Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED

(the "**Applicants**")

BOOK OF AUTHORITIES OF THE APPLICANTS
(CCAA Initial Application)

December 22, 2017

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TAB A

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

[1] R.S.C. 1985, c. C. 36, as amended

the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

[2] The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

[3] No one appearing opposed the relief requested.

Backround Facts

[4] Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

[5] As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

[6] Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

[7] Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

[8] The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

[9] Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

[10] In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six

[2] R.S.C. 1985, c.C.44.

occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

[11] Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

[12] The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

[13] On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

[14] On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

[15] Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

[16] The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to

fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

[17] In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

[18] Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

[19] The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual “pre-packaged” recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a

support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

[20] CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

[21] The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

[22] The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

[23] I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having

reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

[24] This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

[25] Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Re Stelco*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

[3] R.S.C. 1985, c. B-3, as amended.
[4] (2004), 48 C.B.R. (4th) 299; leave to appeal refused 2004 CarswellOnt 2936 (C.A.).

[26] Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

[27] Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

[28] The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

[29] While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*[5]; *Re Smurfit-Stone Container Canada Inc.*[6]; and *Re Calpine Canada Energy Ltd.*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

[5] (1993), 9 B.L.R. (2d) 275.
[6] [2009] O.J. No. 349.
[7] (2006), 19 C.B.R. (5th) 187.

[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

[31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (*a*) the period during which the company is expected to be subject to proceedings under this Act;
>
> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

[34] Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

[35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge

is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

[36] For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

[37] While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[38] I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

[39] As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

[40] Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

[41] The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that

> the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[42] Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

[43] In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the

Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

[44] The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

[45] Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[46] I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

[47] The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

[48] The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor

believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

[49] Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

[50] Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

[51] The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing

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[10] (2003), 39 C.B.R. (4th) 216.

orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

[52] In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

[53] The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

[11] [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
[12] [2002] 2 S.C.R. 522.

[54] CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

[55] The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

[56] Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

[57] Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

[58] This is a “pre-packaged” restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

[59] I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor’s report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

[60] Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

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Pepall J.

Released: October 13, 2009

TAB B

CITATION: Cinram International Inc. (Re), 2012 ONSC 3767
COURT FILE NO.: CV-12-9767-00CL
DATE: 20120626

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A", Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert J. Chadwick, Melaney Wagner and Caroline Descours, for the Applicants**

Steven Golick, for Warner Electra-Atlantic Corp.

Steven Weisz, for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent

Tracy Sandler, for Twentieth Century Fox Film Corporation

David Byers, for the Proposed Monitor, FTI Consulting Inc.

HEARD &
ENDORSED: **JUNE 25, 2012**

REASONS: **JUNE 26, 2012**

ENDORSEMENT

[1] Cinram International Inc. ("CII"), Cinram International Income Fund ("Cinram Fund"), CII Trust and the Companies listed in Schedule "A" (collectively, the "Applicants") brought this application seeking an initial order (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership ("Cinram LP", collectively with the Applicants, the "CCAA Parties").

[2] Cinram Fund, together with its direct and indirect subsidiaries (collectively, "Cinram" or the "Cinram Group") is a replicator and distributor of CDs and DVDs. Cinram has a diversified operational footprint across North America and Europe that enables it to meet the replication and logistics demands of its customers.

[3] The evidentiary record establishes that Cinram has experienced significant declines in revenue and EBITDA, which, according to Cinram, are a result of the economic downturn in Cinram's primary markets of North America and Europe, which impacted consumers' discretionary spending and adversely affected the entire industry.

[4] Cinram advises that over the past several years it has continued to evaluate its strategic alternatives and rationalize its operating footprint in order to attempt to balance its ongoing operations and financial challenges with its existing debt levels. However, despite cost reductions and recapitalized initiatives and the implementation of a variety of restructuring alternatives, the Cinram Group has experienced a number of challenges that has led to it seeking protection under the CCAA.

[5] Counsel to Cinram outlined the principal objectives of these CCAA proceedings as:

(i) to ensure the ongoing operations of the Cinram Group;

(ii) to ensure the CCAA Parties have the necessary availability of working capital funds to maximize the ongoing business of the Cinram Group for the benefit of its stakeholders; and

(iii) to complete the sale and transfer of substantially all of the Cinram Group's business as a going concern (the "Proposed Transaction").

[6] Cinram contemplates that these CCAA proceedings will be the primary court supervised restructuring of the CCAA Parties. Cinram has operations in the United States and certain of the Applicants are incorporated under the laws of the United States. Cinram, however, takes the position that Canada is the nerve centre of the Cinram Group.

[7] The Applicants also seek authorization for Cinram International ULC ("Cinram ULC") to act as "foreign representative" in the within proceedings to seek a recognition order under Chapter 15 of the United States Bankruptcy Code ("Chapter 15"). Cinram advises that the proceedings under Chapter 15 are intended to ensure that the CCAA Parties are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction to be undertaken pursuant to these CCAA proceedings.

[8] Counsel to the Applicants submits that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Cinram is one of the world's largest providers of pre-recorded multi-media products and related logistics services. It has facilities in North America and Europe, and it:

(i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;

(ii) provides various digital media services through One K Studios, LLC; and

(iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the "Cinram Business").

[9] Cinram contemplates that the Proposed Transaction could allow it to restore itself as a market leader in the industry. Cinram takes the position that it requires CCAA protection to provide stability to its operations and to complete the Proposed Transaction.

[10] The Proposed Transaction has the support of the lenders forming the steering committee with respect to Cinram's First Lien Credit Facilities (the "Steering Committee"), the members of which have been subject to confidentiality agreements and represent 40% of the loans under Cinram's First Lien Credit Facilities (the "Initial Consenting Lenders"). Cinram also anticipates further support of the Proposed Transaction from additional lenders under its credit facilities following the public announcement of the Proposed Transaction.

[11] Cinram Fund is the direct or indirect parent and sole shareholder of all of the subsidiaries in Cinram's corporate structure. A simplified corporate structure of the Cinram Group showing all of the CCAA Parties, including the designation of the CCAA Parties' business segments and certain non-filing entities, is set out in the Pre-Filing Report of FTI Consulting Inc. (the "Monitor") at paragraph 13. A copy is attached as Schedule "B".

[12] Cinram Fund, CII, Cinram International General Partner Inc. ("Cinram GP"), CII Trust, Cinram ULC and 1362806 Ontario Limited are the Canadian entities in the Cinram Group that are Applicants in these proceedings (collectively, the "Canadian Applicants"). Cinram Fund and CII Trust are both open-ended limited purpose trusts, established under the laws of Ontario, and each of the remaining Canadian Applicants is incorporated pursuant to Federal or Provincial legislation.

[13] Cinram (US) Holdings Inc. ("CUSH"), Cinram Inc., IHC Corporation ("IHC"), Cinram Manufacturing, LLC ("Cinram Manufacturing"), Cinram Distribution, LLC ("Cinram Distribution"), Cinram Wireless, LLC ("Cinram Wireless"), Cinram Retail Services, LLC ("Cinram Retail") and One K Studios, LLC ("One K") are the U.S. entities in the Cinram Group that are Applicants in these proceedings (collectively, the "U.S. Applicants"). Each of the U.S. Applicants is incorporated under the laws of Delaware, with the exception of One K, which is incorporated under the laws of California. On May 25, 2012, each of the U.S. Applicants opened a new Canadian-based bank account with J.P. Morgan.

[14] Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms

part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

[15] Cinram's European entities are not part of these proceedings and it is not intended that any insolvency proceedings will be commenced with respect to Cinram's European entities, except for Cinram Optical Discs SAC, which has commenced insolvency proceedings in France.

[16] The Cinram Group's principal source of long-term debt is the senior secured credit facilities provided under credit agreements known as the "First-Lien Credit Agreement" and the "Second-Lien Credit Agreement" (together with the First-Lien Credit Agreement, the "Credit Agreements").

[17] All of the CCAA Parties, with the exception of Cinram Fund, Cinram GP, CII Trust and Cinram LP (collectively, the "Fund Entities"), are borrowers and/or guarantors under the Credit Agreements. The obligations under the Credit Agreements are secured by substantially all of the assets of the Applicants and certain of their European subsidiaries.

[18] As at March 31, 2012, there was approximately $233 million outstanding under the First-Lien Term Loan Facility; $19 million outstanding under the First-Lien Revolving Credit Facilities; approximately $12 million of letter of credit exposure under the First-Lien Credit Agreement; and approximately $12 million outstanding under the Second-Lien Credit Agreement.

[19] Cinram advises that in light of the financial circumstances of the Cinram Group, it is not possible to obtain additional financing that could be used to repay the amounts owing under the Credit Agreements.

[20] Mr. John Bell, Chief Financial Officer of CII, stated in his affidavit that in connection with certain defaults under the Credit Agreements, a series of waivers was extended from December 2011 to June 30, 2012 and that upon expiry of the waivers, the lenders have the ability to demand immediate repayment of the outstanding amounts under the Credit Agreements and the borrowers and the other Applicants that are guarantors under the Credit Agreements would be unable to meet their debt obligations. Mr. Bell further stated that there is no reasonable expectation that Cinram would be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012, fiscal 2013, and fiscal 2014. The cash flow forecast attached to his affidavit indicates that, without additional funding, the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

[21] The Applicants request a stay of proceedings. They take the position that in light of their financial circumstances, there could be a vast and significant erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks, which, because of the integration of the Cinram business, also apply to the Applicants' subsidiaries, including Cinram LP:

(a) the lenders demanding payment in full for money owing under the Credit Agreements;

(b) potential termination of contracts by key suppliers; and

(c) potential termination of contracts by customers.

[22] As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access to Debtor-In-Possession ("DIP") Financing in the amount of $15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the "DIP Lenders") through J.P. Morgan Chase Bank, NA as Administrative Agent (the "DIP Agent") whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of $15 million.

[23] The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

(a) the active employment of employees in the ordinary course;

(b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;

(c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and

(d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

[24] Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

[25] The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC ("Moelis"), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

[26] In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the "Directors/Trustees") requested a Director's Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their

Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

[27] Cinram has also developed a key employee retention program (the "KERP") with the principal purpose of providing an incentive for eligible employees, including eligible officers, to remain with the Cinram Group despite its financial difficulties. The KERP has been reviewed and approved by the Board of Trustees of the Cinram Fund. The KERP includes retention payments (the "KERP Retention Payments") to certain existing employees, including certain officers employed at Canadian and U.S. Entities, who are critical to the preservation of Cinram's enterprise value.

[28] Cinram also advises that on June 22, 2012, Cinram Fund, the borrowers under the Credit Agreements, and the Initial Consenting Lenders entered into a support agreement pursuant to which the Initial Consenting Lenders agreed to support the Proposed Transaction to be pursued through these CCAA proceedings (the "Support Agreement").

[29] Pursuant to the Support Agreement, lenders under the First-Lien Credit Agreement who execute the Support Agreement or Consent Agreement prior to July 10, 2012 (the "Consent Date") are entitled to receive consent consideration (the "Early Consent Consideration") equal to 4% of the principal amount of loans under the First-Lien Credit Agreement held by such consenting lenders as of the Consent Date, payable in cash from the net sale proceeds of the Proposed Transaction upon distribution of such proceeds in the CCAA proceedings.

[30] Mr. Bell states that it is contemplated that the CCAA proceedings will be the primary court-supervised restructuring of the CCAA Parties. He states that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Mr. Bell further states that although Cinram has operations in the United States, and certain of the Applicants are incorporated under the laws of the United States, it is Ontario that is Cinram's home jurisdiction and the nerve centre of the CCAA Parties' management, business and operations.

[31] The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

> Cinram ULC to seek recognition of these proceedings as "foreign main proceedings" and to seek such additional relief required in connection with the prosecution of any sale transaction, including the Proposed Transaction, as well as authorization for the Monitor, as a court-appointed officer, to assist the CCAA Parties with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto.

[32] Mr. Bell further states that the Monitor will be actively involved in assisting Cinram ULC as the foreign representative of the Applicants in the Chapter 15 proceedings and will assist in keeping this court informed of developments in the Chapter 15 proceedings.

[33] The facts relating to the CCAA Parties, the Cinram business, and the requested relief are fully set out in Mr. Bell's affidavit.

[34] Counsel to the Applicants filed a comprehensive factum in support of the requested relief in the Initial Order. Part III of the factum sets out the issues and the law.

[35] The relief requested in the form of the Initial Order is extensive. It goes beyond what this court usually considers on an initial hearing. However, in the circumstances of this case, I have been persuaded that the requested relief is appropriate.

[36] In making this determination, I have taken into account that the Applicants have spent a considerable period of time reviewing their alternatives and have done so in a consultative manner with their senior secured lenders. The senior secured lenders support this application, notwithstanding that it is clear that they will suffer a significant shortfall on their positions. It is also noted that the Early Consent Consideration will be available to lenders under the First-Lien Credit Agreement who execute the Support Agreement prior to July 10, 2012. Thus, all of these lenders will have the opportunity to participate in this arrangement.

[37] As previously indicated, the Applicants' factum is comprehensive. The submissions on the law are extensive and cover all of the outstanding issues. It provides a fulsome review of the jurisprudence in the area, which for purposes of this application, I accept. For this reason, paragraphs 41-96 of the factum are attached as Schedule "C" for reference purposes.

[38] The Applicants have also requested that the confidential supplement – which contains the KERP summary listing the individual KERP Payments and certain DIP Schedules – be sealed. I am satisfied that the KERP summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP and that the DIP schedules contain sensitive competitive information of the CCAA Parties which should also be treated as being confidential. Having considered the principals of *Sierra Club of Canada v. Canada (Minister of Finance)*, (2002) 2 S.C.R. 522, I accept the Applicants' submission on this issue and grant the requested sealing order in respect of the confidential supplement.

[39] Finally, the Applicants have advised that they intend to proceed with a Chapter 15 application on June 26, 2012 before the United States Bankruptcy Court in the District of Delaware. I am given to understand that Cinram ULC, as proposed foreign representative, will be seeking recognition of the CCAA proceedings as "foreign main proceedings" on the basis that Ontario, Canada is the Centre of Main Interest or "COMI" of the CCAA Applicants.

[40] In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally

integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

(a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;

(b) key contracts, including, among others, major customer service agreements, are negotiated at the corporate level and created in Canada;

(c) the Chief Executive Officer and Chief Financial Officer of CII, who are also directors, trustees and/or officers of other entities in the Cinram Group, are based in Canada;

(d) meetings of the board of trustees and board of directors typically take place in Canada;

(e) pricing decisions for entities in the Cinram Group are ultimately made by the Chief Executive Officer and Chief Financial Officer in Toronto, Ontario;

(f) cash management functions for Cinram's North American entities, including the administration of Cinram's accounts receivable and accounts payable, are managed from Cinram's head office in Toronto, Ontario;

(g) although certain bookkeeping, invoicing and accounting functions are performed locally, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits are managed at a consolidated level in Toronto, Ontario;

(h) information technology, marketing, and real estate services are provided by CII at the head office in Toronto, Ontario;

(i) with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the Cinram Group are managed in Toronto, Ontario;

(j) new business development initiatives are centralized and managed from Toronto, Ontario; and

(k) research and development functions for the Cinram Group are corporate-level activities centralized at Toronto, Ontario, including the Cinram Group's corporate-level research and development budget and strategy.

[41] Counsel submits that the CCAA Parties are highly dependent upon the critical business functions performed on their behalf from Cinram's head office in Toronto and would not be able to function independently without significant disruptions to their operations.

[42] The above comments with respect to the COMI are provided for informational purposes only. This court clearly recognizes that it is the function of the receiving court – in this case, the United States Bankruptcy Court for the District of Delaware – to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15.

[43] In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

MORAWETZ J.

Date: June 26, 2012

SCHEDULE "A"

ADDITIONAL APPLICANTS

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

Cinram (U.S.) Holdings Inc.

Cinram, Inc.

