SUPERIOR COURT
(Commercial Division)

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-11-048114-157

DATE: August 15, 2016

PRESIDING: THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

WABUSH IRON CO. LIMITED

Debtor/Respondent

- and -

FTI CONSULTING CANADA INC.

Monitor

- and -

ROYAL BANK OF CANADA

Creditor/Petitioner

MOTION TO LIFT THE STAY OF PROCEEDINGS WITH RESPECT TO WABUSH IRON CO. LIMITED
Section 11 of the *Companies' Creditors Arrangement Act*

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Section 11 of the *Companies' Creditors Arrangement Act*

TO THE HONOURABLE STEPHEN W. HAMILTON, J.S.C. OR ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR CORT, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE DISTRICT OF MONTRÉAL, THE ROYAL BANK OF CANADA SUBMITS:

A. SCOPE AND PURPOSE OF MOTION

1. The Creditor/Petitioner, Royal Bank of Canada ("**RBC**"), seeks an order lifting the stay of proceedings in the within CCAA proceeding in respect of the Debtor/Respondent, Wabush Iron Co. Limited.

2. RBC seeks to lift the stay of proceedings as part of its motion to add Wabush Iron Co. Limited as a defendant in RBC's counterclaim in a proceeding in Newfoundland and Labrador, bearing Court File No. 2003 01T 3807 (the "**Newfoundland Proceeding**").

3. The Newfoundland Proceeding was commenced by Cliffs Mining Company "as Managing Agent of Wabush Mines" in 2003. "Wabush Mines" was described by Cliffs Mining Company as an "unincorporated contractual joint venture" of Stelco Inc. (now US Steel Canada),

Dofasco Inc. (now ArcelorMittal Dofasco Inc.), and Wabush Iron Co. Ltd. "Wabush Mines" was a precursor to Wabush Mines, a Mises-en-Cause in the within CCAA proceeding.

4. In 2014, RBC sought and was granted leave to commence a counterclaim against Cliffs Mining Company.

5. In response to that counterclaim, Cliffs Mining Company disclaimed any personal liability for the acts or omissions of "Wabush Mines", including Wabush Iron Co. Ltd. Cliffs Mining Company stated that notwithstanding its pleading "as Managing Agent of Wabush Mines", that any relief sought by RBC by counterclaim must be sought as against the members of "Wabush Mines", including Wabush Iron Co. Limited.

6. RBC has applied to the Court in the Newfoundland Proceeding to add parties to its counterclaim, including Wabush Iron Co. Limited.

7. In order to fully constitute the Newfoundland Proceeding, Wabush Iron Co. Limited must be added as a party. To that end, RBC requires that the stay of proceedings in respect of Wabush Iron Co. Limited be lifted for that specific purpose.

B. FACTS

Background

8. On December 17, 1996, RBC entered into a Master Lease Agreement (the "**Lease**") with "Cliffs Mining Company in its capacity as Managing Agent for Wabush Mines". In subsequent pleadings, Wabush Mines was described as "an unincorporated contractual joint venture" of Stelco Inc., Dofasco Inc., and Wabush Iron Co. Ltd.

9. The Lease was in relation to certain equipment used by Cliffs Mining Company in the operation of the Wabush Mine in Labrador, which operation forms a significant part of the subject matter of the within CCAA proceeding.

10. The Lease described in part the liability relationship between RBC, Cliffs Mining Company, and each of Stelco Inc., Dofasco Inc., and Wabush Iron Co. Ltd. as follows:

53. Liability of each Joint Venturer

53.1 The liability of each Joint Venturer in respect of any Obligation in the Lease and Leasing Schedules shall be as follows:

- Wabush Iron Co. Ltd.: 37.87% thereof

- Stelco Inc.: 37.87% thereof

- Dofasco Inc.: 24.26% thereof.

11. On September 4, 2003, RBC provided Cliffs Mining Company with notice of default under the Lease. RBC states that Cliffs Mining Company failed in its obligations under the Lease. Cliffs Mining Company failed to maintain the leased equipment in good operating condition and repair and thereafter has sought to benefit from its failure to comply with its obligations under the Lease. In particular, Cliffs Mining Company sought the benefit of a lower appraised value for the equipment (and therefore, a lower purchase price under the Lease) because of its poor condition.

12. RBC states that this default entitled RBC to payment of the "Fair Market Value Cap" of the leased equipment, minus payments made to that date by Cliffs Mining Company. That amount was calculated as $1,690,582.02.

