for approval of distribution of Sudbury property sale proceeds was granted.

Table of Authorities

Cases considered by *Morawetz R.S.J.*:

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 36(1) — considered

MOTION brought by parties for approval of sale transaction contemplated by agreement of purchase and sale.

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

1 Argument on this motion was heard on December 9, 2013. The matter was resolved by the parties on December 13, 2013 to the point that the relief sought was not opposed. I endorsed the record as follows:

> After argument further negotiations amongst the parties resulted in a resolution of outstanding points and the matter was not opposed. The transaction is approved. A sealing order is issued with respect to confidential Appendix "I" to the Monitor's Report pending closing of the transaction. I am satisfied that the record supports the requested relief. Motion granted and two orders: (i) approval and vesting and (ii) distribution of Sudbury property sales proceeds have been signed. Reasons will follow.

2 These are the reasons.

3 Comstock Canada Ltd. ("Comstock"), CCL Realty Inc. ("CCL Realty") and CCL Equities Inc. (("CCL Equities"), and together with Comstock and CCL Realty, (the "Comstock Group")) brought a motion for approval of a sale transaction (the "Transaction") contemplated by an Agreement of Purchase and Sale (the "Sale Agreement") as between Comstock and CCL Realty (the "Sellers") and HB Construction Company Ltd. (the "Purchaser"), dated November 28, 2013.

4 The Comstock Group also requested an order vesting in the Purchaser the Sellers' right, title and interest in and to the property described in the Sale Agreement (the "Purchased Assets").

5 In addition, there was a request to seal the Sale Agreement appended as a confidential appendix to the Eighth Report of PricewaterhouseCoopers Inc. (the "Monitor") in its capacity as the court-appointed Monitor of the Comstock Group.

6 Approval of the Eighth Report of the Monitor was also requested as well as ancillary relief related to the distribution of proceeds from the sale of the property in Sudbury (the "Sudbury Property").

7 On July 9, 2013, Comstock was granted protection pursuant to the *Companies' Creditors Arrangement Act* ("CCAA").

8 On August 7, 2013, an order (the "SISP Order") was issued which approved the sale and investor solicitation process (the "SISP") wherein the Monitor, in consultation with Comstock, was authorized to (i) market the assets, property and business of the Comstock Group for sale, and/or (ii) attract new investors for the Comstock Group.

9 The Monitor conducted the SISP in accordance with the SISP Order.

10 Comstock and CCL Realty have entered into a Sale Agreement for the sale of the Purchased Assets.

11 The Purchased Assets comprise, *inter alia*, certain real property, buildings and fixtures, real property leases, contracts, equipment, inventory, permits, intellectual property, accounts receivable and litigation claims and certain other property and assets.

12 The Comstock Group has consented to the issuance of the Sale Approval Order.

13 The Monitor has reported that the sale price and the terms set out in the Sale Agreement are commercially reasonable and satisfactory to the Monitor and both the Comstock Group and the Monitor have been advised by Bank of Montreal that the sale price is satisfactory to Bank of Montreal.

14 Section 36(1) of the CCAA allows the court to authorize the sale of "assets" out of the ordinary course of business. The jurisdiction granted to CCAA courts to authorize the sale of assets free and clear of any restriction is consistent with the discretion granted to the courts by s. 11 of the CCAA to make any order appropriate in the circumstances and reflects the practical reality that absent clear title, purchasers would not be prepared to pay a fair price for a debtor's assets. See *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]).

15 The Transaction has the support of many constituents and is not opposed by any party. Under the circumstances, I can only conclude that the Transaction is fair and reasonable in the circumstances and should be approved.

16 With respect to confidential Appendix "I", I am satisfied that the Sale Agreement, which is contained in this Appendix contains commercially sensitive information, the disclosure of which could be harmful to creditors. Having considered the principals set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), I am satisfied that confidential Appendix "I" should be sealed pending closing of the Transaction.

17 The motion for approval of the Transaction and the issuance of a Vesting Order is granted. An order has been signed to give effect to the foregoing.

18 With respect to the request for approval of the distribution of the Sudbury Property sale proceeds to Bank of Montreal, an approval and Vesting Order in respect of this property was made on September 24, 2013. The sale closed on September 30, 2013 with the proceeds being paid to Gowlings, In Trust.

19 Subsequently, counsel to the Monitor provided an opinion confirming the priority of the position of the Bank of Montreal.

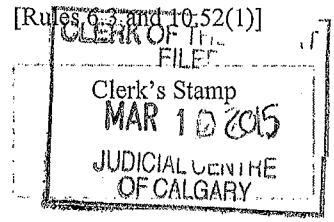
20 The Monitor was of the view that the total proceeds should be applied to reduce the pre-filing indebtedness pursuant to the DIP Commitment Letter. This request was not opposed and is appropriate in the circumstances. The requested relief is granted and an order has been signed.

Motion granted.

End of Document

TAB 10

Form 27
[Rules 6.3 and 10.52(1)]



COURT FILE NUMBER	**1501-00396**
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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9** **AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.**
DOCUMENT	**APPLICATION: Stay Extension, Approval of Claims Procedure, and Approval of Sale & Vesting Order**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Josef G.A. Krüger, Q.C./Robyn Gurofsky
Borden Ladner Gervais LLP
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File No. 441817-000015

NOTICE TO RESPONDENTS: See Service List, Schedule "A" to this Application

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Judge.

To do so, you must be in Court when the application is heard as shown below:

Date	Monday March 16, 2015
Time	10:30 a.m.
Where	Calgary Courts Centre, 601-5th Street S.W., Calgary, AB
Before Whom	The Honourable Justice K.M. Eidsvik

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. The Applicants seek an Order for the following relief:

   (a) Deeming service of this Application together with all supporting materials to be good and sufficient, and abridging the time for service of said documents, if necessary;

   (b) Extending the stay of proceedings in this matter until and including May 14, 2015;

   (c) Approving and authorizing a claims procedure in respect of the creditors of the Company (the "**Claims Procedure**"), in substantially the same form as attached hereto as **Schedule "B"**;

   (d) Approving and authorizing the sale of substantially all of the Applicant's assets pursuant to the Asset Purchase and Sale Agreement ("**APSA**"), a copy of which is attached to the Confidential Affidavit of Lori McLeod-Hill, sworn on March 10, 2015 (the "**Confidential Affidavit**");

   (e) Approving a sale and vesting order with respect to the APSA (the "**Sale & Vesting Order**"), in substantially the same form as attached hereto as **Schedule "C"**; and

   (f) Sealing the Confidential Affidavit and the Confidential Supplement to the Monitor's Third Report (the "**Confidential Report**"), including all exhibits, schedules and attachments thereto.

2. Such further and other relief as Counsel may advise and this Honourable Court permit.

Grounds for making this application:

3. The applicants, GASFRAC Energy Services Inc. ("**GESI**"), GASFRAC Services GP Inc. ("**GSGP**") for itself and in its capacity as general partner of GASFRAC Energy Services Limited Partnership ("**GES LP**"), GASFRAC Energy Services (US) Inc. ("**GESI US**"), GASFRAC US Holdings Inc. ("**Holdings**") and GASFRAC Inc. ("**GI**") (GESI, GSGP, GES LP, GESI US, Holdings and GI are sometimes collectively referred to herein as the "**Applicants**" or the "**Company**"), obtained an Initial Order granted by the Honourable Justice K.M. Eidsvik of the Court of Queen's Bench of Alberta on January 15, 2015, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

4. The Initial Order provided for a stay of proceedings until and including February 9, 2015. The stay of proceedings was extended by this Honourable Court until and including March 18, 2015.

5. Since the granting of the Initial Order, the Applicants have been working diligently and in good faith with the court-appointed financial advisor, CIBC World Markets Inc. ("**CIBC**"), legal

advisors, and with Ernst & Young Inc. in its capacity as the court-appointed Monitor of the Applicants (the "**Monitor**") to review its options with respect to restructuring the Company's business and maximizing value for its stakeholders and creditors.

6. On January 23, 2015, the Applicants obtained Court approval to engage in an extensive sales and solicitation process ("**SISP**") through CIBC, with the assistance of the Monitor, to market the business and operations of the Applicants. The deadline for the receipt of bids was February 24, 2015 (the "**Bid Deadline**").

7. Through the SISP, the Applicants received several bids by the Bid Deadline. The most favourable bid received is put forward by the Applicants for approval by the Court, the proceeds of which will result in full payment to the Applicants' first secured creditor, together with payments to other creditors of the Applicants.

8. The Company and the successful bidder have entered into the APSA, which contemplates a sale of substantially all of the Company's assets to the Purchaser (as defined in the APSA). The projected closing date of the transaction contemplated in the APSA is April 3, 2015.

9. The Company and the Monitor believe that the transaction contemplated by the APSA is in the best interests of the Company, its creditors and other stakeholders.

10. In anticipation of the closing of the APSA, it will be necessary for the Company and the Monitor to have a definitive understanding of the totality of the claims against the Company to ensure a fair and proper distribution to the Company's creditors.

11. The Claims Procedure will provide the Company and the Monitor with the necessary structure and process for the assessment and determination of the validity, nature and amount of the claims of creditors against certain of the Company's entities.

12. Further, in the event the Company proceeds with a plan of arrangement the Claims Procedure is necessary to properly tabulate the votes of creditors.

13. The Company has worked closely with the Monitor to establish claims procedures in Canada and the United States.

14. A further extension of the stay of proceedings is required to enable the Company to close the transaction contemplated by the APSA, address any further adjustments arising subsequent to the closing, and to allow the Company and the Monitor to run the Claims Procedure.

15. The Company in consultation with the Monitor and its legal counsel, is also assessing its options with respect to the presentation of a plan of compromise or arrangement to its creditors whose claims are not anticipated to be paid in full from the proceeds of a sale. An extension of the stay proceeding would allow the Company time to properly assess all options available in respect of a plan.

16. The Company has acted and continues to act in good faith and with due diligence in the within CCAA proceedings.

17. The Confidential Affidavit and the Confidential Report contain commercially sensitive information of the Applicants, that if disseminated could adversely affect the Company's operations and the SISP.

18. The Sealing Order sought is the least restrictive and prejudicial alternative to prevent dissemination of the Applicants' commercially sensitive information.

19. It is fair and just in the circumstances to restrict public access to the Confidential Affidavit.

20. The provisions of the CCAA and the equitable jurisdiction of this Honourable Court are applicable to and provide the basis for the relief sought by the Applicants.

21. Such further and other basis as Counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

22. The Affidavit of Lori McLeod-Hill, sworn March 9, 2015;

23. The Confidential Affidavit of Lori McLeod-Hill, sworn March 10, 2015;

24. The Third Report of the Monitor, filed herein;

25. The Confidential Supplement to the Third Report of the Monitor, to be filed; and

26. Such further and other material as counsel may advise and this Honourable Court permit.

Applicable rules:

27. Alberta *Rules of Court*, AR 124/2010.

Applicable Acts and regulations:

28. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

29. *Judicature Act*, R.S.A. 2000, c. J-2; and

30. Such further and other acts and regulations as Counsel may advise and this Honourable Court permit.

Any irregularity complained of or objection relied on:

31. None.

How the application is proposed to be heard or considered:

32. In person, before the Honourable Madam Justice K.M. Eidsvik, on affidavit evidence with some or all of the parties present.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

SCHEDULE "A"

COURT FILE NUMBER	**1501-00396**
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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9** **AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.**

GASFRAC SERVICE LIST			
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Cam Clark Ford Sales 1001 Highland Park Blvd. NE Airdrie, AB T4A 0R2			**Secured Party**

SCHEDULE "B"

COURT FILE NUMBER	**1501-00396**	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	Calgary	
APPLICANTS	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED** **AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, RSA 2000, c B-9** **AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.**	
DOCUMENT	**CLAIMS PROCESS ORDER**	

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Josef G.A. Kruger/Robyn Gurofsky Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9774 Facsimile: (403) 266-1395 Email: JKruger@blg.com/RGurofsky@blg.com File No. 441817-000015

DATE ON WHICH ORDER WAS PRONOUNCED: March 16, 2015

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: The Honourable Justice K.M. Eidsvik

UPON the application of GASFRAC ENERGY SERVICES INC. ("**GESI**"), GASFRAC SERVICES GP INC. ("**GSGP**") for itself and in its capacity as general partner of GASFRAC ENERGY SERVICES LIMITED PARTNERSHIP ("**GES LP**"), GASFRAC ENERGY SERVICES (US) INC. ("**GESI US**"), GASFRAC US HOLDINGS INC. ("**Holdings**") and GASFRAC INC. ("**GI**") (GESI, GSGP and GES LP, are sometimes collectively referred to herein as the "**Applicants**") for an order approving a claims process (the "**Claims Process**") outlined in Schedule "A" hereto and bar date for Creditors of GESI, GSGP and GES LP, and for the Court's leave and direction to commence a separate claims process for

GESI US, Holdings and GI (the "**Application**"); **AND UPON** having read the Affidavit of Lori McLeod Hill sworn March 9, 2015; **AND UPON** having read the Third Report of Ernst & Young Inc. in its capacity as monitor (the "**Monitor**") of the Applicants dated _____; **AND UPON** having read the pleadings and proceedings had and taken in this Action; **AND UPON** hearing counsel for the Applicants and any other interested party appearing at the Application;

IT IS HEREBY ORDERED THAT:

CAPITALIZED TERMS

1. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Claims Process;

SERVICE

2. Service of the Application and supporting materials is hereby declared to be good and sufficient and the Application is properly returnable today. Further service of the Application other than to those listed on the Service List is hereby disposed with.

SEPARATE CLAIMS PROCESS FOR CREDITORS OF U.S. APPLICANTS

3. This Order establishes the Claims Process only for GESI, GSGP and GES LP. GESI US, Holdings and GI (together, the "U.S. Applicants") shall establish a claims process for the U.S. Applicants in accordance with the protocol and procedures appropriate to like processes in the United States.

APPROVAL OF CLAIMS PROCESS

4. The Claims Process as set forth in the attached Schedule "A" for determining claims of creditors is hereby approved, and the Applicants, in consultation with the Monitor, are authorized and directed to implement the Claims Process.

5. The following forms, together with any necessary non-substantive amendments are hereby approved: Notice to Creditors [Negative Claims Process] (Schedule "B"), Notice to Creditors [Standard Claims Process] (Schedule "C"), Proof of Claim (Schedule "D"), Notice of Revision or Disallowance (Schedule "E"), Notice of Dispute (Schedule "F") and Newspaper Notice (Schedule "G").

CLAIMS BAR

6. Any Creditor who has received a Notice to Creditors in the Standard Claims Process who fails to deliver a Proof of Claim in respect of a Pre-Filing Claim or a Subsequent Claim as the case may be, in accordance with this Order and the Claims Process on or before the Claims Bar Date or Subsequent Claims Bar Date, shall:

   (a) be forever barred, estopped and enjoined from asserting or enforcing any Pre-Filing Claim (or filing a Proof of Claim with respect to such Pre-Filing Claim) against GESI, GSGP or GES LP and such Pre-Filing Claim shall be forever extinguished; and

   (b) not be entitled to receive further notice in these proceedings.

7. Any Creditor who has received a Notice to Creditors in the Negative Claims Process who fails to deliver a Proof of Claim by the Claims Bar Date or Subsequent Claims Bar Date, as applicable, containing an alternate assessment of the classification and/or quantum of its Claim in the Notice to Creditors shall be forever barred, estopped and enjoined from amending or otherwise putting forward an alternate Claim and the Claim as set out in the Notice to Creditors shall be a Proven Claim.

NOTICE SUFFICIENT

8. The publication of the Newspaper Notice, the posting of the Claims Package and this Claims Process Order on the Website, and the mailing to the Creditors of the Claims Package in accordance with the Claims Process and the requirements of this Order shall constitute good and sufficient service and delivery of (i) notice of this Order, (ii) the Claims Bar Date and (iii) the Subsequent Claims Bar Date, on all Persons who may be entitled to receive notice and who may wish to assert Pre-Filing Claims or Subsequent Claims and no other notice or service need be given or made and no other document or material need be sent to or served upon any Person in respect of this Order.

FILING OF PROOFS OF CLAIM

9. A Proof of Claim shall be deemed filed in a timely manner only if delivered by registered mail, personal delivery, courier, email (in PDF format) or facsimile transmission so as to actually be received by the Monitor and the Applicants on or before the applicable Bar Date.

NOTICE OF TRANSFEREES

10. If a Creditor or any subsequent holder of a Pre-Filing Claim or Subsequent Claim transfers or assigns that Pre-Filing Claim or Subsequent Claim to another Person, neither the Applicants nor the Monitor shall be required to give notice to or otherwise deal with the transferee or assignee of the Pre-Filing Claim or Subsequent Claim as the holder of such Pre-Filing Claim or Subsequent Claim unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been delivered to the Applicants and the Monitor. Thereafter, such transferee or assignee shall, for all purposes hereof, constitute the holder of such Pre-Filing Claim or Subsequent Claim and shall be bound by notices given and steps taken in respect of such Pre-Filing Claim or Subsequent Claim in accordance with the provisions of this Order.

NOTICES AND COMMUNICATION

11. Except as otherwise provided herein, the Applicants and the Monitor may deliver any notice or other communication to be given under this Order to Creditors or other interested Persons by forwarding true copies thereof by ordinary mail, courier, personal delivery, facsimile or email to such Creditors or Persons at the address last shown on the books and records of the Applicants and that any such service or notice by courier, personal delivery, facsimile or email shall be deemed to be received on the next Business Day following the date of forwarding thereof, or if sent by ordinary mail on the third Business Day after mailing within Alberta, the fifth Business Day after mailing within Canada and the tenth Business Day after mailing internationally.

12. Any notice or other communication to be given under this Order by a Creditor to the Monitor or the Applicants shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if delivered by registered mail, courier, email (in PDF), personal delivery or facsimile transmission addressed to:

To the Monitor:
Ernst & Young Inc., the Court appointed Monitor of GASFRAC
Attn: Jessica Caden
1000, 440 – 2nd Avenue SW
Calgary, AB T2P 5E9
Email: Jessica.caden@ca.ey.com
Telephone: (403) 206-5153
Fax: (403) 206-5075

To the Applicants:
Borden Ladner Gervais LLP
1900, 520 3rd Avenue SW
Calgary, AB T2P 0R3
Attn: Robyn Gurofsky
Email: RGurofsky@blg.com
Telephone: (403) 232-9774
Fax: (403) 266-1395

13. In the event that the day on which any notice or communication required to be delivered pursuant to the Claims Process is not a Business Day then such notice or communication shall be required to be delivered on the next Business Day.

14. In the event of any strike, lockout or other event which interrupts postal service in any part of Canada, all notices and communication during such interruption may only be delivered by personal delivery, courier, email or facsimile and any notice or other communication given or made by prepaid mail within the five (5) Business Day period immediately preceding the commencement of such interruption, unless actually received, shall be deemed not to have been delivered.

AID AND ASSISTANCE OF OTHER COURTS

15. This Court hereby requests the aid and recognition (including assistance pursuant to section 17 of the CCAA, as applicable) of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulator or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any provinces or any court or any judicial, regulatory or administrative body of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

GENERAL

16. The Applicants, with the consent of the Monitor, are hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which Proofs of Claim and Notices of Dispute are completed and executed and may, if they are satisfied that a Pre-Filing Claim or Subsequent Claim has been adequately proven, waive strict compliance with the requirements of the Claims Process and this Order as to the completion and execution of Proofs of Claim and Notices of Dispute.

17. The Monitor, in addition to its prescribed rights and obligations under the CCAA and under the Initial Order, shall assist the Applicants in connection with the administration of the Claims Process, and is hereby authorized and directed to take such other actions and fulfill such other roles as are contemplated by the Claims Process and this Order.

18. References in this Order to the singular shall include the plural, references to the plural shall include the singular and references to any gender shall include the other gender.

19. Notwithstanding the terms of this Order, the Applicants may apply to this Court from time to time for such further order or orders as it considers necessary or desirable to amend, supplement or replace the Claims Process or this Order.

_____

Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A"

CLAIMS PROCESS

DEFINITIONS

1. For purposes of this Claims Process, the following terms shall have the following meanings:

   (a) **"Applicants"** means GASFRAC Energy Services Inc., GASFRAC Services GP Inc. and GASFRAC Energy Services Limited Partnership.

   (b) **"Initial Order"** means the initial order granted by the Honourable Justice K.M. Eidsvik effective January 15, 2015 in Court of Queen's Bench Action No. 1501-00396 as may be amended by further order of the Court;

   (c) **"Bar Dates"** means the Claims Bar Date and Subsequent Claims Bar Date;

   (d) **"Business Day"** means a day, other than a Saturday or a Sunday on which banks are generally open for business in Calgary, Alberta;

   (e) **"CCAA"** means the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 as amended;

   (f) **"Claim"** means (i) any right or claim of any Person arising prior to the Filing Date that may be asserted or made in whole or in part against the Applicants, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including without limitation, by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise and whether or not any right or claim is executor or anticipatory in nature, including without limitation, any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, together with any other rights or claims of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the BIA had the Applicants become bankrupt, and (ii) any Tax Claim;

(g) **"Claims Bar Date"** means 5:00 p.m. (Mountain Time) on May 7, 2015;

(h) **"Claims Package"** means the document package which shall include a copy of the Notice to Creditor (either in the form of the Negative Claims Process or the Standard Claims Process), a Proof of Claim and such other materials as the Applicants or the Monitor consider necessary or appropriate;

(i) **"Claims Process"** means the procedures outlined herein for the Negative Claims Process and the Standard Claims Process in connection with the assertion of Pre-Filing Claims or Subsequent Claims against one or more of the Applicants;

(j) **"Claims Process Order"** means the order granted by Madam Justice K.M. Eidsvik of the Court on March 16, 2015 approving the Claims Process;

(k) **"Court"** means the Alberta Court of Queen's Bench;

(l) **"Creditor"** means any Person asserting a Pre-Filing Claim or Subsequent Claim;

(m) **"Dispute Package"** means, with respect to any Pre-Filing Claim or Subsequent Claim, a copy of the related Proof of Claim, Notice of Revision or Disallowance and Notice of Dispute;

(n) **"Filing Date"** means January 15, 2015;

(o) **"Known Creditors"** means Creditors which the books and records of the Applicants disclose were owed money by any one of the Applicants as of the applicable Filing Date, which obligation remains unpaid in whole or in part;

(p) **"Monitor"** means Ernst & Young Inc. in its capacity as the Court appointed Monitor of the Applicants and not in its personal capacity;

(q) **"Negative Claims Process"** means the process outlined herein whereby a Creditor will receive a Notice to Creditor assessing the quantum and secured/unsecured status of its Claim based on the books and records of the Applicants and whereby such Creditor need not file a Proof of Claim if it agrees with such assessment;

(r) **"Newspaper Notice"** means the notice of the Claims Process to be published in the newspapers in accordance with the Claims Process in substantially the form attached to the Claims Process Order as Schedule "G";

(s) **"Notice of Dispute"** means the notice that may be delivered by a Creditor who has received a Notice of Revision or Disallowance disputing such Notice

of Revision or Disallowance, which notice shall be substantially in the form attached to the Claims Process Order as Schedule "F";

(t) **"Notice of Revision or Disallowance"** means the notice that may be delivered to a Creditor revising or rejecting such Creditor's Pre-Filing Claim or Subsequent Claim as set out in its Proof of Claim in whole or in part, which notice shall be substantially in the form attached to the Claims Process Order as Schedule "E";

(u) **"Notice to Creditor"** means, in the case of the Negative Claims Process, the letter regarding the assessment of the Creditor's Claim, substantially in the form attached hereto as Schedule "B" and in the case of the Standard Claims Process, the letter regarding completion of a Proof of Claim, substantially in the form attached hereto as Schedule "C";

(v) **"Person"** shall be broadly interpreted and includes an individual, firm, partnership, joint venture, fund, limited liability company, unlimited liability company, association, trust, corporation, unincorporated association or organization, syndicate, committee, the government of a country or any political subdivision thereof, or any agency, board, tribunal, commission, bureau, or any other entity, howsoever designated or constituted, including any Taxing Authority, and the trustees, executors, administrators or other legal representatives of an individual;

(w) **"Pre-Filing Claim"** means any Claim other than a Subsequent Claim;

(x) **"Proof of Claim"** means the form to be completed and filed by a Creditor setting forth its Pre-Filing Claim or Subsequent Claim in the Standard Claims Process, or the form to be completed and filed by a Creditor in the Negative Claims Process, setting forth its Pre-Filing Claim or Subsequent Claim if it disagrees with the assessment of its Claim, which Proof of Claim in either case shall be substantially in the form attached to the Claims Process Order as Schedule "D";

(y) **"Proven Claim"** means the amount, status and/or validity of the Claim as a Creditor as finally determined in accordance with this Claims Process (a Proven Claim will be "finally determined" in accordance with this Claims Process when (i) the Notice to Creditor setting out such Claim is issued and remains unanswered, (ii) the Claim has been accepted by the Applicants, with the consent of the Monitor, (ii) the applicable time period for filing a Notice of Dispute in response to a Notice of Revision or Disallowance issued by any one of the Applicants has expired and no Notice of Dispute has been filed in accordance with this Order, or (iii) any court of competent jurisdiction has made a determination with respect to the amount, status and/or validity of the Claim and no appeal or application for leave to appeal therefrom shall have been taken or served on either party, or if any appeal or application for leave

to appeal shall have been taken therefrom or served on either party, any and all such appeal or application shall have been dismissed, determined or withdrawn;

(z) **"Standard Claims Process"** means the Claims Process outlined herein whereby Creditors file a Proof of Claim setting forth a Pre-Filing Claim or Subsequent Claim against one or more of the Applicants;

(aa) **"Subsequent Claim"** means any Claim arising after the Filing Date as a result of the disclaimer or resiliation after the Filing Date of any contract, lease, employment agreement or other arrangement or agreements of any nature whatsoever, whether oral or written, and any amending agreement related thereto;

(bb) **"Subsequent Claims Bar Date"** means the later of: (i) the Claims Bar Date; and (ii) 5:00 p.m. (Mountain Time) on the day which is 30 days after the date on which the agreement in question was disclaimed or resiliated;

(cc) **"Tax"** or **"Taxes"** means any and all amounts subject to a withholding or remitting obligation and any and all taxes, duties, fees and other governmental charges, duties, impositions and liabilities of any kind whatsoever whether or not assessed by the Taxing Authorities (including any Claims by any of the Taxing Authorities), including all interest, penalties, fines, fees, other charges and additions with respect to such amount;

(dd) **"Taxing Authorities"** means Her Majesty the Queen, Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, the Canada Revenue Agency, any similar revenue or taxing authority of each and every province or territory of Canada and any political subdivision thereof, and any Canadian or foreign governmental authority, and "Taxing Authority" means any one of the Taxing Authorities;

(ee) **"Tax Claim"** means any Claim against any one of the Applicants for any Taxes in respect of any taxation year or period ending on or prior to the applicable Filing Date, and in any case where a taxation year or period commences on or prior to the Filing Date, for any Taxes in respect of or attributable to the portion of the taxation period commencing prior to and including the Filing Date. For greater certainty, a Tax Claim shall include, without limitation, any and all Claims of any Taxing Authority in respect of transfer pricing adjustments and any Canadian or non-resident Tax related thereto;

(ff) **"Website"** means the website maintained by the Monitor located at: www.ey.com/ca/gasfracenergy.