IHC Corporation

Cinram Manufacturing LLC

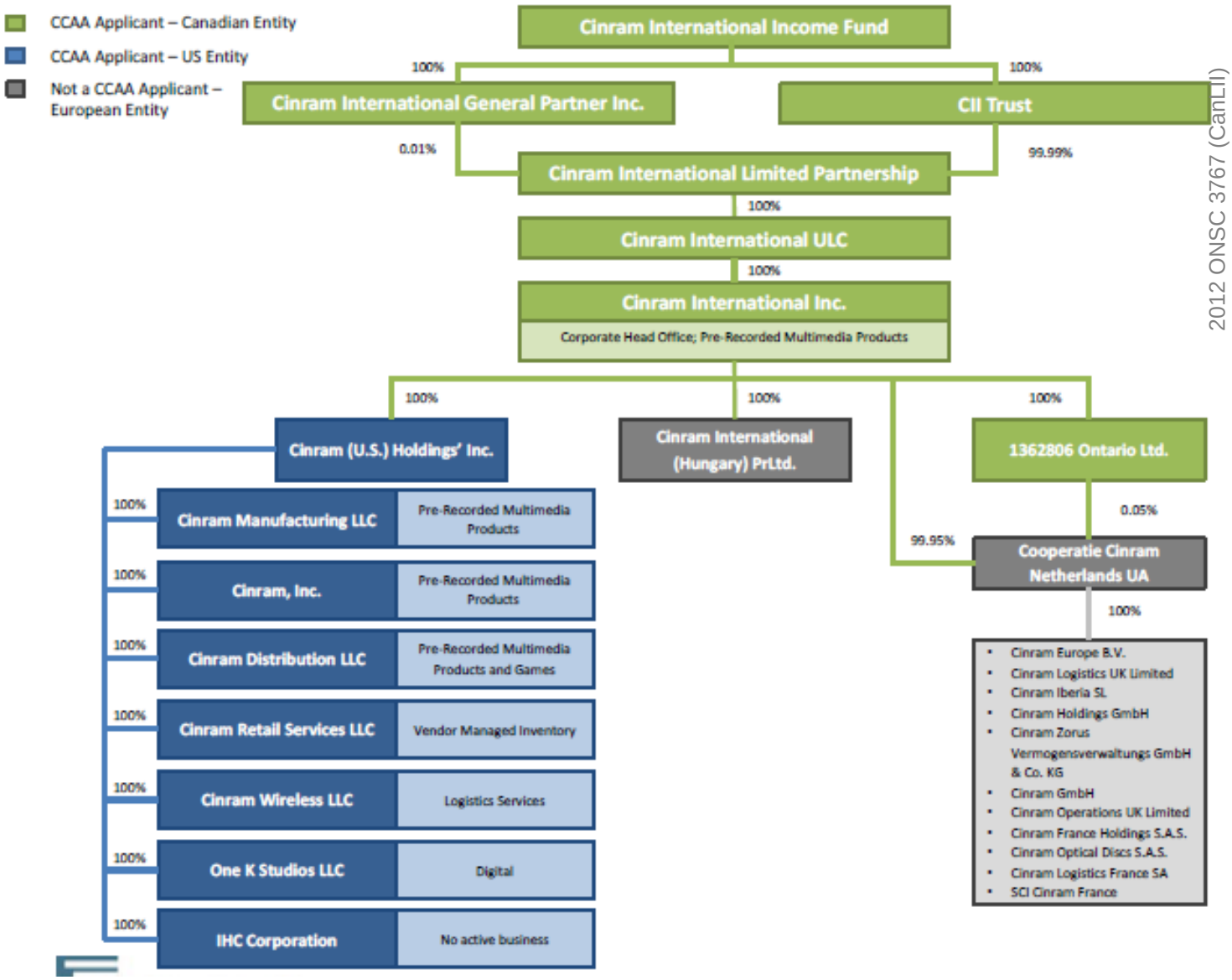
Cinram Distribution LLC

Cinram Wireless LLC

Cinram Retail Services, LLC

One K Studios, LLC

SCHEDULE "B"



SCHEDULE "C"

A. THE APPLICANTS ARE "DEBTOR COMPANIES" TO WHICH THE CCAA APPLIES

41. The CCAA applies in respect of a "debtor company" (including a foreign company having assets or doing business in Canada) or "affiliated debtor companies" where the total of claims against such company or companies exceeds $5 million.

> CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds $5 million.

(1) The Applicants are Debtor Companies

43. The terms "company" and "debtor company" are defined in Section 2 of the CCAA as follows:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.
>
> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound up under the *Winding-Up and Restructuring Act* because the company is insolvent.

CCAA, Section 2 ("company" and "debtor company").

44. The Applicants are debtor companies within the meaning of these definitions.

(2) The Applicants are "companies"

45. The Applicants are "companies" because:

a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and

b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

Bell Affidavit at paras. 4, 80, 84, 86, 91, 94, 98, 102, 105, 108, 111, 114, 117, 120, 123, 212; Application Record, Tab 2.

46. The test for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business in Canada" is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.

47. Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

Re Canwest Global Communications Corp. (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) at para. 30 [*Canwest Global*]; Book of Authorities of the Applicants ("**Book of Authorities**"), Tab 1.
Re Global Light Telecommunications Ltd. (2004), 2 C.B.R. (5th) 210 (B.C.S.C.) at para. 17 [*Global Light*]; Book of Authorities, Tab 2.

48. The Courts do not engage in a quantitative or qualitative analysis of the assets or the circumstances in which the assets were created. Accordingly, the use of "instant" transactions immediately preceding a CCAA application, such as the creation of "instant debts" or "instant assets" for the purposes of bringing an entity within the scope of the CCAA, has received judicial approval as a legitimate device to bring a debtor within technical requirements of the CCAA.

> *Global Light*, *supra* at para. 17; Book of Authorities, Tab 2.
> *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) at paras. 5-6; Book of Authorities, Tab 3.
> *Elan Corporation v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) at paras. 74, 83; Book of Authorities, Tab 4.

(3) The Applicants are insolvent

49. The Applicants are "debtor companies" as defined in the CCAA because they are companies (as set out above) and they are insolvent.

50. The insolvency of the debtor is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

a. is for any reason unable to meet his obligations as they generally become due;

b. has ceased paying his current obligations in the ordinary course of business as they generally become due; or

c. the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, Section 2 ("insolvent person").

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J.[Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, at para. 4 [*Stelco*]; Book of Authorities, Tab 5.

51. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco, supra at paras. 26 and 28; Book of Authorities, Tab 5.

52. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco, supra at para. 40; Book of Authorities, Tab 5.

53. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

a. The Applicants are unable to comply with certain financial covenants under the Credit Agreements and have entered into a series of waivers with their lenders from December 2011 to June 30, 2012.

b. Were the Lenders to accelerate the amounts owing under the Credit Agreements, the Borrowers and the other Applicants that are Guarantors under the Credit Agreements would be unable to meet their debt obligations. Cinram Fund would be the ultimate parent of an insolvent business.

d. The Applicants have been unable to repay or refinance the amounts owing under the Credit Agreements or find an out-of-court transaction for the sale of the Cinram Business with proceeds that equal or exceed the amounts owing under the Credit Agreements.

e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.

f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.

g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

Bell Affidavit, paras. 23, 179-181, 183, 197-199; Application Record, Tab 2.

(4) The Applicants are affiliated companies with claims outstanding in excess of $5 million

54. The Applicants are affiliated debtor companies with total claims exceeding 5 million dollars. Therefore, the CCAA applies to the Applicants in accordance with Section 3(1).

55. Affiliated companies are defined in Section 3(2) of the CCAA as follows:

a. companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each is controlled by the same person; and

b. two companies are affiliated with the same company at the same time are deemed to be affiliated with each other.

CCAA, Section 3(2).

56. CII, CII Trust and all of the entities listed in Schedule "A" hereto are indirect, wholly owned subsidiaries of Cinram Fund; thus, the Applicants are "affiliated companies" for the purpose of the CCAA.

Bell Affidavit, paras. 3, 71; Application Record, Tab 2.

57. All of the CCAA Parties (except for the Fund Entities) are each a Borrower and/or Guarantor under the Credit Agreements. As at March 31, 2012 there was approximately $252 million of aggregate principal amount outstanding under the First Lien Credit Agreement (plus approximately $12 million in letter of credit exposure) and approximately $12 million of aggregate principal amount outstanding under the Second Lien Credit Agreement. The total claims against the Applicants far exceed $5 million.

Bell Affidavit, paras. 75; Application Record, Tab 2.

B. THE RELIEF IS AVAILABLE UNDER THE CCAA AND CONSISTENT WITH THE PURPOSE AND POLICY OF THE CCAA

(1) The CCAA is Flexible, Remedial Legislation

58. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

Elan Corp. v. Comiskey, supra at paras. 22 and 56-60; Book of Authorities, Tab 4.
Re Lehndorff General Partners Ltd. (1993), 17 C.B.R. (3d) 24 at para. 5 (Ont. Gen. Div. [Commercial List]); Book of Authorities, Tab 6.
Re Chef Ready Foods Ltd; Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall

objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

> *Re Sulphur Corporation of Canada Ltd.* (2002), 35 C.B.R. (4th) 304 (Alta Q.B.) ("*Sulphur*") at para. 26; Book of Authorities, Tab 8.

60. Given the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) The Stay of Proceedings Against Non-Applicants is Appropriate

61. The relief sought in this application includes a stay of proceedings in favour of Cinram LP and the Applicants' direct and indirect subsidiaries that are also party to an agreement with an Applicant (whether as surety, guarantor or otherwise) (each, a "Subsidiary Counterparty"), including any contract or credit agreement. It is just and reasonable to grant the requested stay of proceedings because:

a. the Cinram Business is integrated among the Applicants, Cinram LP and the Subsidiary Counterparties;

b. if any proceedings were commenced against Cinram LP, or if any of the third parties to such agreements were to commence proceedings or exercise rights and remedies against the Subsidiary Counterparties, this would have a detrimental effect on the Applicants' ability to restructure and implement the Proposed Transaction and would lead to an erosion of value of the Cinram Business; and

c. a stay of proceedings that extends to Cinram LP and the Subsidiary Counterparties is necessary in order to maintain stability with respect to the Cinram Business and maintain value for the benefit of the Applicants' stakeholders.

> Bell Affidavit, paras. 185-186; Application Record, Tab 2.

62. The purpose of the CCAA is to preserve the *status quo* to enable a plan of compromise to be prepared, filed and considered by the creditors:

> In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.
>
> *Lehndorff General Partner Ltd., Re, supra* at para. 5; Book of Authorities, Tab 6. *Canwest Global, supra* at para. 27; Book of Authorities, Tab 1.
> CCAA, Section 11.

63. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

> *Lehndorff, supra* at paras. 5 and 16; Book of Authorities, Tab 6.
> *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6; Book of Authorities, Tab 9.

64. The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

a. where it is important to the reorganization process;

b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as "companies" within the meaning of the CCAA;

c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and

d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10.
Lehndorff, supra at para. 21; Book of Authorities, Tab 6.
Canwest Global, supra at paras. 28 and 29; Book of Authorities, Tab 1.
Re Sino-Forest Corp. 2012 ONSC 2063 (Commercial List) at paras. 5, 18, and 31; Book of Authorities, Tab 11.
Re MAAX Corp, Initial Order granted June 12, 2008, Montreal 500-11-033561-081, (Que. Sup. Ct. [Commercial Division]) at para. 7; Book of Authorities, Tab 12.

65. The Applicants submit the balance of convenience favours extending the relief in the proposed Initial Order to Cinram LP and the Subsidiary Counterparties. The business operations of the Applicants, Cinram LP and the Subsidiary Counterparties are intertwined and the stay of proceedings is necessary to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow an orderly, going-concern sale of the Cinram Business as an important component of its reorganization process.

(3) Entitlement to Make Pre-Filing Payments

66. To ensure the continued operation of the CCAA Parties' business and maximization of value in the interests of Cinram's stakeholders, the Applicants seek authorization (but not a requirement) for the CCAA Parties to make certain pre-filing payments, including: (a) payments to employees in respect of wages, benefits, and related amounts; (b) payments to suppliers and service providers critical to the ongoing operation of the business; (c) payments and the application of credits in connection with certain existing customer programs; and (d) intercompany payments among the Applicants related to intercompany loans and shared services. Payments will be made with the consent of the Monitor and, in certain circumstances, with the consent of the Agent.

67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's

practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Re Canwest Global*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

Canwest Global supra, at paras. 41 and 43; Book of Authorities, Tab 1.

68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:

a. whether the goods and services were integral to the business of the applicants;

b. the applicants' dependency on the uninterrupted supply of the goods or services;

c. the fact that no payments would be made without the consent of the Monitor;

d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Canwest Global supra, at para. 43; Book of Authorities, Tab 1.
Re Brainhunter Inc., [2009] O.J. No. 5207 (Sup. Ct. J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.
Re Priszm Income Fund (2012), 75 C.B.R. (5th) 213 (Ont. Sup. Ct. J.) at paras. 29-34; Book of Authorities, Tab 14.

69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an

efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor. The Monitor, in determining whether to approve pre-filing payments as critical to the ongoing business operations, will consider various factors, including the above factors derived from the caselaw.

Bell Affidavit, paras. 226, 228, 230; Application Record, Tab 2.

70. In addition, the CCAA Parties' continued compliance with their existing customer programs, as described in the Bell Affidavit, including the payment of certain pre-filing amounts owing under certain customer programs and the application of certain credits granted to customers pre-filing to post-filing receivables, is essential in order for the CCAA Parties to maintain their customer relationships as part of the CCAA Parties' going concern business.

Bell Affidavit, paras. 234; Application Record, Tab 2.

71. Further, due to the operational integration of the businesses of the CCAA Parties, as described above, there is a significant volume of financial transactions between and among the Applicants, including, among others, charges by an Applicant providing shared services to another Applicant of intercompany accounts due from the recipients of those services, and charges by a Applicant that manufactures and furnishes products to another Applicant of inter-company accounts due from the receiving entity.

Bell Affidavit, paras. 225; Application Record, Tab 2.

72. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the CCAA Parties the authority to make the pre-filing payments described in the proposed Initial Order subject to the terms therein.

(4) The Charges Are Appropriate

73. The Applicants seek approval of certain Court-ordered charges over their assets relating to their DIP Financing (defined below), administrative costs, indemnification of their trustees, directors and officers, KERP and Support Agreement. The Lenders and the Administrative Agent under the Credit Agreements, the senior secured facilities that will be primed by the charges, have been provided with notice of the within Application. The proposed Initial Order does not purport to give the Court-ordered charges priority over any other validly perfected security interests.

(A) DIP Lenders' Charge

74. In the proposed Initial Order, the Applicants seek approval of the DIP Credit Agreement providing a debtor-in-possession term facility in the principal amount of $15 million (the "DIP Financing"), to be secured by a charge over all of the assets and property of the Applicants that are Borrowers and/or Guarantors under the Credit Agreements (the "Charged Property") ranking ahead of all other charges except the Administration Charge.

75. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession ("DIP") financing charge:

> 11.2(1) *Interim financing* - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

> 11.2(2) *Priority* – secured creditors – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> *Re Timminco Ltd*. (2012), 211 A.C.W.S. (3d) 881(Ont. Sup. Ct. J. [Commercial List]) at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).

76. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> 11.2(4) Factors to be considered – In deciding whether to make an order, the court is to consider, among other things,
>
> (*a*) the period during which the company is expected to be subject to proceedings under this Act;
>
> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.
>
> CCAA, Section 11.2(4).

77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrows funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

> *Re Canwest Publishing Inc./Publications Canwest Inc.* (2010), 63 C.B.R. (5th) 115 (Ont. Sup. Ct. J. [Commercial List]) at paras. 42-43 [*Canwest Publishing*]; Book of Authorities, Tab 16.

78. Courts in recent cross-border cases have exercised their broad power to grant charges to DIP lenders over the assets of foreign applicants. In many of these cases, the debtors have commenced recognition proceedings under Chapter 15.

> *Re Catalyst Paper Corporation*, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [*Catalyst Paper*]; Book of Authorities, Tab 17.
> *Angiotech, supra*, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18
> *Re Fraser Papers Inc.*, Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

79. As noted above, pursuant to Section 11.2(1) of the CCAA, a DIP financing charge may not secure an obligation that existed before the order was made. The requested DIP Lenders' Charge will not secure any pre-filing obligations.

80. The following factors support the granting of the DIP Lenders' Charge, many of which incorporate the considerations enumerated in Section 11.2(4) listed above:

a. the Cash Flow Forecast indicates the Applicants will need additional liquidity afforded by the DIP Financing in order to continue operations through the duration of these proposed CCAA Proceedings;

b. the Cinram Business is intended to continue to operate on a going concern basis during these CCAA Proceedings under the direction of the current management with the assistance of the Applicants' advisors and the Monitor;

c. the DIP Financing is expected to provide the Applicants with sufficient liquidity to implement the Proposed Transaction through these CCAA Proceedings and implement certain operational restructuring initiatives, which will materially enhance the likelihood of a going concern outcome for the Cinram Business;

d. the nature and the value of the Applicants' assets as set out in their consolidated financial statements can support the requested DIP Lenders' Charge;

e. members of the Steering Committee under the First Lien Credit Agreement, who are senior secured creditors of the Applicants, have agreed to provide the DIP Financing;

f. the proposed DIP Lenders have indicated that they will not provide the DIP Financing if the DIP Lenders' Charge is not approved;

g. the DIP Lenders' Charge will not secure any pre-filing obligations;

h. the senior secured lenders under the Credit Agreements affected by the charge have been provided with notice of these CCAA Proceedings; and

i. the proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

Bell Affidavit, paras. 199-202, 205-208; Application Record, Tab 2.

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD$3.5 million to secure the fees of the Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent,

the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the "Administration Charge"). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

82. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration charge:

> 11.52(1) *Court may order security or charge to cover certain costs*
> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge -- in an amount that the court considers appropriate – in respect of the fees and expenses of
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) *Priority*
> The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> CCAA, Section 11.52(1) and (2).

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Timminco*, *Canwest Global* and *Canwest Publishing*.

> *Canwest Global*, *supra*; Book of Authorities, Tab 1.
> *Canwest Publishing*, *supra*; Book of Authorities, Tab 16.
> *Re Timminco Ltd.*, 2012 ONSC 106 (Commercial List) [*Timminco*]; Book of Authorities, Tab 20.

84. In *Canwest Publishing*, the Court noted Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. These factors were also considered by the Court in *Timminco*. The list of factors to consider in approving an administration charge include:

a. the size and complexity of the business being restructured;

b. the proposed role of the beneficiaries of the charge;

c. whether there is unwarranted duplication of roles;

d. whether the quantum of the proposed charge appears to be fair and reasonable;

e. the position of the secured creditors likely to be affected by the charge; and

f. the position of the Monitor.

Canwest Publishing supra, at para. 54; Book of Authorities, Tab 16.

Timminco, supra, at paras. 26-29; Book of Authorities, Tab 20.

85. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Administration Charge, given:

a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;

b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;

c. there is no unwarranted duplication of roles;

d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and

e. the Monitor is in support of the proposed Administration Charge.