13. Further, Section 30.1 of the Lease provides:

    Any Overdue Payment shall bear interest at the rate of 18% per annum calculated and compounded monthly whether before or after judgement, from the date it is due until paid.

<u>Outstanding Litigation</u>

14. Cliffs Mining Company commenced an action "in its capacity as Managing Agent for Wabush Mines" against RBC on October 9, 2003. In that action, Cliffs Mining Company sought an order compelling RBC to accept payment substantially below the Fair Market Value Cap in exchange for ownership the disputed equipment.

15. During the course of the Newfoundland Proceeding, Cliffs Mining and RBC were parties to litigation in Quebec based upon a nearly identical "Master Lease Agreement" (the "**Quebec Proceeding**"). In fact, the same section (section 53.1) in both Master Lease Agreements was relied upon by Cliffs Mining to attribute liability only to the "Wabush Mines" joint venturers, including Wabush Iron Co. Limited, in respective proportions.

16. In 2010, RBC was wholly successful in the Quebec Proceeding, with the Quebec Court of Appeal finding Cliffs Mining 100% liable in its personal capacity, with Wabush Iron Co. Limited, Stelco Inc. and Dofasco Inc. jointly and severally liable to the extent set out in Section 53.1 of the Quebec "Master Lease Agreement".

17. On February 13, 2014, RBC filed an Amended Defence and Counterclaim in the Newfoundland Proceeding. In its Counterclaim, RBC claimed as against "Cliffs Mining Company in its capacity as Managing Agent for Wabush Mines" for the full Fair Market Value Cap of the equipment, plus compound interest as described above.

18. Subsequently, Cliffs Mining Company pleaded in its Defence to Counterclaim, and has represented to the Court in the Newfoundland Proceeding, that any alleged liability of Cliffs Mining Company is, in fact, properly the liability of "Wabush Mines" and its constituent member corporations, including Wabush Iron Co. Ltd.

19. In January 2015, on the basis of that representation from Cliffs Mining Company, RBC applied to the Supreme Court of Newfoundland and Labrador to amend its Amended Defence and Counterclaim to add Stelco Inc., Dofasco Inc., and Wabush Iron Co. Ltd. as defendants by counterclaim (**Exhibit 1**).

20. On January 23, 2015, Cliffs Mining Company discontinued its claim against RBC.

21. RBC's motion to amend its Amended Statement of Defence and Counterclaim to add Stelco Inc., Dofasco Inc., and Wabush Iron Co. Ltd., served and filed in January 2015, remains outstanding. It is tentatively scheduled to be heard in Newfoundland in October 2016.

22. RBC subsequently learned, in part as a result of the within CCAA proceeding, that the interests of Stelco Inc. and Dofasco Inc. in "Wabush Mines" were sold to Wabush Resources Inc. as of 2010.

23. RBC filed its proof of claim in the within proceeding on December 18, 2015.

24. Wabush Iron Co. Limited, as a member of "Wabush Mines" and a signatory to the Lease, remains indebted to RBC for the amounts set out in the Amended Defence and Counterclaim in the Newfoundland Proceeding.

25. As at the date of the Initial CCAA order in this matter, dated May 20, 2015, the pre-filing amount claimed by RBC against Wabush Iron Co. Limited is $13,795,841.72, inclusive of principal and interest in accordance with the Lease.

26. For the benefit of this Honourable Court, such further exhibits as necessary for the factual and evidentiary record in the Newfoundland Proceeding and the hearing of this motion are appended to the Affidavit of Gary Ivany, which is filed in support of this motion.

C. LAW AND ARGUMENT

Test to Lift a Stay of Proceedings

27. Section 11 of the CCAA provides:

> *Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.*

28. The test to lift a stay of proceedings in a CCAA context is well-established. The Court's discretion to lift a stay is not limited to narrow categories of cases, but should only be exercised where there are sound reasons consistent with the CCAA to do so (**Exhibit 2** - *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72 at paras 66 – 68).

29. Factors that should be considered in a motion to lift a stay include:

    (a) the balance of convenience;

    (b) the relative prejudice to the parties; and

    (c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay.

30. Courts have identified a number of instances in which lifting a stay of proceedings was appropriate, including:

    (a) a plan is likely to fail;

    (b) the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

    (c) the applicant shows necessity for payment;

(d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

(e) it is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;

(f) after the lapse of a significant period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;

(g) there is a real risk that a creditor's loan will become unsecured during the stay period;

(h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;

(i) it is in the interests of justice to do so (**Exhibit 3** - *Canwest Global Communications Corp., Re*, 2011 ONSC 2215 at para 26).