NOTICE OF CLAIMS PROCESS

2. The Monitor shall cause a Claims Package to be sent to each Known Creditor by regular prepaid mail, fax, courier or email on or before March 23, 2015. In the case of Known Creditors whose Claim has been assessed by the Applicants in consultation with the Monitor, the Claims Package shall include a Notice to Creditor in the Negative Claims Process (Schedule "B" to the Claims Process Order). All other Known Creditors shall receive a Claims Package that shall include a Notice to Creditor in the Standard Claims Process (Schedule "C" to the Claims Process Order).

3. The Monitor shall cause the Newspaper Notice to be published in the Calgary Herald on or prior to March 25, 2015.

4. The Monitor shall cause the Claims Package for both the Negative Claims Process and the Standard Claims Process to be posted on the Website.

5. The Applicants shall issue a press release outlining the existence of the Claims Process and may post notice of the Claims Process on its website, in both cases directing any creditor to the Website.

6. The Monitor shall cause the Claims Package to be sent to each Creditor with a Subsequent Claim by regular prepaid mail, fax, courier or email within 5 days of the date after the Subsequent Claim arises either by way of disclaimer or resiliation of agreement;

7. The Monitor shall cause a copy of the Claims Package in the Standard Claims Process to be sent to any Person requesting such material as soon as practicable.

FILING OF PROOFS OF CLAIM (STANDARD CLAIMS PROCESS)

8. Every Creditor asserting a Pre-Filing Claim against any one of the Applicants in the Standard Claims Process shall set out its aggregate Pre-Filing Claim in a written Proof of Claim and deliver that Proof of Claim so that it is received by the Monitor and the Applicants no later than the Claims Bar Date.

9. Every Creditor asserting a Subsequent Claim against any one of the Applicants in the Standard Claims Process shall set out its aggregate Subsequent Claim in a Proof of Claim and deliver that Proof of Claim so that it is received by the Monitor and the Applicants no later than the Subsequent Claims Bar Date.

FILING OF PROOFS OF CLAIM (NEGATIVE CLAIMS PROCESS)

10. In the event the Creditor receives a Claims Package with a Notice to Creditor in the Negative Claims Process and the Creditor agrees with the assessment of the amount and classification of its Pre-Filing Claim or Subsequent Claim as the case may be, as set out in the Notice to Creditor, it need not file a Proof of Claim or take any further action and upon no further action being taken, the Pre-Filing Claim or Subsequent Claim as the case may be shall be a Proven Claim.

11. In the event the Creditor who receives a Claims Package with a Notice to Creditor in the Negative Claims Process and the Creditor disagrees with the assessment of either the amount or classification (or both) of its Pre-Filing Claim as set out in the Notice to Creditor, it must deliver a Proof of Claim setting out its Pre-Filing Claim so that it is received by the Monitor and the Applicants no later than the Claims Bar Date, or in the case of a Subsequent Claim, no later than the Subsequent Claims Bar Date.

DETERMINATION OF CLAIMS AND SUBSEQUENT CLAIMS

12. The Applicants shall review each Proof of Claim received by the Claims Bar Date or Subsequent Claims Bar Date, as applicable, and subject to paragraph 13 shall accept, revise or disallow the Pre-Filing Claim or Subsequent Claim with the consent of the Monitor.

13. The Applicants may attempt to consensually resolve the classification and amount of any Pre-Filing Claim or Subsequent Claim with the Creditor prior to the relevant Applicant accepting, revising or disallowing such Pre-Filing Claim or Subsequent Claim with the consent of the Monitor.

14. If the Applicants, with the consent of the Monitor, accept the Pre-Filing Claim or Subsequent Claim, then such Pre-Filing Claim or Subsequent Claim shall be a Proven Claim.

NOTICE OF REVISION OR DISALLOWANCE

15. If the Applicants, with the consent of the Monitor, determine to revise or disallow a Pre-Filing Claim or Subsequent Claim, the Monitor shall send a Notice of Revision or Disallowance to the Creditor.

NOTICE OF DISPUTE

16. Any Creditor who disputes the classification or amount of its Pre-Filing Claim or Subsequent Claim as set forth in a Notice of Revision or Disallowance shall deliver a Notice of Dispute to the Monitor by 5:00 p.m. (Mountain Time) on the day that is fifteen (15) days after the date of the Notice of Revision or Disallowance. In addition, the disputing Creditor must file an application with the

Court supported by an affidavit setting out the basis for the dispute and must send the application and affidavit to the Monitor immediately upon filing. The application must be scheduled by the disputing Creditor within ten (10) calendar days after sending the Notice of Dispute to the Monitor.

17. Any Creditor who fails to deliver a Notice of Dispute and schedule an application with the Court by the deadlines set forth in paragraph 16 shall be deemed to accept the classification and the amount of its Pre-Filing Claim or Subsequent Claim as set out in the Notice of Revision or Disallowance and such Pre-Filing Claim or Subsequent Claim as set out in the Notice of Revision or Disallowance shall constitute a Proven Claim.

RESOLUTION OF CLAIMS AND SUBSEQUENT CLAIMS

18. Upon receipt of a Notice of Dispute, the Applicants may with the consent of the Monitor, attempt to consensually resolve the classification and amount of the Pre-Filing Claim or Subsequent Claim with the Creditor.

19. If the Applicants and the Creditor consensually resolve the classification and amount of the Pre-Filing Claim or Subsequent Claim, the Applicant may accept, with the consent of the Monitor, a revised Pre-Filing Claim or Subsequent Claim, and such Pre-Filing Claim or Subsequent Claim will constitute a Proven Claim.

J.C.C.Q.B.A.

SCHEDULE "B"

NOTICE TO CREDITORS OF [GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., or GASFRAC ENERGY SERVICES LIMITED PARTNERSHIP]

TO: [NAME]

On January 15, 2015, GASFRAC Energy Services Inc. ("**GESI**"), GASFRAC Services GP Inc. ("**GSGP**"), and GASFRAC Energy Services Limited Partnership ("**GES LP**") applied for and received protection from their creditors by order of the Court of Queen's Bench of Alberta (the "**Court**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**"). Ernst & Young Inc. was appointed Monitor of GESI, Gasfrac GP and Gasfrac LP (together, sometimes referred to as "**GASFRAC**"). There is currently no proposed plan under the CCAA although there is a contemplated distribution. GASFRAC continues to assess its options in respect of a plan.

On [March 16, 2015], the Court granted a further order prescribing a process by which the identity and status of all creditors of [GESI, GSGP or GES LP] and the amounts of their claims will be established for purposes of the CCAA proceedings (the "**Claims Process Order**"). A copy of the Claims Process Order may be viewed at www.ey.com/ca/gasfracenergy.

Pursuant to the Claims Process Order, the Monitor, in cooperation with [GESI, GSGP, or GES LP], is required to send a notice to each known creditor of [GESI, GSGP, or GES LP] (the "**Notice to Creditor**") indicating the amount of such creditor's claim as of January 15, 2015. In the case of the claims of creditors whose claims are disputed, a Notice to Creditor will be sent containing the amount which [GESI, GSGP, or GES LP] is prepared to allow as a claim by such creditor.

In the case of the claims of creditors whose claims cannot be properly determined upon review of the [GESI, GSGP, or GES LP] records, a separate notice to creditor will be issued providing instructions for the completion of a proof of claim form, which that creditor will be required to submit by the Claims Bar Date (May 7, 2015) to prove its claim.

Claim Assessed:

If you are receiving the within Notice to Creditor, your claim has been assessed by [GESI, GSGP, or GES LP] in consultation with the Monitor, as follows:

[GESI, GSGP, or GES LP] HAS REVIEWED ITS RECORDS AND ACCEPTS THAT YOUR CLAIM AGAINST [GESI, GSGP, or GES LP], AS OF JANUARY 15, 2015, WAS AN [UNSECURED/SECURED] CLAIM IN THE AMOUNT OF $[INSERT][CAD/USD].

IN THE EVENT THAT YOU AGREE WITH [GESI's, GSGP's, or GES LP's] ASSESSMENT OF YOUR CLAIM, YOU NEED TAKE NO FURTHER ACTION.

HOWEVER, IF YOU WISH TO DISPUTE [GESI's, GSGP's, or GES LP's] ASSESSMENT OF YOUR CLAIM, YOU MUST TAKE THE STEPS OUTLINED BELOW.

Disagreement with Assessment:

The Claims Process Order provides that if a creditor disagrees with the assessment of its claim set out in this Notice to Creditor, the creditor must complete and return to the Monitor, with a copy to [GESI, GSGP, or GES LP], a completed Proof of Claim advancing a claim in a different amount and/or claiming secured status if applicable, supported by appropriate documentation. A blank Proof of Claim form is enclosed. The Proof of Claim with supporting documentation disputing the within assessment of your claim must be received by the Monitor, with a copy to [GESI, GSGP, or GES LP] no later than **5:00 p.m. (Mountain Time) on May 7, 2015.**

If no such Proof of Claim is received by the Monitor by that date, the amount of your claim and its status as secured or unsecured will be, subject to further order of the Court, conclusively deemed to be as shown in this Notice to Creditor.

The Claims Process Order also provides that any party who does not receive a Notice to Creditor and who wishes to advance a claim against [GESI, GSGP, or GES LP] must complete and forward to the Monitor, with a copy to [GESI, GSGP, or GES LP], a completed Proof of Claim supported by appropriate documentation advancing its claim and claiming secured status, if applicable, no later than **5:00 p.m. (Mountain Time) on May 7, 2015.**

The Proof of Claim should be delivered by registered mail, personal delivery, courier, email (in PDF format) or facsimile transmission to the following parties:

Ernst & Young Inc.
In its capacity as the court appointed
Monitor of GASFRAC
Attn: Jessica Caden
1000, 440 2 Avenue SW
Calgary, AB T2P 5E9
Email: Jessica.Caden@ca.ey.com
Phone: (403) 206-5153
Fax: (403) 206-5075

Borden Ladner Gervais LLP
1900, 520 3rd Avenue SW
Calgary, AB T2P 0R3
Attn: Robyn Gurofsky
Email: RGurofsky@blg.com
Telephone: (403) 232-9774
Fax: (403) 266-1395

A copy of the Proof of Claim form is enclosed, however, further copies of the Proof of Claim form may be downloaded at www.ey.com/ca/gasfracenergy.

Claims Against U.S. GASFRAC Entity:

Please note that if your claim is as against one of GESI's subsidiaries in the United States, namely GASFRAC Inc., GASFRAC US Holdings Inc., or GASFRAC Energy Services (US) Inc., you must file a Proof of Claim form in the U.S. Claims Process. A copy of the U.S. Claims Process documents can be found at www.ey.com/ca/gasfracenergy.

Notice of Revision or Disallowance by [GESI, GSGP, or GES LP]:

Where a Proof of Claim is sent, [GESI, GSGP, or GES LP] with the assistance of the Monitor, will review the Proof of Claim and the Monitor shall provide to the creditor a notice in writing by registered

mail, by courier service, email or facsimile as to whether the claim set out in the Proof of Claim is accepted, disputed in whole, or disputed in part. Where the claim is disputed in whole or in part, the Monitor will issue a Notice of Revision or Disallowance indicating the reasons for the revision or disallowance of the Creditor's Claim.

Notice of Dispute by Creditor:

The Claims Process Order further provides that where a creditor disputes a Notice of Revision or Disallowance, the creditor must notify the Monitor of the dispute by completing and delivering a Notice of Dispute to the Monitor by registered mail, courier service, email or facsimile within fifteen (15) days of receipt of the Notice of Revision or Disallowance. The creditor shall thereafter serve on the Monitor, with a copy to [GESI, GSGP, or GES LP], a filed application with a supporting affidavit in GASFRAC's CCAA proceedings, returnable within ten (10) calendar days after issuing the Notice of Dispute, for the determination by the Court of the claim in dispute.

A copy of the Notice of Dispute form is enclosed, however, further copies of the Notice of Dispute form may be downloaded at www.ey.com/ca/gasfracenergy.

CLAIMS NOT PROVEN OR ACCEPTED IN ACCORDANCE WITH THE PROCEDURES SET OUT ABOVE IN THIS NOTICE SHALL, UNLESS OTHERWISE ORDERED BY THE COURT, BE DEEMEND TO BE FOREVER BARRED AND MAY NOT THEREAFTER BE ADVANCED AGAINST [GESI, GSGP, or GES LP] OR ANY OF THE GASFRAC ENTITIES.

If you have any questions regarding the claims process or the attached materials, please contact Jessica Caden of Ernst & Young Inc. at (403) 206-5153 or Jessica.caden@ca.ey.com.

Dated the ___ day of March, 2015 in Calgary, Alberta

Ernst & Young Inc., in its capacity as
Monitor of GASFRAC

H. Neil Narfason, CA•CIRP, CBV
Senior Vice President

SCHEDULE "C"

NOTICE TO CREDITORS OF [GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., or GASFRAC ENERGY SERVICES LIMITED PARTNERSHIP]

RE: NOTICE OF CLAIMS PROCESS PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT* ("CCAA")

On January 15, 2015, GASFRAC Energy Services Inc. ("**GESI**"), GASFRAC Services GP Inc. ("**GSGP**"), and GASFRAC Energy Services Limited Partnership ("**GES LP**") applied for and received protection from their creditors by order of the Court of Queen's Bench of Alberta (the "**Court**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**"). Ernst & Young Inc. was appointed Monitor of GESI, GSGP and GES LP (together, sometimes referred to as "**GASFRAC**"). There is currently no proposed plan under the CCAA although there is a contemplated distribution. GASFRAC continues to assess its options in respect of a plan.

On [March 16, 2015], the Court granted a further order prescribing a process by which the identity and status of all creditors of [GESI, GSGP, or GES LP] and the amounts of their claims will be established for purposes of the CCAA proceedings (the "**Claims Process Order**"). A copy of the Claims Process Order may be viewed at www.ey.com/ca/gasfracenergy.

Any person having a Pre-Filing Claim against [GESI, GSGP, or GES LP] arising prior to January 15, 2015 must send a Proof of Claim to the Monitor, with a copy to [GESI, GSGP, or GES LP], to be received by no later than 5:00 p.m. (Mountain Time) on May 7, 2015 (the "**Claims Bar Date**").

Any person having a Subsequent Claim against [GESI, GSGP, or GES LP] arising after January 15, 2015 as a result of a disclaimer or repudiation by [GESI, GSGP, or GES LP] after January 15, 2015 of any contract, lease, employment agreement or other arrangement or agreement of any nature whatsoever, whether oral or written, and any amending agreement related thereto, must send a Proof of Claim to the Monitor, with a copy to [GESI, GSGP, or GES LP], to be received by the later of (a) the Claims Bar Date; and (b) 5:00 p.m. (Mountain Time) on the day which is 30 days after the date of the applicable disclaimer or repudiation (the "Subsequent Claims Bar Date").

All Proofs of Claim should be delivered by registered mail, personal deliver, courier, email (in PDF format) or facsimile transmission to the following parties:

Ernst & Young Inc.
In its capacity as the court appointed
Monitor of GASFRAC
Attn: Jessica Caden
1000, 440 2 Avenue SW
Calgary, AB T2P 5E9
Email: Jessica.Caden@ca.ey.com

Borden Ladner Gervais LLP
1900, 520 3rd Avenue SW
Calgary, AB T2P 0R3
Attn: Robyn Gurofsky
Email: RGurofsky@blg.com
Telephone: (403) 232-9774
Fax: (403) 266-1395

A copy of the Proof of Claim form is enclosed, however, further copies of the Proof of Claim form may be downloaded at www.ey.com/ca/gasfracenergy.

Please note that if your claim is as against one of GESI's subsidiaries in the United States, namely GASFRAC Inc., GASFRAC US Holdings Inc., or GASFRAC Energy Services (US) Inc., you must file a Proof of Claim form in the U.S. Claims Process. A copy of the U.S. Claims Process documents can be found at www.ey.com/ca/gasfracenergy.

PROOFS OF CLAIM WHICH ARE NOT RECEIVED BY THE APPLICABLE BAR DATES SPECIFIED HEREIN WILL BE BARRED AND EXTINGUISHED FOREVER.

If you have any questions regarding the claims process or the attached materials, please contact Jessica Caden of Ernst & Young Inc. at (403) 206-5153.

Dated the ___ day of March, 2015 in Calgary, Alberta

Ernst & Young Inc., in its capacity as
Monitor of GASFRAC

_____

H. Neil Narfason, CA•CIRP, CBV
Senior Vice President

SCHEDULE "D"

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

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

AND IN THE MATTER OF
GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC.,
GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.

Proof of Claim [GASFRAC ENERGY SERVICES INC. ("GESI")/GASFRAC SERVICES GP INC. ("GSGP")/GASFRAC ENERGY SERVICES LIMITED PARTNERSHIP ("GES LP")

**For Claims Arising Before January 15, 2015 ("Pre-Filing Claims")
Of For Claims Arising Due To Disclaimer or Resiliation of Contract
After January 15, 2015 ("Subsequent Claims")**

(See Reverse for Instructions)

Regarding the claim of _____(referred to in this form as "the creditor")
(name of creditor)

All notices or correspondence regarding this claim to be forwarded to the creditor at the following address:

_____

_____

_____

Telephone: _____ Fax: _____

I, _____ residing in the_____
(name of person signing claim) **(city, town, etc.)**

of _____ in the Province of _____
(name of city, town, etc.)

Do hereby certify that:

☐ 1. I am the creditor

or

☐ I am _____ of the creditor.
(if an officer or employee of the company, state position or title)

2. I have knowledge of all the circumstances connected with the claim referred to in this form.

3. A. [GESI, GSGP or GES LP] was, (as at January 15, 2015 in respect of a Pre-Filing Claim **OR** after January 15, 2015 in respect of a Subsequent Claim), and still is indebted to the creditor in the sum of $_____ as shown by the statement of account attached hereto and marked "Schedule A". Pre-Filing Claims should **not** include the value of goods and/or services supplied or claims arising after January 15, 2015. If a creditor's claim is to be reduced by deducting any counter claims to which [GESI, GSGP or GES LP] is entitled and/or amounts associated with the return of equipment and/or assets by [GESI, GSGP or GES LP], please specify.

The statement of account must specify the vouchers or other evidence in support of the claim including the date and location of the delivery of all services and materials. Any claim for interest must be supported by contractual documentation evidencing the entitlement to interest.

B. The indebtedness referred to in paragraph 3. A. is in the following currency:

☐ Canadian Dollars

☐ United States Dollars

4. ☐ A. **Unsecured claim.** $_____. In respect to the said debt, the creditor does not and has not since January 15, 2015, held any assets of [GESI, GSGP or GES LP] as security.

☐ B. [FOR GESI FORMS:] **Subordinate Debentureholder.** $_____. In respect to the said debenture, the creditor does not and has not since January 15, 2015, held any assets of GESI as security.

☐ C. **Secured claim.** $_____. In respect of the said debt, the creditor holds assets of [GESI, GSGP or GES LP] valued at $ _____ as security.

Provide full particulars of the security, *including the date on which the security was given and the value at which the creditor assesses the security together with the basis of valuation, and attach a copy of the security documents as Schedule "B"*

Dated at _____ this _____ day of _____, 2015.
Insert city and date of signature

_____ _____
Witness **(signature of individual completing the form)**
Must be signed and witnessed

Instructions for Completing Proof of Claim Forms

In completing the attached form, your attention is directed to the notes on the form and to the following requirements:

Proof of Claim:

1. The form must be completed by an individual and not by a corporation. If you are acting for a corporation or other person, you must state the capacity in which you are acting, such as, "Credit Manager", "Treasurer", "Authorized Agent", etc., and the full legal name of the party you represent.

2. The person signing the form must have knowledge of the circumstances connected with the claim.

3. A. A Statement of Account containing details of secured and unsecured claims, and if applicable, of the amount due in respect of property claims, must be attached and marked Schedule "A". Indicate whether claim is Pre-Filing Claim or Subsequent Claim.

   Pre-Filing Claims should **not** include the value of goods and/or services arising after January 15, 2015. It is necessary that all creditors indicate the date and location of the delivery of all goods and/or services. Any amounts claimed as interest should be clearly noted as being for interest.

   B. Tick the appropriate currency.

4. The nature of the claim must be indicated by ticking the type of claim which applies. e.g. -

   Ticking (A) indicates the claim is unsecured;

   Ticking (B) indicates the claim is from an unsecured subordinate debenture;

   Ticking (C) indicates the claim is secured, such as a mortgage, lease, or other security interest, and the value at which the creditor assesses the security must be inserted, together with the basis of valuation. Details of each item of security held should be attached as Schedule "B" and submitted with a copy of the chattel mortgage, conditional sales contract, security agreement, etc.;

   A creditor may have separate claims in different categories, in which case a separate claim form must be submitted for each claim.

5. The person signing the form must insert the place and date in the space provided, and the signature must be witnessed.

Send a copy of the completed Proof of Claim, by May 7, 2015, to both GESI and the Monitor at the below addresses:

GASFRAC Energy Services Inc.
Attn: Robyn Gurofsky
1900, 520 - 3rd Ave SW
Calgary, AB T2P 0R3

Ernst & Young Inc.
Attn: Jessica Caden
1000,440 - 2nd Ave SW
Calgary, AB T2P 5E9

Additional information regarding GASFRAC and the CCAA process, as well as copies of claims documents may be obtained at http://www.ey.com/ca/gasfracenergy.If there are any questions in completing the Proof of Claim, please contact Jessica Caden of Ernst & Young Inc. at (403) 206-5394.

Note: Any claim not filed by May 7, 2015 will, unless otherwise ordered by the Court of Queen's Bench of Alberta, be barred and may not thereafter be advanced against GESI.

SCHEDULE "E"

NOTICE OF REVISION OR DISALLOWANCE

FOR CREDITORS OF [GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., or GASFRAC ENERGY SERVICES LIMITED PARTNERSHIP]

Claim Reference Number: _____

TO: _____

(Name of Creditor)

Defined terms not defined in this Notice of Revision or Disallowance have the meaning ascribed to them in the Order of the Court of Queen's Bench of Alberta dated March 16, 2015 (the "Claims Procedure Order"). All dollar values contained herein are in Canadian dollars unless otherwise noted.

Pursuant to the Claims Procedure Order dated March 16, 2015, the Applicants and Ernst & Young Inc., in its capacity as Court-appointed Monitor of the Applicants, hereby gives you notice that it has reviewed your Proof of Claim in conjunction with the Claims Process and has revised or disallowed your Claim. Subject to further dispute by you in accordance with the Claims Procedure Order, your Claim will be allowed as follows:

Claim as Submitted ($CDN)	**Revised Claim as Accepted by Monitor and Applicants ($CDN)**	**Secured ($CDN)**	**Unsecured ($CDN)**	[if GESI form:] **Subordinate Debenture ($CDN)**

REASONS FOR THE REVISION OR DISALLOWANCE:

_____

_____

_____

_____

SERVICE OF DISPUTE NOTICES

If you intend to dispute this Notice of Revision or Disallowance, you must **within fifteen (15) Business days after receipt of this Notice of Revision or Disallowance** deliver to the Monitor a Dispute Notice (in the form enclosed) either by prepaid registered mail, personal delivery, courier or facsimile to the address below.

Ernst & Young Inc.
Attention: Jessica Caden
Ernst & Young Inc.
1000, 440 2nd Avenue SW
Calgary, AB T2P 5E9
Email: jessica.caden@ca.ey.com
Phone: (403) 206-5153
Fax: (403) 206-5075

IF YOU FAIL TO FILE YOUR NOTICE OF DISPUTE WITHIN 15 BUSINESS DAYS AFTER RECEIPT OF THIS NOTICE OF REVISION OR DISALLOWANCE, THE VALUE OF YOUR CLAIM WILL BE DEEMED TO BE ACCEPTED AS FINAL AND BINDING AS SET OUT IN THIS NOTICE OF REVISION OR DISALLOWANCE.

Dated THIS ____ DAY OF _____, 2015.

Ernst & Young Inc., in its capacity as
Monitor of GASFRAC

_____

H. Neil Narfason, CA•CIRP, CBV
Senior Vice President

SCHEDULE "F"

NOTICE OF DISPUTE

GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES LIMITED PARTNERSHIP (hereinafter, "GASFRAC")

Pursuant to the Claims Procedure Order dated March 16, 2015, we hereby give you notice of our intention to dispute the Notice of Revision or Disallowance bearing Reference # _____ and dated _____ issued by Ernst & Young Inc. in its capacity as Monitor of GASFRAC in respect of our Claim.

NAME OF CREDITOR: _____

Reviewed Claim as Accepted ($CDN)	Reviewed Claim as Disputed ($CDN)	Secured ($CDN)	Unsecured ($CDN)

REASONS FOR THE DISPUTE:

_____

_____

_____

_____

SIGNATURE OF INDIVIDUAL: _____

DATE: _____

PRINT NAME: _____

TELEPHONE NUMBER: _____

FACSIMILE: _____

EMAIL ADDRESS: _____

FULL MAILING ADDRESS: _____

THIS FORM AND SUPPORTING DOCUMENTATION TO BE RETURNED BY REGISTERED MAIL, PERSONAL SERVICE, EMAIL (IN PDF FORMAT), FACSIMILE OR COURIER TO

THE ADDRESS FOR SERVICE INDICATED HEREIN AND TO BE RECEIVED BY 5:00 P.M. (MOUNTAIN TIME) ON THE DAY WHICH IS FIFTEEN (15) DAYS AFTER THE DATE OF THE NOTICE OF REVISION OR DISALLOWANCE.

Address for Service of Notices of Dispute.

Ernst & Young Inc.
Attention: Jessica Caden
Ernst & Young Inc.
1000, 440 2nd Avenue SW
Calgary, AB T2P 5E9
Email: jessica.caden@ca.ey.com
Phone: (403) 206-5153
Fax: (403) 206-5075

IN ADDITION, YOU MUST SERVE THE MONITOR WITH AN APPLICATION FILED WITH THE COURT IN GASFRAC'S CCAA PROCEEDINGS, SUPPORTED BY WAY OF AN AFFIDAVIT, RETURNABLE TO COURT WITHIN TEN (10) CALENDAR DAYS AFTER SENDING THE NOTICE OF DISPUTE, FOR DETERMINATION BY THE COURT OF THE CLAIM IN DISPUTE.

IF YOU:

1) **FAIL TO FILE YOUR DISPUTE NOTICE WITHIN FIFTEEN (15) BUSINESS DAYS AFTER RECEIPT OF THE NOTICE OF REVISION OR DISALLOWANCE; and**
2) **FAIL TO SERVE THE MONITOR WITH AN APPLICATION AND AFFIDAVIT RETURNABLE WITHIN TEN (10) CANEDLAR DAYS AFTER ISSUING THE NOTICE OF DISPUTE,**

THE VALUE OF YOUR CLAIM WILL BE DEEMED TO BE ACCEPTED AS FINAL AND BINDING AS SET OUT IN THE NOTICE OF REVISION OR DISALLOWANCE.