Bell Affidavit, paras. 188, 190; Application Record, Tab 2.

(C) Directors' Charge

86. The Applicants seek a Directors' Charge in an amount of CAD$13 over the Charged Property to secure their respective indemnification obligations for liabilities imposed on the Applicants' trustees, directors and officers (the "Directors and Officers"). The Directors' Charge is to be subordinate to the Administration Charge and the DIP Lenders' Charge but in priority to the KERP Charge and the Consent Consideration Charge.

87. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

> 11.51(1) *Security or charge relating to director's indemnification*
> On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge -- in an amount that the court considers appropriate -- in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) *Priority*
> The court may order that the security or charge rank in priority over the claim of any secured creditors of the company
>
> 11.51(3) *Restriction* -- indemnification insurance
> The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51(4) *Negligence, misconduct or fault*
> The court shall make an order declaring that the security or charge

> does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
>
> CCAA, Section 11.51.

88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global*, the Court outlined the test for granting such a charge:

> I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.
>
> *Canwest Global, supra* at paras 46-48; Book of Authorities, Tab 1.
> *Canwest Publishing, supra* at paras. 56-57; Book of Authorities, Tab 16.
> *Timminco, supra* at paras. 30-36; Book of Authorities, Tab 20.

89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD$13 million, given:

a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;

c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;

d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;

e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

f. the Monitor is in support of the proposed Directors' Charge.

Bell Affidavit, paras. 249, 250, 254-257 ; Application Record, Tab 2.

(D) KERP Charge

90. The Applicants seek a KERP Charge in an amount of CAD$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);

b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

d. the employees' history with and knowledge of the debtor;

e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Re Grant Forest Products Inc. (2009), 57 C.B.R. (5th) 128 (Ont. Sup. Ct. J [Commercial List]) at para. 8-24 [*Grant Forest*]; Book of Authorities, Tab 21.
Canwest Publishing supra, at paras 59; Book of Authorities, Tab 16.
Canwest Global supra, at para. 49; Book of Authorities, Tab 1.
Re Timminco Ltd. (2012), 95 C.C.P.B. 48 (Ont. Sup. Ct. J [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.

Grant Forest, *supra* at para. 22-23; Book of Authorities, Tab 21.

93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD$3 million, given:

a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora

Employees to remain with the Cinram Group while the company pursued its restructuring efforts;

b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;

c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;

d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;

e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;

f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.

Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate

in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In *Sino-Forest*, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement (or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.

> *Sino-Forest, supra*, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.

96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:

a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;

b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and

c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.

> Bell Affidavit, para. 176; Application Record, Tab 2.

TAB C

2004 BCSC 745
British Columbia Supreme Court

Global Light Telecommunications Inc., Re

2004 CarswellBC 1249, 2004 BCSC 745, [2004] B.C.J. No. 1153,
131 A.C.W.S. (3d) 650, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155

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

And In the Matter of the Yukon Business Corporations Act, R.S.Y. 1986, c. 15

And In the Matter of Global Light Telecommunications Inc., Un Limited and Brightstar Limited (Petitioner)

Pitfield J.

Heard: April 26, 2004
Judgment: June 4, 2004 *
Docket: Vancouver L021991

Counsel: Scott A. Turner, David E. Gruber for Petitioners
Gordon D. Phillips for Respondents, UBS Capital Americas II, LLC and Canven V (Barbados) Limited
Douglas B. Hyndman for York Capital Management LP
Alan B. Brown for Credit Suisse First Boston
Heather M. Ferris for Monitor, PricewaterhouseCoopers Inc.

Subject: Insolvency; Corporate and Commercial

APPLICATION by debtor companies for order under *Companies' Creditors Arrangement Act* approving plan of arrangement.

***Pitfield J.*:**

1 Global Light Telecommunications Inc., Un Limited and Brightstar Limited apply for an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-25 sanctioning a consolidated Plan of Arrangement approved by creditors in the manner contemplated by the *Act*.

2 If approved, the Plan would permit distribution of cash on hand in the approximate amount of US $658,000 to the petitioners' creditors on a rateable basis in the calculation of which the claims of creditors owed more than $100,000 would be capped at $100,000. Creditors with claims in excess of $100,000 would receive shares in a corporation to be incorporated for the purpose of acquiring Global's interest in Bestel, S.A., a Mexican company that operates a telecommunications network located primarily in Mexico. Share entitlement would be determined on a rateable basis by reference to the gross amount of each creditor's claim.

3 The Plan has been approved by the requisite majority of creditors. However, York Capital Management LP, York Offshore Investors Unit Trust and York Investment Limited oppose the application to sanction on the grounds that Brightstar and Un Limited are not debtor companies for *CCAA* purposes and cannot be included in the Plan; Brightstar and Un Limited should not have been added as petitioners in the proceeding and the order purporting to do so was a nullity; and the Plan is not fair and reasonable.

4 The relevant background is the following. Global is a Yukon corporation. It raised substantial amounts of capital by issuing shares and various debt instruments. The capital so acquired was used, in part, to capitalize Un Limited as a wholly owned subsidiary. In turn, Un Limited capitalized Brightstar. Both Un Limited and Brightstar are Bermuda corporations. Global also capitalized GST Mextel, Inc., a Delaware corporation, as a wholly owned subsidiary. Following capitalization by Global, Brightstar acquired a 49% interest in New World Network Holdings Ltd., and GST Mextel acquired a 49% interest in Bestel.

5 Global borrowed US $4 million from York pursuant to a series of loan agreements dated June 29, 2001. That sum compares to debts in excess of US $40 million owed to other debenture holders. By January 2002, Global was in default under the York loan agreements. York agreed to extend the loan repayment date to June 30, 2002, in consideration for, among other things, loan guarantees from Brightstar and Un Limited.

6 On June 28, 2002, Global was granted a stay of proceedings under the *Act* in order to allow it to construct a plan of Arrangement or Compromise for presentation to its creditors. On August 15, 2003, Global applied to add its subsidiary, Un Limited, and that company's subsidiary, Brightstar, as petitioners in the proceeding. The application to add clearly identified the fact that Brightstar and Un Limited had provided guarantees in relation to some of Global's debts. York appeared at the hearing of the application but took no position in relation to it.

7 On August 28, 2003, the court granted an order approving the sale of Brightstar's 49% equity interest in New World Network Holdings Ltd. on condition that the sale price of approximately US $658,000 be remitted to, and held by, the Monitor in trust for the benefit of the petitioners' creditors. York Capital appeared on that application but took no position.

8 On February 18, 2004, the court granted a procedural order authorizing the petitioners to seek creditor approval of the consolidated Plan of Arrangement in respect of which sanction is now sought. Counsel for York appeared on that application but took no position.

9 On March 23, 2004, the Plan was approved by 83% of creditors in number and 86% of creditors in dollar value. The percentages exceeded the minimum required by the *Act*. This application to sanction followed as a result.

10 At the hearing of this application, York claimed that it had recently learned that Brightstar and Un Limited had opened Canadian bank accounts with nominal deposits of US $100 immediately prior to applying to be added as petitioners. It claimed to have been informed that the accounts were closed immediately after the granting of the order adding them as petitioners. These statements of fact, not verified by affidavit at the time of the hearing, were not disputed by the petitioners. York relied on this information to support its claim that Brightstar and Un Limited, as Bermuda corporations, were not companies that could not benefit from a *CCAA* proposal because the bank accounts with nominal amount on deposit did not satisfy the *CCAA* requirement that the companies have assets in Canada before availing themselves of the protection afforded by the *Act*.

11 Following the hearing, I directed the petitioners to file affidavit evidence explaining the origin, operation, and current status of the bank accounts. The affidavits indicate that each of Un Limited and Brightstar opened an account with HSBC in Vancouver on July 24, 2003. The amount of US $100 was deposited to each account. The monitor deposes as follows in relation to the origin of the funds:

> The funds that were deposited to the Brightstar and Un Limited accounts were provided to Brightstar and Un Limited by Global Light. This was consistent with the dealings between Global Light, Un Limited and Brightstar throughout their existence. Whenever Brightstar or Un Limited required funds in the past, those funds were always provided by Global Light.

12 The affidavit evidence establishes that the accounts have remained open. No additional deposits have been made. The only debits to the accounts have been the bank's monthly minimum balance service charges. At March 31, 2004, the balance in each account was US $45.15.

13 I invited the parties to make additional submissions having regard for the additional evidence. None were forthcoming.

14 York does not challenge the efficacy of the transactions resulting in the creation of the accounts but says the "instant" Canadian bank accounts created shortly before the application to add Brightstar and Un Limited as petitioners do not qualify as assets sufficient to bring Brightstar within the definition of "company" as defined in s. 2 of the *Act*. In the alternative, York says that the Plan is unfair because Brightstar has no real connection to Canada and consolidation produces an inappropriate result by permitting creditors of a Canadian company to enjoy benefits that should accrue solely to York under the guarantees granted to it by Brightstar.

15 The petitioners submit that the Plan is fair and reasonable. They say that York failed to object to the procedural order that permitted the presentation of a consolidated plan to creditors and did not appeal the order or apply to have it set aside as a nullity.

16 In my opinion, York's claim that Brightstar does not qualify as a company for purposes of the *Act* must fail. Section 2 of the *Act* defines "company" as follows:

> ..."company" means any company, corporation or legal person incorporation by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, except banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;...

17 The substance of York's claim is that the court must engage in a qualitative or quantitative analysis of the Canadian assets in order to decide whether a company that is not incorporated in Canada and is not doing business in Canada otherwise qualifies as one "having assets ... in Canada". In my opinion, the court must not engage in that kind of analysis. Certainty is required in so far as the availability of the *Act* is concerned. In my opinion, importing an element of discretion into the question of eligibility would diminish the effectiveness of the *Act* as a means of assisting in the evolution of plans of arrangement acceptable to companies and their creditors. It is for that reason, I suggest, that courts concerned with the application of the *Act* have acknowledged the efficacy of "instant assets": see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.); *Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]); *Philip's Manufacturing Ltd., Re* (1991), 9 C.B.R. (3d) 1 (B.C. S.C.); and *P.R.O. Holdings Ltd., Re* (1994), 24 C.B.R. (3d) 1 (N.B. C.A.). If a *de minimis* standard is thought to be appropriate in determining whether a company has assets in Canada, it is for parliament to amend the *Act* accordingly.

18 I conclude that Brightstar qualified as a company at the time it applied to be added as a petitioner. It qualified as a company at the time of the application for the procedural order and at the time of the application to sanction the plan. It would not have qualified without opening the bank account. It would have ceased to qualify if the account balance had been reduced to nil, or if the bank account had been closed. The qualitative and quantitative analyses urged by York are only relevant in the assessment of the suitability of a consolidated plan of arrangement in any particular circumstances. In that regard, York expressed no opposition to a consolidated plan of arrangement when it was first proposed by the petitioners at the time of applying for the procedural order.

19 In considering whether to sanction the Plan, the court must have regard for three well-established principles, as set out in *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), at 201:

1. There must be strict compliance with all statutory requirements;

2. All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the *CCCA*;

3. The plan must be fair and reasonable.

20 Brightstar qualifies as a company under the *CCAA* and has complied with the technical requirements. That which has been done to date is authorized by the *Act*. The only issue is whether the consolidated Plan is fair and reasonable.

21 York says the Plan is not fair and reasonable because Brightstar has no real connection to this jurisdiction other than a hastily opened bank account of an insignificant amount. This objection amounts to a back door attempt to oppose the permission granted to the petitioners to submit a consolidated proposal to creditors.

22 York must have been aware that the consolidated Plan would deprive it of the right to seek to recover on its guarantees. It did not attempt to suggest in its submissions that the operating relationship among Global, Un Limited and Brightstar was such that consolidation was inappropriate. Indeed, York became involved as a lender to Global, as did other lenders, knowing that Global's capital would be directed to the capitalization of subsidiaries. York did not oppose the application to consolidate at the hearing of the application regarding the procedural order. It did not appeal that order. In the circumstances, York cannot now be heard to complain about adverse effects flowing from the consolidated Plan.

23 Is the Plan otherwise fair and reasonable? In addressing that question the court must not insist on perfection with respect to fairness and reasonableness. Rather, a fair and reasonable plan is meant to be an equitable arrangement in the nature of a compromise: *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), at 173. Each of the creditors will not necessarily be treated equally, but the Plan must satisfy the majority of creditors on the whole. This Plan has that effect. All creditors became involved with Global and its subsidiaries knowing they were dealing with Global as the parent. While one may query whether the guarantee in favour of York is valid given that it was granted when the group was seemingly insolvent, there is nothing in the evidence tendered by York that would suggest it accommodated the Global group in a manner that should result in it being potentially the sole beneficiary of the sale proceeds of a subsidiary's interest in a distant investment. The majority has voted in favour of the Plan. There is a heavy burden on parties seeking to oppose sanctioning: *Central Guaranty Trustco Ltd., Re* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]). York has not discharged that burden.

24 In my view, the Plan is sufficiently fair and reasonable in the circumstances of this case. Accordingly, the application for an order sanctioning the Plan dated February 18, 2004 is granted.

Application granted.

Footnotes

* An amended replacement copy of the judgment was issued by the court on June 28, 2004.

TAB D

2004 CarswellOnt 1211
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004] O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

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

Farley J.

Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries
Lewis Gottheil for CAW Canada and its Local 523
Virginie Gauthier for Fleet
H. Whiteley for CIBC
Gail Rubenstein for FSCO
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

"debtor company" means any company that:

(a) is bankrupt or insolvent;

(b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;

(c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA 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.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised reorganization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

> s. 2(1) . . .

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past*. I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;
>
> (e) developing restructuring alternatives; and
>
> (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage

some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp.*, *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:
>
> (a) the ability to meet liabilities as they fall due; and
>
> (b) that assets exceed liabilities.

> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run . . . eventually*" is not a finite time in the foreseeable future.

39 I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

> 33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

> 11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd.*, *supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the

hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc.*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's

> property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.
>
> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 - January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

66 On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

Motion dismissed.

APPENDIX

2004 CarswellOnt 2936
Ontario Court of Appeal

Stelco Inc., Re

2004 CarswellOnt 2936, [2004] O.J. No. 1903

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Stelco Inc. and the other Applicants Listed on Schedule "A" Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended

Doherty J.A., Laskin J.A., Moldaver J.A.

Judgment: May 5, 2004
Docket: CA M31129

Counsel: David P. Jacobs, for Moving Party
Michael E. Barrack, for Responding Party

Subject: Insolvency; Civil Practice and Procedure

Per Curiam:

1 Leave to appeal refused. Costs to the respondents Stelco in the amount by $2,000 and to the "primary lender" in the amount of $1000.

End of Document

2004 CarswellOnt 5200
Supreme Court of Canada

Stelco Inc., Re

2004 CarswellOnt 5200, 2004 CarswellOnt 5201, [2004] S.C.C.A. No. 336, 338 N.R. 196 (note)

Local Union No. 1005 United Steelworkers of America, Local Union No. 5328 United Steelworkers of America, Local Union No. 8782 United Steelworkers of America v. Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd., and Welland Pipe Ltd. (collectively "STELCO"), CIT Business Credit Canada Inc., GE Commercial Finance, Fleet Capital Canada (collectively the "Senior Lenders")

Binnie J., Charron J., McLachlin C.J.C.

Judgment: December 9, 2004
Docket: 30447

Proceedings: Leave to appeal refused, 2004 CarswellOnt 2936 (Ont. C.A.); Leave to appeal refused, 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List])

Counsel: None given

Subject: Insolvency; Civil Practice and Procedure

Per Curiam:

1 The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number M31129, dated May 5, 2004, is dismissed with costs.

TAB E

CITATION: Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
COURT FILE NO.: CV-13-10228-00CL
DATE: 20130828

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:	
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 TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.	S. Richard Orzy, Derek J. Bell and Sean H. Zweig, for the Applicants Robert J. Chadwick and Logan Willis, for Duff & Phelps Canada Restructuring Inc., the proposed Monitor Joseph Bellissimo, for Renvest Mercantile Bankcorp Inc. **HEARD:** August 23, 2013

NEWBOULD J.

[1] The applicants applied on August 23, 2013 for protection under the CCAA, at which time an Initial Order was granted containing several provisions. These are my reasons for the granting of the order.

Tamerlane business

[2] At the time of the application, Tamerlane Ventures Inc. (“Tamerlane”) was a publicly traded company whose shares were listed and posted for trading on the TSX Venture Exchange. Tamerlane and its subsidiaries (collectively, the "Tamerlane Group"), including Pine Point Holding Corp. (“Tamerlane Pine Point”), Tamerlane Ventures USA Inc. ("Tamerlane USA") and Tamerlane Ventures Peru SAC ("Tamerlane Peru") are engaged in the acquisition, exploration and development of base metal projects in Canada and Peru.

[3] The applicants' flagship property is the Pine Point Property, a project located near Hay River in the South Slave Lake area of the Northwest Territories of Canada. It at one time was an operating mine. The applicants firmly believe that there is substantial value in the Pine Point Property and have completed a NI 43-101 Technical Report which shows 10.9 million tonnes of measured and indicated resources in the "R-190" zinc-lead deposit. The project has been determined to be feasible and licences have been obtained to put the first deposit into production. All of the expensive infrastructure, such as roads, power lines and railheads, are already in place, minimizing the capital cost necessary to commence operations. The applicants only need to raise the financing necessary to be able to exploit the value of the project, a task made more difficult by, among other things, the problems experienced generally in the mining sector thus far in 2013.