SCHEDULE "C"

Clerk's Stamp

COURT FILE NUMBER	**1501-00396**
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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9** **AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.**
DOCUMENT	**APPROVAL & VESTING ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Josef G.A. Krüger, Q.C./Robyn Gurofsky Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9774 Facsimile: (403) 266-1395 Email: JKruger@blg.com /RGurofsky@blg.com File No. 441817-000015

DATE ON WHICH ORDER WAS PRONOUNCED: March 16, 2015

NAME OF JUSTICE WHO MADE THE ORDER: The Honourable Justice K.M. Eidsvik

LOCATION OF HEARING: Calgary, Alberta

UPON the application of **GASFRAC ENERGY SERVICES INC.** ("**GESI**"), **GASFRAC SERVICES GP INC.** ("**GSGP**") for itself and in its capacity as general partner of **GASFRAC ENERGY SERVICES LIMITED PARTNERSHIP** ("**GES LP**"), **GASFRAC ENERGY SERVICES (US) INC.** ("**GESI US**"), **GASFRAC US HOLDINGS INC.** ("**Holdings**") and **GASFRAC INC.** ("**GI**") (individually a "**Vendor Entity**" and collectively the "**Vendor**") in these proceedings; **AND UPON** having read the Application, the Affidavit of Lori McLeod-Hill sworn on

March 9, 2015, the Confidential Affidavit of Lori McLeod-Hill dated March 10, 2015 (the "**Confidential Affidavit**"), the Third Report of the Monitor, dated March ____, 2015, the Confidential Supplement to the Monitor's Third Report dated March ____, 2015 (the "**Confidential Report**"), the Affidavit of _____, dated _____, 2015 (the "**Service Affidavit**"), the pleadings and proceedings filed herein, including the Initial Order granted on January 15, 2015 (the "**Initial Order**"), and the Order granted on January 23, 2015 approving the sales and solicitation process; **AND UPON** hearing counsel for the Vendor, the Purchaser, the Monitor and any other interested party appearing at the Application;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The time for service of notice of this application is abridged to the time actually given and service of the Application and supporting material as described in the Service Affidavit is good and sufficient, and this hearing is properly returnable before this Honourable Court today and further service thereof is hereby dispensed with.

2. Unless otherwise defined in this Order, all capitalized terms used in this Order shall have the meaning ascribed to them in the Asset Purchase Agreement between the Vendor and [Purchaser] (the "**Purchaser**") dated February 27, 2015 (the "**Agreement**"), attached to the Confidential Affidavit as Exhibit "C".

Approval of the Agreement and the Transaction

3. The Agreement, including the transaction for the purchase, sale, assignment, transfer and conveyance of the Purchased Assets from the Vendor to the Purchaser and related assignments, transfers, conveyances, assumptions, and other arrangements contemplated by or set forth in the Agreement (the "**Transaction**"), is found to be in the best interests of the Vendor, its creditors, and its other stakeholders, and therefore the Agreement and the Transaction contemplated thereby is hereby authorized, ratified, deemed commercially reasonable and approved.

4. The sale, assignment, transfer and conveyance of the Purchased Assets by the Vendor to the Purchaser on the terms and conditions contained in the Agreement is hereby approved and

the Vendor and the Monitor are hereby authorized and directed to complete the Closing of the Transaction pursuant to the terms of the Agreement.

5. The Vendor and the Monitor are authorized and directed to take all such steps, perform, consummate, implement and executed and deliver all such conveyance documents, bills of sale, assignments, conveyances, transfers, deeds, representations, indicia of title, tax elections, documents and instruments of whatsoever nature or kind as may reasonably be necessary or desirable to consummate the Transaction in accordance with the terms of the Agreement including, without limitation, proceeding with the Inspection, settlement with the Purchaser in respect of all adjustments contemplated by the Interim Statement of Adjustments and the Final Statement of Adjustments, and distributions from the Holdback, and making such amendments as the Vendor, the Monitor and the Purchaser may approve in writing and which do not materially alter the Agreement, and upon such trust conditions as may be agreed upon among legal counsel for the Vendor, the Monitor and the Purchaser.

6. In the event the Vendor fails to take any step or execute any document reasonably necessary or desirable to consummate the Transaction, the Monitor is hereby authorized and directed to take such step or execute any such document on the Vendor's behalf.

Monitor's Certificate

7. Upon Closing, the Monitor is hereby authorized and directed to promptly file with the Court in these proceedings and serve upon the Vendor, the Purchaser and those Persons listed on the Service List (attached as **Schedule "A"** to this Order) a certificate (substantially in the form set out as **Schedule "B"** to this Order) certifying that the Transaction has closed substantially in accordance with the terms of the Agreement, subject to the Final Statement of Adjustments and distributions from the Holdback (the "**Monitor's Certificate**").

Vesting of the Assets

8. Upon Closing and filing of the Monitor's Certificate, all of the Vendor's right, title, estate and interest in and to the Purchased Assets shall vest absolutely in the name of the Purchaser (or its nominee), free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, caveats, mortgages, trusts or deemed trusts

(whether contractual, statutory, or otherwise) liens, encumbrances, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, and whether by payment, set off or otherwise (collectively, the "**Claims**"), including, without limiting the generality of the foregoing:

a) any encumbrances or charges created by the Initial Order or subsequent Orders granted in the within CCAA proceedings;

b) all charges, security interests or claims against the personalty comprising the Purchased Assets, whether evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta), any other personal property registry system or otherwise; and

c) the Encumbrances listed on **Schedule "C"** hereto, which shall not include the permitted encumbrances, caveats, easements and restrictive covenants listed on **Schedule "D"**.

For greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets and all charges, security interests or Claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta), any other personal property registry system or otherwise where any Claim of any kind may be registered or recorded are hereby expunged, ordered removed and otherwise unconditionally discharged and terminated as against the Purchased Assets. The Vendor is hereby authorized to take all necessary steps and execute any and all documents to effect any and all discharges, and the registrars and all other persons in control or otherwise supervising such offices of registration or recording shall forthwith remove and discharge all such registrations.

9. The Purchaser is authorized to file, register or otherwise record a certified copy of this Order with the appropriate filing office, agency, clerk(s) and/or recorder(s), which, once filed, registered or otherwise recorded, shall constitute conclusive evidence of the sale of the Purchased Assets free and clear from any and all Claims, including the release of all liens, claims, encumbrances and interests in the Purchased Assets as of the Closing Date of any kind or nature whatsoever.

10. Upon delivery of the Monitor's Certificate and a certified copy of this Order, together with any applicable registration fees, the Registrar of Land Titles of Alberta (the "Registrar") is hereby authorized, requested, and directed, notwithstanding the requirements of section 191(1) of the *Land Titles Act*, RSA 2000, c L-7 and notwithstanding that the appeal period in respect of this Order may not have elapsed, to cancel the existing Certificate of Titles for those lands and premises municipally and legally described in the attached **Schedule "E"** (the "**Lands**"), and to issue a new Certificate of Title for the Lands in the name of the Purchaser (or its nominee), and to register such transfers, discharges, discharge statements of conveyances, as may be required to convey clear title to the Lands to the Purchaser (or its nominee), which Certificate of Title shall be clear of all Encumbrances and subject only to the Permitted Encumbrances.

11. The Purchaser (and its nominee) shall, by virtue of the completion of the Transaction, have no liability of any kind whatsoever in respect of any Claims against the Vendor.

12. Under no circumstances shall the Purchaser be deemed a successor of or to the Vendor for any Claims of any kind or nature whatsoever against or in the Vendor or the Purchased Assets. Following the Closing, no person with a Claim shall interfere with the Purchaser's title to or use and enjoyment of the Purchased Assets based on or related to such Claim or any actions that the Vendor may take in the within CCAA proceedings.

13. The Vendor and all persons who claim by, through or under the Vendor in respect of the Purchased Assets, and all persons or entities having any Claims of any kind whatsoever in respect of the Purchased Assets, save and except for the persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped and foreclosed from and permanently enjoined from, pursuing, asserting or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption, or Claim in respect of or to the Purchased Assets and, to the extent that any such persons or entities remain in the possession or control of any of the Purchased Assets, or any artifacts, certificates, instruments or other indicia of title representing or evidencing any right, title, estate, or interest in and to the Purchased Assets, they shall forthwith deliver possession thereof to the Purchaser (or its nominee).

14. The Purchaser (or its nominee) shall be entitled to enter into and upon, hold and enjoy the Purchased Assets for its own use and benefit absolutely without any interference of or by the Vendor, or any person claiming by or through or against the Vendor.

15. The Purchaser shall be authorized, as of the Closing, to operate under any Governmental Authority, license, permit, registration and authorization or approval of or given to the Vendor with respect to the Purchased Assets, and all such licences, permits, registrations and authorizations and approvals shall be and shall be deemed to have been transferred to the Purchaser as of the Closing.

16. Pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act* and section 20(e) of the Alberta *Personal Information Protection Act*, the Vendor and the Monitor are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Vendor's records pertaining to the Vendor's past and current employees, including personal information of those employees listed in the Agreement. The Purchaser (or its nominee) shall maintain and protect the privacy of such information 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.

Handling of the Net Proceeds

17. The Monitor shall hold the proceeds received from the Purchaser pursuant to the Agreement, less completion costs (including, but without limitation good and services taxes, transfer taxes, legal and other costs, expenses and disbursements, of the Vendor and the Monitor) and other usual completion costs incurred (the "**Net Proceeds**") pursuant to and in accordance with the terms of this Order.

18. The Net Proceeds shall stand in the place and stead of the Purchased Assets, and from and after the delivery of the Monitor's Certificate all Claims shall attach to the Net Proceeds with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

19. Unless otherwise authorized by this Order, the Monitor shall make no distributions from the Net Proceeds except by further Order of this Court.

20. At Closing, the Holdback shall be retained by the Purchaser and delivered to the Purchaser's legal counsel. The Holdback shall be held in trust by the Purchaser's legal counsel in an interest-bearing account and it shall be releasable in accordance with the terms of the Agreement or by further Order of this Court.

Transaction not a Preference or Transfer at Undervalue

21. Notwithstanding:

a) the pendency of this proceeding and the declaration of insolvency made herein;

b) the pendency of any petition for receiving orders or bankruptcy orders heretofore or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), as amended, in respect of any or all Vendor Entities, any receiving orders issued pursuant to any such petitions or any assignments in bankruptcy which may hereafter be made by or with respect to any or all Vendor Entities;

c) any assignment in bankruptcy made by any or all Vendor Entities; and

d) the provisions of any federal or provincial statute:

the assignment, transfer, conveyance and vesting of the Vendor's right, title, estate and interest in and to the Purchased Assets in the Purchaser (or its nominee) pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Vendor and shall not be void or voidable by creditors of the Vendor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

Sealing Order

22. The Confidential Affidavit and the Confidential Report shall immediately be sealed by the Clerk of the Court, kept confidential and not form part of the public record, and not be available for public inspection unless and until otherwise ordered by this Court, upon seven days' notice to all interested parties. The Confidential Affidavit and the Confidential Report shall be sealed and filed in an envelope containing the following endorsement thereon:

> THIS ENVELOPE CONTAINS THE CONFIDENTIAL AFFIDAVIT OF LORI MCLEOD-HILL DATED MARCH 10, 2015 AND THE CONFIDENTIAL SUPPLEMENT TO THE MONITOR'S THIRD REPORT DATED MARCH ____, 2015, WHICH SHALL BE SEALED FOR A PERIOD OF THREE (3) MONTHS PURSUANT TO AN ORDER ISSUED BY THE HONOURABLE MADAM JUSTICE EIDSVIK DATED MARCH 16, 2015, AND IS NOT TO BE PLACED ON THE PUBLIC RECORD OR MADE PUBLICALLY ACCESSIBLE.

Application for Further Advice

23. The Monitor, the Purchaser (or its nominee), the Vendor or any other interested party, shall be at liberty to apply for further advice, assistance and directions as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.

Miscellaneous Matters

24. This Court hereby requests the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or any court or any judicial, regulatory or administrative body of any other nation or state, to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

25. Service of this Order shall be deemed good and sufficient by serving the same on:

a) the persons listed on the Service List (as found at Schedule "A" to this Order);

b) the Purchaser or on the Purchaser's solicitors; and

c) by posting a copy of this Order on the Monitor's website at:

http://www.ey.com/ca/gasfracenergy.

26. No other Persons are entitled to be served with a copy of this Order.

27. Service of this Order shall be deemed good and sufficient regardless of whether service is effected by PDF copy attached to an email, facsimile, courier, personal delivery or ordinary mail.

Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A"

COURT FILE NUMBER	**1501-00396**
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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9** **AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.**

GASFRAC SERVICE LIST			
FIRM	**EMAIL**	**PHONE**	
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Ford Credit Canada Leasing, A Division of Canadian Road Leasing Company PO Box 2400 Edmonton, AB T5J 5C7			**Secured Party**
HSBC Bank Canada 407 8th Avenue SW Calgary, AB T2P 1E5			**Secured Party**
Tricor And Finance Corp. PO Box 397 Burlington, ON L7R 3Y3			**Secured Party**
Cam Clark Ford Sales 1001 Highland Park Blvd. NE Airdrie, AB T4A 0R2			**Secured Party**

SCHEDULE "B"

Clerk's Stamp

COURT FILE NUMBER	**1501-00396**
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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9** **AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.**
DOCUMENT	**MONITOR'S CERTIFICATE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Josef G.A. Krüger, Q.C./Robyn Gurofsky Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9774 Facsimile: (403) 266-1395 Email: JKruger@blg.com /RGurofsky@blg.com File No. 441817-000015

1. All defined terms used but not defined herein shall have the meanings ascribed thereto in the Sale Approval and Vesting Order granted in these proceedings on [ ], 2015 (the "**Order**").

2. Pursuant to paragraph [ ] of the Order, Ernst & Young Inc., in its capacity as the Court-appointed Monitor (the "**Monitor**") of GASFRAC Energy Services Inc., GASFRAC Services GP Inc. for itself and in its capacity as general partner of GASFRAC Energy Services Limited Partnership, GASFRAC Energy Services (US) Inc., GASFRAC US Holdings Inc. and GASFRAC Inc. (collectively, the "**Vendor**"), delivers this certificate and hereby confirms that Closing of the sale of the Purchased Assets pursuant to the Asset Purchase and Sale Agreement between the Vendor and [ ] (the "**Purchaser**") dated February 27, 2015 (the "**Agreement**") has occurred and all purchase monies due and owing in respect of such sale

have been paid by the Purchaser to the Monitor for the Vendor, subject to the Final Statement of Adjustments and distributions from the Holdback.

DATED at the City of Calgary, in the Province of Alberta, this ___ day of [ ], 2015.

ERNST & YOUNG INC. in its capacity as
Court-appointed Monitor of GASFRAC Energy
Services Inc., GASFRAC Services GP Inc.
for itself and in its capacity as general partner of
GASFRAC Energy Services Limited Partnership,
GASFRAC Energy Services (US) Inc.,
GASFRAC US Holdings Inc. and GASFRAC Inc.

SCHEDULE "C"

Encumbrances

Nil

SCHEDULE "D"

Permitted Encumbrances

LEGAL DESCRIPTION
PLAN 8722703
BLOCK 1
LOTS 6 AND 7
EXCEPTING THEREOUT ALL MINES AND MINERALS

Permitted Encumbrances:

Registration Number	Date	Particulars
752 055 566	20/05/1975	UTILITY RIGHT OF WAY GRANTEE - YELLOWHEAD GAS CO-OP LTD.
802 274 979	17/11/1980	UTILITY RIGHT OF WAY GRANTEE - FORTISALBERTA INC. 320 - 17 AVENUE S.W. CALGARY, ALBERTA T2S2Y1
852 056 382	21/03/1985	UTILITY RIGHT OF WAY GRANTEE - THE TOWN OF EDSON. AFFECTED LAND: 8722703;1;7 "PART"

SCHEDULE "E"

The Lands

Municipal Address	Legal Description
174-27th Street, Edson Alberta	PLAN 8722703, BLOCK 1, LOTS 6 and 7 EXCEPTING THEREOUT ALL MINES AND MINERALS

TAB 11

COURT FILE NUMBER	**1501-00396**
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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9** **AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.**
DOCUMENT	**APPROVAL & VESTING ORDER**

Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
FILED
MAR 16 2015
CLERK OF THE COURT

I hereby certify this to be a true copy of the original Order
Dated this 16 day of March 2015
for Clerk of the Court

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Josef G.A. Krüger, Q.C./Robyn Gurofsky
Borden Ladner Gervais LLP
1900, 520 3rd Ave. S.W.
Calgary, AB T2P 0R3
Telephone: (403) 232-9774
Facsimile: (403) 266-1395
Email: JKruger@blg.com /RGurofsky@blg.com
File No. 441817-000015

DATE ON WHICH ORDER WAS PRONOUNCED: March 16, 2015

NAME OF JUSTICE WHO MADE THE ORDER: The Honourable Justice K.M. Eidsvik

LOCATION OF HEARING: Calgary, Alberta

UPON the application of **GASFRAC ENERGY SERVICES INC.** ("**GESI**"), **GASFRAC SERVICES GP INC.** ("**GSGP**") for itself and in its capacity as general partner of **GASFRAC ENERGY SERVICES LIMITED PARTNERSHIP** ("**GES LP**"), **GASFRAC ENERGY SERVICES (US) INC.** ("**GESI US**"), **GASFRAC US HOLDINGS INC.** ("**Holdings**") and **GASFRAC INC.** ("**GI**") (individually a "**Vendor Entity**" and collectively the "**Vendor**") in these proceedings; **AND UPON** having read the Application, the Affidavit of Lori McLeod-Hill sworn on

March 9, 2015, the Confidential Affidavit of Lori McLeod-Hill dated March 10, 2015 (the "**Confidential Affidavit**"), the Third Report of the Monitor, dated March 11, 2015, the Confidential Supplement to the Monitor's Third Report dated March 11, 2015 (the "**Confidential Report**"), the Affidavit of Stella Kim, dated March 12, 2015 (the "**Service Affidavit**"), the pleadings and proceedings filed herein, including the Initial Order granted on January 15, 2015 (the "**Initial Order**"), and the Order granted on January 23, 2015 approving the sales and solicitation process; **AND UPON** hearing counsel for the Vendor, the Purchaser, the Monitor and any other interested party appearing at the Application;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The time for service of notice of this application is abridged to the time actually given and service of the Application and supporting material as described in the Service Affidavit is good and sufficient, and this hearing is properly returnable before this Honourable Court today and further service thereof is hereby dispensed with.

2. Unless otherwise defined in this Order, all capitalized terms used in this Order shall have the meaning ascribed to them in the Asset Purchase Agreement between the Vendor and [Purchaser] (the "**Purchaser**") dated February 27, 2015 (the "**Agreement**"), attached to the Confidential Affidavit as Exhibit "C".

Approval of the Agreement and the Transaction

3. The Agreement, including the transaction for the purchase, sale, assignment, transfer and conveyance of the Purchased Assets from the Vendor to the Purchaser and related assignments, transfers, conveyances, assumptions, and other arrangements contemplated by or set forth in the Agreement (the "**Transaction**"), is found to be in the best interests of the Vendor, its creditors, and its other stakeholders, and therefore the Agreement and the Transaction contemplated thereby is hereby authorized, ratified, deemed commercially reasonable and approved.

4. The sale, assignment, transfer and conveyance of the Purchased Assets by the Vendor to the Purchaser on the terms and conditions contained in the Agreement is hereby approved and

the Vendor and the Monitor are hereby authorized and directed to complete the Closing of the Transaction pursuant to the terms of the Agreement.

5. The Vendor and the Monitor are authorized and directed to take all such steps, perform, consummate, implement and executed and deliver all such conveyance documents, bills of sale, assignments, conveyances, transfers, deeds, representations, indicia of title, tax elections, documents and instruments of whatsoever nature or kind as may reasonably be necessary or desirable to consummate the Transaction in accordance with the terms of the Agreement including, without limitation, proceeding with the Inspection, settlement with the Purchaser in respect of all adjustments contemplated by the Interim Statement of Adjustments and the Final Statement of Adjustments, and distributions from the Holdback, and making such amendments as the Vendor, the Monitor and the Purchaser may approve in writing and which do not materially alter the Agreement, and upon such trust conditions as may be agreed upon among legal counsel for the Vendor, the Monitor and the Purchaser.

6. In the event the Vendor fails to take any step or execute any document reasonably necessary or desirable to consummate the Transaction, the Monitor is hereby authorized and directed to take such step or execute any such document on the Vendor's behalf.

Monitor's Certificate

7. Upon Closing, the Monitor is hereby authorized and directed to promptly file with the Court in these proceedings and serve upon the Vendor, the Purchaser and those Persons listed on the Service List (attached as **Schedule "A"** to this Order) a certificate (substantially in the form set out as **Schedule "B"** to this Order) certifying that the Transaction has closed substantially in accordance with the terms of the Agreement, subject to the Final Statement of Adjustments and distributions from the Holdback (the "**Monitor's Certificate**").

Vesting of the Assets

8. Upon Closing and filing of the Monitor's Certificate, all of the Vendor's right, title, estate and interest in and to the Purchased Assets shall vest absolutely in the name of the Purchaser (or its nominee), free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, caveats, mortgages, trusts or deemed trusts

(whether contractual, statutory, or otherwise) liens, encumbrances, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, and whether by payment, set off or otherwise (collectively, the "**Claims**"), including, without limiting the generality of the foregoing:

a) any encumbrances or charges created by the Initial Order or subsequent Orders granted in the within CCAA proceedings;

b) all charges, security interests or claims against the personalty comprising the Purchased Assets, whether evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta), any other personal property registry system or otherwise; and

c) the Encumbrances listed on **Schedule "C"** hereto, which shall not include the permitted encumbrances, caveats, easements and restrictive covenants listed on **Schedule "D"**.

For greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets and all charges, security interests or Claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta), any other personal property registry system or otherwise where any Claim of any kind may be registered or recorded are hereby expunged, ordered removed and otherwise unconditionally discharged and terminated as against the Purchased Assets. The Vendor or the Monitor is hereby authorized and directed to take all necessary steps and execute any and all documents to effect any and all discharges, and the registrars and all other persons in control or otherwise supervising such offices of registration or recording shall forthwith remove and discharge all such registrations.

9. The Purchaser is authorized and directed to file, register or otherwise record a certified copy of this Order and the Monitor's Certificate with the appropriate filing office, agency, clerk(s) and/or recorder(s), which, once filed, registered or otherwise recorded, shall constitute conclusive evidence of the sale of the Purchased Assets free and clear from any and all Claims, including the release of all liens, claims, encumbrances and interests in the Purchased Assets as of the Closing Date of any kind or nature whatsoever.

10. Upon delivery of the Monitor's Certificate and a certified copy of this Order, together with any applicable registration fees, the Registrar of Land Titles of Alberta (the "Registrar") is hereby authorized, requested, and directed, notwithstanding the requirements of section 191(1) of the *Land Titles Act*, RSA 2000, c L-7 and notwithstanding that the appeal period in respect of this Order may not have elapsed, to cancel the existing Certificate of Titles for those lands and premises municipally and legally described in the attached **Schedule "E"** (the "**Lands**"), and to issue a new Certificate of Title for the Lands in the name of the Purchaser (or its nominee), and to register such transfers, discharges, discharge statements of conveyances, as may be required to convey clear title to the Lands to the Purchaser (or its nominee), which Certificate of Title shall be clear of all Encumbrances and subject only to the Permitted Encumbrances.

11. The Purchaser (and its nominee) shall, by virtue of the completion of the Transaction, have no liability of any kind whatsoever in respect of any Claims against the Vendor.

12. Under no circumstances shall the Purchaser be deemed a successor of or to the Vendor for any Claims of any kind or nature whatsoever against or in the Vendor or the Purchased Assets. Following the Closing, no person with a Claim shall interfere with the Purchaser's title to or use and enjoyment of the Purchased Assets based on or related to such Claim or any actions that the Vendor may take in the within CCAA proceedings.

13. The Vendor and all persons who claim by, through or under the Vendor in respect of the Purchased Assets, and all persons or entities having any Claims of any kind whatsoever in respect of the Purchased Assets, save and except for the persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped and foreclosed from and permanently enjoined from, pursuing, asserting or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption, or Claim in respect of or to the Purchased Assets and, to the extent that any such persons or entities remain in the possession or control of any of the Purchased Assets, or any artifacts, certificates, instruments or other indicia of title representing or evidencing any right, title, estate, or interest in and to the Purchased Assets, they shall forthwith deliver possession thereof to the Purchaser (or its nominee).

14. The Purchaser (or its nominee) shall be entitled to enter into and upon, hold and enjoy the Purchased Assets for its own use and benefit absolutely without any interference of or by the Vendor, or any person claiming by or through or against the Vendor.

15. The Purchaser shall be authorized, as of the Closing, to operate under any Governmental Authority, license, permit, registration and authorization or approval of or given to the Vendor with respect to the Purchased Assets, and all such licences, permits, registrations and authorizations and approvals shall be and shall be deemed to have been transferred to the Purchaser as of the Closing.

16. Pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act* and section 20(e) of the Alberta *Personal Information Protection Act*, the Vendor and the Monitor are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Vendor's records pertaining to the Vendor's past and current employees, including personal information of those employees listed in the Agreement. The Purchaser (or its nominee) shall maintain and protect the privacy of such information 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.

Handling of the Net Proceeds

17. The Monitor shall hold the proceeds received from the Purchaser pursuant to the Agreement, less completion costs (including, but without limitation good and services taxes, transfer taxes, legal and other costs, expenses and disbursements, of the Vendor and the Monitor) and other usual completion costs incurred (the "**Net Proceeds**") pursuant to and in accordance with the terms of this Order.

18. The Net Proceeds shall stand in the place and stead of the Purchased Assets, and from and after the delivery of the Monitor's Certificate all Claims shall attach to the Net Proceeds with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

19. Unless otherwise authorized by this Order, the Monitor shall make no distributions from the Net Proceeds except by further Order of this Court.

20. Unless otherwise ordered, at Closing, the Monitor is hereby authorized and directed to pay to PNC Bank Canada Branch ("**PNC**") all of its claims against the Vendor, provided that the Monitor shall withhold $1.440 million (USD) thereof, comprised of the amount of the early termination fee claimed by PNC plus security for costs, pending determination of whether or not the early termination fee properly forms part of the obligations of the Vendor payable to PNC. The determination shall be made by the Court on application by the Monitor for advice and direction to be heard on or before April 25, 2015, or such other date as counsel may agree or the Court may direct.

21. At Closing, the Holdback shall be retained by the Purchaser and delivered to the Purchaser's legal counsel. The Holdback shall be held in trust by the Purchaser's legal counsel in an interest-bearing account and it shall be releasable in accordance with the terms of the Agreement or by further Order of this Court.

Transaction not a Preference or Transfer at Undervalue

22. Notwithstanding:

a) the pendency of this proceeding and the declaration of insolvency made herein;

b) the pendency of any petition for receiving orders or bankruptcy orders heretofore or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), as amended, in respect of any or all Vendor Entities, any receiving orders issued pursuant to any such petitions or any assignments in bankruptcy which may hereafter be made by or with respect to any or all Vendor Entities;

c) any assignment in bankruptcy made by any or all Vendor Entities; and

d) the provisions of any federal or provincial statute:

the assignment, transfer, conveyance and vesting of the Vendor's right, title, estate and interest in and to the Purchased Assets in the Purchaser (or its nominee) pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the

Vendor and shall not be void or voidable by creditors of the Vendor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

Sealing Order

23. The Confidential Affidavit and the Confidential Report shall immediately be sealed by the Clerk of the Court, kept confidential and not form part of the public record, and not be available for public inspection unless and until otherwise ordered by this Court, upon seven days' notice to all interested parties. The Confidential Affidavit and the Confidential Report shall be sealed and filed in an envelope containing the following endorsement thereon:

> THIS ENVELOPE CONTAINS THE CONFIDENTIAL AFFIDAVIT OF LORI MCLEOD-HILL DATED MARCH 10, 2015 AND THE CONFIDENTIAL SUPPLEMENT TO THE MONITOR'S THIRD REPORT DATED MARCH 11, 2015, WHICH SHALL BE SEALED FOR A PERIOD OF THREE (3) MONTHS PURSUANT TO AN ORDER ISSUED BY THE HONOURABLE MADAM JUSTICE EIDSVIK DATED MARCH 16, 2015, AND IS NOT TO BE PLACED ON THE PUBLIC RECORD OR MADE PUBLICALLY ACCESSIBLE.

Application for Further Advice

24. The Monitor, the Purchaser (or its nominee), the Vendor or any other interested party, shall be at liberty to apply for further advice, assistance and directions as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.

Miscellaneous Matters

25. This Court hereby requests the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or any court or any judicial, regulatory or administrative body of

any other nation or state, to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

26. Service of this Order shall be deemed good and sufficient by serving the same on:

a) the persons listed on the Service List (as found at Schedule "A" to this Order);

b) the Purchaser or on the Purchaser's solicitors; and

c) by posting a copy of this Order on the Monitor's website at:

http://www.ey.com/ca/gasfracenergy.

27. No other Persons are entitled to be served with a copy of this Order.

28. Service of this Order shall be deemed good and sufficient regardless of whether service is effected by PDF copy attached to an email, facsimile, courier, personal delivery or ordinary mail.

"K.M. Eidsvik"

Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A"

COURT FILE NUMBER	**1501-00396**
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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9** **AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.**

GASFRAC SERVICE LIST			
FIRM	**EMAIL**	**PHONE**	
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Pepper Hamilton LLP 5100, 1313 N. Market Street Wilmington, DE 19899-1709 **John H. Schanne, II**	schannej@pepperlaw.com	302-777-6502	**US Attorneys for Preferred Pipeline LLC**

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Computershare 600, 530 – 8th Avenue S.W. Calgary, Alberta T2P 3S8 **Kristine Calesso**	Kristine.calesso@computershare.com	403-267-6372	

Computershare 600, 530 – 8th Avenue S.W. Calgary, Alberta T2P 3S8 **Nadia Mohamed**	Nadia.mohamed@computershare.com	403-267-6509	
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Ford Credit Canada Leasing, A Division of Canadian Road Leasing Company PO Box 2400 Edmonton, AB T5J 5C7			**Secured Party**
HSBC Bank Canada 407 8th Avenue SW Calgary, AB T2P 1E5			**Secured Party**
Tricor And Finance Corp. PO Box 397 Burlington, ON L7R 3Y3			**Secured Party**
Cam Clark Ford Sales 1001 Highland Park Blvd. NE Airdrie, AB T4A 0R2			**Secured Party**

SCHEDULE "B"

Clerk's Stamp

COURT FILE NUMBER	**1501-00396**
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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9** **AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.**
DOCUMENT	**MONITOR'S CERTIFICATE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Josef G.A. Krüger, Q.C./Robyn Gurofsky Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9774 Facsimile: (403) 266-1395 Email: JKruger@blg.com /RGurofsky@blg.com File No. 441817-000015

1. All defined terms used but not defined herein shall have the meanings ascribed thereto in the Sale Approval and Vesting Order granted in these proceedings on [ ], 2015 (the "**Order**").

2. Pursuant to paragraph [ ] of the Order, Ernst & Young Inc., in its capacity as the Court-appointed Monitor (the "**Monitor**") of GASFRAC Energy Services Inc., GASFRAC Services GP Inc. for itself and in its capacity as general partner of GASFRAC Energy Services Limited Partnership, GASFRAC Energy Services (US) Inc., GASFRAC US Holdings Inc. and GASFRAC Inc. (collectively, the "**Vendor**"), delivers this certificate and hereby confirms that Closing of the sale of the Purchased Assets pursuant to the Asset Purchase and Sale Agreement between the Vendor and [ ] (the "**Purchaser**") dated February 27, 2015 (the "**Agreement**") has occurred and all purchase monies due and owing in respect of such sale

have been paid by the Purchaser to the Monitor for the Vendor, subject to the Final Statement of Adjustments and distributions from the Holdback.

DATED at the City of Calgary, in the Province of Alberta, this ___ day of [ ], 2015.

ERNST & YOUNG INC. in its capacity as
Court-appointed Monitor of GASFRAC Energy
Services Inc., GASFRAC Services GP Inc.
for itself and in its capacity as general partner of
GASFRAC Energy Services Limited Partnership,
GASFRAC Energy Services (US) Inc.,
GASFRAC US Holdings Inc. and GASFRAC Inc.

SCHEDULE "C"

Encumbrances

Nil

SCHEDULE "D"

Permitted Encumbrances

LEGAL DESCRIPTION
PLAN 8722703
BLOCK 1
LOTS 6 AND 7
EXCEPTING THEREOUT ALL MINES AND MINERALS

Permitted Encumbrances:

Registration Number	Date	Particulars
752 055 566	20/05/1975	UTILITY RIGHT OF WAY GRANTEE - YELLOWHEAD GAS CO-OP LTD.
802 274 979	17/11/1980	UTILITY RIGHT OF WAY GRANTEE - FORTISALBERTA INC. 320 - 17 AVENUE S.W. CALGARY, ALBERTA T2S2Y1
852 056 382	21/03/1985	UTILITY RIGHT OF WAY GRANTEE - THE TOWN OF EDSON. AFFECTED LAND: 8722703;1;7 "PART"

SCHEDULE "E"

The Lands

Municipal Address	Legal Description
174-27th Street, Edson Alberta	PLAN 8722703, BLOCK 1, LOTS 6 and 7 EXCEPTING THEREOUT ALL MINES AND MINERALS

TAB 12

Form 27

[Rules 6.3 and 10.52(1)]

CLERK OF THE COURT
FILED
Clerk's Stamp
MAR 24 2015
CALGARY, ALBERTA

COURT FILE NUMBER	1501-00396
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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9 AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.
DOCUMENT	**APPLICATION: Approval of Transaction**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Josef G.A. Krüger, Q.C./Robyn Gurofsky Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9774 Facsimile: (403) 266-1395 Email: JKruger@blg.com/RGurofsky@blg.com File No. 441817-000015

NOTICE TO RESPONDENTS: See Service List, Schedule "A" to this Application

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Judge.

To do so, you must be in Court when the application is heard as shown below:

Date	Thursday March 26, 2015
Time	1:30
Where	Calgary Courts Centre, 601-5th Street S.W., Calgary, AB
Before Whom	The Honourable Justice K.M. Eidsvik

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. The Applicants seek an Order for the following relief:

   (a) Deeming service of this Application together with all supporting materials to be good and sufficient, and abridging the time for service of said documents, if necessary;

   (b) Approving and authorizing the Applicants' agreement to conduct the transactions pursuant to the Restructuring Term Sheet (the "**Term Sheet**"), a copy of which is attached to the Confidential Affidavit of Lori McLeod-Hill, sworn on March 23, 2015 (the "**Confidential Affidavit**");

   (c) Approving and authorizing the Applicants' agreement to purchase from Calfrac Well Services Ltd. ("**Calfrac**") certain assets so as to assist the Applicants in continuing their operations, and the completion of the transactions contemplated under the Term Sheet, pursuant to an Asset Purchase Agreement dated March 20, 2015, along with certain related agreements (collectively, the "**Calfrac APA**"), a copy of which is attached to the Confidential Affidavit; and

   (d) Sealing the Confidential Affidavit, including all exhibits, schedules and attachments thereto.

2. Such further and other relief as Counsel may advise and this Honourable Court permit.

Grounds for making this application:

3. The applicants, GASFRAC Energy Services Inc. ("**GESI**"), GASFRAC Services GP Inc. ("GSGP") for itself and in its capacity as general partner of GASFRAC Energy Services Limited Partnership ("**GES LP**"), GASFRAC Energy Services (US) Inc. ("**GESI US**"), GASFRAC US Holdings Inc. ("**Holdings**") and GASFRAC Inc. ("**GI**") (GESI, GSGP, GES LP, GESI US, Holdings and GI are sometimes collectively referred to herein as the "**Applicants**" or the "**Company**"), obtained an Initial Order granted by the Honourable Justice K.M. Eidsvik of the Court of Queen's Bench of Alberta on January 15, 2015, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

4. The Initial Order provided for a stay of proceedings until and including February 9, 2015. The stay of proceedings was extended by this Honourable Court until and including May 14, 2015.

5. Since the granting of the Initial Order, the Applicants have been working diligently and in good faith with the court-appointed financial advisor, CIBC World Markets Inc. ("CIBC"), legal advisors, and with Ernst & Young Inc. in its capacity as the court-appointed Monitor of the

Applicants (the "**Monitor**") to review its options with respect to restructuring the Company's business and maximizing value for its stakeholders and creditors.

6. On January 23, 2015, the Applicants obtained Court approval to engage in an extensive sales and solicitation process ("**SISP**") through CIBC, with the assistance of the Monitor, to market the business and operations of the Applicants. The deadline for the receipt of bids was February 24, 2015 (the "**Bid Deadline**").

7. On March 16, 2015, the Applicants obtained Court approval with respect to an Asset Purchase Agreement ("**APA**") entered into by the Applicants with the successful bidder through the SISP. The projected closing date of the transaction contemplated in the APA is April 3, 2015.

8. The proceeds from the APA will result in full payment to the Applicants' first secured creditor, together with payments to other creditors of the Applicants.

9. Subsequent to the Bid Deadline, the Applicants received an offer from Calfrac involving the continuance of the Company's business and the restructure of certain of GESI's subsidiaries and its shareholdings pursuant to the Term Sheet. The Term Sheet and the Calfrac APA were entered into by the Applicants on March 20, 2015, subsequent to the APA.

10. The transactions contemplated by the Term Sheet require the Applicants to continue its Canadian operations uninterrupted in the ordinary course and it is necessary for the Applicants to acquire certain assets to continue to be in a position to do so.

11. The Applicants are prepared to conduct the transactions contemplated by the Term Sheet and enter into the Calfrac APA because it will result in increased payments to the Company's unsecured subordinate debenture holders. In addition, it will ensure continued employment to some of the Company's employees who would otherwise be out of work in a difficult economy.

12. As a result of the provision by Calfrac of the working capital amount, the Company will have sufficient funding for any incremental costs in relation to the Calfrac APA and, as such, these costs will not reduce the recoveries available for creditors of the Company.

13. The key provisions of the Term Sheet contemplate that the Applicants will:

    (a) Continue their operations uninterrupted in the ordinary course of business including the continued use of their remaining assets, as well as assets to be acquired from Calfrac

pursuant to the Calfrac APA, and the satisfaction of continuing obligations to remaining employees, certain key suppliers of goods and services and customers; and

(b) Obtain Court approval of the APA;

(c) Finalize a Plan of Compromise and Arrangement with its remaining creditors, on terms subject to the approval of the Purchaser (the "**Plan**").

collectively referred to as the "**Restructuring Transaction**".

14. As consideration for the Restructuring Transaction, Calfrac will pay to the Company an amount sufficient to provide working capital to the Company to undertake the Plan and will act as the Plan sponsor, providing funding for distribution to affected creditors as contemplated by the Plan.

15. The Restructuring Transaction will provide a greater recovery to the Applicants' unsecured subordinate debenture holders.

16. The Company and the Monitor believe that the transactions contemplated by the Term Sheet are in the best interests of the Company, its creditors and other stakeholders.

17. The Company has acted and continues to act in good faith and with due diligence in the within CCAA proceedings.

18. The Confidential Affidavit and the Confidential Report contain commercially sensitive information of the Applicants, that if disseminated could adversely affect the Company's operations and the SISP.

19. The Sealing Order sought is the least restrictive and prejudicial alternative to prevent dissemination of the Applicants' commercially sensitive information.

20. It is fair and just in the circumstances to restrict public access to the Confidential Affidavit.

21. The provisions of the CCAA and the equitable jurisdiction of this Honourable Court are applicable to and provide the basis for the relief sought by the Applicants.

22. Such further and other basis as Counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

23. The Affidavit of Lori McLeod-Hill, sworn March 23, 2015;

24. The Confidential Affidavit of Lori McLeod-Hill, sworn March 23, 2015;

25. The Sixth Report of the Monitor, dated March 23, 2015; and

26. Such further and other material as counsel may advise and this Honourable Court permit.

Applicable rules:

27. Alberta *Rules of Court*, AR 124/2010.

Applicable Acts and regulations:

28. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

29. *Judicature Act*, R.S.A. 2000, c. J-2; and

30. Such further and other acts and regulations as Counsel may advise and this Honourable Court permit.

Any irregularity complained of or objection relied on:

31. None.

How the application is proposed to be heard or considered:

32. In person, before the Honourable Madam Justice K.M. Eidsvik, on affidavit evidence with some or all of the parties present.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

TAB 13

COURT FILE NUMBER	1501-00396
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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9** **AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.**

Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
FILED
MAR 26 2015
CLERK OF THE COURT

DOCUMENT	**APPROVAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Josef G.A. Krüger, Q.C./Robyn Gurofsky Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9774 Facsimile: (403) 266-1395 Email: JKruger@blg.com /RGurofsky@blg.com File No. 441817-000015

I hereby certify this to be a true copy of the original order
Dated this 26 day of March 2015
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: March 26, 2015

NAME OF JUSTICE WHO MADE THE ORDER: The Honourable Justice K.M. Eidsvik

LOCATION OF HEARING: Calgary, Alberta

UPON the application of **GASFRAC ENERGY SERVICES INC.** ("**GESI**"), **GASFRAC SERVICES GP INC.** ("**GSGP**") for itself and in its capacity as general partner of **GASFRAC ENERGY SERVICES LIMITED PARTNERSHIP** ("**GES LP**"), **GASFRAC ENERGY SERVICES (US) INC.** ("**GESI US**"), **GASFRAC US HOLDINGS INC.** ("**Holdings**") and **GASFRAC INC.** ("**GI**") (collectively the "**CCAA Applicants**") in these proceedings; **AND UPON** having read the Application, the Affidavit of Lori McLeod-Hill sworn on March 23, 2015, the

Confidential Affidavit of Lori McLeod-Hill dated March 23, 2015 (the "**Confidential Affidavit**"), the Sixth Report of the Monitor, dated March 23, 2015, the Affidavit of Service of Stella Kim, dated March 25, 2015 (the "**Service Affidavit**"), the pleadings and proceedings filed herein, including the Initial Order granted on January 15, 2015 (the "**Initial Order**"); **AND UPON** hearing counsel for the Vendor, the Purchaser, the Monitor and any other interested party appearing at the Application;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The time for service of notice of this application is abridged to the time actually given and service of the Application and supporting material as described in the Service Affidavit is good and sufficient, and this hearing is properly returnable before this Honourable Court today and further service thereof is hereby dispensed with.

2. Unless otherwise defined in this Order, all capitalized terms used in this Order shall have the meaning ascribed to them in the following agreements entered into between Calfrac Well Services Ltd. (the "**Vendor**") and GES LP (the "**Purchaser**") and all dated March 24, 2015:

   (a) Asset Purchase Agreement (the "**APA**"), including all Schedules thereto, attached to the Confidential Affidavit as Exhibit "B";

   (b) Promissory Notes (the "**Notes**"), attached to the Confidential Affidavit as Exhibit "B";

   (c) Security Agreement (the "**Security Agreement**"), attached to the Confidential Affidavit as Exhibit "B"; and

   (d) Support Services Agreement (the "**Support Services Agreement**"), attached to the Confidential Affidavit as Exhibit "B";

   (collectively, the "**Agreements**").

Approval of the Agreements and the Transaction

3. The Agreements, including the transactions contemplated therein for the purchase and sale, assignment, transfer and conveyance of the Purchased Assets from the Vendor to the Purchaser, the related granting of the Security Interest and the other arrangements contemplated by or set forth in the Agreements (collectively, the "**Transaction**"), is found to be in the best interests of the Purchaser, its creditors, and its other stakeholders, and therefore the Agreements and the Transaction are hereby authorized, ratified, deemed commercially reasonable and approved.

4. The Purchaser and the Monitor are hereby authorized and directed to complete the Closing of the Transaction pursuant to the terms of the Agreements.

5. The Purchaser and the Monitor are hereby authorized and directed to take all such steps, perform, consummate, implement and execute and deliver all such conveyance documents, bills of sale, assignments, conveyances, transfers, deeds, representations, indicia of title, tax elections, documents and instruments of whatsoever nature or kind as may reasonably be necessary or desirable to consummate the Transaction in accordance with the terms of the Agreements.

6. The Agreements and the completion of the Transaction require the closing of the transaction contemplated by the Asset Purchase Agreement dated February 27, 2015 entered into by the CCAA Applicants and STEP Energy Services Ltd. (the "**STEP Agreement**") that was approved by this Court pursuant to the Approval and Vesting Order granted on March 16, 2015 (the "**Approval Order**") and by the United States Bankruptcy Court pursuant to an Order granted on March 18, 2015 (the "**US Order**") on or before April 3, 2015, or such later date as PNC Bank Canada Branch may agree to in writing or as may be ordered by the Court. For greater clarity, if any of the agreements or transactions contemplated by the Transaction are completed and the STEP Agreement fails to close on or before April 3, 2015 (or such later date as may be agreed to by PNC Bank Canada Branch or ordered by the Court), such agreements shall be unwound in accordance with the terms thereof, on the basis that the failure to close the STEP Agreement on or before April 3, 2015 constitutes a "Purchase Trigger Event" within the meaning of the APA.

7. If and to the extent that any of the provisions in this Order and the Agreements conflict with the STEP Agreement, the Approval Order and the US Order, the STEP Agreement, the Approval Order and the US Order shall prevail and the conflicting provisions in this Order and the Agreements shall be of no force and effect. For greater certainty, the Calfrac Charge shall only be a Charge against the Collateral (further described in paragraph 9 hereof and Article 1.1 of the Security Agreement) and it shall not constitute a Charge on any of the assets, undertakings, real and personal property, assignments, rights, assumptions, and other interests being purchased and sold pursuant to the STEP Agreement.

8. The Vendor shall not interfere with the closing of the transactions contemplated by the STEP Agreement and it is hereby deemed to have waived any rights of objection and appeal with respect to the Approval Order and the US Order.

The Calfrac Charge

9. The Security Interest, as defined in the Security Agreement, shall constitute a Charge only on the Collateral, as defined in Article 1.1 of the Security Agreement (the "**Calfrac Charge**"), and the Calfrac Charge shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory, court-ordered or otherwise, in favour of any person, including any creditor of the Purchaser, the CCAA Applicants or their affiliates. For certainty, the Calfrac Charge shall rank only as against the Collateral in priority to all charges granted in this Action by this Honourable Court, including but not limited to the Administration Charge, the Critical Suppliers' Charge, the Directors Charge, the Financial Advisor Charge and the KERP Charge.

10. The filing, registration or perfection of the Calfrac Charge shall not be required, and the Calfrac Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected before or after the Calfrac Charge coming into existence, notwithstanding any such failure to file, register, record or perfect the Calfrac Charge. Any registration by Calfrac to perfect or register the Calfrac Charge as against the Collateral shall be permitted and shall not be stayed by the stay of proceedings ordered in Initial Order and extended thereafter (the "**Stay**").

11. The Purchaser shall not grant any security interest, trust, lien, charge or encumbrance as against the Purchased Assets whatsoever. After the closing of the Transaction, the Purchased Assets shall constitute part of the "Property" of the CCAA Applicants as defined in the Initial Order and as such are covered by the Stay.

12. The Calfrac Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Vendor with respect to the Calfrac Charge shall not otherwise be limited or impaired in any way by:

a) the pendency of this proceeding and the declaration of insolvency made herein;

b) the pendency of any petition for receiving orders or bankruptcy orders heretofore or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), as amended, in respect of any or the Purchaser, the CCAA Applicants or their affiliates, any receiving orders issued pursuant to any such petitions or any assignments in bankruptcy which may hereafter be made by or with respect to any or all CCAA Applicants or their affiliates;

c) any assignment in bankruptcy made by any or all of the CCAA Applicants or their affiliates;

d) the provisions of any federal or provincial statute; or

e) any negative covenant, prohibitions or other similar provisions with respect borrowings, incurring debt or the creation of any charge or encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, a "**Third Party Agreement**") which binds the Purchaser, the CCAA Applicants or any of their affiliates, and notwithstanding any provision to the contrary in any Agreement:

i. neither the creation of the Calfrac Charge nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Purchaser, the CCAA Applicants or their affiliates of any Third Party Agreement to which they are a party;

ii. Calfrac shall not have any liability to any person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the Calfrac Charge; and

iii. the payments made by the Purchaser pursuant to this Order, including the granting of the Calfrac Charge, does not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

Transaction not a Preference or Transfer at Undervalue

13. Notwithstanding:

a) the pendency of this proceeding and the declaration of insolvency made herein;

b) the pendency of any petition for receiving orders or bankruptcy orders heretofore or hereafter issued pursuant to the BIA, as amended, in respect of any or all CCAA Applicants or their affiliates, any receiving orders issued pursuant to any such petitions or any assignments in bankruptcy which may hereafter be made by or with respect to any or all CCAA Applicants or their affiliates;

c) any assignment in bankruptcy made by any or all of the CCAA Applicants or their affiliates; and

d) the provisions of any federal or provincial statute:

the Transaction shall not be void or voidable by creditors of the Purchaser or the CCAA Applicants or their affiliates, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

Sealing Order

14. The Confidential Affidavit shall immediately be sealed by the Clerk of the Court, kept confidential and not form part of the public record, and not be available for public inspection unless and until otherwise ordered by this Court, upon seven days' notice to all interested parties. The Confidential Affidavit shall be sealed and filed in an envelope containing the following endorsement thereon:

> THIS ENVELOPE CONTAINS THE CONFIDENTIAL AFFIDAVIT OF LORI MCLEOD-HILL DATED MARCH 23, 2015, WHICH SHALL BE SEALED FOR A PERIOD OF THREE (3) MONTHS PURSUANT TO AN ORDER ISSUED BY THE HONOURABLE MADAM JUSTICE EIDSVIK DATED MARCH 26, 2015, AND IS NOT TO BE PLACED ON THE PUBLIC RECORD OR MADE PUBLICALLY ACCESSIBLE.

Miscellaneous Matters

15. Pursuant to paragraph 4(b) of the Initial Order, and subject to any further Order of this Court, the CCAA Applicants shall continue their operations uninterrupted in the ordinary course of business, including the use of the Purchased Assets and their other assets, and the satisfaction of their continuing obligations to employees, suppliers of goods and services, and customers.

16. Calfrac is not, and shall not be deemed to be, in control or possession of the business or assets of the CCAA Applicants or any of their affiliates, and Calfrac shall incur no liability or obligations that arise in association with the operations, the conduct of the business or the assets of the CCAA Applicants or any of their affiliates.

17. This Court hereby requests the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or any court or any judicial, regulatory or administrative body of any other nation or state, to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

18. Service of this Order shall be deemed good and sufficient by serving the same on:

    a) the persons listed on the Service List (as found at Schedule "A" to this Order); and

b) by posting a copy of this Order on the Monitor's website at:

http://www.ey.com/ca/gasfracenergy.

19. No other Persons are entitled to be served with a copy of this Order.

20. Service of this Order shall be deemed good and sufficient regardless of whether service is effected by PDF copy attached to an email, facsimile, courier, personal delivery or ordinary mail.

"K.M. Eidsvik"

Justice of the Court of Queen's Bench of Alberta

COURT FILE NUMBER	**1501-00396**
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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9** **AND IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC. and GASFRAC INC.**

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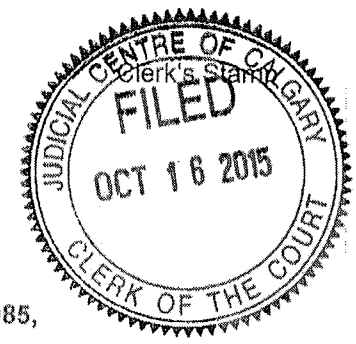
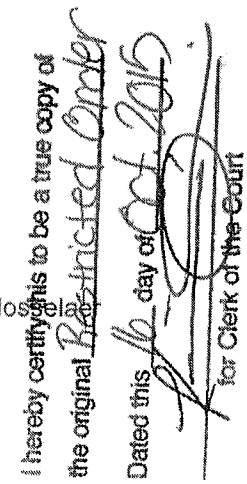
TAB 14

COURT FILE NUMBER	1501-04191
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED** **AND IN THE MATTER OF VERITY ENERGY LTD.**
DOCUMENT	**RESTRICTED COURT ACCESS ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Norton Rose Fulbright Canada LLP 3700 Devon Tower 400 Third Avenue SW Calgary, Alberta T2P 4H2 Telephone: 403.267.8144 Fax: 403.264.5973 Email: howard.gorman@nortonrosefulbright.com Attention: Howard A. Gorman, Q.C./Randal S. Van de Mosselaer File No. 01030213-0001
DATE ON WHICH ORDER WAS PRONOUNCED	October 15, 2015
NAME OF JUSTICE WHO MADE THIS ORDER	The Honourable Madam Justice K.D. Yamauchi
LOCATION WHERE ORDER WAS PRONOUNCED	Calgary, Alberta





UPON THE APPLICATION of Verity Energy Ltd. ("**Verity**" or the "**Applicant**"); **AND UPON HAVING READ** the pleadings, proceedings, orders and other materials filed in this action, including the Fourth Report of Grant Thornton Limited in its capacity as Monitor (the "**Monitor**"), filed September 24, 2015 (the "**Monitor's Fourth Report**"), and the Fifth Report of the Monitor dated October 9, 2015 (the "**Monitor's Fifth Report**"), including Confidential Appendix "A" to the Monitor's Fifth Report (the "**Confidential Appendix "A"**"), filed; **AND UPON HEARING** counsel for Verity, counsel to the Monitor, counsel for Topanga Resources Ltd. (the "**Purchaser**") and from any other interested persons who by the Court record have appeared at the within Application; **AND UPON IT APPEARING** that all interested and affected parties have been served with notice of this Application; **AND WHEREAS** all capitalized terms

not defined herein shall take the meaning ascribed to them in the Verity PSA (as that term is defined in the Sale Approval and Vesting Order granted in the within proceedings on October 13, 2015);

IT IS HEREBY ORDERED AND DECLARED THAT:

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, time for service of this Application is abridged to that actually given, and specifically, the service, notice and formal requirements of Part 6, Division 4 of the *Alberta Rules of Court*, Alta Reg 124/2010 shall not apply to this Order and are hereby dispensed with.

2 Confidential Appendix A" shall, subject to further Order of this Court, be marked "SEALED PURSUANT TO COURT ORDER - NOT TO BE OPENED WITHOUT PRIOR ORDER OF THE COURT", and shall be maintained in accordance with the terms of this Order and shall be treated as confidential, sealed and not form part of the public record.