[4] The Tamerlane Group's other significant assets are the Los Pinos mining concessions south of Lima in Peru, which host a historic copper resource. The Tamerlane Group acquired the Los Pinos assets in 2007 through one of its subsidiaries, Tamerlane Peru, and it currently holds the mining concessions through another of its subsidiaries, Tamerlane Minera.

[5] The Los Pinos deposit is a 790 hectare porphyry (a type of igneous rock) copper deposit. Originally investigated in the 1990s when the price of copper was a quarter of its price today, Los Pinos has historically been viewed as a valuable property. With rising copper prices, it is now viewed as being even more valuable.

[6] The exploration and development activities have been generally carried out by employees of Tamerlane USA. The applicants' management team consists of four individuals who are employees of Tamerlane USA, which provides management services by contract to the applicants.

[7] As at March 31, 2013 the Tamerlane Group had total consolidated assets with a net book value of $24,814,433. The assets included consolidated current assets of $2,007,406, and consolidated non-current assets with a net book value of $22,807,027. Non-current assets included primarily the investment in the Pine Point property of $20,729,551 and the Los Pinos property of $1,314,936.

[8] Tamerlane has obtained valuations of Los Pinos and the Pine Point Property. The Los Pinos valuation was completed in May 2013 and indicates a preliminary valuation of $12 to $15 million using a 0.3% copper cut-off grade, or $17 to $21 million using a 0.2% copper cut-off grade. The Pine Point valuation was completed in July 2013 and indicates a valuation of $30 to $56 million based on market comparables, with a value as high as $229 million considering precedent transactions.

Secured and unsecured debt

[9] Pursuant to a credit agreement between Tamerlane and Global Resource Fund, a fund managed by Renvest Mercantile Bancorp Inc. (“Global Resource Fund” or "secured lender") made as of December 16, 2010, as amended by a first amending agreement dated June 30, 2011 and a second amending agreement dated July 29, 2011, Tamerlane became indebted to the Secured Lender for USD $10,000,000 . The secured indebtedness under the credit agreement is

guaranteed by both Tamerlane Pine Point and Tamerlane USA, and each of Tamerlane, Tamerlane Pine Point and Tamerlane USA has executed a general security agreement in favour of the secured lender in respect of the secured debt.

[10] The only other secured creditors are the applicants' counsel, the Monitor and the Monitor's counsel in respect of the fees and disbursements owing to each.

[11] The applicants' unsecured creditors are principally trade creditors. Collectively, the applicants' accounts payable were approximately CAD $850,000 as at August 13, 2013, in addition to accrued professional fees in connection with issues related to the secured debt and this proceeding.

Events leading to filing

[12] Given that the Tamerlane Group is in the exploration stage with its assets, it does not yet generate cash flow from operations. Accordingly, its only potential source of cash is from financing activities, which have been problematic in light of the current market for junior mining companies.

[13] It was contemplated when the credit agreement with Global Resource Fund was entered into that the take-out financing would be in the form of construction financing for Pine Point. However Tamerlane was unsuccessful in arranging that. Tamerlane was successful in late 2012 in arranging a small flow-through financing from a director and in early 2013 a share issuance for $1.7 million dollars. Negotiations with various parties for to raise more funds by debt or asset sales have so far been unsuccessful.

[14] As a result of liquidity constraints facing Tamerlane in the fall of 2012, it failed to make regularly scheduled monthly interest payments in respect of the secured debt beginning on September 25, 2012 and failed to repay the principal balance on the maturity date of October 16, 2012, each of which was an event of default under the credit agreement with the secured lender Global Resource Fund.

[15] Tamerlane and Global Resource Fund then entered into a forbearance agreement made as of December 31, 2012 in which Tamerlane agreed to make certain payments to Global Resource Fund, including a $1,500,000 principal repayment on March 31, 2013. As a result of liquidity constraints, Tamerlane was unable to make the March 31 payment, an event of default under the credit and forbearance agreements. On May 24, 2013, Tamerlane failed to make the May interest payment, and on May 29, 2013, the applicants received a letter from Global Resource Fund's counsel enclosing a NITES notice under the BIA and a notice of intention to dispose of collateral pursuant to section 63 of the PPSA. The total secured debt was $11,631,948.90.

[16] On June 10, 2013, Global Resource Fund and Tamerlane entered into an amendment to the forbearance agreement pursuant to which Global Resource Fund withdrew its statutory notices and agreed to capitalize the May interest payment in exchange for Tamerlane agreeing to pay certain fees to the Global Resource Fund that were capitalized and resuming making cash interest payments to the Secured Lender with the June 25, 2013 interest payment. Tamerlane was unable to make the July 25 payment, which resulted in an event of default under the credit and forbearance amendment agreements.

[17] On July 26, 2013, Global Resource Fund served a new NITES notice and a notice of intention to dispose of collateral pursuant to section 63 the PPSA, at which time the total of the secured debt was $12,100,254.26.

[18] Thereafter the parties negotiated a consensual CCAA filing, under which Global Resource Fund has agreed to provide DIP financing and to forbear from exercising its rights until January 7, 2014. The terms of the stay of proceedings and DIP financing are unusual, to be discussed.

Discussion

[19] There is no doubt that the applicants are insolvent and qualify for filing under the CCAA and obtaining a stay of proceedings. I am satisfied from the record, including the report from the

proposed Monitor, that an Initial Order and a stay under section 11 of the CCAA should be made.

[20] The applicants request that the stay apply to Tamerlane USA and Tamerlane Peru, non-parties to this application. The business operations of the applicants, Tamerlane USA and Tamerlane Peru are intertwined, and the request to extend the stay of proceedings to Tamerlane USA and Tamerlane Peru is to maintain stability and value during the CCAA process.

[21] Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. See Farley J. in *Re Lehndorff* (1993), 9 B.L.R. (2d) 275 and Pepall J. (as she then was) in *Re Canwest Publishing Inc*. (2010), 63 C.B.R. (5th) 115. Recently Morawetz J. has made such orders in *Cinram International Inc. (Re.),* 2012 ONSC 3767, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 and *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500. I am satisfied that it is appropriate that the stay of proceedings extend to Tamerlane USA, which has guaranteed the secured loans and to Tamerlane Peru, which holds the valuable Los Pinos assets in Peru.

[22] Under the Initial Order, PricewaterhouseCoopers Corporate Finance Inc. is to be appointed a financial advisor. PWC is under the oversight of the Monitor to implement a Sale and Solicitation Process, under which PWC will seek to identify one or more financiers or purchasers of, and/or investors in, the key entities that comprise the Tamerlane Group. The SISP will include broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing to repay the secured debt, an investment in the applicants' business and/or a purchase of some or all of the applicants' assets. The proposed Monitor supports the SIST and is of the view that it is in the interests of the applicants' stakeholders. The SISP and its terms are appropriate and it is approved.

[23] The Initial Order contains provisions for an administration charge for the Monitor, its counsel and for counsel to the applicants in the amount of $300,000, a financial advisor charge of

$300,000, a directors' charge of $45,000 to the extent the directors are not covered under their D&O policy and a subordinated administration charge subordinated to the secured loans and the proposed DIP charge for expenses not covered by the administration and financial advisor charges. These charges appear reasonable and the proposed Monitor is of the same view. They are approved.

DIP facility and charge

[24] The applicants' principal use of cash during these proceedings will consist of the payment of ongoing, but minimized, day-to-day operational expenses, such as regular remuneration for those individuals providing services to the applicants, office related expenses, and professional fees and disbursements in connection with these *CCAA* proceedings. The applicants will require additional borrowing to do this. It is apparent that given the lack of alternate financing, any restructuring will not be possible without DIP financing.

[25] The DIP lender is Global Resource Fund, the secured lender to the applicants. The DIP loan is for a net $1,017,500 with simple 12% interest. It is to mature on January 7, 2014, by which time it is anticipated that the SISP process will have resulted in a successful raising of funds to repay the secured loan and the DIP facility.

[26] Section 11.2(4) of the CCAA lists factors, among other things, that the court is to consider when a request for a DIP financing charge is made. A review of those factors in this case supports the DIP facility and charge. The facility is required to continue during the CCAA process, the assets are sufficient to support the charge, the secured lender supports the applicants' management remaining in possession of the business, albeit with PWC being engaged to run the SISP, the loan is a fraction of the applicants' total assets and the proposed Monitor is of the view that the DIP facility and charge are fair and reasonable. The one factor that gives me pause is the first listed in section 11.2(4), being the period during which the applicants are expected to be subject to the CCAA proceedings. That involves the sunset clause, to which I now turn.

Sunset clause

[27] During the negotiations leading to this consensual CCAA application, Global Resource Fund, the secured lender, expressed a willingness to negotiate with the applicants but firmly stated that as a key term of consenting to any CCAA initial order, it required (i) a fixed "sunset date" of January 7, 2014 for the CCAA proceeding beyond which stay extensions could not be sought without the its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and (ii) a provision in the initial order directing that a receiver selected by Global Resource Fund would be appointed after that date.

[28] The Initial Order as drafted contains language preventing the applicants from seeking or obtaining any extension of the stay period beyond January 7, 2014 unless it has repaid the outstanding secured debt and the DIP loan or received the consent of Global Resource Fund and the Monitor, and that immediately following January 7, 2013 (i) the CCAA proceedings shall terminate, (ii) the Monitor shall be discharged, (iii) the Initial Order (with some exceptions) shall be of no force and effect and (iv) a receiver selected by Global Resource Fund shall be appointed.

[29] Ms. Kent, the executive chair and CFO of Tamerlane, has sworn in her affidavit that Global Resource Fund insisted on these terms and that given the financial circumstances of the applicants, there were significant cost-savings and other benefits to them and all of the stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the applicants exercised their business judgment to agree to the terms. The proposed Monitor states its understanding as well is that the consent of Global Resource Fund to these CCAA proceedings is conditional on these terms.

[30] Section 11 of the CCAA authorizes a court to make any order “that it considers appropriate in the circumstances.” In considering what may be appropriate, Deschamps J. stated in *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379:

> 70. …Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[31] There is no doubt that CCAA proceedings can be terminated when the prospects of a restructuring are at an end. In *Century Services*, Deschamps J. recognized this in stating:

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

[32] The fact that the board of directors of the applicants exercised their business judgment in agreeing to the terms imposed by Global Resource Fund in order to achieve a consensual outcome is a factor I can and do take into account, with the caution that in the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). The court may consider, but not defer to or be fettered by, the recommendation of the board. See *Re Crystallex International Corp.* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para 85.

[33] It is apparent from looking at the history of the matter that Global Resource Fund had every intention of exercising its rights under its security to apply to court to have a receiver appointed, and with the passage of time during which there were defaults, including defaults in forbearance agreements, the result would likely have been inevitable. See *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 and the authorities therein discussed. Thus it is understandable that the directors agreed to the terms required by Global Resource Fund. If Global Resource Fund had refused to fund the DIP facility or had refused to agree to

any further extension for payment of the secured loan, the prospects of financing the payout of Global Resource Fund through a SISP process would in all likelihood not been available to the applicants or its stakeholders.

[34] What is unusual in the proposed Initial Order is that the discretion of the court on January 7, 2014 to do what it considers appropriate is removed. Counsel have been unable to provide any case in which such an order has been made. I did not think it appropriate for such an order to be made. At my direction, the parties agreed to add a clause that the order was subject in all respects to the discretion of the Court. With that change, I approved the Initial Order.

Newbould J.

Released: August 28, 2013

CITATION: Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
COURT FILE NO.: CV-13-10228-00CL
DATE: 20130828

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:

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 TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.

REASONS FOR JUDGMENT

Newbould J.

Released: August 28, 2013

TAB F

CITATION: Jaguar Mining Inc. (Re), 2014 ONSC
COURT FILE NO.: CV-13-10383-00CL
DATE: 20140116

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND:

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JAGUAR MINING INC., Applicant

BEFORE: **MORAWETZ R.S.J.**

COUNSEL: **Tony Reyes and Evan Cobb, for the Applicant, Jaguar Mining Inc.**

Robert J. Chadwick and Caroline Descours, for the Ad Hoc Committee of Noteholders

Joseph Bellissimo, for Global Resource Fund, Secured Lender

Jeremy Dacks, for FTI Consulting Canada Inc., Proposed Monitor

Robin B. Schwill, for the Special Committee of the Board of Directors

HEARD & ENDORSED: **DECEMBER 23, 2013**

REASONS: **JANUARY 16, 2014**

ENDORSEMENT

[1] On December 23, 2013, I heard the CCAA application of Jaguar Mining Inc. ("Jaguar") and made the following three endorsements:

1. CCAA protection granted. Initial Order signed. Reasons will follow. It is expected that parties will utilize the e-Service Protocol which can be confirmed on comeback motion. Sealing Order of confidential exhibits granted.

2. Meeting Order granted in form submitted.

3. Claims Procedure Order granted in form submitted.

[2] These are my reasons.

[3] Jaguar sought protection from its creditors under the *Companies' Creditors Arrangement Act* ("CCAA") and requested authorization to commence a process for the approval and implementation of a plan of compromise and arrangement affecting its unsecured creditors.

[4] Jaguar also requested certain protections in favour of its wholly-owned subsidiaries that are not applicants (the "Subsidiaries" and, together with the Applicant, the "Jaguar Group").

[5] Counsel to Jaguar submits that the principal objective of these proceedings is to effect a recapitalization and financing transaction (the "Recapitalization") on an expedited basis through a plan of compromise and arrangement (the "Plan") to provide a financial foundation for the Jaguar Group going forward and additional liquidity to allow the Jaguar Group to continue to work towards its operational and financial goals. The Recapitalization, if implemented, is expected to result in a reduction of over $268 million of debt and new liquidity upon exit of approximately $50 million.

[6] Jaguar's senior unsecured convertible notes (the "Notes") are the primary liabilities affected by the Recapitalization. Any other affected liabilities of Jaguar, which is a holding company with no active business operations, are limited and identifiable.

[7] The Recapitalization is supported by an Ad Hoc Committee of Noteholders of the Notes (the "Ad Hoc Committee of Noteholders") and other Consenting Noteholders, who collectively represent approximately 93% of the Notes.

[8] The background facts are set out in the affidavit of David M. Petrov sworn December 23, 2013 (the "Petrov Affidavit"), the important points of which are summarized below.

[9] Jaguar is a corporation existing under the *Business Corporations Act*, R.S.O. 1990 c. B.16, with a registered office in Toronto, Ontario. Jaguar has assets in Canada.

[10] Jaguar is the public parent corporation of other corporations in the Jaguar Group that carry on active gold mining and exploration in Brazil, employing in excess of 1,000 people. Jaguar itself does not carry on active gold mining operations.

[11] Jaguar has three wholly-owned Brazilian operating subsidiaries: MCT Mineração Ltda. ("MCT"), Mineração Serras do Oeste Ltda. ("MSOL") and Mineração Turmalina Ltda. ("MTL") (and, together with MCT and MSOL, the "Subsidiaries"), all incorporated in Brazil.

[12] The Subsidiaries' assets include properties in the development stage and in the production stage.

[13] Jaguar has been the main corporate vehicle through which financing has been raised for the operations of the Jaguar Group. The Subsidiaries have guaranteed repayment of certain funds borrowed by Jaguar.

[14] Jaguar has raised debt financing by (a) issuing notes, and (b) borrowing from Renvest Mercantile Bank Corp. Inc., through its global resource fund ("Renvest").

[15] In aggregate, Jaguar has issued a principal amount of $268.5 million of Notes through two transactions, known as the "2014 Notes" and the "2016 Notes".

[16] Interest is paid semi-annually on the 2014 Notes and the 2016 Notes. Jaguar has not paid the last interest payment due on November 1, 2013. Under the 2014 Notes, the grace period has lapsed and an event of default has occurred.

[17] Jaguar is also the borrower under a fully drawn $30 million secured facility (the "Renvest Facility") with Renvest. The obligations under the Renvest Facility are secured by a general security agreement from Jaguar as well as guarantees and collateral security granted by each of the Subsidiaries.

[18] Jaguar has identified another potential liability. Mr. Daniel Titcomb, former chief executive officer of Jaguar, and certain other associated parties, have instituted a legal proceeding against Jaguar and certain of its current and former directors that is currently proceeding in the United States Federal Court. Counsel to Jaguar submits that this lawsuit alleges certain employment-related claims and other claims in respect of equity interests in Jaguar that are held by Mr. Titcomb and others. Counsel to Jaguar advises that Jaguar and its board of directors believe this lawsuit to be without merit.

[19] Counsel also advises that, aside from the lawsuit and professional service fees incurred by Jaguar, the unsecured liabilities of Jaguar are not material.

[20] The Jaguar Group's mines are not low-cost gold producers and the recent decline in the price of gold has negatively impacted the Jaguar Group.

[21] Based on current world prices and Jaguar Group's current level of expenditures, the Jaguar Group is expected to cease to have sufficient cash resources to continue operations early in the first quarter of 2014.

[22] Counsel also submits that, as a result of Jaguar's event of default under the 2014 Notes, certain remedies have become available, including the possible acceleration of the principal amount and accrued and unpaid interest on the 2014 Notes. As of November 13, 2013, that principal and accrued interest totalled approximately $169.3 million.

[23] Jaguar's unaudited consolidated financial statements for the nine months ending September 30, 2013 show that Jaguar had an accumulated deficit of over $317 million and a net loss of over $82 million for the nine months ending September 30, 2013. Jaguar's current liabilities (at book value) exceed Jaguar's current assets (at book value) by approximately $40 million.