3 Every person on whom Confidential Appendix "A" is served shall keep the information contained therein confidential and such information:

(a) shall be used only for the purposes of this proceeding and not for any business or other purpose whatsoever;

(b) shall not be given, shown, made available, or communicated in any way to anyone other than for the purpose of retaining and instructing counsel with respect to these proceedings only, who shall be bound by the terms of this Order; and

(c) shall not be copied or reproduced, except by counsel for the purpose of responding to Verity's motion or preparing materials for use in these proceedings.

4 The Monitor and the Applicant are at liberty to reapply for further advice, assistance and direction as may be necessary to give full force and effect to the terms of this Order.

5 This Order will remain in effect subject to further Order of the Court granted on notice to Verity, the Purchaser, and the Monitor, an Application for which may be brought by any interested party only following the filing by the Monitor of the Monitor's Certificate confirming the closing (if any) of the transaction to which Confidential Appendix "A" relates.

6 Confidential Appendix "A" shall be filed with the Court 90 days following the closing of the pending transaction contemplated by the Verity PSA.

J.C.Q.B.A.

TAB 15

COURT FILE NUMBER	1501-03351
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	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 BUSINESS CORPORATIONS ACT, R.S.C. 2000, c. B-9
	AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LARICINA ENERGY LTD., LARICINA GP HOLDING LTD. AND 1276158 ALBERTA INC.
DOCUMENT	**AFFIDAVIT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Osler, Hoskin & Harcourt LLP Suite 2500, 450 – 1st Street SW Calgary, AB T2P 5H1 Solicitors: A. Robert Anderson, Q.C. Phone: 403.260.7004 Fax: 403.260.7024 Email: randerson@osler.com Matter No.: 1151294

AFFIDAVIT OF GLEN C. SCHMIDT
Sworn on July 3, 2015

I, Glen C. Schmidt, of Calgary, Alberta, **SWEAR AND SAY THAT**:

1. I am the President and Chief Executive Officer ("**CEO**") of Laricina Energy Ltd. ("**Laricina**" or the "**Company**"), an oil sands exploration, development and production company, with oil sands interests in Western Canada.

2. I have served as Laricina's President and CEO since founding Laricina in 2005, and as such have personal knowledge of the matters herein deposed to, except where stated to be based on information and belief, in which case I believe the same to be true.

3. I have previously sworn the following affidavits in this action:

(a) an affidavit (the "**Initial Affidavit**") and a confidential affidavit (the "**Initial Confidential Affidavit**") on March 24, 2015 in support of Laricina's initial application for protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, as amended (the "**CCAA**");

(b) an affidavit (the "**Comeback Affidavit**") and a confidential Affidavit (the "**Confidential Comeback Affidavit**") on April 18, 2015 in support of Laricina's comeback application on April 22, 2015 (the "**Comeback Application**") for an extension of the general stay and other relief under the CCAA; and

(c) an affidavit (the "**June Affidavit**") on June 26, 2015 in support of Laricina's application for an extension of the general stay and other relief under the CCAA (the "**June 30 Application**").

4. Tim Lisevich, of BMO Capital Markets ("**BMO**"), swore an affidavit (the "**BMO Comeback Affidavit**") and a confidential affidavit (the "**BMO Confidential Comeback Affidavit**") on April 19, 2015 in connection with the Comeback Application.

5. Marla Van Gelder, Vice President Corporate Development of Laricina, swore an affidavit on June 26, 2015 in support of the June 30 Application.

6. In addition to this Affidavit, today, I have also sworn a confidential affidavit (the "**Concurrent Confidential Affidavit**").

7. My Concurrent Confidential Affidavit contains confidential, commercially-sensitive information including: (i) certain of Laricina's assets which are the subject of the Marketing Process (defined at paragraph 25); (ii) Laricina's proposed Marketing Process to raise capital to repay the Company's indebtedness in whole or in part to CPPIB Credit Investments Inc. (the "**Noteholder**"); (iii) a draft Asset and Corporate Sale Process Information Memorandum (the "**Confidential Information Memorandum**"); and (iv) a non-redacted copy of the term sheet agreement entered into by Laricina and the Noteholder on June 28, 2015 for the consensual resolution of Laricina's indebtedness to the Noteholder (the "**Term Sheet Agreement**").

8. Laricina respectfully requests that the information contained in my Concurrent Confidential Affidavit be sealed on the Court file, and not be disclosed to ensure that such information does not adversely impact Laricina's Marketing Process or its recovery of receivables from third parties, as referenced in the Term Sheet Agreement.

9. This affidavit is sworn in support of applications by Laricina to be heard on:

   (a) July 22, 2015 (the "**July 22 Application**") seeking, without limitation:

      (i) approval of Laricina's proposed second cash payment to the Noteholder;

      (ii) approval of Laricina's proposed Marketing Process;

      (iii) approval of Laricina's proposed claims process; and

      (iv) sealing my Concurrent Confidential Affidavit and attached confidential exhibits on the Court file;

   (b) August 5, 2015 (the "**Approval Application**") seeking, without limitation:

      (i) approval of the Term Sheet Agreement;

      (ii) approval of the Definitive Documents (as defined in the Term Sheet Agreement);

      (iii) extension of the general stay until December 11, 2015; and

      (iv) sealing portions of the Definitive Documents and any supplemental confidential affidavit(s) Laricina may file in support of the Approval Application and attached confidential exhibits on the Court file.

10. Capitalized terms not specifically defined in this Affidavit have the meanings set forth in the Term Sheet Agreement.

INTRODUCTION

11. Laricina and the Noteholder entered into the Term Sheet Agreement on June 28, 2015 for the consensual resolution of Laricina's indebtedness under the Notes.

12. The Term Sheet Agreement is non-binding, apart from the provisions referenced in Article 11 thereof. It contemplates preparation and execution of a number of Definitive Documents that will contain the terms of the binding Settlement Transaction between Laricina and the Noteholder (consistent with the terms of the Term Sheet Agreement).

13. The Term Sheet Agreement was unanimously approved by Laricina's Board of Directors, who consider the Settlement Transaction provided for therein to be balanced, fair and reasonable, having regard to the interests of all stakeholders.

14. Subject to Court approval, the Term Sheet Agreement provides, in part, for Laricina to make a second cash repayment to the Noteholder of $26.4 million (subject to adjustments) in excess cash plus an additional $5 million if Canadian Imperial Bank of Commerce ("**CIBC**") agrees to release cash collateral in that amount. This cash is in excess of what Laricina requires to complete wind down of its operations, restructure and maintain operations through to March 2018. Laricina pays a high interest rate on its debt to the Noteholder (13.5% per annum). Accordingly, Laricina considers it prudent to pay down the debt with excess cash on hand, whether or not the Term Sheet Agreement and Definitive Documents are approved.

15. Pursuant to the terms of the Term Sheet Agreement, Laricina may, on or prior to November 30, 2015, terminate the Term Sheet Agreement to enter into binding agreements providing for a transaction or transactions to repay the Noteholder in full (defined in the Term Sheet Agreement as a "Note Repayment Transaction"). The Term Sheet Agreement also contemplates that certain Additional Transactions may be implemented prior to the Effective Date of the Settlement Transaction. Pending approval by the Court, Laricina has prepared for and is now ready to implement its Marketing Process to canvass the market for transactions to raise capital. It is important that Laricina implement the Marketing Process as soon as possible in order to ensure it has the time required to complete the process.

16. The Settlement Transaction provided for in the Term Sheet Agreement and to be implemented by the Definitive Documents (once completed) is balanced, fair and reasonable having regard to the interests of all stakeholders. The Settlement Transaction provides a structure and path for resolution of the financial difficulties triggered by

Laricina's loan being called in March 2015. The Settlement Transaction will resolve the loan, leave Laricina with cash to continue in business until March 2018 and enable it to repay or pursue a plan of arrangement with its unsecured creditors. It avoids costs and risks of litigation with the Noteholder including the risk of receivership.

SECOND CASH REPAYMENT TO THE NOTEHOLDER

17. The Second Cash Repayment is a key element of the Term Sheet Agreement. Subject to Court approval, pursuant to the Term Sheet Agreement Laricina has agreed to pay the Noteholder, subject to adjustments: (a) $26.4 million within two business days of Court approval of the Term Sheet Agreement; and (b) a further $5 million, provided that CIBC agrees to reduce the cash collateral securing Laricina's revolving credit facility by $5 million (collectively, the "**Second Cash Repayment**").

18. Laricina pays a high rate of interest, 13.5% per annum, on its debt to the Noteholder. Accordingly, Laricina considers it prudent to apply excess cash in reduction of its debt while retaining sufficient cash to complete wind down of its operations, restructure and maintain operations to March 2018.

19. After retaining capital for the foregoing, Laricina has determined that it has sufficient excess cash on hand to make the Second Cash Repayment to the Noteholder.

20. Pursuant to section 10 of the comeback order dated April 22, 2015 (the "**Comeback Order**"), Laricina is prohibited from making any cash repayment to the Noteholder, except by further order of this Court or with the consent of the Monitor, the Ad Hoc Committee and the Noteholder.

21. Subject to Court approval, Laricina proposes to make the Second Cash Repayment to the Noteholder whether or not the Term Sheet Agreement and Definitive Documents are subsequently approved by the Court. Doing so will reduce the debt and the interest payable thereon in any case. Laricina considers this to be the best use of such excess cash in its current circumstances.

22. I am not aware of any prejudice to other stakeholders if Laricina makes the Second Cash Repayment to the Noteholder, whether or not the Term Sheet Agreement and Definitive Documents are subsequently approved.

MARKETING PROCESS

23. Pursuant to the Settlement Transaction in the Term Sheet Agreement, Laricina is permitted to:

(a) solicit transactions which may, on their own or in combination, result in a transaction or transactions which, in aggregate, are sufficient to repay the loan in full; and

(b) pursue Additional Transactions, the proceeds of which may reduce the loan debt although be insufficient to retire it in full.

24. Pending approval of the Court, Laricina has prepared for and is ready to implement its proposed Marketing Process.

25. Laricina proposes to thoroughly canvas the market by a process ("**Marketing Process**") it has designed to solicit a broad range of transaction alternatives for consideration by a broad range of potential investors in parallel. Such transaction alternatives include, but are not limited to, the following:

(a) Sale of Laricina as a corporate entity;

(b) Sale of some or all of the Saleski Pilot, Saleski Prospect, Germain CDP and/or the Germain Prospect;

(c) Sale of other oil sands interests other than the Saleski Prospect or the Germain Prospect;

(d) Sale of working interest in the Saleski Prospect, the Germain Prospect and/or other oil sands assets;

(e) Sale of its interest in Chip Lake Road and/or option to own the camp facilities associated with the Saleski Prospect and the Germain Prospect;

(f) Sale of above ground infrastructure (some or all of the Germain CDP, the Saleski Pilot, etc.); and

(g) New money investment (equity, debt, etc.) in Laricina.

All transactions would be subject to Court approval.

26. To assist in the Marketing Process, Laricina has continued the engagement of BMO, Morgan Stanley, and Peters & Co. Limited as financial advisors.

27. With the assistance of its advisors, the Company has prepared a Confidential Information Memorandum describing Laricina's marketing initiatives. The draft Confidential Information Memorandum is attached as Exhibit 1 to my Concurrent Confidential Affidavit. It may be revised before it is finalized, and it may be further revised and updated from time to time over the course of the Marketing Process.

28. The Settlement Transaction provides a limited time frame for Laricina to find a Note Repayment Transaction or Transactions and exercise its termination right or implement Additional Transactions. It provides that Laricina has until November 30, 2015 to do so. Accordingly, it is important that Laricina implement the Marketing Process as soon as possible in order to ensure it has the time required to complete the process.

29. If the Term Sheet Agreement and Definitive Documents are not approved, Laricina will still need to conduct the Marketing Process to raise the additional capital needed to repay the debt, and to fund the Company's restructuring and continued operations. As such, Laricina seeks to have its Marketing Process promptly approved and implemented whether or not the Term Sheet Agreement and Definitive Documents are subsequently approved.

LARICINA'S PROPOSED CLAIMS PROCESS

30. Laricina and the Monitor must have a definitive understanding of the totality of claims against the Company to ensure a fair and proper distribution to the Company's creditors. It will also be necessary for the tabulation of votes of creditors, in the event Laricina decides to present a plan of arrangement to its unsecured creditors. Laricina has prepared a proposed claims process for these purposes, a copy of which is attached as **Exhibit 1** (the "**Proposed Claims Process**").

31. The Proposed Claims Process is intended to deal with claims excluding that of the Noteholder. If the Term Sheet Agreement and Definitive Documents are approved by the Court, there will be no need for a process to determine the Noteholder's claim because it will be dealt with in accordance with the terms of the Settlement Transaction. If the Term Sheet Agreement and Definitive Documents are not approved, the parties will have to address with the Court how the Noteholder's claim and Laricina's Counterclaim are to be dealt with.

32. The Proposed Claims Process and its potential role in effecting a transaction under the Marketing Process is discussed further in my Concurrent Confidential Affidavit.

33. The Proposed Claims Process is needed whether or not the Term Sheet Agreement and Definitive Documents are subsequently approved.

APPROVAL OF THE TERM SHEET AGREEMENT AND DEFINITIVE DOCUMENTS

34. Laricina is an early stage oil sands development company. As such, it does not yet generate substantial revenue and will have to raise and spend very substantial development capital before it can do so.

35. Over the last few years it has been particularly challenging for junior oil sands development businesses, including Laricina, to raise equity capital for development.

36. In March 2014, the Noteholder loaned $150 million to Laricina as a 'bridge' to enable the Company to operate until March 20, 2018. Laricina also prepared and launched a market solicitation process in the fall of 2014 to raise necessary development capital.

37. However, by the fall of 2014 world oil prices were plummeting with unprecedented speed and by early 2015 equity markets had become illiquid.

38. In March 2015, the Noteholder called for immediate repayment of all amounts owing under the Notes. The circumstances regarding the demand for repayment of the Notes and Laricina's Counterclaim (which, in part, disputes the validity of the demand) are outlined in my Initial Affidavit and my Comeback Affidavit. The Noteholder vigorously disputes my evidence and Laricina's Counterclaim, as outlined in prior affidavits sworn by Mr. Humayun in these proceedings.

39. Based on commentary from this Court leading to the orders made on March 30, 2015 and April 22, 2015, Laricina understands that if it were to pursue the Counterclaim, it would have to do so outside of these CCAA proceedings. The Court might lift the stay which currently stops the Noteholder from bringing its application to place Laricina in receivership.

40. The Company expects the Counterclaim would be vigorously defended by the Noteholder and estimates that its cost of litigating it would be about $1.8 million. Laricina anticipates that the Noteholder would also contest use of Laricina's cash on hand to fund prosecution of the Counterclaim.

41. The outcome of litigation over the Noteholder's receivership application and Laricina's Counterclaim is uncertain. In considering its options, Laricina considered the litigation cost and risks involved, including the risk of receivership.

42. Although Laricina has substantial cash on hand, it does not have sufficient money to repay the loan. To do so, Laricina would need to implement a marketing process to raise additional capital by sale of assets, loan, equity injection, joint venture or other arrangements or by some combination of one or more of the foregoing.

43. Conducting a marketing process in an illiquid market is risky. Although Laricina has substantial value, there is no certainty that such value would be recognized or realized in the current economic climate. The Company would only know for sure by conducting a marketing process with adequate time to properly canvas the market for an acceptable transaction or transactions.

44. One potential option for Laricina would be to litigate the Counterclaim including the efficacy of the loan demand and, if unsuccessful, then seek to pursue its proposed Marketing Process as part of a CCAA restructuring. From commentary by this Court leading to the Initial Order made on March 30, 2015, Laricina understands that the Court might not be receptive to Laricina doing so; it might view that as an improper attempt to have 'a second kick at the can'.

45. Accordingly, Laricina faces litigation cost and risks, including the risk of receivership, if it pursues the Counterclaim and market risk if it pursues a marketing process. No

consensual resolution with the Noteholder is possible without including release of the Counterclaim.

46. To best address market risk, Laricina needs a 'backstop' that would provide an acceptable alternative course if the marketing process does not result in an acceptable transaction or transactions that would generate sufficient capital which, when combined with cash on hand, would enable Laricina to repay its indebtedness to the Noteholder, retain core assets and carry on its operations to March 2018. A marketing process with a backstop would likely avoid distress sales at distress pricing and signal to interested purchasers that there is an opportunity to make an attractive acquisition at fair market value but no prospect of, and no reason to wait for, a receivership with associated distress sale pricing.

47. The Court encouraged the parties to explore consensual resolution and Laricina actively did so with the Noteholder and with the Ad Hoc Committee. After extensive good faith negotiations, on June 28, 2015, Laricina and the Noteholder entered into the Term Sheet Agreement outlining the terms for their consensual resolution of Laricina's indebtedness under the Notes. A copy of the Term Sheet Agreement with commercially sensitive and confidential portions redacted, is attached as **Exhibit 2**. A non-redacted copy of the entire Term Sheet Agreement is attached as Exhibit 2 to my Concurrent Confidential Affidavit.

48. The Term Sheet Agreement provides, without limitation, for the following:

(a) completion of the Settlement Transaction between Laricina and the Noteholder on or prior to November 30, 2015 or such later date as Laricina may request and to which the Noteholder may consent, which consent shall not be unreasonably withheld, provided that in no event shall such date be later than January 5, 2016;

(b) the exchange of mutual releases upon completion of the Settlement Transaction, including release of the Noteholder from the Counterclaim and release of Laricina from the Acceleration Payment Amount;

(c) a 'go shop' right, which permits Laricina to:

(i) solicit transactions, which may, on their own or in combination, result in a Note Repayment Transaction (ie. a transaction or transactions which in aggregate are sufficient to repay the loan in full); and

(ii) pursue Additional Transactions, the proceeds of which may reduce the loan debt although be insufficient to retire it in full;

(d) a fiduciary out, which permits Laricina to terminate the Settlement Transaction with the Noteholder prior to its completion, but no later than November 30, 2015, provided that:

(i) Laricina enters into Note Repayment Transaction(s) that (in aggregate) will repay the loan to the Noteholder in full no later than January 5, 2016;

(ii) exchange of mutual releases will occur notwithstanding such termination by fiduciary out; and

(iii) if the Settlement Transaction is terminated, the Noteholder will receive warrants for 2.5% of Laricina's common equity at an exercise price of $0.25 per share or cash equivalent capped at $2.5 million;

(e) if the Settlement Transaction proceeds to completion, based on formulae contained in the Term Sheet Agreement, up to $30 million of the debt will be carried by the Noteholder to the original maturity date under the Notes (March 20, 2018) and the balance of notes outstanding will be converted to equity at $0.12 per share, as described below;

(f) all existing shareholders will have the right to participate rateably in an equity offering (Pro Rata Offering) at $0.12 per share, including subscription rights to be transferrable and provide for typical over-subscription rights and, to the extent not taken up by existing shareholders, will be taken up by the Noteholder;

Accordingly, the Noteholder backstops the Pro Rata Offering;

(g) on completion of the Settlement Transaction, including the Pro Rata Offering, the Noteholder will receive as a consent fee warrants exercisable for common shares

equivalent to 5% of Laricina's common equity pro forma the Pro Rata Offering, with an exercise price of $0.25 per common share; and

(h) the loan will be paid down from cash on hand by an Initial Payment of $31.4 subject to adjustments and a further Effective Date Payment of $8.7 million subject to adjustments and when received, 50% of specified receivables, subject to adjustments.

49. The Settlement Transaction and Definitive Documents will enable Laricina to:

(a) avoid the risk of receivership and carry on business at least until March, 2018;

(b) obtain release of the Noteholder's claim for the Acceleration Payment of approximately $9.7 million;

(c) require the Noteholder to carry (subject to adjustments) up to $30 million of the loan until March 20, 2018;

(d) conduct its Marketing Process to raise capital to reduce or repay the loan in full; and

(e) implement a Pro Rata Offering (in which all existing shareholders will have the right to participate), which will convert to equity any loan balance (exclusive of the carried portion of the loan).

50. Laricina's Board of Directors unanimously authorized and approved the Term Sheet Agreement because, in the Board's view, it is balanced, fair and reasonable having regard to the interests of all stakeholders. It will enable Laricina to conduct its proposed Marketing Process with sufficient time and without distress. If the market response is satisfactory, the loan may be repaid without diminishing equity value. If market response to the Marketing Process does not generate transactions at values acceptable to Laricina or which in aggregate are insufficient to repay the loan, any non-carried loan balance will be converted to equity by a Pro Rata Offering in which all existing shareholders may participate to avoid significant dilution of their existing shareholdings. Even those shareholders who do not participate in the Pro Rata Offering can transfer their participation rights to others, to

mitigate dilution of their equity position. Laricina will thus be able to continue in business and raise development capital when market conditions improve.

51. Prior to entering into the Term Sheet Agreement, Laricina's Board of Directors received, reviewed and carefully considered a range of strategic, financial and other factors, including those documented in paragraphs 34 to 50 herein, and including advice from its financial advisors and legal advice regarding the Counterclaim from the Company's special counsel, Norton Rose Fulbright. After diligent deliberation, the Board of Directors decided that the benefits of the proposed Settlement Transaction outweighed the cost and risks associated with litigating the Counterclaim, potentially defending a receivership application and conducting a potentially abbreviated marketing process, all under vigorous opposition by the Noteholder.

52. The Term Sheet Agreement provides a structure and path for consensual resolution of the financial difficulties triggered by the call of Laricina's loan in March, 2015. The Term Sheet Agreement will resolve the loan, leave Laricina with cash to continue in business until March 2018 and enable it to repay or pursue a plan of arrangement with its unsecured creditors.

53. The Term Sheet Agreement contemplates the execution of Definitive Documents including a Settlement Agreement, which will contain the binding terms of the Settlement Transaction between Laricina and the Noteholder (consistent with the terms of the Term Sheet Agreement). The Term Sheet Agreement provides that it will automatically terminate upon the Noteholder and Laricina entering into the Settlement Agreement (which is one of the Definitive Documents). Laricina expects that the Definitive Documents will be finalized by July 20, 2015, and exhibited to supplemental affidavit(s) that will be filed in support of Laricina's request for their approval by the Court.

54. The Term Sheet Agreement, Definitive Documents and the Settlement Transaction provided therein are subject to approval of the Court, but are not made subject to approval by affirmative vote of Laricina's shareholders. The initial deadline for Court approval of the Term Sheet Agreement was July 31, 2015, but by agreement of Laricina and the Noteholder, the deadline was extended to August 5, 2015.

55. Laricina requests the Court's approval of the Term Sheet Agreement and Definitive Documents.

STAY EXTENSION

56. An extension of the general stay to December 11, 2015 is necessary to enable Laricina to complete the Settlement Transaction or exercise its right of termination to enter into one or more transactions that constitute a Note Repayment Transaction by November 30, 2015.

57. Laricina has acted and is acting diligently and in good faith in all of its dealings.

58. I believe it is appropriate in the circumstances and in the best interests of the Company and all stakeholders that extension of the general stay and other relief requested by Laricina be granted.

SWORN BEFORE ME at Calgary, Alberta, this 3rd day of July, 2015.

Commissioner for Oaths in and for the Province of Alberta

EMILY E. PAPLAWSKI
Barrister & Solicitor

Glen C. Schmidt

CLAIMS PROCESS

DEFINITIONS

1. For purposes of this Claims Process, the following terms shall have the following meanings:

   (a) **"Applicants"** means Laricina Energy Ltd., Laricina GP Holdings Ltd. and 1276158 Alberta Inc.;

   (b) **"Initial Order"** means the initial order granted by the Honourable Justice S.J. LoVecchio granted on March 30, 2015 in Court of Queen's Bench Action No. 1501-03351 as may be amended by further order of the Court;

   (c) **"Bar Dates"** means the Claims Bar Date and Subsequent Claims Bar Date;

   (d) **"Business Day"** means a day, other than a Saturday or a Sunday on which banks are generally open for business in Calgary, Alberta;

   (e) **"CCAA"** means the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 as amended;

   (f) **"Claim"** means (i) any right or claim of any Person arising prior to the Filing Date that may be asserted or made in whole or in part against the Applicants, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including without limitation, by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise and whether or not any right or claim is executor or anticipatory in nature, including without limitation, any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, together with any other rights or claims of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the BIA had the Applicants become bankrupt, but excluding Excluded Claims and (ii) any Tax Claim;

"THIS IS EXHIBIT "1" referred to in the Affidavit of Glen C. Schmidt Sworn before me this 3rd day of July A.D. 2015

NOTARY PUBLIC / COMMISSIONER FOR OATHS IN AND FOR THE PROVINCE OF ALBERTA

EMILY E. PAPLAWSKI
Barrister & Solicitor

(g) **"Claims Bar Date"** means 5:00 p.m. (Mountain Time) on [**September 15, 2015**];

(h) **"Claims Package"** means the document package which shall include a copy of the Notice to Creditor (either in the form of the Negative Claims Process or the Standard Claims Process), a Proof of Claim and such other materials as the Applicants or the Monitor consider necessary or appropriate;

(i) **"Claims Process"** means the procedures outlined herein for the Negative Claims Process and the Standard Claims Process in connection with the assertion of Pre-Filing Claims or Subsequent Claims against one or more of the Applicants;

(j) **"Claims Process Order"** means the order granted by the Honourable Justice S.J. LoVecchio of the Court on July 22, 2015 approving the Claims Process;

(k) **"Court"** means the Alberta Court of Queen's Bench;

(l) **"Creditor"** means any Person asserting a Pre-Filing Claim or Subsequent Claim, but expressly excluding CPPIB Credit Investments Inc.;

(m) **"Dispute Package"** means, with respect to any Pre-Filing Claim or Subsequent Claim, a copy of the related Proof of Claim, Notice of Revision or Disallowance and Notice of Dispute;

(n) **"Excluded Claims"** include (i) indemnity claims for former officers or directors or existing officers or directors of Laricina; (ii) claims subject to the administrative charge under the Initial Order; and (iii) claims of the Noteholder;

(o) **"Filing Date"** means March 30, 2015;

(p) **"Known Creditors"** means Creditors which the books and records of the Applicants disclose were owed money by any one of the Applicants as of the applicable Filing Date, which obligation remains unpaid in whole or in part;

(q) **"Monitor"** means PricewaterhouseCoopers Inc. in its capacity as the Court appointed Monitor of the Applicants and not in its personal capacity;

(r) **"Negative Claims Process"** means the process outlined herein whereby a Creditor will receive a Notice to Creditor assessing the quantum and secured/unsecured status of its Claim based on the books and records of the Applicants and whereby such Creditor need not file a Proof of Claim if it agrees with such assessment;

(s) **"Newspaper Notice"** means the notice of the Claims Process to be published in the newspapers in accordance with the Claims Process in substantially the form attached to the Claims Process Order as Schedule "G";

(t) **"Notice of Dispute"** means the notice that may be delivered by a Creditor who has received a Notice of Revision or Disallowance disputing such Notice of Revision or Disallowance, which notice shall be substantially in the form attached to the Claims Process Order as Schedule "F";

(u) **"Notice of Revision or Disallowance"** means the notice that may be delivered to a Creditor revising or rejecting such Creditor's Pre-Filing Claim or Subsequent Claim as set out in its Proof of Claim in whole or in part, which notice shall be substantially in the form attached to the Claims Process Order as Schedule "E";

(v) **"Notice to Creditor"** means, in the case of the Negative Claims Process, the letter regarding the assessment of the Creditor's Claim, substantially in the form attached hereto as Schedule "B" and in the case of the Standard Claims Process, the letter regarding completion of a Proof of Claim, substantially in the form attached hereto as Schedule "C";

(w) **"Person"** shall be broadly interpreted and includes an individual, firm, partnership, joint venture, fund, limited liability company, unlimited liability company, association, trust, corporation, unincorporated association or organization, syndicate, committee, the government of a country or any political subdivision thereof, or any agency, board, tribunal, commission, bureau, or any other entity, howsoever designated or constituted, including any Taxing Authority, and the trustees, executors, administrators or other legal representatives of an individual;

(x) **"Pre-Filing Claim"** means any Claim other than a Subsequent Claim;

(y) **"Proof of Claim"** means the form to be completed and filed by a Creditor setting forth its Pre-Filing Claim or Subsequent Claim in the Standard Claims Process, or the form to be completed and filed by a Creditor in the Negative Claims Process, setting forth its Pre-Filing Claim or Subsequent Claim if it disagrees with the assessment of its Claim, which Proof of Claim in either case shall be substantially in the form attached to the Claims Process Order as Schedule "D";

(z) **"Proven Claim"** means the amount, status and/or validity of the Claim as a Creditor as finally determined in accordance with this Claims Process. A Proven Claim will be "finally determined" in accordance with this Claims Process when: (i) the Notice to Creditor setting out such Claim is issued and remains unanswered, (ii) the Claim has been accepted by the Applicants, with the consent of the Monitor, (iii) the applicable time period for filing a Notice

of Dispute in response to a Notice of Revision or Disallowance issued by any one of the Applicants has expired and no Notice of Dispute has been filed in accordance with this Order, or (iv) any court of competent jurisdiction has made a determination with respect to the amount, status and/or validity of the Claim, and no appeal or application for leave to appeal therefrom shall have been taken or served on either party, or if any appeal or application for leave to appeal shall have been taken therefrom or served on either party, any and all such appeal or application shall have been dismissed, determined or withdrawn;

(aa) **"Standard Claims Process"** means the Claims Process outlined herein whereby Creditors file a Proof of Claim setting forth a Pre-Filing Claim or Subsequent Claim against one or more of the Applicants;

(bb) **"Subsequent Claim"** means any Claim arising after the Filing Date as a result of the disclaimer or resiliation after the Filing Date of any contract, lease, employment agreement or other arrangement or agreements of any nature whatsoever, whether oral or written, and any amending agreement related thereto;

(cc) **"Subsequent Claims Bar Date"** means the later of: (i) the Claims Bar Date; and (ii) 5:00 p.m. (Mountain Time) on the day which is 30 days after the date on which the agreement in question was disclaimed or resiliated;

(dd) **"Tax"** or **"Taxes"** means any and all amounts subject to a withholding or remitting obligation and any and all taxes, duties, fees and other governmental charges, duties, impositions and liabilities of any kind whatsoever whether or not assessed by the Taxing Authorities (including any Claims by any of the Taxing Authorities), including all interest, penalties, fines, fees, other charges and additions with respect to such amount;

(ee) **"Taxing Authorities"** means Her Majesty the Queen, Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, the Canada Revenue Agency, any similar revenue or taxing authority of each and every province or territory of Canada and any political subdivision thereof, and any Canadian or foreign governmental authority, and "Taxing Authority" means any one of the Taxing Authorities;

(ff) **"Tax Claim"** means any Claim against any one of the Applicants for any Taxes in respect of any taxation year or period ending on or prior to the applicable Filing Date, and in any case where a taxation year or period commences on or prior to the Filing Date, for any Taxes in respect of or attributable to the portion of the taxation period commencing prior to and including the Filing Date. For greater certainty, a Tax Claim shall include, without limitation, any and all Claims of any Taxing Authority in respect of

transfer pricing adjustments and any Canadian or non-resident Tax related thereto;

(gg) **"Website"** means the website maintained by the Monitor located at: www.pwc.com/ca/en/car/laricina/index.jhtml.