[24] I accept that Jaguar faces a liquidity crisis and is insolvent.

[25] Jaguar has been involved in a strategic review over the past two years. Counsel submits that the efforts of Jaguar and its advisors have shown that a comprehensive restructuring plan involving a debt-to-equity exchange and an investment of new money is the best available alternative to address Jaguar's financial issues.

[26] Counsel to Jaguar advises that the board of directors of Jaguar has determined that the Recapitalization is the best available option to Jaguar and, further, that the plan cannot be implemented outside of a CCAA proceeding. Counsel emphasizes that without the protection of the CCAA, Jaguar is exposed to the immediate risk that enforcement steps may be taken under a variety of debt instruments. Further, Jaguar is not in a position to satisfy obligations that may result from such enforcement steps.

[27] Jaguar requests a stay of proceedings in favour of non-applicant Subsidiaries contending that, because of Jaguar's dependence upon its Subsidiaries for their value generating capacity, the commencement of any proceedings or the exercise of rights or remedies against these Subsidiaries would be detrimental to Jaguar's restructuring efforts and would undermine a process that would otherwise benefit Jaguar Group's stakeholders as a whole.

[28] Jaguar also seeks a charge on its current and future assets (the "Property") in the maximum amount of $5 million (a $500,000 first-ranking charge (the "Primary Administration Charge") and a $4.5 million fourth-ranking charge (the "Subordinated Administration Charge") (together, the "Administration Charge")). The purpose of the charge is to secure the fees and disbursements incurred in connection with services rendered both before and after the commencement of the CCAA proceedings by various professionals, as well as Canaccord Genuity and Houlihan Lokey, as financial advisors to the Ad Hoc Committee (collectively, the "Financial Advisors").

[29] Counsel advises that the Financial Advisors' monthly work fees (but not their success fees) will be secured by the Primary Administration Charge, while the Financial Advisors' success fees will be secured solely by the Subordinated Administration Charge.

[30] Counsel further advises that the Proposed Initial Order contemplates the establishment of a charge on Jaguar's Property in the amount of $150,000 (the "Director's Charge") to protect the directors and officers. Counsel further advises that the benefit of the Director's Charge will only be available to the extent that a liability is not covered by existing directors and officers insurance. The directors and officers have indicated that, due to the potential for personal liability, they may not continue their service in this restructuring unless the Initial Order grants the Director's Charge.

[31] Counsel to Jaguar further advises that the proposed monitor is of the view that the Director's Charge and the Administration Charge are reasonable in these circumstances.

[32] Jaguar is unaware of any secured creditors, other than those who have received notice of the application, who are likely to be affected by the court-ordered charges.

[33] In addition to the Initial Order, Jaguar also seeks a Claims Procedure Order and a Meeting Order, submitting that it must complete the Recapitalization on an expedited timeline.

[34] Each of the Claims Procedure Order and Meeting Order include a comeback provision.

[35] Having reviewed the record and upon hearing submissions, I am satisfied the Applicant is a company to which the CCAA applies. It is insolvent and faces a looming liquidity crisis. The Applicant is subject to claims in excess of $5 million and has assets in Canada. I am also satisfied that the application is properly before me as the Applicant's registered office and certain of its assets are situated in Toronto, Ontario.

[36] I am also satisfied that the Applicant has complied with the obligations of s. 10(2) of the CCAA.

[37] I am also satisfied that an extension of the stay of proceedings to the Subsidiaries of Jaguar is appropriate in the circumstances. Further, I am also satisfied that it is reasonable and appropriate to grant the Administration Charge and the Director's Charge over the Property of the Applicant. In these circumstances, I am also prepared to approve the Engagement Letters and to seal the terms of the Engagement Letters. In deciding on the sealing provision, I have taken into account that the Engagement Letters contain sensitive commercial information, the disclosure of which could be harmful to the parties at issue. However, as I indicated at the hearing, this issue should be revisited at the comeback hearing.

[38] I am also satisfied that Jaguar should be authorized to comply with the pre-filing obligations to the extent provided in the Initial Order.

[39] In arriving at the foregoing conclusions, I reviewed the argument submitted by counsel to Jaguar that the stay of proceedings against non-applicants is appropriate. The Jaguar Group operates in a fully integrated manner and depends upon its Subsidiaries for their value generating capacity. Absent a stay of proceedings not only in favour of Jaguar but also in favour of the Subsidiaries, various creditors would be in a position to take enforcement steps which could conceivably lead to a failed restructuring, which would not be in the best interests of Jaguar's stakeholders.

[40] The court has jurisdiction to extend the stay in favour of Jaguar's Subsidiaries. See *Lehndorff General Partners Limited (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Calpine Canada Energy Limited (Re)*, 2006 ABQB 153, 19 C.B.R. (5th) 187; *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500, 3 C.B.R. (6th) 150.

[41] The authority to grant the court-ordered Administration Charge and Director's Charge is contained in ss. 11.51 and 11.52 of the CCAA.

[42] In granting the Administration Charge, I am satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate; and

(iii) the charges should extend to all of the proposed beneficiaries.

[43] In considering both the amount of the Administration Charge and who should be entitled to its benefit, the following factors can also be considered:

(a) the size and complexity of the business being restructured; and

(b) whether there is an unwarranted duplication of roles.

See *Canwest Publishing Inc. (Re)*, 2010 ONSC 222, 63 C.B.R. (5th) 115.

[44] In this case, the proposed restructuring involves the proposed beneficiaries of the charge. I accept that many have played a significant role in the negotiation of the Recapitalization to date and will continue to play a role in the implementation of the Recapitalization. I am satisfied that there is no unwarranted duplication of roles among those who benefit from the proposed Administration Charge.

[45] With respect to the Director's Charge, the court must be satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate;

(iii) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and

(iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

[46] A review of the evidence satisfies me that it is appropriate to grant the Director's Charge as requested.

[47] Jaguar requested that the Initial Order authorize it to perform certain pre-filing obligations in respect of professional service providers and third parties who provide services in respect of Jaguar's public listing agreement. In the circumstances, I find it to be reasonable that Jaguar be authorized to perform these pre-filing obligations.

[48] In view of Jaguar's desire to move quickly to implement the Recapitalization, I have also been persuaded that it is both necessary and appropriate to grant the Claims Procedure Order and the Meeting Order at this time. These are procedural steps in the CCAA process and do not require any assessment by the court as to the fairness and reasonableness of the Plan at this stage.

[49] Counsel to Jaguar submits that Jaguar's approach to classification of the affected unsecured creditors is appropriate in these circumstances, citing a commonality of interest. Counsel also references s. 22(2) of the CCAA. For the purposes of today's motion, I am prepared to accept this argument. However, this is an issue that can, if raised, be reviewed at the comeback hearing.

[50] In the result, an Initial Order is granted together with a Meeting Order and Claims Procedure Order. All orders have been signed in the form presented.

MORAWETZ R.S.J.

Date: January 16, 2014

TAB G

CITATION: Re: Mobilicity Group 2013 ONSC 6167
COURT FILE NO.: 13-CV-16274-OOCL
DATE: 20131004

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INCORPORATION

BEFORE: Newbould J.

COUNSEL: Robert Frank, Virginie Gauthier and Evan Cobb, for applicants
David C. Moore for The Catalyst Capital Group Inc.
John Porter and Leanne M. Williams, for Ernst & Young Inc, the proposed Monitor
Robert J. Chadwick and Brendan O'Neill, for the proposed DIP lender and the ad hoc Committee of Noteholders
Kevin P. McElcheran and James D. Gage, for Quadrangle, a shareholder and for subordinated note holders
Janice Wright, for Equity Financial Trust Company, as Trustee and Collateral Agent under the First Lien Notes, Trustee under the Unsecured Senior Notes, and Collateral Agent under the Bridge Notes

DATE HEARD: September 30, 2013

[1] On September 30, the applicants ("Mobilicity Group") applied for protection under the CCAA. At the conclusion of the hearing I ordered that the application should be granted for reasons to follow, and an Initial Order was signed. These are my reasons.

Background facts

[2] The Mobilicity Group consists of Data & Audio-Visual Enterprises Wireless Inc., the operating company ("Wireless" or "Mobilicity"), its holding company Data & Audio-Visual

Enterprises Holdings Inc. ("Holdings") and 8440522 Canada Inc., wholly owned by Wireless and which has no material assets or liabilities.

[3] Mobilicity carries on business as a Canadian wireless telecommunications carrier. It provides cellular service to Canadians in five urban markets: Ottawa, Toronto, Calgary, Edmonton and Vancouver and has roaming agreements with third party service providers to provide continuity of service outside of these markets. Mobilicity also offers hardware (handsets and accessories) to its customers.

[4] Mobilicity was founded on the concept of offering low cost cellular services to value-conscious consumers seeking less expensive cellular services than those offered by the established players in the market, being Bell Canada Inc., TELUS Corporation and Rogers Communications Inc.

[5] In addition to four corporately-owned stores, the Mobilicity dealer network consists of approximately 314 points of distribution which include approximately 94 "platinum-level" stores that exclusively sell Mobilicity-branded services and only offer wireless-related products at their stores, and approximately 150 "gold" and "silver" level stores that sell Mobilicity-branded services, but also sell non-wireless related products. With the exception of the four corporately owned stores, these points of distribution are operated independently from the Mobilicity Group and are compensated for sales on a commission basis 45 days after the end of the month in which a subscriber is signed on, subject to certain customer retention requirements. These dealers often operate with very low liquidity and any disruption to the stream of revenue derived from commissions would cause many of them to cease operations due to a lack of funding

[6] Mobilicity operates on a "pay in advance" billing system which provides set monthly plans for its subscribers. Mobilicity has approximately 194,000 subscribers who together generate gross revenues of approximately $6.3 million per month.

[7] Mobilicity's business model provides for outsourcing of certain business functions: network building and maintenance, real-time billing and rating, provisioning systems, handset logistics and distribution and call centre operations. Suppliers of such business functions include: Ericsson Canada Inc., Amdocs Canadian Managed Services Inc. and Ingram Micro Inc.

[8] The single most significant capital expenditure made by Mobilicity was the acquisition of its 10 spectrum licenses from the Government of Canada effective in 2009. Mobilicity acquired the spectrum licenses for $243 million using funds contributed by Holdings.

[9] After purchasing the spectrum licences, Mobilicity incurred significant costs by establishing an office, hiring a management team to develop the wireless carrier business, and contracting with Ericsson Canada Inc. to build a network system.

Outstanding indebtedness

[10] In aggregate, the Mobilicity Group has raised in excess of $400 million in debt financing to fund capital expenditures and operations since 2008. A description of that indebtedness is below:

a. Wireless is the borrower under certain first lien notes issued in a principal amount of $195,000,000 due April 29, 2018. Holdings is a guarantor of the first lien notes and each of Wireless and Holdings has entered into a general security agreement in connection with the first lien notes. The Catalyst Capital Group Inc. ("Catalyst") holds approximately 32% of the first lien notes.

b. Wireless is the borrower of $43.25 million in second lien notes (the "Bridge Notes") due September 30, 2013. These Bridge Notes are also guaranteed by Holdings and the obligations thereunder are secured by the assets of Wireless and

Holdings. The Bridge Notes rank behind the first lien notes in right of payment and the security on the Bridge Notes is subordinate to the first lien notes security.

c. Holdings has issued 15% Senior Unsecured Debentures in the total principal amount of $95 million due September 25, 2018. As of July 31, 2013, the amount outstanding on the Unsecured Senior Notes (including payment in kind interest) was approximately $154.4 million.

d. Holdings has also issued 12% Convertible Unsecured Notes due September 25, 2018. Initially, convertible notes in the principal amount of $59,741,000 were issued (the "Unsecured Pari Passu Notes"). Subsequently, additional convertible notes in the principal amount of $35,000,000 were issued (the "Unsecured Subordinated Notes"). The Unsecured Subordinated Notes rank subordinate in right of payment to the Unsecured Pari Passu Notes and the Unsecured Senior Notes and the Unsecured Pari Passu Notes rank pari passu in right of payment with the Unsecured Senior Notes. As of July 31, 2013, the amount outstanding on the Unsecured Pari Passu Notes and the Unsecured Subordinated Notes (including payment in kind interest) respectively, was approximately $88.4 million and approximately $38.6 million.

[11] The cash interest payment under the above described indebtedness is a payment of over $9 million on the first lien notes which became due on September 30, 2013, the date of the Initial Order.

Mobilicity Group's financial difficulties

[12] Wireless telecom start-ups are highly capital-intensive. As indicated by the substantial indebtedness incurred by the Mobilicity Group to date, significant fixed costs must be incurred before revenue can be generated. During the period where a wireless carrier is building its

customer base, revenue is typically insufficient to cover previously incurred investments and ongoing operating costs. It can take several years for a customer base to be adequately built to provide profitability. The applicants submit that Mobilicity ran out of "financial runway" before profitability was achieved and it now faces an imminent liquidity crisis.

[13] For the seven months ended July 31, 2013, the Mobilicity Group recognized revenue of $46,864,490. During that period, the Mobilicity Group recorded a net loss of $71,958,543. As of July 31, 2013, the Mobilicity Group had on a consolidated basis accumulated a net deficit of $431,807,958.

[14] In July 2012, the Mobilicity Group engaged National Bank and Canaccord Genuity (together, the "financial advisors") as their financial advisors in an effort to raise additional financing.

[15] With the assistance of the financial advisors, the Mobilicity Group solicited more than 30 potential investors in an attempt to raise financing. In this regard, an investor roadshow was completed in August and September of 2012 without success.

[16] The Bridge Notes facility was entered into on February 6, 2013 to allow Mobilicity to continue operations while it pursued strategic alternatives. The Bridge note lenders are the first lien note holders other than Catalyst, and certain existing holders of Unsecured Senior Notes. Catalyst has started oppression proceedings attacking the Bridge Notes facility.

[17] Mr. William Aziz was retained in late April of 2013 through BlueTree Advisors II Inc. as Chief Restructuring Officer to provide assistance in dealing with restructuring matters. Mr. Aziz has extensive experience in the area of corporate restructuring.

[18] The Mobilicity Group proposed alternative plans of arrangement earlier this year. During the course of those proceedings, a transaction was agreed to sell the Mobilicity Group to TELUS

Corporation for $380 million pursuant to a plan of arrangement under the *Canada Business Corporations Act*. The plan of arrangement was approved on May 28, 2013. However, On June 4, 2013, the Minister of Industry announced that TELUS Corporation's application to transfer the spectrum licenses would not be approved at that time. Accordingly, the TELUS transaction was not completed.

[19] The Mobilicity Group has continued to engage with potential acquirers. As part of those efforts, the Mobilicity Group solicited and received an expression of interest and engaged in detailed discussions with a significant U.S.-based wireless service provider. However, after significant due diligence these discussions did not ultimately result in a binding offer due to uncertainty surrounding the Government's upcoming spectrum auction.

[20] In the two weeks preceding this application the Mobilicity Group developed a transaction structure for a proposed transaction with a prospective purchaser, which is currently being considered by Industry Canada. The government's assent to the proposed transaction was not obtained prior to this application being made.

Analysis

[21] It is clear from the affidavit of Mr. Aziz that the Mobilicity Group is insolvent and that without the protection of the CCAA, a shutdown of operations would be inevitable as the Mobilicity Group will cease to be able to pay its trade creditors in the ordinary course and will cease to be able to make interest payments on its outstanding debt securities. Thus the applicants are entitled to relief under the CCAA.

[22] The Initial Order contained provisions permitting a charge for directors and an administration charge. These were not opposed except as to part of the administrative charge discussed below. The applicants also sought authorization to continue the engagement of the financial advisors who had initially been retained in 2012, which was not opposed, and approval

of KERP agreements for a small number of employees, also not opposed. The Monitor supported these provisions and they appeared to be reasonable, and were approved.

[23] I will deal with issues that were raised by Catalyst, not in opposition to the Initial Order, but in opposition to certain parts of it.

DIP financing

[24] The Mobilicity Group has obtained a $30 million DIP facility available in five tranches, to be used only in accordance with the cash flow forecasts of the applicants. They seek approval of this facility and a charge to secure the facility. The facility was obtained after a solicitation process undertaken by the Mobilicity Group and its financial advisors, described in some particularity in Mr. Aziz's affidavit. The lenders are the holders of the second lien notes under the Bridge Loan and other unsecured lenders of the Mobilicty Group.

[25] The DIP financing ranks pari passu with the Bridge Notes, and subordinate to the first lien notes, with the exception of cash interest payments under the DIP Financing. Since the DIP financing ranks subordinate to the first lien notes, the holders of the first lien notes, including Catalyst, will not be adversely affected by the DIP Financing.

[26] In the solicitation process, the Mobilicity Group received DIP financing proposals from not less than four parties, including existing creditors as well as third parties with no prior financial involvement with the Mobilicity Group. One such proposal was provided by the holders of the Bridge Notes and another was provided by Catalyst. The Mobilicity Group engaged its financial advisors and legal counsel to assist in the evaluation of the DIP Financing options that were presented.

[27] Upon review, the Mobilicity Group determined, with advice from its advisors, that the proposals provided by the non-creditor third parties likely could not be implemented. Therefore,

the financial advisors held discussions with the holders of the Bridge Notes and Catalyst to obtain what the Mobilicity Group believed to be the best available offer from each party either in the form of a final definitive term sheet or definitive agreements. These discussions occurred over the course of several weeks.