NOTICE OF CLAIMS PROCESS

2. The Monitor shall cause a Claims Package to be sent to each Known Creditor by regular prepaid mail, fax, courier or email on or before [**July 31, 2015**]. In the case of Known Creditors whose Claim has been assessed by the Applicants in consultation with the Monitor, the Claims Package shall include a Notice to Creditor in the Negative Claims Process (Schedule "B" to the Claims Process Order). All other Known Creditors shall receive a Claims Package that shall include a Notice to Creditor in the Standard Claims Process (Schedule "C" to the Claims Process Order).

3. The Monitor shall cause the Newspaper Notice to be published in the Calgary Herald on or prior to [**July 31, 2015**].

4. The Monitor shall cause the Claims Package for both the Negative Claims Process and the Standard Claims Process to be posted on the Website.

5. The Applicants shall issue a press release outlining the existence of the Claims Process and may post notice of the Claims Process on its website, in both cases directing any creditor to the Website.

6. The Monitor shall cause the Claims Package to be sent to each Creditor with a Subsequent Claim by regular prepaid mail, fax, courier or email within 5 days of the date after the Subsequent Claim arises either by way of disclaimer or resiliation of agreement;

7. The Monitor shall cause a copy of the Claims Package in the Standard Claims Process to be sent to any Person requesting such material as soon as practicable.

FILING OF PROOFS OF CLAIM (STANDARD CLAIMS PROCESS)

8. Every Creditor asserting a Pre-Filing Claim against any one of the Applicants in the Standard Claims Process shall set out its aggregate Pre-Filing Claim in a written Proof of Claim and deliver that Proof of Claim so that it is received by the Monitor and the Applicants no later than the Claims Bar Date.

9. Every Creditor asserting a Subsequent Claim against any one of the Applicants in the Standard Claims Process shall set out its aggregate Subsequent Claim in a

Proof of Claim and deliver that Proof of Claim so that it is received by the Monitor and the Applicants no later than the Subsequent Claims Bar Date.

FILING OF PROOFS OF CLAIM (NEGATIVE CLAIMS PROCESS)

10. In the event the Creditor receives a Claims Package with a Notice to Creditor in the Negative Claims Process and the Creditor agrees with the assessment of the amount and classification of its Pre-Filing Claim or Subsequent Claim as the case may be, as set out in the Notice to Creditor, it need not file a Proof of Claim or take any further action and upon no further action being taken, the Pre-Filing Claim or Subsequent Claim as the case may be shall be a Proven Claim.

11. In the event the Creditor who receives a Claims Package with a Notice to Creditor in the Negative Claims Process and the Creditor disagrees with the assessment of either the amount or classification (or both) of its Pre-Filing Claim as set out in the Notice to Creditor, it must deliver a Proof of Claim setting out its Pre-Filing Claim so that it is received by the Monitor and the Applicants no later than the Claims Bar Date, or in the case of a Subsequent Claim, no later than the Subsequent Claims Bar Date.

DETERMINATION OF CLAIMS AND SUBSEQUENT CLAIMS

12. The Applicants shall review each Proof of Claim received by the Claims Bar Date or Subsequent Claims Bar Date, as applicable, and subject to paragraph 13 shall accept, revise or disallow the Pre-Filing Claim or Subsequent Claim with the consent of the Monitor.

13. The Applicants may attempt to consensually resolve the classification and amount of any Pre-Filing Claim or Subsequent Claim with the Creditor prior to the relevant Applicant accepting, revising or disallowing such Pre-Filing Claim or Subsequent Claim with the consent of the Monitor.

14. If the Applicants, with the consent of the Monitor, accept the Pre-Filing Claim or Subsequent Claim, then such Pre-Filing Claim or Subsequent Claim shall be a Proven Claim.

NOTICE OF REVISION OR DISALLOWANCE

15. If the Applicants, with the consent of the Monitor, determine to revise or disallow a Pre-Filing Claim or Subsequent Claim, the Monitor shall send a Notice of Revision or Disallowance to the Creditor.

NOTICE OF DISPUTE

16. Any Creditor who disputes the classification or amount of its Pre-Filing Claim or Subsequent Claim as set forth in a Notice of Revision or Disallowance shall

deliver a Notice of Dispute to the Monitor by 5:00 p.m. (Mountain Time) on the day that is fifteen (15) days after the date of the Notice of Revision or Disallowance. In addition, the disputing Creditor must file an application with the Court supported by an affidavit setting out the basis for the dispute and must send the application and affidavit to the Applicants and to the Monitor immediately upon filing. The application and affidavit must be filed by the disputing Creditor within twenty (20) calendar days after sending the Notice of Dispute to the Applicants and the Monitor.

17. Any Creditor who fails to deliver a Notice of Dispute and schedule an application with the Court by the deadlines set forth in paragraph 16 shall be deemed to accept the classification and the amount of its Pre-Filing Claim or Subsequent Claim as set out in the Notice of Revision or Disallowance and such Pre-Filing Claim or Subsequent Claim as set out in the Notice of Revision or Disallowance shall constitute a Proven Claim.

RESOLUTION OF CLAIMS AND SUBSEQUENT CLAIMS

18. Upon receipt of a Notice of Dispute, the Applicants may with the consent of the Monitor, attempt to consensually resolve the classification and amount of the Pre-Filing Claim or Subsequent Claim with the Creditor.

19. If the Applicants and the Creditor consensually resolve the classification and amount of the Pre-Filing Claim or Subsequent Claim, the Applicant may accept, with the consent of the Monitor, a revised Pre-Filing Claim or Subsequent Claim, and such Pre-Filing Claim or Subsequent Claim will constitute a Proven Claim.

SCHEDULE "B"

NOTICE TO CREDITORS OF
LARICINA ENERGY LTD., LARICINA GP HOLDINGS LTD.
and 1276158 ALBERTA INC.

TO: [NAME]

On March 30, 2015, Laricina Energy Ltd., Laricina GP Holdings Ltd. and 1276158 Alberta Inc. (collectively, "**Laricina**") applied for and received protection from their creditors by order of the Court of Queen's Bench of Alberta (the "**Court**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**"). PricewaterhouseCoopers Inc. was appointed Monitor of Laricina. There is currently no proposed plan under the CCAA although there is a contemplated distribution. Laricina continues to assess its options in respect of a plan.

On July 22, 2015, the Court granted a further order prescribing a process by which the identity and status of all creditors of Laricina and the net amounts of their claims will be established for purposes of the CCAA proceedings (the "**Claims Process Order**"). A copy of the Claims Process Order may be viewed at www.pwc.com/ca/en/car/laricina/index.jhtml.

Pursuant to the Claims Process Order, the Monitor, in cooperation with Laricina, is required to send a notice to each known creditor of Laricina (the "**Notice to Creditor**") indicating the amount of such creditor's claim as of March 30, 2015. In the case of the claims of creditors whose claims are disputed, a Notice to Creditor will be sent containing the amount which Laricina is prepared to allow as a claim by such creditor.

In the case of the claims of creditors whose claims cannot be properly determined upon review of the Laricina records, a separate notice to creditor will be issued providing instructions for the completion of a proof of claim form, which that creditor will be required to submit by the Claims Bar Date ([**September 15, 2015**]) to prove its claim.

Claim Assessed:

If you are receiving the within Notice to Creditor, your claim has been assessed by Laricina in consultation with the Monitor, as follows:

LARICINA HAS REVIEWED ITS RECORDS AND ACCEPTS THAT YOUR CLAIM AGAINST LARICINA, AS OF MARCH 30, 2015, WAS AN [UNSECURED/SECURED] CLAIM IN THE AMOUNT OF $[INSERT][CAD/USD].

IN THE EVENT THAT YOU AGREE WITH LARICINA'S ASSESSMENT OF YOUR CLAIM, YOU NEED TAKE NO FURTHER ACTION.

HOWEVER, IF YOU WISH TO DISPUTE LARICINA'S ASSESSMENT OF YOUR CLAIM, YOU MUST TAKE THE STEPS OUTLINED BELOW.

Disagreement with Assessment:

The Claims Process Order provides that if a creditor disagrees with the assessment of its claim set out in this Notice to Creditor, the creditor must complete and return to the Monitor, with a copy to Laricina, a completed Proof of Claim advancing a claim in a different amount and/or claiming secured status if applicable, supported by appropriate documentation. A blank Proof of Claim form is enclosed. The Proof of Claim with supporting documentation disputing the within assessment of your claim must be received by the Monitor, with a copy to Laricina no later than **5:00 p.m. (Mountain Time) on [September 15, 2015]**.

If no such Proof of Claim is received by the Monitor by that date, the amount of your claim and its status as secured or unsecured will be, subject to further order of the Court, conclusively deemed to be as shown in this Notice to Creditor.

The Claims Process Order also provides that any party who does not receive a Notice to Creditor and who wishes to advance a claim against Laricina must complete and forward to the Monitor, with a copy to Laricina, a completed Proof of Claim supported by appropriate documentation advancing its claim and claiming secured status, if applicable, no later than **5:00 p.m. (Mountain Time) on [September 15, 2015]**.

The Proof of Claim should be delivered by registered mail, personal delivery, courier, email (in PDF format) or facsimile transmission to the following parties:

PricewaterhouseCoopers Inc.
In its capacity as the court appointed
Monitor of Laricina
Attn: Brenda Kuryk
111 5th Avenue SW, Suite 3100, East Tower
Calgary, AB T2P 5L3
Email: brenda.l.kuryk@ca.pwc.com
Phone: (403) 509-7308
Fax: (403) 781-1825

Osler Hoskin & Harcourt LLP
2500, 450 1st Street SW
Calgary, AB T2P 5H1
Attn: A. Robert Anderson, Q.C.
Email: randerson@osler.com
Telephone: (403) 260-7004
Fax: (403) 260-7024

A copy of the Proof of Claim form is enclosed, however, further copies of the Proof of Claim form may be downloaded at www.pwc.com/ca/en/car/laricina/index.jhtml.

Notice of Revision or Disallowance by Laricina:

Where a Proof of Claim is sent, Laricina with the assistance of the Monitor, will review the Proof of Claim and the Monitor shall provide to the creditor a notice in writing by registered mail, by courier service, email or facsimile as to whether the claim set out in the Proof of Claim is accepted, disputed in whole, or disputed in part. Where the claim is disputed in whole or in part, the Monitor will issue a Notice of Revision or Disallowance indicating the reasons for the revision or disallowance of the Creditor's Claim.

Notice of Dispute by Creditor:

The Claims Process Order further provides that where a creditor disputes a Notice of Revision or Disallowance, the creditor must notify the Monitor of the dispute by completing and delivering a Notice of Dispute to the Monitor by registered mail, courier service, email or facsimile within fifteen (15) days of receipt of the Notice of Revision or Disallowance. The creditor shall thereafter serve on the Monitor, with a copy to Laricina, a filed application with a supporting affidavit in Laricina's CCAA proceedings, within twenty (20) calendar days after issuing the Notice of Dispute, for the determination by the Court of the claim in dispute.

A copy of the Notice of Dispute form is enclosed, however, further copies of the Notice of Dispute form may be downloaded www.pwc.com/ca/en/car/laricina/index.jhtml.

CLAIMS NOT PROVEN OR ACCEPTED IN ACCORDANCE WITH THE PROCEDURES SET OUT ABOVE IN THIS NOTICE SHALL, UNLESS OTHERWISE ORDERED BY THE COURT, BE DEEMEND TO BE FOREVER BARRED AND MAY NOT THEREAFTER BE ADVANCED AGAINST LARICINA.

If you have any questions regarding the claims process or the attached materials, please contact Brenda Kuryk at PricewaterhouseCoopers Inc. at (403) 509-7308 or brenda.l.kuryk@ca.pwc.com.

Dated the ___ day of ●, 2015 in Calgary, Alberta

PricewaterhouseCoopers Inc., in its capacity as
Monitor of LARICINA

_____

Clinton L. Roberts
Senior Vice President

SCHEDULE "C"

NOTICE TO CREDITORS OF
LARICINA ENERGY LTD., LARICINA GP HOLDINGS LTD.
and 1276158 ALBERTA INC.

RE: NOTICE OF CLAIMS PROCESS PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT* ("CCAA")

On March 30, 2015, Laricina Energy Ltd., Laricina GP Holdings Ltd. and 1276158 Alberta Inc. (collectively, "**Laricina**") applied for and received protection from their creditors by order of the Court of Queen's Bench of Alberta (the "**Court**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**"). PricewaterhouseCoopers Inc. was appointed Monitor of Laricina. There is currently no proposed plan under the CCAA although there is a contemplated distribution. Laricina continues to assess its options in respect of a plan.

On July 22, 2015, the Court granted a further order prescribing a process by which the identity and status of all creditors of Laricina and the net amounts of their claims will be established for purposes of the CCAA proceedings (the "**Claims Process Order**"). A copy of the Claims Process Order may be viewed at www.pwc.com/ca/en/car/laricina/index.jhtml.

Any person having a Pre-Filing Claim against Laricina arising prior to March 30, 2015 must send a Proof of Claim to the Monitor, with a copy to Laricina, to be received by no later than 5:00 p.m. (Mountain Time) on [September 15, 2015], 2015 (the "**Claims Bar Date**").

Any person having a Subsequent Claim against Laricina arising after March 30, 2015 as a result of a disclaimer or repudiation by Laricina after March 30, 2015 of any contract, lease, employment agreement or other arrangement or agreement of any nature whatsoever, whether oral or written, and any amending agreement related thereto, must send a Proof of Claim to the Monitor, with a copy to Laricina, to be received by the later of (a) the Claims Bar Date; and (b) 5:00 p.m. (Mountain Time) on the day which is 30 days after the date of the applicable disclaimer or repudiation (the "Subsequent Claims Bar Date").

All Proofs of Claim should be delivered by registered mail, personal deliver, courier, email (in PDF format) or facsimile transmission to the following parties:

PricewaterhouseCoopers Inc.
In its capacity as the court appointed
Monitor of Laricina
Attn: Brenda Kuryk
111 5th Avenue SW, Suite 3100, East Tower
Calgary, AB T2P 5L3
Email: brenda.l.kuryk@ca.pwc.com
Phone: (403) 509-7308
Fax: (403) 781-1825

Osler Hoskin & Harcourt LLP
2500, 450 1st Street SW
Calgary, AB T2P 5H1
Attn: A. Robert Anderson, Q.C.
Email: randerson@osler.com
Telephone: (403) 260-7004
Fax: (403) 260-7024

A copy of the Proof of Claim form is enclosed, however, further copies of the Proof of Claim form may be downloaded at www.pwc.com/ca/en/car/laricina/index.jhtml.

PROOFS OF CLAIM WHICH ARE NOT RECEIVED BY THE APPLICABLE BAR DATES SPECIFIED HEREIN WILL BE BARRED AND EXTINGUISHED FOREVER.

If you have any questions regarding the claims process or the attached materials, please contact Brenda Kuryk at PricewaterhouseCoopers Inc. at (403) 509-7308 or brenda.l.kuryk@ca.pwc.com.

Dated the ___ day of ●, 2015 in Calgary, Alberta

PricewaterhouseCoopers Inc., in its capacity as
Monitor of LARICINA

_____

Clinton L. Roberts
Senior Vice President

SCHEDULE "D"

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

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

AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, R.S.C. 2000, c. B-9

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LARICINA ENERGY LTD., LARICINA GP HOLDING LTD. and 1276158 ALBERTA INC. (collectively, "Laricina")

Proof of Claim
For Claims Arising Before March 30, 2015 ("Pre-Filing Claims")
or For Claims Arising Due To Disclaimer or Resiliation of Contract After March 30, 2015 ("Subsequent Claims")

(See Reverse for Instructions)

Regarding the claim of _____ (referred to in this form as "the creditor")
(name of creditor)

All notices or correspondence regarding this claim to be forwarded to the creditor at the following address:

_____

_____

_____

Telephone: _____ Fax: _____

I, _____ residing in the _____
(name of person signing claim) **(city, town, etc.)**

of _____ in the Province of _____
(name of city, town, etc.)

Do hereby certify that:

☐ 1. I am the creditor

or

☐ I am _____ of the creditor.
(if an officer or employee of the company, state position or title)

2. I have knowledge of all the circumstances connected with the claim referred to in this form.

3. A. Laricina was, (as at March 30, 2015 in respect of a Pre-Filing Claim **OR** after March 30, 2015 in respect of a Subsequent Claim), and still is indebted to the creditor in the sum of $_____ as shown by the statement of account attached hereto and marked "Schedule A". Pre-Filing Claims should **not** include the value of goods and/or services supplied or claims arising after March 30, 2015. If a creditor's claim is to be reduced by deducting any counter claims to which Laricina is entitled and/or amounts associated with the return of equipment and/or assets by Laricina, please specify.

The statement of account must specify the vouchers or other evidence in support of the claim including the date and location of the delivery of all services and materials. Any claim for interest must be supported by contractual documentation evidencing the entitlement to interest.

B. The indebtedness referred to in paragraph 3. A. is in the following currency:

☐ Canadian Dollars

☐ United States Dollars

4. ☐ A. **Unsecured claim.** $_____. In respect to the said debt, the creditor does not and has not since March 30, 2015, held any assets of Laricina as security.

☐ B. **Subordinate Debentureholder.** $_____. In respect to the said debenture, the creditor does not and has not since March 30, 2015, held any assets of Laricina as security.

☐ C. **Secured claim.** $_____. In respect of the said debt, the creditor holds assets of Laricina valued at $ _____ as security.

***Provide full particulars of the security**, including the date on which the security was given and the value at which the creditor assesses the security together with the basis of valuation, and attach a copy of the security documents as Schedule "B"*

Dated at _____ this _____ day of _____, 2015.
Insert city and date of signature

_____ _____
Witness **(signature of individual completing the form)**
Must be signed and witnessed

Instructions for Completing Proof of Claim Forms

In completing the attached form, your attention is directed to the notes on the form and to the following requirements:

Proof of Claim:

1. The form must be completed by an individual and not by a corporation. If you are acting for a corporation or other person, you must state the capacity in which you are acting, such as, "Credit Manager", "Treasurer", "Authorized Agent", etc., and the full legal name of the party you represent.

2. The person signing the form must have knowledge of the circumstances connected with the claim.

3. A. A Statement of Account containing details of secured and unsecured claims, and if applicable, of the amount due in respect of property claims, must be attached and marked Schedule "A". Indicate whether claim is Pre-Filing Claim or Subsequent Claim.

   Pre-Filing Claims should **not** include the value of goods and/or services arising after March 30, 2015. It is necessary that all creditors indicate the date and location of the delivery of all goods and/or services. Any amounts claimed as interest should be clearly noted as being for interest.

   B. Tick the appropriate currency.

4. The nature of the claim must be indicated by ticking the type of claim which applies. e.g. -

   Ticking (A) indicates the claim is unsecured;

   Ticking (B) indicates the claim is from an unsecured subordinate debenture;

   Ticking (C) indicates the claim is secured, such as a mortgage, lease, or other security interest, and the value at which the creditor assesses the security must be inserted, together with the basis of valuation. Details of each item of security held should be attached as Schedule "B" and submitted with a copy of the chattel mortgage, conditional sales contract, security agreement, etc.;

   A creditor may have separate claims in different categories, in which case a separate claim form must be submitted for each claim.

5. The person signing the form must insert the place and date in the space provided, and the signature must be witnessed.

Send a copy of the completed Proof of Claim, by [September 15, 2015], to both Laricina and the Monitor at the below addresses:

PricewaterhouseCoopers Inc.
In its capacity as the court appointed
Monitor of Laricina
Attn: Brenda Kuryk
111 5th Avenue SW, Suite 3100, East Tower
Calgary, AB T2P 5L3
Email: brenda.l.kuryk@ca.pwc.com
Phone: (403) 509-7308
Fax: (403) 781-1825

Osler Hoskin & Harcourt LLP
2500, 450 1st Street SW
Calgary, AB T2P 5H1
Attn: A. Robert Anderson, Q.C.
Email: randerson@osler.com
Telephone: (403) 260-7004
Fax: (403) 260-7024

Additional information regarding Laricina and the CCAA process, as well as copies of claims documents may be obtained at www.pwc.com/ca/en/car/laricina/index.jhtml. If there are any questions in completing the Proof of Claim, please contact Brenda Kuryk at PricewaterhouseCoopers Inc. at (403) 509-7308 or brenda.l.kuryk@ca.pwc.com.

Note: Any claim not filed by [September 15, 2015] will, unless otherwise ordered by the Court of Queen's Bench of Alberta, be barred and may not thereafter be advanced against Laricina.

SCHEDULE "E"

NOTICE OF REVISION OR DISALLOWANCE

FOR CREDITORS OF LARICINA ENERGY LTD., LARICINA GP HOLDING LTD. and 1276158 ALBERTA INC.
(collectively, the "Applicants")

Claim Reference Number: _____

TO: _____

(Name of Creditor)

Defined terms not defined in this Notice of Revision or Disallowance have the meaning ascribed to them in the Order of the Court of Queen's Bench of Alberta dated July 22, 2015 (the "Claims Procedure Order"). All dollar values contained herein are in Canadian dollars unless otherwise noted.

Pursuant to the Claims Procedure Order dated July 22, 2015, the Applicants and PricewaterhouseCoopers Inc., in its capacity as Court-appointed Monitor of the Applicants, hereby gives you notice that it has reviewed your Proof of Claim in conjunction with the Claims Process and has revised or disallowed your Claim. Subject to further dispute by you in accordance with the Claims Procedure Order, your Claim will be allowed as follows:

Claim as Submitted ($CDN)	**Revised Claim as Accepted by Monitor and Applicants ($CDN)**	**Secured ($CDN)**	**Unsecured ($CDN)**	**Subordinate Debenture ($CDN)**

REASONS FOR THE REVISION OR DISALLOWANCE:

_____

_____

SERVICE OF DISPUTE NOTICES

If you intend to dispute this Notice of Revision or Disallowance, you must **within fifteen (15) Business days after receipt of this Notice of Revision or Disallowance** deliver to the Monitor, with a copy to the Applicants, a Dispute Notice (in the form enclosed) either by prepaid registered mail, personal delivery, courier or facsimile to the addresses below.

PricewaterhouseCoopers Inc.
In its capacity as the court appointed
Monitor of Laricina
Attn: Brenda Kuryk
111 5th Avenue SW, Suite 3100, East Tower
Calgary, AB T2P 5L3
Email: brenda.l.kuryk@ca.pwc.com
Phone: (403) 509-7308
Fax: (403) 781-1825

Osler Hoskin & Harcourt LLP
2500, 450 1st Street SW
Calgary, AB T2P 5H1
Attn: A. Robert Anderson, Q.C.
Email: randerson@osler.com
Telephone: (403) 260-7004
Fax: (403) 260-7024

IF YOU FAIL TO FILE YOUR NOTICE OF DISPUTE WITHIN 15 BUSINESS DAYS AFTER RECEIPT OF THIS NOTICE OF REVISION OR DISALLOWANCE, THE VALUE OF YOUR CLAIM WILL BE DEEMED TO BE ACCEPTED AS FINAL AND BINDING AS SET OUT IN THIS NOTICE OF REVISION OR DISALLOWANCE.

Dated THIS ____ DAY OF _____, 2015.