[28] The financial advisors and counsel to the Mobilicity Group evaluated these DIP financing options, including the Catalyst DIP term sheet, based upon, among other things, quantum, conditions, price, ranking and execution risk and provided their expert views to the board of directors of the Mobilicity Group. After consideration of the DIP financing options, and after considering the advice of its legal and financial advisors, the board of directors of the Mobilicity Group concluded that the DIP financing option presented by the holders of the Bridge Notes was the best available option.

[29] Catalyst contends that the DIP lending should not be approved at this time. It points to the cash flow forecast of the applicants that indicates that no DIP borrowing will be required until the week ending November 8, 2013 and says that there is time to give consideration to other DIP facilities that might be available. Mr. Moore said that he expects to obtain instructions from Catalyst to propose DIP financing that will rank equally as the DIP lending proposed by the applicants but provide more money and on better terms than that provided for in the proposal before the court.

[30] Mr. Moore relies on the statement of Blair. J. (as he then was) in *Re Royal Oak Mines Inc*. (1999), 6 C.B.R. (4th) 314 that extraordinary relief such as DIP financing with super priority status should be kept in the Initial Order to what is reasonably necessary to meet the debtor's urgent needs during the sorting out period. Each case, of course, depends on its particular facts. Unlike *Royal Oak*, the proposed DIP financing does not give the DIP lender super priority of the kind in *Royal Oak*. It will rank behind the first lien notes held by Mr. Moore's client. The issue is whether approval of DIP financing is necessary at this time.

[31] As to that question, I accept the position of Mobilicity that it is important that now that the CCAA proceedings have commenced, approving a DIP facility will provide some assurance of stability to the market place, including the customers of Mobilicity and its suppliers and dealers. If no DIP financing were approved, there is a serious risk that customers of Mobilicity, who do not have long term contracts, will go elsewhere. That would negatively affect the cash flow of Mobilicity and the assumption that advances under the DIP loan would not be required until November.

[32] Should this DIP facility be approved with its proposed security? In my view it should. On the record before me, the facility was approved by the board of directors of the Mobilicity Group with the benefit of expert advice after a process undertaken to obtain bids for the loan. I recognize that board approval is a factor that may be taken into account but it is not determinative. See *Re Crystallex* (2012), 91 C.B.R. (5th) 207 (C.A.) at para. 85.

[33] The factors in s.11.2 (4) of the CCAA must be considered. I will deal with each of them.

(a) The period during which the company is expected to be subject to the CCAA proceedings.

[34] Mobilicity hopes to be able to enter into a transaction with a proposed purchaser within a relatively short period of time. The applicants submit that it is reasonable to estimate that the proceedings could last to February, 2014 and that subject to its conditions, the DIP facility can provide funding until that time.

(b) How the company's business and financial affairs are to be managed during the proceedings.

[35] The Mobilicity Group retained Mr. Aziz in April, 2013 as its CRO, and he will continue in that capacity. He is a person of known ability. The business will continue to be run on a day to day basis by management who are looking for stability to enable it to keep its customer base.

(c) Whether the company's management has the confidence of its major creditors.

[36] Catalyst, as the holder of approximately 34% of the first lien notes, says it has no confidence in Mr. Aziz or the way that it alleges the Mobilicity Group has ignored the different interests of Mobilicity and its holding company. That is the subject of its claim for oppression. However, the balance of first lien note holders, all of the Bridge Note holders, approximately 92% of the unsecured debenture holders and all of the holders of the pari passu notes support the company's management and the approval of the DIP facility. That is, holders of $444 million of the Mobilicity Group's debt, or 88% of that debt, support management and the DIP facility.

(d) Whether the loan would enhance the prospects of a viable compromise or arrangement.

[37] The Mobilicity Group's preferred course is to achieve a going concern transaction that will be of benefit to all stakeholders, including the first lien note holders. The DIP facility permits some stability and breathing room to enable this to happen.

(e) The nature and value of the company's property.

[38] The earlier TELUS deal was for $380 plus assumption of obligations of the company. If the value of the Mobilicity Group is anywhere near that size, the $30 million DIP facility appears reasonable, particularly as it is to be drawn down in tranches when needed.

(f) Whether any creditor would be materially prejudiced as a result of the security.

[39] No creditors will be materially prejudiced as a result of the DIP facility charge. The secured creditors likely to be affected by the charge have consented to it. The charge is junior to the security granted to the holders of first lien notes and is subordinate to any encumbrances that may have priority over the first lien notes either by contract or by operation of law.

(g) The position of the Monitor as set out in its report.

[40] In its pre-filing report, E & Y, the proposed Monitor, has reviewed the process leading to the DIP facility and its terms. It states that it is of the view that the DIP facility charge is required and is reasonable in the circumstances in view of the applicants' liquidity needs.

[41] In all of the circumstances, I approved the DIP facility and its charge. There is a come-back clause in the Initial Order, which Catalyst may or may not wish to utilize. I would observe that if Catalyst seeks to have a DIP facility proposed by it to replace the approved DIP facility, some consideration of the *Soundair* and *Crown Trust Co. v. Rosenberg* principles may be appropriate.

Stay of oppression action

[42] The Initial Order sought by the applicants contained a usual stay order preventing the commencement or continuance of proceedings against or in respect of the applicants and the Monitor. Included in the protection were the DIP lenders, the holders of Bridge Notes and the Collateral Agent under the Bridge notes. The applicants submitted, and I agree with them, that this expanded group was appropriate in the circumstances as the holders of Bridge Notes and the Trustee have each been named in the oppression application brought by Catalyst. The holders of the Bridge Notes and the Trustee are parties to the oppression application by Catalyst solely due to their lending arrangements with the applicants and, as a result, the applicants are central parties to that litigation and would need to participate actively in any steps taken in that litigation. Further, any continuation of the oppression application against the holders of the

Bridge Notes and the Trustee would distract from the goals of these proceedings and also result in unwarranted expenditure of resources by the holders of the Bridge Notes and the Trustee, each of which are indemnified in a customary manner by the applicants for these types of expenditures. As the DIP lenders are also Bridge Note holders and as such parties are stepping into a similar financial position as the Bridge Note holders, the extension of the stay to those parties is appropriate and reasonable. See *Sino- Forest Corp. (Re)*, (May 8, 2012), Toronto CV-12-9667-00CL (Ont. S.C.J.); *Timminco Ltd. Re*., 2012 ONSC 2515 at paras. 23 and 24.

[43] Catalyst contended, however, that the stay provisions should exclude its oppression application. Why this is so is not clear. Mr. Moore said there had been no steps taken in the application since the August cross-examination of Mr. Aziz, and that Catalyst would undertake not to take further steps until the come-back date. I see no reason why the oppression application should be excluded from the stay contained in the Initial Order. It may be that Catalyst will be paid out in the near future if the transaction now on the table can be concluded. In any event, it is open to any party to apply to lift a stay on proper grounds. Catalyst is no different.

Ad hoc committee charge

[44] The Initial Order contains an administration charge to cover fees and disbursements to be paid out to the Monitor and its counsel, counsel to the applicants, counsel to the DIP lenders and counsel to the ad hoc committee of Noteholders. Catalyst contends that there is no basis for counsel for the ad hoc committee of Noteholders to be included in this charge or to be paid by the applicant.

[45] In this case, counsel to the DIP lenders is also counsel to the ad hoc committee of noteholders. That committee includes the balance of the first lien noteholders other than Catalyst who are the Bridge Note holders. It was the Bridge Notes that permitted the Mobilicity Group to continue since February of this year. Those noteholders making up the ad hoc committee have been working in a supportive capacity in an attempt to have the Mobilicity Group re-organized in

a constructive way. I am satisfied that the ad hoc committee has been of assistance to the process and that the charge is appropriate and necessary. I would also note that the administrative charge is junior to the first lien notes and thus the security position of Catalyst is not affected by the charge. As well the administrative charge is supported by the proposed Monitor.

Appointment of chief restructuring officer

[46] The Initial Order authorizes the applicants to continue the engagement of William Aziz as the chief restructuring officer of the Mobilicity Group on the terms set out in the CRO engagement letter. This letter has been sealed as confidential. Catalyst said it should see the letter and until then no order should be made. On the day before this application was heard, counsel for the Mobilicity Group offered to send the complete record to counsel for Catalyst if an undertaking was given that the material would be kept confidential prior to the hearing. Mr. Moore objected to such a pre-condition and was served shortly before the hearing with the application record without the confidential documents.

[47] Catalyst contends that no order should be made until it has had a chance to see the terms of the engagement letter. I do not think this wise. To proceed with the CCAA process without the continuation of Mr. Aziz as the chief restructuring officer would send the entirely wrong signal to all stakeholders, let alone the Government of Canada with whom Mr. Aziz has been dealing regarding a proposed transaction.

[48] Mr. Aziz has a thorough knowledge of the affairs of the Mobilicity Group, having been its chief restructuring officer since April of this year. He has been central to the efforts of the applicants to restructure. He is very knowledgeable and experienced. In is appropriate that his engagement now be continued. The proposed Monitor has reviewed the engagement letter and is of the view that the fee arrangement is reasonable and consistent with the fee arrangements in other engagements of similar size, scope and complexity.

[49] Counsel for the applicants and Catalyst were agreeable to working out an appropriate confidentiality arrangement. Once Catalyst has seen the engagement letter for Mr. Aziz, it will be entitled if so advised to bring whatever come-back motion it thinks appropriate.

[50] The Initial Order as signed contains provisions as discussed in this endorsement.

Newbould J.

Released: October 4, 2013

CITATION: Re: Mobilicity 2013 ONSC 6167
COURT FILE NO.: 13-CV-16274-OOCL
DATE: 20131004

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

BETWEEN:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INCORPORATION

REASONS FOR JUDGMENT

Newbould J.

Released: October 4, 2013

TAB H

Court File No.
CV-15-10953-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MADAM	)	THURSDAY, THE 30th
JUSTICE CONWAY	)	DAY OF APRIL, 2015

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 GREAT WESTERN MINERALS GROUP LTD.

(the "Applicant")

INITIAL ORDER

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

ON READING the affidavit of K. Marc LeVier sworn April 29, 2015 and the Exhibits thereto (the "LeVier Affidavit"), and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicant, counsel for PricewaterhouseCoopers Inc. ("PwC"), in its capacity as the proposed monitor (the "Monitor") of the Applicant in these CCAA proceedings, counsel for the ad hoc committee of holders of US$90,000,000 principal 8.00 percent secured convertible bonds due 2017 (the "Ad Hoc Committee"), counsel for the directors of the Applicant and such other parties as were present, no one else appearing for any other person although duly served as appears from the affidavit of service of Dylan Chochla sworn April 30, 2015, filed, and on reading the consent of PwC to act as the Monitor,

SERVICE

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

APPLICATION

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

PLAN OF ARRANGEMENT

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

POSSESSION OF PROPERTY AND OPERATIONS

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

5. THIS COURT ORDERS that the Applicant shall be entitled, but not required, to continue to fund the working capital requirements of its direct and indirect subsidiaries from and after the date of this Order in accordance with existing practice, provided that such amounts are included in the cash flow forecast attached as Exhibit "S" to the LeVier Affidavit, as may be amended

with the prior written consent of the Monitor and the Ad Hoc Committee (the "Cash Flow Forecast").

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

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

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

provided that total disbursements for each of the Canadian, UK and South African operations (as denoted in the Cash Flow Forecast) shall not exceed the amount allocated to them in the Cash Flow Forecast (irrespective of timing variances) by greater than 10% without the prior approval of the Ad Hoc Committee.

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

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

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

provided that total disbursements for each of the Canadian, UK and South African operations (as denoted in the Cash Flow Forecast) shall not exceed the amount allocated to them in the Cash

Flow Forecast (irrespective of timing variances) by greater than 10% without the prior approval of the Ad Hoc Committee.

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

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

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

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

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

10. THIS COURT ORDERS that, except as specifically permitted herein or in the terms of the Support Agreement, the Applicant is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

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

(a) permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $75,000 in any one transaction or $250,000 in the aggregate;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) in accordance with the SISP (as defined below), pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

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

12. THIS COURT ORDERS that the Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further Order of this Court upon application by the Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicant disclaims the lease governing such leased premises in

accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

13. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

SUPPORT AGREEMENT

14. THIS COURT ORDERS that the Applicant is authorized and empowered to take all steps and actions in respect of, and to comply with all of its obligations pursuant to, the Support Agreement dated April 29, 2015 between the Applicant and certain holders and/or investment managers for one or more holders of the US$90,000,000 principal 8.00 percent secured convertible bonds due 2017 (the "Support Agreement") and its various obligations thereunder, and nothing in this Order shall be construed as waiving or modifying any of the rights, commitments or obligations of the Applicant and the Supporting Bondholders (as defined in the Support Agreement) under the Support Agreement.

SALE AND INVESTMENT SOLICITATION PROCESS

15. THIS COURT ORDERS that the sale and investment solicitation process (the "SISP") attached hereto as Schedule "A" (subject to such non-material amendments as may be agreed to by the Applicant, the Monitor, and the Majority Supporting Bondholders (as defined in the SISP)) be and is hereby approved and the Applicant and the Monitor are hereby authorized and directed to take such steps as they deem necessary or advisable (subject to the terms of the SISP)

to carry out the SISP, subject to prior approval of this Court being obtained before completion of any transaction(s) under the SISP.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

16. THIS COURT ORDERS that until and including May 29, 2015, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

17. THIS COURT ORDERS that, during the Stay Period, no Proceeding shall be commenced or continued against or in respect of the direct and indirect subsidiaries of the Applicant listed in the attached Schedule "B" (the "Non-Applicant Subsidiaries), or affecting their respective current and future business (the "Subsidiary Businesses") or assets, undertakings and property, wherever situate (the "Subsidiary Property"), except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Non-Applicant Subsidiaries or affecting the Subsidiary Businesses or the Subsidiary Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

18. THIS COURT ORDERS that, subject to paragraph 20 hereof, during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court.

19. THIS COURT ORDERS that, subject to paragraph 20 hereof, during the Stay Period, all rights and remedies of any Person against or in respect of the Non-Applicant Subsidiaries or affecting the Subsidiary Businesses or the Subsidiary Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court.

20. THIS COURT ORDERS that the provisions of paragraphs 18 and 19 are subject to the proviso that nothing in this Order shall (i) empower the Applicant or any Non-Applicant Subsidiary to carry on any business which the Applicant or such Non-Applicant Subsidiary is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, (iv) prevent the registration of a claim for lien, (v) prevent the Trustee (as defined in the LeVier Affidavit) from issuing such notices or demands that are contemplated by or necessary under the Trust Deed (as defined in the LeVier Affidavit) for the purpose of accelerating repayment of all amounts payable pursuant the Trust Deed provided that the Trustee may not take any enforcement action as result of such acceleration without the consent of the Applicant or further order of this Court, or (vi) prevent the Supporting Bondholders (as defined in the Support Agreement) from exercising any rights or remedies contained in the Support Agreement.

NO INTERFERENCE WITH RIGHTS

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

CONTINUATION OF SERVICES

22. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Applicant or any Non-Applicant Subsidiary or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicant or any Non-Applicant Subsidiary, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant or any Non-Applicant Subsidiary, and that the Applicant or any Non-Applicant Subsidiary shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each

case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant or any Non-Applicant Subsidiary in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant or any Non-Applicant Subsidiary and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

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

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

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

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

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

26. THIS COURT ORDERS that the directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of $200,000, as security for the indemnity provided in paragraph 25 of this Order. The Directors' Charge shall have the priority set out in paragraphs 44 and 46 herein.

27. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 25 of this Order.

APPROVAL OF CONTINUED ENGAGEMENT OF FINANCIAL ADVISOR

28. THIS COURT ORDERS that the Applicant be and is hereby authorized to carry out its obligations to the financial advisor to the Ad Hoc Committee, Houlihan Lokey Capital, Inc. ("Houlihan Lokey") under the Houlihan Lokey Fees Letter (as defined in the LeVier Affidavit).

29. THIS COURT ORDERS that all claims of Houlihan Lokey pursuant to the Houlihan Lokey Fees Letter shall be treated as unaffected in any Plan.

30. THIS COURT ORDERS that Houlihan Lokey shall be paid its fees and expenses in accordance with the terms of the Houlihan Lokey Fees Letter, whether incurred prior to or after the date of this Order, by the Applicant as part of the costs of these proceedings, and shall be entitled to the benefit of the Administration Charge (as set out and defined in paragraph 41) in respect of its Work Fees (as defined in the LeVier Affidavit) and expenses, but not any Transaction Fees (as defined in the LeVier Affidavit).

31. THIS COURT ORDERS that Houlihan Lokey shall be entitled to the benefit of and is hereby granted a charge (the "Houlihan Lokey Transaction Fee Charge") on the Property, which charge shall not exceed an aggregate amount of $300,000, as security for the Transaction Fees that may become payable in accordance with the terms of Houlihan Lokey Fees Letter. The Houlihan Lokey Transaction Fee Charge shall have the priority set out in paragraphs 44 and 46 herein.

32. THIS COURT ORDERS that Houlihan Lokey and its affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of its activities from and after the date of this Order pursuant to its engagement by the Ad Hoc Committee as financial advisor or any matter referred to in the Houlihan Lokey Fees Letter except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct of Houlihan Lokey (as applicable).

APPOINTMENT OF MONITOR

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

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

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

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

(c) assist the Applicant, to the extent required by the Applicant, in its dissemination, to the Supporting Bondholders and their advisors, of financial and other information required by the terms of the Support Agreement;

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

(e) advise the Applicant in its development of the Plan and any amendments to the Plan;

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

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

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

(i) administer and conduct the SISP in accordance with its terms;

(j) assist the Applicant, including by appearing before foreign courts, with any matters relating to any foreign proceedings commenced by or in respect of the Applicant or any of its direct or indirect subsidiaries, if and to the extent deemed appropriate by the Monitor in the interest of the Applicant and its stakeholders;

(k) engage in discussions with the Ad Hoc Committee and its advisors; and

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

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

36. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property (or any Subsidiary Property) that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or

rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, the Ontario *Occupational Health and Safety Act*, the Saskatchewan *Environmental Management and Protection Act, 2002*, or *The Saskatchewan Employment Act*, and the regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property (or any Subsidiary Property) within the meaning of any Environmental Legislation, unless it is actually in possession.

37. THIS COURT ORDERS that that the Monitor shall provide the Ad Hoc Committee and any creditor of the Applicant with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors (other than creditors that are subject to confidentiality agreements with the Applicant) unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

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

39. THIS COURT ORDERS that the Monitor, counsel to the Monitor, domestic and foreign counsel to the Applicant, counsel to the directors of the Applicant, and domestic and foreign counsel to the Ad Hoc Committee shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to or after the date of this Order, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized

and directed to pay the accounts of the Monitor, counsel for the Monitor, domestic and foreign counsel for the Applicant, counsel for the directors of the Applicant and domestic and foreign counsel for the Ad Hoc Committee on a weekly basis or on such basis as otherwise agreed by the Applicant and the applicable payee and, in addition, the Applicant is hereby authorized, *nunc pro tunc*, to pay to the Monitor, counsel to the Monitor, counsel to the Applicant, counsel to the directors of the Applicant and counsel to the Ad Hoc Committee, retainers in the amounts of $25,000, $25,000, $25,000, $20,000 and $25,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

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

41. THIS COURT ORDERS that the Monitor, counsel to the Monitor, the Applicant's domestic and foreign counsel, counsel for the directors of the Applicant, domestic and foreign counsel to the Ad Hoc Committee, and Houlihan Lokey shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of $750,000, as security for the professional fees and disbursements of the Monitor and all such counsel incurred at their standard rates and charges and as security for the Work Fees (excluding any Transaction Fees) and expenses of Houlihan Lokey incurred pursuant to the terms of the Houlihan Lokey Fees Letter, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 44 and 46 hereof.

KEY EMPLOYEE RETENTION PAYMENTS

42. THIS COURT ORDERS that the key employee retention payments (the "KERPs") offered by the Applicant to its remaining employees and executive officer, as set out and described in the LeVier Affidavit, be and are hereby approved and the Applicant be and is hereby authorized and empowered to make the KERPs in accordance with the terms set out in the LeVier Affidavit.

43. THIS COURT ORDERS that the employees of the Applicant who are the beneficiaries of the KERPs shall be entitled to the benefit of and are hereby granted a charge (the "KERP

Charge") on the Property, which charge shall not exceed an aggregate amount of $195,695 as security for the Applicant's obligations in respect of the KERPs. The KERP Charge shall have the priority set out in paragraphs 44 and 46 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

44. THIS COURT ORDERS that the priorities of the Directors' Charge, the Administration Charge, the KERP Charge and the Houlihan Lokey Transaction Fee Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $750,000);

Second – KERP Charge (to the maximum amount of $195,695);

Third – Directors' Charge (to the maximum amount of $200,000); and

Fourth – Houlihan Lokey Transaction Fee Charge (to the maximum amount of $300,000).

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

46. THIS COURT ORDERS that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, other than (subject to further Order of the Court) validly perfected and enforceable security interests, if any, in favour of Canadian Western Bank (registration no. 300479551 under the *Personal Property Registry Personal Property Registry* (Saskatchewan)), MCAP Leasing Inc. (registration no. 300626369 under the *Personal Property Registry Personal Property Registry* (Saskatchewan)) and Vernon Kiss Legal Professional Corporation (registration no.

301318904 under the *Personal Property Registry Personal Property Registry* (Saskatchewan)), (collectively, "Encumbrances"), in favour of any Person.

47. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicant also obtains the prior written consent of the Monitor, the beneficiaries of the Charges and the Ad Hoc Committee, or further Order of this Court.

48. THIS COURT ORDERS that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act* of Canada, as amended from time to time (the "BIA"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

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

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

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

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

SEALING ORDER

50. THIS COURT ORDERS that Exhibit "Q" to the LeVier Affidavit, filed separately with the Court by the Applicant, shall be sealed in the Court File pending further Order of the Court.

SERVICE AND NOTICE

51. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in *The Globe and Mail* (National Edition; English) and *The StarPhoenix* (Saskatchewan; English) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

52. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/ shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the *Rules of Civil Procedure*. Subject to Rule 3.01(d) of the *Rules of Civil Procedure* and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: http://www.pwc.com/car-greatwesternmineralsgroup.

53. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicant, the Monitor and the Ad Hoc Committee are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail,

courier, personal delivery or facsimile transmission to the Applicant, the Monitor, the Applicant's creditors or other interested parties, as applicable, at their respective addresses as last shown on the records of the Applicant and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

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

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

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

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

58. THIS COURT ORDERS that any interested party (including the Applicant, the Monitor and the Ad Hoc Committee) may apply to this Court to vary or amend this Order on not less than

seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

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

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

APR 30 2015

SCHEDULE "A"
SISP

Procedures for the Sale and Investor Solicitation Process

1. On April 30, 2015, Great Western Minerals Group Ltd. ("**GWMG**" or the "**Company**") obtained an initial order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act* ("**CCAA**") from the Ontario Superior Court of Justice (Commercial List) (the "**Court**"), pursuant to which the Court approved, among other things, the Sale and Investor Solicitation Process ("**SISP**") set forth herein.

2. The purpose of the SISP is to identify one or more financiers, purchasers of and/or investors in the Company's Business and/or Property (each as defined herein) with a completion date of a transaction or transactions no later than July 2, 2015 (the "**Outside Date**").

3. Set forth below are the procedures (the "**SISP Procedures**") to be followed with respect to the SISP and, if there is a Successful Bid or Successful Bids (as defined herein), to complete the transactions contemplated by such Successful Bid(s).

Defined Terms

4. All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Initial Order. In addition, capitalized terms used but not otherwise defined in these SISP Procedures shall have the following meaning:

"**Business Day**" means a day, other than a Saturday, Sunday, or a day on which banks in Toronto, Ontario, Canada are authorized or obligated by applicable law to close or otherwise are generally closed.

"**Cassels**" means Cassels Brock & Blackwell LLP, as counsel to the Supporting Bondholders.

"**Convertible Bonds**" means the US$90,000,000 8.00 per cent. Secured Convertible Bonds due 2017 governed by that certain Trust Deed dated April 5, 2012 as may be amended, between Great Western Minerals Group Ltd. and Wilmington Trust (London) Limited, as trustee.

"**Fasken**" means Fasken Martineau DuMoulin LLP, as counsel to the Company.

"**Houlihan**" or the "**Supporting Bondholders' Financial Advisor**" means Houlihan Lokey Capital, Inc., as financial advisor to the Supporting Bondholders.

"**Monitor**" means PricewaterhouseCoopers Inc., in its capacity as Court-appointed monitor pursuant to the Initial Order, and not in its personal or corporate capacity.

"**Secured Convertible Bonds Claim**" means the aggregate of all amounts owing under the trust deed for the US$90,000,000 8.00 per cent. Secured Convertible Bonds due 2017 between Great Western Minerals Group Ltd. and Wilmington Trust (London) Limited, as trustee.

"**SISP Team**" means the Monitor, the Company, Fasken, Cassels and Houlihan.

"**Supporting Bondholders**" means those holders and/or investment managers for one or more holders of the Convertible Bonds that are signatories (originally or by joinder agreement) to the Support Agreement with the Company dated April 29, 2015, and that are represented by Cassels.

"**Majority Supporting Bondholders**" means a majority of the Supporting Bondholders, where each Supporting Bondholder will vote the principal dollar amount of Convertible Bonds that it holds and/or manages, and a simple majority based on the principal dollar amount of votes cast will govern.

Solicitation Process

5. The SISP Procedures set forth herein describe the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning GWMG, its business and operations (the "**Business**") and its assets, undertakings and properties including the shares of each of GWMG's direct subsidiaries (collectively, the "**Property**"), the manner in which a bid becomes a Qualified Bid (as defined herein), the receipt and negotiation of Qualified Bids received, the ultimate selection of Successful Bid(s) and/or Alternate Bids(s) (as defined in Appendix "B"), and the approval thereof by the Court.

6. The Monitor shall have overall supervision of the SISP Procedures and shall lead the process with the support and assistance of the other members of the SISP Team. In the event that there is disagreement as to the interpretation or application of these SISP Procedures, the Court will have jurisdiction to hear and resolve any such dispute.

7. The Monitor, with the assistance of the other members of the SISP Team, will compile a listing of prospective financiers, investors and/or purchasers (together with others expressing an interest in the Business and/or Property, the "**Interested Parties**"). The Monitor will use best efforts to contact all parties identified in such list as well as any additional parties that any member of the SISP Team believes could be a potential financier, investor and/or purchaser.

8. As soon as reasonably practicable after the issuance of the Initial Order, but in any event no more than five (5) Business Days thereafter, the Monitor shall cause a notice of the SISP contemplated by these SISP Procedures, and such other relevant information which the Monitor, after consultation with the other members of the SISP Team, considers appropriate, to be published in the Northern Miner and on mining.com. At the same time, the Company shall issue a press release setting out the notice and such other relevant information in form and substance satisfactory to the SISP Team, with Canada Newswire designating dissemination in Canada and major financial centres in the United States, Canada, Europe, South Africa, Russia, Brazil and China.

9. A non-confidential Information Memorandum ("**IM**") describing the opportunity to finance, acquire or invest in GWMG or to acquire some, all or substantially all of the Business or the Property, in form and substance acceptable to the SISP Team, will be made available by the Monitor to Interested Parties and will be posted on the Monitor's and the Company's websites by no later than the date that is two business days following court approval of the SISP.

10. In order to participate in the SISP, each Interested Party (a "**Potential Bidder**") must deliver to the Monitor at the address specified in **Appendix "A"** hereto (including by email or fax transmission), and prior to granting of access to the electronic data room compiled and maintained by the Company in consultation with the other members of the SISP Team, containing confidential information concerning the Company, the Business and the Property (the "**Data Room**") and the distribution of any such confidential information by the Monitor to a Potential Bidder, an executed non-disclosure agreement in form and substance satisfactory to the SISP Team, which shall inure to the benefit of any Successful Bidder(s) that is/are a purchaser of the Property and/or Business or an investor in the Company. Those parties that have already executed a non-disclosure agreement with the Company may not be required to execute a new non-disclosure agreement.

11. All Potential Bidders that are parties to a non-disclosure agreement with the Company in accordance with these SISP Procedures shall be deemed to be a qualified bidder (a "**Qualified Bidder**").

12. No later than May 15, 2015 the Monitor shall deposit in the Data Room a form of definitive purchase agreement acceptable to the SISP Team (the "**Template Purchase Agreement**") to be used by Qualified Bidders in submitting a Bid (as defined below) to purchase all or part of the Business and/or Property.

13. A chart summarizing the key deadlines for the SISP is set out below, which may only be amended or modified with the consent of the Monitor, the Company and the Majority Supporting Bondholders:

Sale and Investment Solicitation Process	Date
Court Approval of SISP	May 1, 2015
Begin Marketing to Interested Parties	May 4, 2015
Receipt of Binding Offers	June 16, 2015
Auction (as applicable)	June 19, 2015
Execution of Binding Agreement(s)	June 22, 2015
Court Approval of Successful Bid(s)	No later than June 25, 2015
Closing(s) of Successful Bid(s)	No later than June 29, 2015

Submission of Binding Offers

14. A Qualified Bidder, if it wishes to submit a binding bid, must deliver an original executed copy of a comprehensive, final and binding proposal (a "**Bid**") to the Monitor at the address specified in Appendix "A" hereto (including by email or fax transmission) so as to be received by it not later than 12:00 p.m. (Eastern Time) on June 16, 2015, or such other date or time as may be agreed by the Monitor, the Company and the Majority Supporting Bondholders (the "**Bid Deadline**").

15. A Bid will be deemed to be a "**Qualified Bid**" only if the Bid complies with all of the following:

a. It includes a letter stating that the offer is irrevocable until the later of (i) the selection of the Successful Bidder (as defined herein) and (ii) thirty (30) calendar days following the Bid Deadline, provided that if such bidder is selected as the Successful Bidder or the Alternate Bidder (as defined in Appendix "B"), its offer shall remain irrevocable until the closing of the sale to the Successful Bidder or to the Alternate Bid Expiration Date (as defined below), as applicable;

b. It includes:

i. in the case of an offer to purchase the Business or any or all of the Property, a duly authorized and executed definitive purchase agreement substantially in the form of the Template Purchase Agreement containing the detailed terms and conditions of the proposed transaction, including identification of the Business or the Property proposed to be acquired, the purchase price for the Business or Property proposed to be acquired expressed in Canadian dollars (the "**Purchase Price**"), the detailed structure and financing of the proposed transaction, together with a redline comparing the purchase agreement submitted to the Template Purchase Agreement; or

ii. in the case of an offer to make an investment in the Company, a duly authorized and executed term sheet describing the detailed terms and conditions of the proposed transaction, including details regarding the proposed equity and debt structure of the Company following completion of the proposed transaction, the direct or indirect investment target and the aggregate amount of equity and debt investment (including the sources of such capital, the underlying assumptions regarding the pro forma capital structure, as well as anticipated tranches of debt, debt service fees, interest and amortization) to be made in the Company, the treatment of the Convertible Bonds (including what portion of the Secured Convertible Bonds Claim will be paid on closing) and the debt, equity, or other securities, if any, proposed to be allocated to other creditors of the Company, and the treatment of existing employees or consultants of the Company (or its subsidiaries) including the terms of any proposed retention or continued employment as the case may be;

c. It includes written evidence of a firm commitment for all required financing, or other evidence of the financial ability to consummate the proposed transaction, that will allow the SISP Team, to make a reasonable determination as to the Qualified Bidder's financial and other capabilities to consummate the transaction contemplated by the bid;

d. It is not conditioned on (i) the outcome of unperformed due diligence and/or (ii) obtaining financing;

e. It fully discloses the identity of each person (including any person that controls such person) that will be directly or indirectly sponsoring or participating in the bid, including whether any prior or current member of the Company's board, management, any employee or consultant to the Company or any creditor (including any Supporting Bondholder) or shareholder of the Company is involved in any way with the bid or assisted with the bid, and the complete terms of any such participation as well as evidence of corporate authority to sponsor or participate in the bid;

f. It includes an acknowledgement and representation that the bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property to be acquired and liabilities to be assumed in making its bid; and (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the Property to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, except as expressly provided in a definitive agreement;

g. It includes an acknowledgment that the bid is on an "as is, where is" basis;

h. It includes evidence, in form and substance reasonably satisfactory to the SISP Team, of authorization and approval from the bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction contemplated by the bid, and identifies any anticipated shareholder, regulatory or other approvals outstanding, and the anticipated time frame and any anticipated impediments for obtaining such approvals;

i. It does not include any request for or entitlement to any break or termination fee, expense reimbursement or similar type of payment;

j. It is accompanied by a refundable deposit (the "**Deposit**") in the form of a wire transfer (to a bank account specified by the Monitor), or such other form acceptable to the Monitor, payable to the order of the Monitor, in trust, (i) if the total consideration is quantifiable, in an amount equal to 10% of that total consideration in the Qualified Bid; or (ii) if the total consideration is unquantifiable, in an amount to be determined by the Monitor, which Deposit is to be held and dealt with in accordance with these SISP Procedures;

k. It contains such other information as may reasonably be requested by the Monitor, after consultation with the other members of the SISP Team; and

l. It is received by the Bid Deadline.

16. The Monitor, in consultation with the SISP Team, may waive any one or more minor and non-material violations of the requirements specified for Qualified Bids and deem such non-compliant bids to be Qualified Bids.

Procedure for Qualified Bids

17. Subject to paragraphs 31 and 33 of these SISP Procedures, as soon as practicable following the Bid Deadline, the Monitor will distribute copies of all Qualified Bids received (including any submissions received that did not conform to the specific requirements set out in paragraph 15), along with a summary evaluation of the Qualified Bids, in each case contemporaneously to all other members of the SISP Team. Subject to paragraph 31 of these SISP Procedures, Cassels and Houlihan may provide a copy of the Qualified Bids (and such other submissions circulated) and the Monitor's summary evaluation to the Supporting Bondholders.

Evaluation of Competing Bids

18. The SISP Team shall evaluate bids on various grounds including, but not limited to the purchase price or imputed value, the treatment of the Convertible Bonds and related implied recovery on account of the Secured Convertible Bonds Claim (in each case, as applicable) and any delay or other risks (including closing risks) in connection with the bids. Following that evaluation, the Monitor, the Company and the Majority Supporting Bondholders may jointly elect to:

a. Subject to paragraph 19 of these SISP Procedures and paragraphs 3 and 4 of Appendix "B" hereto , as applicable, accept one (or more than one, if for distinct and compatible transactions) of the Qualified Bids (the "**Successful Bid**" and the offeror(s) making the Successful Bid(s) being a "**Successful Bidder**") and, with the assistance of the SISP Team, the Monitor shall take such steps as necessary to finalize an agreement for the Successful Bid(s) with Successful Bidder(s);

b. Continue negotiations with a selected number of Qualified Bidders (collectively, the "**Selected Bidders**") with a view to finalizing acceptable terms (subject to paragraph 19 of these SISP Procedures) with one (or more than one, if for distinct and compatible transactions) of the Qualified Bidders; or

c. Pursue an auction in accordance with the procedures set out in the attached **Appendix "B"** (an "**Auction**") if more than one Qualified Bid for the same Property or aspects of the Business has been received pursuant to these SISP Procedures or if the Monitor, the Company and the Majority Supporting Bondholders otherwise determine that an Auction is appropriate under the circumstances

In the case of (a), (b) or (c), all purchase or investment transaction agreements (and all related schedules and exhibits), plans or other documentation to effect the Successful Bid must be acceptable to the Monitor, the Company and the Majority Supporting Bondholders.