PricewaterhouseCoopers Inc., in its capacity as
Monitor of LARICINA

_____
Clinton L. Roberts
Senior Vice President

SCHEDULE "F"

NOTICE OF DISPUTE

LARICINA ENERGY LTD., LARICINA GP HOLDING LTD. and 1276158 ALBERTA INC. (collectively, the "Applicants")

Pursuant to the Claims Procedure Order dated July 22, 2015, we hereby give you notice of our intention to dispute the Notice of Revision or Disallowance bearing Reference # _____ and dated _____ issued by PricewaterhouseCoopers Inc. in its capacity as Monitor of Laricina in respect of our Claim.

NAME OF CREDITOR: _____

Reviewed Claim as Accepted ($CDN)	Reviewed Claim as Disputed ($CDN)	Secured ($CDN)	Unsecured ($CDN)

REASONS FOR THE DISPUTE:

_____

_____

_____

_____

SIGNATURE OF INDIVIDUAL: _____

DATE: _____

PRINT NAME: _____

TELEPHONE NUMBER: _____

FACSIMILE: _____

EMAIL ADDRESS: _____

FULL MAILING ADDRESS: _____

THIS FORM AND SUPPORTING DOCUMENTATION TO BE RETURNED BY REGISTERED MAIL, PERSONAL SERVICE, EMAIL (IN PDF FORMAT), FACSIMILE OR COURIER TO THE ADDRESS FOR SERVICE INDICATED HEREIN AND TO BE RECEIVED BY 5:00 P.M. (MOUNTAIN TIME) ON THE DAY WHICH IS FIFTEEN (15) DAYS AFTER THE DATE OF THE NOTICE OF REVISION OR DISALLOWANCE.

Address for Service of Notices of Dispute.

PricewaterhouseCoopers Inc.
In its capacity as the court appointed
Monitor of Laricina
Attn: Brenda Kuryk
111 5th Avenue SW, Suite 3100, East Tower
Calgary, AB T2P 5L3
Email: brenda.l.kuryk@ca.pwc.com
Phone: (403) 509-7308
Fax: (403) 781-1825

Osler Hoskin & Harcourt LLP
2500, 450 1st Street SW
Calgary, AB T2P 5H1
Attn: A. Robert Anderson, Q.C.
Email: randerson@osler.com
Telephone: (403) 260-7004
Fax: (403) 260-7024

IN ADDITION, YOU MUST SERVE THE MONITOR, WITH A COPY TO THE APPLICANTS, WITH AN APPLICATION FILED WITH THE COURT IN LARICINA'S CCAA PROCEEDINGS, SUPPORTED BY WAY OF AN AFFIDAVIT WITHIN TWENTY (20) CALENDAR DAYS AFTER SENDING THE NOTICE OF DISPUTE, FOR DETERMINATION BY THE COURT OF THE CLAIM IN DISPUTE.

IF YOU:

1) **FAIL TO FILE YOUR DISPUTE NOTICE WITHIN FIFTEEN (15) BUSINESS DAYS AFTER RECEIPT OF THE NOTICE OF REVISION OR DISALLOWANCE; and**
2) **FAIL TO SERVE THE MONITOR, WITH A COPY TO THE APPLICANTS, WITH AN APPLICATION AND AFFIDAVIT WITHIN TWENTY (20) CALENDAR DAYS AFTER ISSUING THE NOTICE OF DISPUTE,**

THE VALUE OF YOUR CLAIM WILL BE DEEMED TO BE ACCEPTED AS FINAL AND BINDING AS SET OUT IN THE NOTICE OF REVISION OR DISALLOWANCE.

SCHEDULE "G"

NOTICE TO CREDITORS OF

LARICINA ENERGY LTD., LARICINA GP HOLDINGS LTD.
and 1276158 ALBERTA INC.
(the "Applicants")

NOTICE OF CLAIMS PROCESS PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

On March 30, 2015, the Applicants applied for and received protection from their creditors by virtue of an order of the Court of Queen's Bench of Alberta (the "**Court**") granted pursuant to the *Companies Creditors' Arrangements Act* (the "**CCAA**"). The Court also appointed PricewaterhouseCoopers Inc. as the Monitor (the "**Monitor**") of the Applicants in these proceedings.

On July 22, 2015, the Court granted a further order establishing a process by which the identity and status of all creditors of the Applicants will be established for purposes of the CCAA Proceedings (the "**Claims Process Order**"). Capitalized terms not defined in this notice are as defined in the Claims Process Order as available from the Monitor's office at (403) 509-7308 or available on the Monitor's website at www.pwc.com/ca/en/car/laricina/index.jhtml (the "**Monitor's Website**")

Pursuant to the Claims Process Order, the Monitor was required by [**July 31, 2015**] to send a Claims Package to each Known Creditor. In the case of Known Creditors whose Claim has been assessed by the Applicants, the Claims Package will include a Negative Claims Process. All other Known Creditors will receive a Claims Package that will include a Notice to Creditor in the Standard Claims Process.

CREDITORS RECEIVING A NOTICE TO CREDITOR IN THE NEGATIVE CLAIMS PROCESS WHO AGREE WITH THE AMOUNT SHOWN AS OWED TO THEM BY THE APPLICANTS IN THE NOTICE TO CREDITOR NEED TAKE NO FURTHER STEPS TO PROVE OR PRESERVE THEIR CLAIMS.

ANY CREDITOR HAVING A CLAIM AGAINST THE APPLICANTS WHO HAS NOT RECEIVED A NOTICE TO CREDITOR OR WHO DISAGREES WITH THE AMOUNT OR STATUS OF THE CLAIM AS INDICATED IN THE NOTICE TO CREDITOR MUST FILE A PROOF OF CLAIM WITH THE MONITOR, BEFORE [**SEPTEMBER 15, 2015**] IN ORDER TO PARTICIPATE IN ANY DISTRIBUTIONS ASSOCIATED WITH THESE PROCEEDINGS.

ANY CREDITOR HAVING A CLAIM AND RECEIVING A CLAIMS PACKAGE IN THE STANDARD CLAIMS PROCESS MUST FILE A PROOF OF CLAIM FORM ESTABLISIDNG THEIR CLAIM WITH THE MONITOR BEFORE [**SEPTEMBER 15, 2015**] IN ORDER TO PARTICIPATE IN ANY DISTRIBUTIONS ASSOCIATED WITH THESE PROCEEDINGS.

All claims must be made in the prescribed "**Proof of Claim**" form and must be received by the Monitor, with a copy to the Applicants, together with the required supporting documentation, such as contracts, debentures, cancelled cheques, bills of sale, receipts, or invoices in support of their claim, no later than 5:00 p.m. (Mountain Time) on [**September 15, 2015**] (the "**Claims Bar Date**") to:

PricewaterhouseCoopers Inc.
In its capacity as the court appointed
Monitor of Laricina
Attn: Brenda Kuryk
111 5th Avenue SW, Suite 3100, East Tower
Calgary, AB T2P 5L3
Email: brenda.l.kuryk@ca.pwc.com
Phone: (403) 509-7308
Fax: (403) 781-1825

Osler Hoskin & Harcourt LLP
2500, 450 1st Street SW
Calgary, AB T2P 5H1
Attn: A. Robert Anderson, Q.C.
Email: randerson@osler.com
Telephone: (403) 260-7004
Fax: (403) 260-7024

Additional copies of Proofs of Claim can also be obtained from the Monitor's website or the address listed above.

Proofs of Claim for Subsequent Claims arising after the Filing Date as a result of a disclaimer or repudiation after the Filing Date of any contract, lease, employment agreement or other arrangement or agreements of any nature whatsoever, whether oral or written, and any amending agreement related thereto, must be received by the later of (a) the Claims Bar Date, and (b) 5:00 p.m. (Mountain Time) on the day which is 30 days after the date of the applicable repudiation or disclaimer.

PROOFS OF CLAIM WHICH ARE NOT RECEIVED BY THE APPLICABLE BAR DATES SPECIFIED HEREIN WILL BE BARRED AND EXTINGUISHED FOREVER UNLESS OTHERWISE ORDERED BY THE COURT.

PricewaterhouseCoopers Inc.

Monitor of Laricina Energy Ltd., Laricina GP Holdings Ltd. and 1276158 Alberta Inc.

Settlement Transaction Term Sheet
Between
CPPIB Credit Investments Inc. ("**CPP Credit**")
And
Laricina Energy Ltd. ("**Laricina**")

This term sheet outlines Laricina's proposal to provide for an arrangement to settle outstanding matters between them including to amend the terms of the outstanding arrangements between CPP Credit and Laricina as set out in the Trust Indenture dated March 20, 2014 (the "**Indenture**") relating to the outstanding 11.5% Senior Secured Notes issued thereunder (the "**Notes**") and the other security and related documentation relating thereto. These terms are summary in nature and, except as set forth herein, are non-binding and are subject to the entering into binding Definitive Documents (as herein defined) providing for the Settlement Transaction (as hereinafter defined) that are consistent with the terms hereof and have been approved by all necessary internal approvals of the parties and, if required, the Court of Queen's Bench of Alberta under the proceedings in respect of Laricina under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**").

1. Effective Date

The date of completion of the Settlement Transaction (the "**Effective Date**").

2. Notes

A. Repayment

Within 2 business days of the date of Initial Court Approval (as hereinafter defined), Laricina shall pay CPP Credit on the account of, firstly, accrued and unpaid interest to the date of Initial Court Approval, secondly, reasonable costs reimbursable pursuant to the Indenture and related agreements and, thirdly, with the remainder applied as a partial repayment of principal outstanding under the Notes, the amount of (the "**Initial Payment**"):

i. $26.4 million;

ii. plus $5 million if CIBC agrees to reduce the cash collateral securing the revolving credit facility (such amount, or any greater or lesser amount by which CIBC agrees to reduce such cash collateral, the "**CIBC Amount**");

iii. less any interest and cost reimbursements paid by Laricina to CPP Credit after June 27, 2015 and prior to the date of the Initial Court Approval.

Following the date of the Initial Court Approval and

THIS IS EXHIBIT " 2 "
referred to in the Affidavit of
Glen C. Schmidt
Sworn before me this 3rd
day of July A.D. 2015
NOTARY PUBLIC / COMMISSIONER FOR OATHS
IN AND FOR THE PROVINCE OF ALBERTA

EMILY E. PAPLAWSKI
Barrister & Solicitor

notwithstanding whether the settlement transaction described herein (the "**Settlement Transaction**") is terminated following the Initial Court Approval, CPP Credit and Laricina agree:

i. no interest payable pursuant to the terms of the Notes for the period from the date of Initial Court Approval until December 31, 2015 shall be payable in cash and instead such accrued and unpaid interest shall be added to the principal amount of the Notes on the date such interest would otherwise be payable in cash pursuant to the terms of the Notes;

ii. no costs and expenses reimbursable pursuant to the Indenture and related agreements for the period from the date of Initial Court Approval until December 31, 2015 shall be payable in cash and instead such costs and expenses shall be added to the principal amount of the Notes. Such amounts will be added to the principal amount of the Notes as of the date of the invoice relating to such amounts (which invoices shall not be backdated); and

iii. in the event the Initial Payment does not include the CIBC Amount, Laricina shall on the second business day following the date on which CIBC has agreed to reduce the cash collateral securing the revolving credit (whether before, on or after the Effective Date), pay CPP Credit the CIBC Amount as a further partial repayment of principal outstanding under the Notes.

On the Effective Date of the Settlement Transaction Laricina shall pay CPP Credit as a further partial repayment of principal outstanding under the Notes, the amount of $8.7 million (the "**Effective Date Payment**"). The Effective Date Payment shall be subject to an adjustment provision contained in the Definitive Documents for positive and negative variances from the written forecast provided by Laricina to CPP Credit dated June 28, 2015 (the "**Laricina Forecast**").

Upon the occurrence of the latest of:

[redacted]

[redacted]

then, within 5 business days of the date referred to above, Laricina shall pay to CPP Credit as further partial repayment of principal outstanding under the Notes, the amount of $3.4 million. Such payment shall be subject to an adjustment provision contained in the Definitive Documents for positive and negative variances from the Laricina Forecast.

The principal amount of Notes remaining after the Initial Payment and the Effective Date Payment shall be treated as follows:

i. $30 million of such principal amount of Notes shall remain outstanding following the Effective Date (the "**Remaining Amount of Notes**") and shall be governed by the Indenture as amended as contemplated herein.

ii. All of the remaining principal amount of Notes (the "**Principal Amount For Conversion**") shall be repaid in cash or converted to equity of Laricina as described in Section 3 below.

Laricina shall pay to CPP Credit the net proceeds of certain outstanding anticipated receivables (the "**Anticipated Receivables**") when they are received as further repayments of the principal amount owing pursuant to the Notes For the purposes of the Settlement Transaction: (a) if received prior to the date the equity subscription forms are mailed to shareholders (the "**Mailing Date**"), such proceeds shall be applied 50% as a reduction of the Principal Amount For Conversion and 50% as a reduction of the Remaining Amount of Notes; or (b) if received after the Mailing Date as a reduction of the Remaining Amount of Notes. These receivables include: (i) amounts due from the Alberta Government in connection with an urban development sub-region claim, [redacted] and (iii) net amounts due from the settlement of two insurance claims relating to a bitumen excursion incident at Germain.

B. No Acceleration Payment

CPP Credit shall not have a claim for any Acceleration Payment Amount (as defined in the Indenture) under the terms of the Indenture (CPP Credit has claimed $9,741,011.65) with respect to an event of default occurring on or prior to the later of: (a) the Effective Date; or (b) the date on which CPP Credit is paid in

full pursuant to a Note Repayment Transaction. For greater certainty, CPP Credit shall waive, on the Effective Date or the date on which CPP Credit is paid in full pursuant to a Note Repayment Transaction (as applicable), all defaults and events of defaults that have occurred on or prior to such date.

C. Amendments to the Note Indenture

The Remaining Amount of Notes shall be governed by the Indenture, as amended by a supplemental indenture included in the Definitive Documents, to give effect to the following amendments on the Effective Date:

The maturity date of the Notes shall remain March 20, 2018. There shall be no other mandatory note redemption obligations other than as contemplated in Section 2.A. above and as currently contemplated by Sections 4.16 or 8.02 of the Indenture (provided that, notwithstanding anything else in the Indenture, no Change of Control (as defined in the Indenture) shall arise from or as a result of either the pro rata equity offering or the conversion of the Principal Amount For Conversion contemplated herein).

Interest shall accrue from the Effective Date until the Note maturity date at the Default Rate (as defined in the Indenture). Interest shall be paid-in-kind through the issuance of additional Notes until the Note maturity date. Notwithstanding the foregoing, the fact that interest is to be payable at the Default Rate shall not be construed to mean that an event of default exists after the Effective Date.

Covenants set out in the Indenture under Expenditure Plan (Section 4.11), Production Covenants (Section 6.01) and Financial Covenants (Section 6.02) shall be removed, along with their corresponding reporting covenants (including for certainty the related certifications). There shall be no other financial maintenance covenants or approval rights for business plans or financials.

The remaining covenants contained in the Indenture shall be amended to provide for the matters set forth in Schedule A hereto. Failure to make any payments contemplated to be made herein following the Effective Date shall be an event of default under the Indenture.

All prepayment amounts, make-whole amounts or other acceleration payments of any kind (including any Acceleration Payment Amount) which would arise pursuant to the terms of the Indenture shall not apply to the repayments contemplated herein which repayments shall be effected at a redemption price equal to 100% of the principal amount of the Notes, except as set forth in Section 8 hereof with respect to a Note Repayment Transaction, but such Indenture provisions shall continue to apply to any future repayments (after the Effective Date) whether voluntary or mandatory in accordance with the terms set forth in the Indenture (as amended as contemplated herein).

Laricina shall, as contemplated by the Indenture, continue to be permitted to raise Permitted Subordinated Indebtedness (as defined in the Indenture) and common equity.

CPP Credit in its capacity as lender (from and after the Effective Date for so long as any of the Remaining Amount of Notes are outstanding and CPP Credit does not have a representative on the board of directors of Laricina (the "**Board**")), shall be granted board observer rights to the Board of Laricina and its subsidiaries and all committees thereof (which rights shall be set out in a board observer agreement reasonably satisfactory to Laricina and CPP Credit).

For greater certainty, the Note Subscription Agreement dated March 20, 2014 between CPP Credit and Laricina (the "**Note Subscription Agreement**") shall continue to apply following the Effective Date in accordance with its terms, provided that Laricina shall not be obligated to comply with section 8.2(a) of the Note Subscription Agreement with respect to any particular Board or Board committee meeting, to the extent that it delivers the information and materials contemplated in such section to each representative that CPP Credit has on the Board or such committee at that time.

3. Note Conversion and Pro Rata Offering

Prior to the conversion of the Principal Amount For Conversion to equity contemplated herein, Laricina shall conduct a pro rata offering to existing shareholders (the "**Pro Rata Offering**") in the amount at least equal to the Principal Amount for Conversion at Cdn. $0.12 per share (such subscription right to be transferrable and provide for typical over-subscription

rights). Any proceeds from the Pro Rata Equity Offering shall be paid to CPP Credit and reduce the Principal Amount for Conversion.

Upon the completion of the Pro Rata Offering and the application of the proceeds thereof to reduce the Principal Amount For Conversion, any remaining portion of the Principal Amount For Conversion shall be satisfied in full by Laricina issuing that number of common shares equal to (x) such remaining Principal Amount For Conversion divided by (y) Cdn. $0.12.

Certain additional transactions ("**Additional Transactions**") are being considered, the structure and subject matter of which was communicated by Laricina's counsel to CPP Credit's counsel on June 19, 2015, and, if completed, the proceeds therefrom shall be applied 50% to reduce the Principal Amount for Conversion and 50% applied to reduce the Remaining Amount of Notes. CPP Credit has no objection in principle to Laricina pursuing or completing such an Additional Transaction (for certainty, the Settlement Transaction shall not be conditional upon Laricina completing any Additional Transaction and the Additional Transaction shall be completed prior to or concurrently with the Settlement Transaction). CPP Credit and Laricina shall work together, acting reasonably, to complete any such Additional Transaction in conjunction with the Settlement Transaction; provided that Laricina shall not enter into any binding agreement with respect to any such Additional Transaction without CPP Credit's prior written consent, which consent shall not be unreasonably withheld. For greater certainty, nothing in this provision shall be construed as affecting CPP Credit's termination rights as provided in Section 9 of this term sheet.

4. Releases

On the Effective Date (or upon such other dates as contemplated in Sections 8 and 9 hereof with respect to a Note Repayment Transaction) releases shall be provided by CPP Credit to Laricina and by Laricina to CPP Credit, for certainty, including releases of all such parties' representatives.

5. Certain Conditions to Transaction becoming Effective

Constitution of Board and management upon the Effective Date to be satisfactory to CPP Credit and Laricina.

The structuring of the Settlement Transaction shall be amended

to the extent necessary or advisable, without changing the economics or fundamental terms, to comply with any applicable law including section 18(a) of the Canada Pension Plan Investment Board regulations.

6. Board Nomination

From and after the Effective Date, the Board shall consist of five directors. Initially those directors shall be as set forth in the Definitive Documents.

If CPP Credit (and its affiliates) hold:

- more than 50% of the common equity then CPP Credit (or its affiliates) shall be entitled to nominate 3 directors for inclusion on the slate of directors recommended by the Board to shareholders;

- 25% to 50% of the common equity, CPP Credit (or its affiliates) shall be entitled to nominate 2 directors for inclusion on the slate of directors recommended by the Board to shareholders; and

- more than 10% and less than 25% of the common equity, CPP Credit (or its affiliates) shall be entitled to nominate one director for inclusion on the slate of directors recommended by the Board to shareholders.

7. Illustrative Timetable

Laricina and CPP Credit shall cooperate with the goal of having the Settlement Transaction effective by September 30, 2015.

June 28 Agreement on term sheet
Laricina Board and CPP Credit approval of the Settlement Transaction contemplated hereby.

July 2 First drafts of the "**Definitive Documents**", being a settlement agreement incorporating the terms hereof (the "**Settlement Agreement**"), a Board observer agreement, a supplemental indenture effecting amendments to the Indenture contemplated herein, the form of warrant certificates and the form of releases and any other documents contemplated in the Settlement Agreement.

[TBD] Court approval of the Settlement Transaction (the "**Initial Court Approval**")

- Extension of stay
- Making of Initial Payment
- Approval of this term sheet

Initial Payment made within two business days of Initial Court Approval

July 13 Composition of post-emergence board and management agreed

July [TBD] Court Approval of the settlement Agreement

July 31 Entry into of the Settlement Agreement

Aug 17 Court approval of Pro Rata Offering subscription forms and information memorandum, if required
Mailing of Pro Rata Offering subscription forms and information memorandum (as required)

Sep 18 End of subscription period

Sep 23 Court approval, if required

Sep 30 Effective Date

The timetable set out above is indicative.

8. Fiduciary Out

Laricina Board shall have a fiduciary out that may be exercised at any time prior to or on November 30, 2015 provided that:

- It may only be exercised to enter into a binding agreement with a third party that provides for a Court approved transaction that contemplates that the Notes shall be repaid in full no later than January 5, 2016, including a premium equal to 3% of the principal amount of the Notes then outstanding (no other prepayment amounts, make-whole payments or other acceleration payments of any kind shall apply) (a "**Note Repayment Transaction**"). To the extent that waivers from certain of the provisions in the Indenture are required to effect a Note Repayment Transaction (for example, the Change

of Control provision) or an Additional Transaction to which CPP Credit has provided its prior written consent, CPP Credit agrees to provide such waivers as may reasonably be required and on reasonable terms without additional compensation or fees.

- Notwithstanding the termination of this term sheet or the Settlement Agreement:

  i. if the Note Repayment Transaction arises from a transaction that does not result in the sale of Laricina in its entirety then Laricina (or its successor on an economically equivalent basis if the interests of existing Laricina shareholders are exchanged for interests in a successor) shall issue to CPP Credit warrants equal to 2.5% of the common equity of Laricina pro forma the Note Repayment Transaction, each such warrant having an exercise price of $0.25 per common share (as such exercise price would be adjusted pursuant to customary anti-dilution provisions) and a term that expires on March 20, 2018 (the "**Note Repayment Warrants**"). The intrinsic value of the Note Repayment Warrants shall be capped at $2.5 million;

  ii. if the Note Repayment Transaction arises from a sale of Laricina in its entirety, then Laricina shall pay to CPP Credit, upon completion of the Note Repayment Transaction a cash fee equal to the implied intrinsic value of the Note Repayment Warrants had they been outstanding immediately prior to the Note Repayment Transaction (subject to $2.5 million cap noted above); and

  iii. the releases contemplated to be provided by Laricina to CPP Credit as set out in Section 4 above shall be provided concurrently with, and as a condition of,

Laricina entering into a binding agreement that provides for a Note Repayment Transaction, and by CPP Credit to Laricina as set out in Section 4 above shall be provided upon the repayment of the Notes in accordance with this Section 8 (provided that CPP Credit shall release Laricina from its claim for Acceleration Payment upon Laricina entering into a binding agreement that provides for a Note Repayment Transaction).

Prior to the Effective Date, Laricina shall be permitted to solicit transactions which may, on their own or in combination, result in a Note Repayment Transaction.

9. Termination

This term sheet shall automatically terminate upon the earlier of (i) Laricina entering into a binding agreement with a third party to provide for a Note Repayment Transaction and provided that the releases, warrants and fees contemplated by Section 4 above shall be provided as contemplated by Section 8 above or (ii) the parties entering into the Settlement Agreement.

Either Laricina or CPP Credit may terminate this term sheet immediately upon notice in writing by one party to the other which notice may be given in the event the Settlement Agreement is not entered into on or before July 31, 2015.

CPP Credit may terminate the Settlement Agreement if either (i) the Settlement Transaction is not completed on or prior to November 30, 2015 or such later date as Laricina may request and to which CPP Credit may consent, which consent shall not be unreasonably withheld, provided that in no event shall such date be later than January 5, 2016; or (ii) a material adverse change occurs with respect to Laricina after the date hereof.

In the event that the Settlement Agreement is terminated, and Laricina has not at such time entered into a binding agreement with a third party to provide for a Note Repayment Transaction, Laricina shall promptly commence a Capital Repayment Process substantially on the terms set out in the Monitor's first report dated April 21, 2015 in Laricina's CCAA proceedings, with such changes as are required to update the

dates contained within such terms to current dates; and Laricina shall pay CPP Credit $31.8 million as a partial repayment of principal outstanding under the Notes.

The Settlement Agreement shall contain substantially similar termination terms as contained in this Section 9 (other than with respect to termination of this term sheet).

10. Consent Fee

As part of the Settlement Transaction, warrants exercisable for that number of common shares that shall be equivalent to 5% of the common equity of Laricina pro forma the Pro Rata Offering, each such warrant having an exercise price of $0.25 per common share and expiring on March 20, 2018 shall be issued and delivered to CPP Credit on the Effective Date. All warrants to be issued in the Settlement Transaction shall be substantially in the form of the Existing Warrants.

The existing 3,750,000 warrants issued pursuant to the Note Subscription Agreement shall be surrendered and cancelled upon the Effective Date (the "**Existing Warrants**").

11. Binding Provisions

The Parties have entered into this term sheet subject to approval of the Alberta Court of Queen's Bench in the CCAA Proceedings of Laricina Energy Ltd., et al, Action No. 1501-03351. Each of the parties hereto agree that the following provisions shall be binding upon them upon receipt of the Initial Court Approval:

(a) Laricina and CPP Credit shall proceed diligently and in good faith and to take all necessary and desirable action to complete the steps and transactions set forth herein in accordance with the terms hereof;

(b) The Definitive Documents providing for the Settlement Transaction including the terms hereof shall be in form satisfactory to each of Laricina and CPP Credit, acting reasonably. Drafting responsibilities for Definitive Documents shall be subject to agreement of Laricina and CPP Credit, acting reasonably;

(c) Laricina shall proceed diligently and in good faith to collect the Anticipated Receivables and to seek a reduction of Laricina's revolving credit facility from $15 million to $10 million and a release of $5 million of cash collateral (which provisions shall also be contained in

the Definitive Documents); and

(d) The provisions of Section 2A above relating to paying the Initial Payment, payment-in-kind of Note interest and Indenture expenses, paying the CIBC Amount and paying the Anticipated Receivables; Section 8 above; Section 9 above; and this Section 11 shall be binding.

LARICINA ENERGY LTD.

Per:_____

Name: _____

Title: _____

Accepted and agreed to this ____ day of June, 2015

CPPIB CREDIT INVESTMENTS INC.

Per:_____

Name: _____

Title: _____

Schedule A - Additional Covenants

1. The following covenants shall be added to the covenants contained in Article Five of the Indenture:

Laricina shall not:

(a) change Laricina's auditors or independent engineer subject to certain reasonable exceptions to be agreed;

(b) liquidate, dissolve or wind-up or take any steps or proceedings in connection therewith;

(c) except as provided in any security document relating to the CIBC credit agreement, directly or indirectly, enter into or suffer to exist, or permit any of its subsidiaries to enter into or suffer to exist, any agreement or arrangement limiting the ability of any of its subsidiaries to declare or pay dividends or other distributions in respect of its equity or repay or prepay any debt owed to, make loans or advances to, or otherwise transfer assets to or make investments in, Laricina or any of its other subsidiaries; and

(d) create or own, or permit any subsidiary to create or own, a subsidiary (subject to customary exclusions relating to wholly-owned subsidiaries).

2. The following amendments, shall be made to existing reporting covenants:

(a) Section 4.18(e) of the Indenture shall be amended to provide the actual form of quarterly operating report as agreed to by CPPIB and Laricina; and

(b) Section 4.18(f) of the Indenture shall be amended to provided that notices of defaults and events of default shall be provided within three business days (as opposed to five business days).

3. The following amendments shall be made to existing negative covenants and related definitions in the Indenture:

(a) Clause (a) of "Permitted Indebtedness" contained in Section 1.01 of the Indenture to be reduced from $30,000,000 to $15,000,000 (or in the event Laricina's revolving credit facility is reduced to $10 million then the limit shall be reduced to that amount) and clause (e) of such definition to be reduced to $250,000; and

(b) The amount of $500,000 contained in Section 5.07(d) of the Indenture shall be reduced to $100,000 wherever it occurs in that clause.

TAB 16

|Clerk's stamp:

COURT FILE NUMBER	1501-03351
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	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 *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LARICINA ENERGY LTD., LARICINA GP HOLDINGS LTD. AND 1276158 ALBERTA INC.

APPLICANTS	LARICINA ENERGY LTD., LARICINA GP HOLDING LTD., and 1276158 ALBERTA INC.
DOCUMENT	**ORDER** **Second Cash Repayment, Marketing Process and Sealing Order**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Osler, Hoskin & Harcourt LLP
Suite 2500, 450-1st Street SW
Calgary, Alberta T2P 5H1
Solicitors: A. Robert Anderson, Q.C.
Phone: 403.260.7004
Fax: 403.260.7024
Email: randerson@osler.com
File No: 1151294

I hereby certify this to be a true copy of the original Order

Dated this 23 day of July 2015

for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: July 22, 2015

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Mr. Justice S.J. LoVecchio

LOCATION OF HEARING: Calgary Courts Centre
601 – 5th Street SW
Calgary, AB

UPON the application of Laricina Energy Ltd., Laricina GP Holding Ltd., and 1276158 Alberta Inc. (collectively, "**Laricina**" or the "**Applicant**"); **AND UPON** reading the Affidavit of Glen C. Schmidt, sworn July 3, 2015 (the "**Schmidt Affidavit**") and the Concurrent Confidential Affidavit of Glen C. Schmidt, sworn July 3, 2015 (the "**Concurrent Confidential Schmidt Affidavit**"); **AND UPON** reading the Limited Objection of the Ad Hoc Shareholders Committee, filed July 14, 2015; **AND UPON** reading the Third Report of the court-appointed Monitor, PricewaterhouseCoopers Inc. (the "**Monitor**") dated July 17, 2015; **AND UPON** hearing from counsel for the Applicant, the Monitor, CPPIB Credit Investments Inc. (the "**Noteholder**"), the ad hoc committee representing approximately 16.7% of Laricina's shareholders (the "**Committee**"), CPPIB Equity Investments Inc. ("**CPPIB Equity**") and the Board of Directors of Laricina; **AND UPON** being satisfied that Laricina's proposed Second Cash Repayment and Marketing Process should be approved and the Concurrent Confidential Schmidt Affidavit sealed on the Court file; **AND UPON** being satisfied that the Applicant has acted and continues to act in good faith and with due diligence and that circumstances exist that make this Order appropriate; **IT IS HEREBY ORDERED AND DECLARED THAT:**

CAPITALIZED TERMS

1. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Schmidt Affidavit or the Term Sheet Agreement which is Exhibit 2 to the Schmidt Affidavit.

SECOND CASH REPAYMENT

2. The Applicant shall, within 2 business days of the date of this Order, make payment to the Noteholder of $26.4 million to be applied: (a) firstly, to accrued and unpaid interest to the date of this Order; (b) secondly, to reasonable costs reimbursable pursuant to the Indenture and Section 8.3 of the Note Subscription Agreement; and (c) thirdly, as a partial repayment of the principal outstanding under the Notes. The Noteholder's application to its claimed costs of amounts paid under this paragraph shall not be determinative of whether such costs are reasonable or reimbursable pursuant to the Indenture and Section 8.3 of the Note Subscription Agreement. The Noteholder shall provide the Applicant with reasonable particulars of such claimed costs within 30 days of this Order and if the Applicant does not agree or requires further particulars regarding such claimed costs which the Noteholder

does not provide, then the Applicant may apply to the Court for further particulars and/or to determine the reasonable costs reimbursable pursuant to the Indenture and Section 8.3 of the Note Subscription Agreement. If the amount of costs as determined by the Court is less than the amount claimed by the Noteholder, the difference with interest thereon at the rate applicable under the Indenture shall be applied to reduce the principal outstanding.

3. The Applicant shall make a further payment to the Noteholder of $5 million or any greater or lesser amount which Canadian Imperial Bank of Commerce ("**CIBC**") agrees to release as cash collateral securing the Applicant's revolving line of credit. Such payment shall be made by the Applicant within 2 business days of the date the cash collateral is released by CIBC to the Applicant and shall be applied to the principal amount of Notes. Subject to further order of the Court, the payments provided for in this paragraph and paragraph 2 are made without prejudice to any counterclaim(s) or other legal or equitable claim(s) the Applicant may have against the Noteholder and reserving all rights of the Applicant regarding same.

MARKETING PROCESS

4. The Applicant's Marketing Process is approved, and the Applicants are authorized and directed to implement the Marketing Process.

SEALING ORDER

5. The Concurrent Confidential Schmidt Affidavit including the Confidential Exhibits thereto shall be sealed on the Court file and not form part of the public record.

6. The Clerk of this Honourable Court shall file the Concurrent Confidential Schmidt Affidavit in a sealed envelope attached to a notice that sets out the style of cause of these proceedings and states that:

> THIS ENVELOPE CONTAINS CONFIDENTIAL MATERIALS FILED BY LARICINA ENERGY LTD., LARICINA GP HOLDING LTD., AND 1276158 ALBERTA INC.; and
>
> THE CONFIDENTIAL MATERIALS ARE SEALED PURSUANT TO THE SEALING ORDER ISSUED BY THE HONOURABLE MR. JUSTICE S. J. LOVECCHIO ON JULY 22, 2015.

7. The Applicant is empowered and authorized, but not directed, to provide the Concurrent Confidential Schmidt Affidavit (or any portion thereof, or information contained therein) to any interested party, entity or person that the Applicant considers reasonable in the circumstances subject to confidentiality arrangements satisfactory to the Applicant.

8. The Concurrent Confidential Schmidt Affidavit shall remain on the Court file in accordance with this Order pending the termination of the within CCAA proceedings, or such other insolvency proceedings as may be undertaken with respect to the Applicant, whichever occurs later (the latter event being referred to herein as the "**Insolvency Proceedings**"). Within 5 business days of the termination of the Insolvency Proceedings, the Applicant shall file the Concurrent Confidential Schmidt Affidavit with the Court, failing which the Court Clerk shall be at liberty to do so.

9. Leave is hereby granted to any person, entity or party affected by this Order to apply to this Honourable Court for a further Order substituting, modifying or varying the terms of paragraphs 5 to 8 of this Order, with such Application to be brought on notice to the Applicant and any other affected party in accordance with the Alberta Rules of Court.

Justice of the Court of Queen's Bench of Alberta

TAB 17

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada (Procureur général) c. Contrevenant No. 10 | 2015 CAF 155, 2015 FCA 155, 2015 CarswellNat 2920, 2015 CarswellNat 4847, 476 N.R. 142, 123 W.C.B. (2d) 413, 256 A.C.W.S. (3d) 759, [2015] A.C.F. No. 873 | (F.C.A., Jun 30, 2015)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

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

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous

Civil practice and procedure

XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination

XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous

Evidence

VII Documentary evidence
VII.5 Privilege as to documents
VII.5.d Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la

société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when 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 includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information

confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

Table of Authorities

Cases considered by *Iacobucci J.*:

AB Hassle v. Canada (Minister of National Health & Welfare), 1998 CarswellNat 2520, 83 C.P.R. (3d) 428, 161 F.T.R. 15 (Fed. T.D.) — considered

AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to

Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

M. (A.) v. Ryan, 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205 D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

R. v. Mentuck, 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409 (S.C.C.) — followed

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37
Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46
s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106
R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

> 151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions

judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in

establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights

and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> > (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
> >
> > (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> > (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
> >
> > (b) the judge must consider whether the order is limited as much as possible; and
> >
> > (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing

under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.* [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 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.

52 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*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 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 R. 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
>
> (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.

54 As in *Mentuck*, *supra*, 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.

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 *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

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 branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick*, *supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are 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: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in

a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies 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, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, 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. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. 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.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, 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. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

End of Document

TAB 18

2002 CarswellOnt 2254
Ontario Court of Appeal

Anvil Range Mining Corp., Re

2002 CarswellOnt 2254, [2002] O.J. No. 2606, 115 A.C.W.S. (3d) 923, 34 C.B.R. (4th) 157

IN THE MATTER OF ANVIL RANGE MINING CORPORATION; AND IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. c-36, AS AMENDED; IN THE MATTER OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C-43, AS AMENDED; AND IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-3, AS AMENDED; AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF ANVIL RANGE MINING CORPORATION

Morden, Borins, Feldman JJ.A.

Heard: March 6, 2002
Judgment: July 5, 2002
Docket: CA C36919

Proceedings: affirming (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List])

Counsel: *Kevin R. Aalto*, *David Estrin*, for Appellants, Cumberland Asset Management, Berner & Company, Global Securities Corporation, Peel Brooke Inc, Inukshuk Resources Inc., Robert N. Granger, Adrian M.S. White
George Karayannides, *Kenneth Kraft*, for Respondent, Deloitte & Touche Inc., Interim Receiver of Anvil Range Mining Corporation and Anvil Mining Properties Inc.
David Hager, for Respondent, Cominco Ltd.
John Porter, for Respondent, Department of Indian Affairs and Northern Development
Jeremy Dacks, for Respondent, Yukon Territories Government
Derek T. Ross, for Respondent, Ross River Dena Council, Ross River Development Corporation
Geoffrey B. Morawetz, for Respondent, Yukon Energy Corporation

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Company purchased mine, refurbished it and operated mine until early 1998 — Company received protection from creditors under Companies' Creditors Arrangement Act and interim receiver was appointed — Secured creditors of company reached settlement which was to be implemented by plan under Act — Plan provided for distribution of company's assets among three classes of secured creditor — Affected creditors approved plan — Interim receiver's motion for sanction of plan of arrangement pursuant to Act was granted — Motions judge's findings were based on two reports valuing company's assets between $10,000,000 and $19,900,000 — Motions judge concluded that secured claims were far in excess of value of assets — Other creditors appealed — Appeal dismissed — In context of purchase price for mine, that mine's resources underwent depletion, cost of putting mine into state where it could recommence operations and that no one had expressed interest in purchasing mine, reports formed reasonable basis for motions judge's findings — Secured claims totalled far more than maximum possible total value of company's assets — Plan reflected compromise of priority issues among secured creditors and approval allowed creditors to move on while mining properties were under proper stewardship — Alternative plan by other creditors had no viability — As assets were insufficient to pay half of secured

creditors' claims, approval occasioned no prejudice to other creditors — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered:

Equity Waste Management of Canada Corp. v. Halton Hills (Town), 1997 CarswellOnt 3270, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324, 35 O.R. (3d) 321 (Ont. C.A.) — considered

Northland Properties Ltd., Re, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 34 B.C.L.R. (2d) 122, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* [1989] 3 W.W.R. 363, 1989 CarswellBC 334 (B.C. C.A.) — referred to

Statutes considered:

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

s. 5 — considered

s. 6 — considered

APPEAL by creditors from judgment reported at 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) sanctioning plan of arrangement under *Companies' Creditors Arrangement Act*.

***The Court*:**

1 Cumberland Asset Management, and others, appeal from orders made by Farley J. dated March 29, 2001 and May 7, 2001. In the March 29, 2001 order Farley J. sanctioned a plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (C.C.A.A.) proposed by Deloitte & Touche Inc., the Interim Receiver of Anvil Range Mining Range Mining Corporation and Anvil Range Properties Inc. In his May 7, 2001 order, Farley J. ordered that the appellants pay costs relating to the sanction motion in the total amount of $28,500.

2 The facts respecting the sanctioning of the plan are set forth in Farley J.'s reasons which are reported at (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) and need not be repeated in detail. The following is an outline, which contains some history of this proceeding which is not included in Farley J.'s reasons.

3 Anvil Range Mining Corporation is the owner of a lead and zinc mine, known as the Faro Mine, in the Yukon Territory. It bought this mine for about $27,000,000 in 1994 from KPMG Inc., in its capacity as Interim Receiver of the then owner, Curragh Inc.

4 Anvil Range began production in August 1995 after conducting a nine-month $75,000,000 pre-stripping and mill refurbishment program. It suspended mining operations in December 1996 and milling operations in the spring of 1997 because of falling metal prices. It recommenced operations in the fall of 1997 but ceased mining and milling early in 1998.

5 In January 1998, Anvil Range applied for and received protection from its creditors under the C.C.A.A. This was the beginning of the proceeding in which the orders under appeal were, eventually, made. In March 1998, Cominco Ltd., a secured creditor of Anvil Range, moved for the appointment of an interim receiver and termination of the stay provided for in the

C.C.A.A. proceeding. Deloitte & Touche Inc. was appointed Interim Receiver and the court directed it to report to the court on certain matters, including seeking advice and directions respecting a marketing plan for the mine.

6 In response to this, the Interim Receiver filed its second report dated June 17, 1998 in which it recommended that "no funds be spent on marketing the mine for the present". This was based on several different facts, one of them being "the fact that no prospective purchasers had emerged to that date . . . . to express even minimal interest in the mine site despite the well publicized facts in the industry press".

7 As part of the ongoing dispute among the parties, the Interim Receiver brought a motion before Blair J., which was heard on August 20, 1998, seeking approval to sell certain assets at the mine. Blair J. noted that the Interim Receiver had expressed the opinion on the basis of its market analysis that it was "unlikely that the Faro Mine can be reopened within the next 2-3 years and possibly as long as 5 years." He then said:

> I agree that it is difficult to be very optimistic about the future prospects of the Faro Mine, including the chance of its re-opening. On the other hand, Strathcona (acknowledged by all to be expert in the field) seems to feel strongly that the best chance of recovery is if the Grum Pit at least is kept on a "standby-mode" ready to be made operative quickly when a period of good metal prices arrives. To do this the equipment in question will be necessary. To replace it would be costly and it may well be a non-starter if what is being considered is only a 3 year operation or so.

8 Blair J. did not dismiss the request for approval to sell the equipment but adjourned it to October 29, 1998 to enable the Yukon Territorial Government to do further analysis. This was because of the importance of the mine to the fabric of the Yukon Territory.

9 After extensive negotiations and a filing of the Yukon Territorial Government report, a funding formula was established in December 1998 whereby the Department of Indian Affairs and Northern Development ("DIAND") assumed most of the funding obligations of going forward. This funding was secured by a charge against the real property.

10 In December 1999, the court granted leave to the Interim Receiver or the secured creditors to file a plan of arrangement. About a year of negotiations among the secured creditors followed, eventually leading to an extensive settlement conference held in Vancouver under the direction of Justice Kierans, sitting as a justice of the Supreme Court of the Yukon Territory. The conference resulted in a settlement among three groups of secured creditors: (1) the Mining Lien Act Claimants; (2) Cominco Ltd.; and (3) DIAND, the Yukon Territorial Government and the Yukon Workers' Compensation, Health and Safety Board. The settlement was to be implemented by a plan under the C.C.A.A.

11 As will be set forth in more detail later in these reasons, the three groups of secured creditors were the only parties with a legal and economic interest in the assets of Anvil Range. The plan settled a series of complex priority disputes both within creditor classes and among creditor classes and also dealt with allocating funds in the Interim Receiver's possession.

12 The plan divides the creditors who are affected by it (the "Affected Creditors") into three classes (the three groups mentioned above):

1. The Mining Lien Act Claimants.

2. Cominco Ltd.

3. The government creditors, DIAND, the Yukon Territorial Government, and the Yukon Workers' Compensation, Health and Safety Board.

13 The plan provides for the class 3 creditors to acquire the mine and the mill located on it and certain other assets (the "Excluded Assets") and to assume responsibility for funding the ongoing necessary environmental, maintenance and security programs. The other two classes of Affected Creditors are to share in the proceeds of the sale of the remaining assets (the "Realization Assets").

14 The Interim Receiver recommended approval of the plan as the best alternative for settling the outstanding priority issues in dispute and because there was no recovery possible other than to the Affected Creditors.

15 The class 1 creditors' secured claims against Anvil Range property, as judicially declared by judgments of the Supreme Court of the Yukon Territory, total $18,312,169. The claim of the class 2 creditor, Cominco Ltd., was judicially determined by the Superior Court of Justice (Ontario) on January 27, 1999 to be $24,353,657 with post-judgment interest accruing on this amount at 8.5% per annum.

16 With respect to the class 3 creditors, the Yukon Territorial Government and the Yukon Workers' Compensation and Health and Safety Board claim is about $1,000,000. The claim advanced on behalf of DIAND is said to total over $60,000,000 for funding the Interim Receiver's expenses and, also, the environmental remediation costs. We shall deal with the salient details of it shortly.

17 The Affected Creditors unanimously approved the plan which was then sanctioned by the order of Farley J. dated March 29, 2001.

18 The appellants' appeal is substantially based on the following submissions:

1. The plan is not "fair and reasonable" in all of its circumstances as it effectively eliminates the opportunity for unsecured creditors to realize anything.

2. The plan is contrary to the purposes underlying the C.C.A.A.

3. DIAND's reclamation claim is inconsistent with the "fair and reasonable principles" of the C.C.A.A. and environmental remediation legislation.

19 Underlying these submissions is the submission that Farley J. erred in not requiring a more complete and in-depth valuation of Anvil Range's assets be obtained by the Interim Receiver.

20 This last submission should be dealt with first because it is fundamental to the success of the appeal. Farley J.'s findings were based on two reports, one by Strathcona Mineral Services Ltd. dated March 12, 2001 and the other by Deloitte & Touche Corporate Finance Canada, Inc. dated March 13, 2001. In preparing its report, Deloitte & Touche reviewed the Strathcona report, among other materials.

21 In its report Strathcona noted that in the Interim Receiver's 22nd report there was an estimate of the capital expenditures that would be required to resume mining activity at the Grum deposit (which was the only accessible resource base on the Anvil property) including the purchase of mining equipment, rehabilitation of the pit walls, and modifications and repairs to the process facilities. Strathcona said:

> The total is estimated at $80 to $100 million before working capital requirements and we consider this estimate to be reasonable and in the general range of what could be expected. It is clear that the capital expenditures to restart mining operations are going to exceed, perhaps by a factor of two, the cumulative gross operating margins for three years of operation that are indicated.

22 Strathcona concluded its report as follows:

> The total amount realized from the sale or disposition of the foregoing assets on a salvage basis would appear to be in the order of $10-$15 million without making any contribution towards the ongoing care and maintenance costs for the property or the reclamation requirements which we understand have become the responsibility of DIAND. There may also be some value ascribed to tax pools that remain from operating losses, capital expenditures and exploration expenditures by Anvil Range. However, presumably most of the value, if any, of those tax pools would only be applicable upon the resumption of mining operations on the property, and the Interim Receiver would be best positioned to comment on this item.

23 Deloitte & Touche Corporate Finance Canada, Inc. concluded that the established market value of all the assets to be "in the range of $11.1 to $19.9 million (Schedule 1), as at January 31, 2001" and that, if it were asked to be more specific, "[it] would suggest the mid-point of the foregoing range, being $15.5 million." It concluded: "Based on the above, there is no value remaining for the unsecured creditors, as the amount owed to secured creditors of over $90.0 million exceeds the value of the assets of Anvil Range."

24 The appellants submitted a letter from Watts, Griffis & McOuat, Consulting Geologists and Engineers, dated March 21, 2001 which reviewed several documents, "in particular" the Strathcona report dated March 12, 2001. In this letter, Watts, Griffis & McOuat stated "a number of questions about the methodology and logic that Strathcona is using". It did not state an opinion on the value of the Anvil Range property.

25 On these materials, Farley J. concluded that "the secured claims are far in excess of the value of the assets" and that the value had to be determined "on a current basis" and not "on a speculative or (remote) possibility basis." He dealt with the evidence submitted by the appellant as follows:

> The Watts, Griffis & McOuat letter of March 21, 2001 has been hastily prepared in an attempt to throw doubt on some of the Strathcona observations and conclusions - but not to discredit them. In fact in numerous instances [the] letter concurs with the Strathcona report. Rather the author of the letter has some questions. It must be appreciated that Strathcona/ Farquharson has had significant involvement with the Anvil mining facilities over the past several years, whereas Watts, Griffis & McOuat has only had this rather peripheral engagement. I do not find it unusual that two experienced consultants in this mining field may have different views or approaches, nor that one may feel the need for more information than it was able to glean from reviewing the listed documents before reaching a conclusion. In the result, I think it reasonable to accept the views of Farquharson, an established and recognized expert in this field, who has had, as indicated, considerable experience with this matter over the past several years. Further, I think it inappropriate and unnecessary to further delay and incur additional costs to engage upon a further study.

26 In our view, Farley J. did not err in accepting the respondent's evidence as affording a reasonable basis for his findings and, further, he did not make any error in his assessment of this evidence that would justify our interfering with his conclusions: *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.) at 333-336.

27 It may be that the Strathcona report, as a free standing document, could have been more detailed but this is far from saying that it was not capable, particularly in the context of this proceeding, which began in 1998, of forming a reasonable basis for Farley J.'s findings. This context includes the evidence that Anvil Range bought the property in 1994 for $27,000,000, that its resources underwent depletion since then, that the cost of putting the property in a state where it could recommence operations was some $80,000,000 to $100,000,000 and, although it had been known for sometime in the industry that the property was "available", no one had expressed any interest in it.

28 We turn now to the three basic submissions of the appellant set forth in paragraph 18 of these reasons.

29 It will be helpful to deal with the third submission first, that relating to the DIAND claim. The total DIAND claim is for something over $60,000,000. The appellants submit that by reason of the "polluter pays" principle, it is wrong that DIAND should have a secured claim against the assets of Anvil Range for environmental remediation at the expense of the unsecured creditors. There are several facets to this submission but, because of the particular facts of this case, we need not explore them. Of the total DIAND claim, some $16,000,000 relates to funds expended under court orders for the Interim Receiver and this is, undeniably, a valid secured claim. As will be apparent, it is sufficient to resolve this appeal if only this part of DIAND's claim is taken into account - and it may well not be necessary to take any part of the claim into account.

30 We turn now to the first two of the appellant's specific submissions. The first is that the plan is not fair and reasonable because it effectively eliminates the opportunity for unsecured creditors to realize anything.

31 From the accepted valuation the maximum possible total value of Anvil Range's assets is $19,900,000. After eliminating the portion of DIAND's claim for remediation costs, the secured claims total at least $60,000.000. Accordingly, even after allowing for a fair margin of error on each side of the equation (the assets side and the claims side) it can be seen that the unsecured creditors have no legal or economic interest in the assets in question.

32 The second submission is that the plan is contrary to the purposes of the C.C.A.A. Courts have recognized that the purpose of the C.C.A.A. is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators. See, for example, *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at 201. Farley J. recognized this but also expressed the view in paragraph 11 of his reasons that:

> The CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List] at p. 104. Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.

33 Further to this it may be noted that the plan in this case reflected a compromise of difficult priority issues among the secured creditors and, as stated later in Farley J.'s reasons, "the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship."

34 It may also be noted that s. 5 of the C.C.A.A. contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors.

35 Relevant to this issue is the fact that the appellants put forward an alternative plan, which involved their receiving the corporate shell of Anvil Range together with $500,000, and other terms. This plan, however, had no viability. As Farley J. noted in his reasons for the costs disposition it was "doomed to failure given the stated opposition to same [the alternate plan] of the secureds-Cominco Lien and Claimants and DIAND".

36 It is not necessary to resolve this issue to decide the appeal. If the order under appeal was not properly made under the C.C.A.A., there is no doubt that it could have been made by Farley J. in response to the alternative relief sought, which was that of approving a sale of Anvil Range's assets by the Interim Receiver on terms substantially similar to those provided for in the plan. Taking into account that the assets are insufficient to pay even half of the secured creditors claims, it is clear that the order under appeal occasioned no prejudice whatsoever to the appellants. Accordingly we do not give effect to this submission.

37 In the complex circumstances of the operation of the mine and given that there is no hope of the sale generating sufficient funds to satisfy the secured creditors, it cannot be said that Farley J. erred in approving the plan as being fair and reasonable.

COSTS

38 The other appeal is from Farley J.'s order requiring the appellants to pay costs relating to the motion which he fixed in the total amount of $28,500 and allocated as follows:

$15,000 to the Interim Receiver;

$7,000 to Cominco;

$5,000 to DIAND;

$1,500 to Yukon Energy Corporation

39 The appellants submit that Farley J. erred in this costs disposition because parties with an interest in a company governed by the C.C.A.A. should be free to appear in court and oppose the sanctioning of a plan on legitimate grounds without the threat of the penalty of the costs being imposed against them.

40 The award of costs, of course, was a matter within the discretion of the judge and we are not entitled to interfere with the exercise of the discretion just because we may have exercised it differently. To succeed the appellants must show that the exercise of discretion was affected by some error in principle or by misapprehension of the facts. In this case, while we might have been inclined simply to deprive the appellant of costs relating to the motion, we cannot say that there was no principled basis for the disposition which Farley J. made. He was entitled to conclude, as he did, that there was no realistic basis supporting the appellants' opposition to the plan.

DISPOSITION

41 In the result, the appeal is dismissed with costs payable by the appellants to the respondents who delivered factums and appeared on the hearing of the appeal. These respondents should deliver their submissions respecting the costs of the appeal, in writing, within seven days of the release of these reasons and the appellants should deliver their submissions within fourteen days of the release of the reasons.

Appeal dismissed.

End of Document

TAB 19

11 U.S. Code § 365 - Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) (A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B) (i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated

or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1) (A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2) (A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperform-ance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p) (1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2) (A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2574; Pub. L. 98–353, title III, §§ 362, 402–404, July 10, 1984, 98 Stat. 361, 367; Pub. L. 99–554, title II, §§ 257(j), (m), 283(e), Oct. 27, 1986, 100 Stat. 3115, 3117; Pub. L. 100–506, § 1(b), Oct. 18, 1988, 102 Stat. 2538; Pub. L. 101–647, title XXV, § 2522(c), Nov. 29, 1990, 104 Stat. 4866; Pub. L. 102–365, § 19(b)–(e), Sept. 3, 1992, 106 Stat. 982–984; Pub. L. 103–394, title II, §§ 205(a), 219(a), (b), title V, § 501(d)(10), Oct. 22, 1994, 108 Stat. 4122, 4128, 4145; Pub. L. 103–429, § 1, Oct. 31, 1994, 108 Stat. 4377; Pub. L. 109–8, title III, §§ 309(b), 328(a), title IV, § 404, Apr. 20, 2005, 119 Stat. 82, 100, 104.)