19. The Monitor, Company and Majority Supporting Bondholders shall be under no obligation to accept the highest or best offer or any offer or to pursue an Auction and the selection of any Successful Bidder(s) and any Alternate Bidder(s) and the decision whether to pursue an Auction shall be entirely in the discretion of the Monitor, Company and Majority Supporting Bondholders after consultation with the SISP Team.

20. If no Qualified Bids are received by the Bid Deadline or if no Qualified Bid(s) are accepted or no Auction has been pursued by the Monitor, the Company and the Majority Supporting Bondholders in accordance with and following the procedures described in paragraphs 18 and 19 by June 22, 2015, the SISP shall automatically terminate unless the Court orders otherwise or unless agreed otherwise in writing by the Majority Supporting Bondholders.

Approval Hearing

21. The Company shall apply to the Court (the "**Approval Motion**") for an order approving the Successful Bid(s) and the Alternate Bid(s), if and as applicable, and authorizing the Company to complete the transactions contemplated in the definitive agreement(s) with the Successful Bidder(s) and any and all necessary further instruments and agreements with respect to the Successful Bid(s), as well as an order, if applicable, vesting title to purchased property in the name of the Successful Bidder(s).

22. If the Successful Bidder(s) fail to consummate the sale(s) for any reason, then the Alternate Bid(s) will be deemed to be the Successful Bid(s) and the Company will be authorized to effectuate sale(s) to the Alternate Bidder(s) subject to the terms of the Alternate Bid(s) of such Alternate Bidder(s) without further order of the Court. The Alternate Bid(s) shall remain open until the earlier of (a) ten Business Days following the Sale Hearing or (b) the consummation of the sale to the Successful Bidder(s) (the "**Alternate Bid Expiration Date**"). All Qualified Bids (other than the Successful Bid(s) and the Alternate Bid(s)) shall be deemed rejected by the Company on and as of the date of the approval of the Successful Bid by the Court.

Deposits

23. All Deposits shall be retained by the Monitor and invested in an interest bearing trust account. If there is a Successful Bid, the Deposit (plus accrued interest thereon) paid by the Successful Bidder whose bid is approved at the Approval Motion shall be applied to the Purchase Price to be paid or investment amount to be made by the Successful Bidder(s) upon closing of the approved transaction and will be non-refundable. The Deposits (plus, in each case, accrued interest thereon) of Qualified Bidders not selected as either the Successful Bidder(s) or the Alternate Bidder(s) shall be returned to such bidders within five (5) Business Days of the date upon which a Successful Bid is approved by the Court. In the case of an Alternate Bid, the deposit in respect of that bid shall be retained by the Monitor until the Alternate Bid Expiration Date and returned to the Alternate Bidder(s) within two (2) Business Days thereafter or, if an Alternate Bid become a Successful Bid, shall be applied to the Purchase Price to be paid by the Alternate Bidder in accordance with the terms of the Alternate Bid.

Approvals

24. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the CCAA, or any other statute or as otherwise required at law in order to implement or complete a Successful Bid.

No Amendment

25. There shall be no amendments to these SISP Procedures without the written consent of each of the Monitor, the Company and the Majority Supporting Bondholders or further order of the Court.

"As Is, Where Is"

26. Any sale of the Business and/or Property or any investment in the Company will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by any member of the SISP Team or any of their agents or estates, except to the extent otherwise provided under any definitive sale or investment agreement with a Successful Bidder executed and delivered by the Company and approved by the Court. No member of the SISP Team makes any representation or warranty as to the information contained in the IM or in the Data Room, except to the extent otherwise provided under any definitive sale or investment agreement with a Successful Bidder executed and delivered by the Company.

Free Of Any And All Claims And Interests

27. In the event of a sale of Property, to the extent permitted by law, all of the rights, title and interests of the Company in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests on or against the Property (collectively, the "**Claims and Interests**") pursuant to a Court order made under section 36(6) of the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Property (without prejudice to any claims or causes of action regarding the priority,

validity or enforceability thereof), except to the extent otherwise set forth in any definitive sale or investment agreement with a Successful Bidder.

28. An investment in the Company may include one or more of the following: a restructuring, recapitalization or other form of reorganization of the business and affairs of the Company as a going concern, a sale of all or some of the Property to a newly formed entity on terms contemplated in the above paragraph or a plan of compromise or arrangement pursuant to the CCAA or any applicable corporate legislation which compromises the Claims and Interests as set out therein.

No Obligation to Conclude a Sale

29. The Monitor, the Company and the Majority Supporting Bondholders have no obligation to agree to conclude a sale or investment arising out of the SISP, and they reserve the right and unfettered discretion to reject any offer or other proposal made in connection with the SISP. In addition, at any time during these SISP Procedures, the Company, the Monitor and the Majority Supporting Bondholders may jointly determine to terminate these SISP Procedures, and shall provide notice of such a decision to any Qualified Bidders.

Consent and Information

30. Without limiting any of the foregoing provisions of these SISP Procedures, subject to paragraphs 31 and 33 of these SISP Procedures, the Monitor shall provide regular updates to the other members of the SISP Team on a contemporaneous basis with respect to all matters related to the SISP, discussions with Interested Parties and any bids.

31. Notwithstanding anything else in these SISP Procedures, to the extent that any Supporting Bondholder (a) does not agree to extend its existing confidentiality agreement with the Company or, for such Supporting Bondholder who is not presently a party to a confidentiality agreement with the Company, enter into and agree to extend, as applicable, a confidentiality agreement in the same form as executed by the Supporting Bondholders prior to the date of the Initial Order or (b) either individually or jointly with another Interested Party, submits a Bid or participates in the Auction as a bidder, such Supporting Bondholder shall no longer from the first applicable point forward (i) be included in any discussions or deliberations of the Supporting Bondholders for which the Majority Supporting Bondholder support or consent is required throughout these SISP Procedures (and such Supporting Bondholder's consent will not be counted in such decisions); or (ii) receive any information which Supporting Bondholders are entitled in that capacity to receive under these SISP Procedures.

32. A Supporting Bondholder that receives non-public information pursuant to the SISP Procedures shall not disclose such information to any Supporting Bondholder that is restricted from receiving information pursuant to paragraph 31 or that is otherwise not subject to a confidentiality agreement with the Company.

33. Notwithstanding anything else in these SISP Procedures, to the extent that any director, officer or employee of, or any consultant to, the Company or any of its subsidiaries, or any entity controlled by such person, either individually or jointly with another Interested Party, submits a Bid, participates at the Auction as a bidder, or is directly or indirectly involved with or assisting any Interested Party that is deemed a Qualified Bidder, submits a Bid or participates at the

Auction as a bidder, such person shall no longer from the first applicable point forward (i) be included in any discussions or deliberations in connection with these SISP Procedures, including any decision making of the Company in respect of any matter on which the Company's consent is required or (ii) receive any information which any representative of any member of the SISP Team are entitled in that capacity to receive under these SISP Procedures.

Communications

34. All Interested Parties and any bidders shall direct all communications or discussions with respect to these SISP Procedures, including but not limited to, any requests for information about the Company and the Property or Business or with respect to the terms or conditions of any proposed or actual bid, or the status of any such bids, directly to the Monitor. The Monitor shall include members of the SISP Team in any subsequent discussions with Interested Parties, as may be required.

Miscellaneous

35. In each case in this SISP where the consent or approval of the Monitor, the Company and the Majority Supporting Bondholders is required (including paragraphs 13, 14, 18, 19, 21, 22, 23, 24, 25 and 29) such consent or approval will only be deemed to be provided where the written consent or approval of each of the parties, acting in their sole and absolute discretion, is provided to the other parties. The consent or approval of the Majority Supporting Bondholders shall be conclusively evidenced by written communication from Cassels, and the other parties shall be entitled to rely on such communication as conclusive and binding on the Supporting Bondholders. In the event that the Monitor, the Company and the Majority Supporting Bondholders do not unanimously agree on matters that require each of their consent or approval, any one of them may seek direction from the Court.

36. In each case in this SISP where the SISP Team is required to make decisions, such decisions will require the unanimous support of each of the members of the SISP Team.

37. Notwithstanding anything else herein, the SISP shall terminate without any further action by any party or Court order, on the earlier of (i) the occurrence of the Outside Date or (ii) the termination of the SISP in accordance with its terms.

Appendix "A"

Addresses for Notices

Michael Huber, CFA
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Appendix "B"

Auction Procedures

Auction

1. If the Monitor, the Company and the Majority Supporting Bondholders determine to pursue an Auction pursuant to paragraph 18 of these SISP Procedures, the Monitor will conduct the Auction at 10:00 a.m. (ET) on June 19, 2015 at the offices of the Monitor's counsel, or such other location as determined by the Monitor, after consultation with the SISP Team. The Auction shall be conducted in accordance with the following procedures:

    a. The Monitor shall notify in writing each Qualified Bidder that has submitted a Qualified Bid in respect of the Property and/or Business to be subject to the Auction that (i) its bid has been selected as a Qualified Bid to participate in the Auction, (ii) the date, time and location of the Auction and (iii) the procedures to be followed at the Auction, along with any other information that the Monitor, after consultation with the SISP Team, determines necessary.

    b. Only the SISP Team members (including advisors and representatives of the SISP Team members), Supporting Bondholders that are party to a confidentiality agreement with the Company, and any Qualified Bidder (and their representatives and advisors) that has submitted a Qualified Bid selected to participate in the auction, and such other persons or entities that the Monitor, after consultation with the SISP Team determines, shall be permitted to attend the Auction in person, and only Qualified Bidders will be invited to bid at the Auction.

    c. At least one (1) Business Day prior to the Auction, each Qualified Bidder whose bid has been selected as a Qualified Bid to participate in the Auction must inform the Monitor whether it intends to attend the Auction; provided that in the event a Qualified Bidder elects not to attend the Auction, such Qualified Bidder's Qualified Bid shall nevertheless remain fully enforceable against such Qualified Bidder until (i) the date of the selection of the Successful Bidder at the conclusion of the Auction and (ii) if such bidder is selected as an Alternate Bidder (as defined below), the Alternate Bid Expiration Date.

    d. Prior to the commencement of the Auction, the Monitor will notify all Qualified Bidders of each Qualified Bidder participating in the Auction and which Qualified Bid the Monitor, the Company and the Majority Supporting Bondholders have decided is the highest or otherwise best offer (the "**Starting Bid**").

    e. All Qualified Bidders wishing to attend the Auction must have at least one individual representative with authority to bind such Qualified Bidder attending the Auction in person, provided that the true identity of each Qualified Bidder at the Auction will be fully disclosed to all other Qualified Bidders at the Auction and that all material terms of each Subsequent Bid (as defined herein) (including any agreements with any creditors

of, or contract parties with, the Company) will be fully disclosed to all other Qualified Bidders throughout the entire Auction.

f. Bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one subsequent bid is submitted by a Qualified Bidder that (i) improves upon such Qualified Bidder's immediately prior Qualified Bid (a "**Subsequent Bid**") and (ii) the Monitor, the Company and the Majority Supporting Bondholders determine that such Subsequent Bid is (A) for the first round, a higher or otherwise better offer than the Starting Bid, and (B) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (defined below). The Auction may include individual negotiations by the Monitor and the SISP Team, with the Qualified Bidders. After the first round of bidding and between each subsequent round of bidding, the Monitor shall announce the bid that is the higher or otherwise best offer (the "**Leading Bid**"). A round of bidding will conclude after each participating Qualified Bidder has had the opportunity to submit a Subsequent Bid with full knowledge of the Leading Bid. Each incremental bid at the Auction shall provide net value to the estate of (i) at least $500,000 over the Starting Bid, or (ii) $500,000 over the Leading Bid, as applicable.

g. For the purpose of evaluating Subsequent Bids, the Monitor, after consultation with SISP Team, may require a Qualified Bidder submitting a Subsequent Bid to submit to the Monitor, additional evidence (in the form of financial disclosure or credit-qualify support information or enhancement reasonably acceptable to the SISP Team), demonstrating such Qualified Bidder's ability to close the proposed transaction at the amount of the Subsequent Bid.

2. The Monitor (with the agreement of the Company and the Supporting Bondholders) may employ and announce at the Auction additional procedural rules that are reasonable under the circumstances (e.g., the amount of time allotted to make Subsequent Bids) for conducting the Auction, provided that such rules are (a) not inconsistent with this SISP, the Initial Order, the CCAA or any order of the Court entered in connection herewith and (b) disclosed to each Qualified Bidder.

Selection of Successful Bid at Auction

3. Prior to the conclusion of the Auction, the Monitor, the Company and the Majority Supporting Bondholders will jointly:

a. review each Qualified Bid that is either the Leading Bid or submitted subsequent to and as an improvement to the submission of the Leading Bid (except in the event that there is no Leading Bid, in which case the Qualified Bids to be considered will be the Starting Bid and any bids submitted subsequent and as an improvement to the Starting Bid) on the basis of financial and contractual terms and the factors relevant to the SISP, the counterparties to such transactions, the Purchase Price and the net value (including assumed liabilities, other obligations to be performed or assumed by the bidder) provided by such bid, the treatment of Convertible Bonds (including the amount to be repaid on closing) and the implied recovery on account of the Secured Convertible Bonds Claim, the claims likely to be created by such bid in relation to other bids

(including the added costs of any cure or disclaimer damages), other factors affecting the speed, certainty and value of the transaction (including any regulatory approvals or other requirements or conditions required to close the proposed transaction) the Property or Business included or excluded from the bid, the transition services required from the Company (if any) post-closing and any related restructuring costs, and the likelihood and timing of consummating such transaction, each as determined by the Monitor, the Company and the Majority Supporting Bondholders;

b. identify the highest or otherwise best offer for the Property or Business received at the Auction (such bid then being a Successful Bid and the bidder making such bid then being a Successful Bidder); and

c. If considered appropriate by the Monitor, the Company and the Majority Supporting Bondholders, identify the next higher or Best Qualified Bid (the **"Alternate Bid"** and such bidder, the **"Alternate Bidder"**); and

d. communicate to Qualified Bidders selected to participate at the Auction the identity of the Successful Bidder, the Alternate Bidder, if any, and the details of the Successful Bid and Alternate Bid, if any.

4. The determination of the Successful Bid(s) and the Alternate Bid(s) by the Monitor, the Company and the Majority Supporting Bondholders at the conclusion of the Auction, shall be final, subject to approval of the Court, and the Auction shall be closed and concluded upon such Court approval.

SCHEDULE "B"
NON-APPLICANT SUBSIDIARIES

1. LCMG Limited (U.K.)
2. Less Common Metals Limited (U.K.)
3. Rare Earth Extraction Co. Limited (South Africa)
4. Great Western GQD Rare Earth Materials Proprietary Limited (South Africa)
5. Steenkampskraal Monazite Mine (Pty) Ltd. (South Africa)

Court File No. CV-15-10953-00CL

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 GREAT WESTERN MINERALS GROUP LTD.

(the "Applicant")

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

Proceedings commenced in Toronto

INITIAL ORDER

FASKEN MARTINEAU DuMOULIN LLP
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Lawyers for the Applicant, Great Western Minerals Group Ltd.

TAB I

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JAGUAR MINING INC.

Applicant

INITIAL ORDER

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

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

SERVICE

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

APPLICATION

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

PLAN OF ARRANGEMENT

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

POSSESSION OF PROPERTY AND OPERATIONS

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

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

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

and arrangements; and

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

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

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

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

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

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

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

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

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

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

RESTRUCTURING

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

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

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

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

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

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

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

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

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

SUPPORT AGREEMENT AND BACKSTOP AGREEMENT

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

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

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

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

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

NO EXERCISE OF RIGHTS OR REMEDIES

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

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

NO INTERFERENCE WITH RIGHTS

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

CONTINUATION OF SERVICES

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

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

NON-DEROGATION OF RIGHTS

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

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

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

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

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

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

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

APPOINTMENT OF MONITOR

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

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

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

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

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

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

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

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

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

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

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

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

reasonably practicable following delivery to the Ad Hoc Committee;

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

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

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

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

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

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

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

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

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

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

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

APPROVAL OF FINANCIAL ADVISORS' ENGAGEMENT

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

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

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

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

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

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

Second - Directors' Charge (to the maximum amount of $150,000);

Third – Renvest Security; and

Fourth – the Administration Charge (to a maximum of $4,500,000) (the "**Subordinated Administration Charge**").

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

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

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

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

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

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

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

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

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

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

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

SERVICE AND NOTICE

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

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

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

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

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

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

SEALING OF CONFIDENTIAL EXHIBITS

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

GENERAL

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

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

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

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

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

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

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

DEC - 3 2013

NB

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JAGUAR MINING INC. (Applicant)

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

INITIAL ORDER

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Lawyers for the Applicant,
Jaguar Mining Inc.

Court File No.

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 BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS)LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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(CCAA Initial Application)

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