31. In *Manitoba Capital Fund Ltd. Partnership v. Royal Bank* (**Exhibit 4** - *Manitoba Capital Fund Ltd. Partnership v. Royal Bank*, 2001 MBQB 197 at para 24), the Manitoba Court of Queen's Bench held that in a BIA stay of proceedings (rather than a CCAA) could be lifted where "the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties."

The Stay of Proceedings Should be Lifted

32. RBC states that there are sound commercial reasons to lift the stay in respect of Wabush Iron Co. Limited.

33. The balance of convenience favours RBC. From a procedural and evidentiary perspective, Wabush Iron Co. Limited is a necessary party to the Newfoundland Proceeding. Lifting the stay would not grant RBC any advantage over secured or unsecured creditors. Rather, it would afford RBC the opportunity to fully constitute the Newfoundland Proceeding.

34. Without Wabush Iron Co. Limited's participation as a party, RBC will be limited in its recourse to the evidence of Wabush Iron Co. Limited in the Newfoundland Proceeding. That evidence is crucial to the determination of liability in the Newfoundland Proceeding. If the stay is not lifted, it is arguable that RBC may not even be able to compel Wabush Iron Co. Limited to make non-party production of evidence or witnesses. Such a determination would seriously hamper RBC's ability to prosecute its case, particularly with the significant passage of time since the events in question took place.

35. On the other hand, Wabush Iron Co. Limited has been aware of the Newfoundland Proceeding for several years. Until 2014, RBC understood that Cliffs Mining Company was conducting its claim against RBC in the Newfoundland Proceeding with the explicit authority and knowledge of Wabush Iron Co. Limited.

36. Should the stay be lifted, Wabush Iron Co. Limited would be required to participate in the Newfoundland Proceeding for the purpose of document disclosure and examinations for discovery. During the course of the Quebec Proceeding, Wabush Iron Co. Limited was a participant in nearly identical litigation in respect of the Quebec operation of Wabush Mines.

37. Wabush Iron Co. Limited was served with RBC's application to add it as a party to the Newfoundland Proceeding in January 2015, several months before the within proceeding was commenced. The inconvenience to Wabush Iron Co. Limited in responding to RBC's application in the Newfoundland Proceeding and the time and cost associated with participating in that action is less than what will be suffered by RBC if this motion is dismissed.

38. RBC would be seriously prejudiced if the stay is not lifted. During the course of the Newfoundland Proceeding, Cliffs Mining Company held itself out as a representative binding the "Wabush Mines" joint venturers, including Wabush Iron Co. Limited. It was only after 11 years of litigation that Cliffs Mining Company resiled from that position. RBC had always intended that the joint venturers of "Wabush Mines" be bound by the determination of Cliffs Mining's claim and RBC's counterclaim.

39. If the stay is not lifted, RBC will be prevented from pursuing Wabush Iron Co. Limited for the significant damages suffered by RBC to date. This would prejudice RBC's case as it relates to each of Wabush Iron Co. Limited, Cliffs Mining Company, and the other joint venturers of "Wabush Mines".

40. RBC ought not to be prejudiced by the conduct of Cliffs Mining Company in advancing the Newfoundland Proceeding. Particularly where Wabush Iron Co. Limited had knowledge of that proceeding and was served with the relevant application pre-filing.

41. If Wabush Iron Co. Limited were to suffer any prejudice by an order lifting the stay of proceedings, RBC states that such prejudice is significantly less serious than that suffered by RBC.

42. As stated above, Wabush Iron Co. Limited has been aware of the Newfoundland Proceeding for over 12 years. During that time, it has litigated the Quebec Proceeding from pleadings to the Quebec Court of Appeal. It cannot be said that Wabush Iron Co. Limited has not had ample opportunity to gather evidence and witness information for a parallel ongoing proceeding.

43. Further, Wabush Iron Co. Limited is the only surviving member of "Wabush Mines" from 1999 to today. With the sale of Stelco Inc.'s and Dofasco Inc.'s interests to Wabush Resources Inc. in 2010, only Wabush Iron Co. Limited remains as a party with a continuous interest in the business of Wabush Mine, including the disputed equipment at issue in the Newfoundland Proceeding.

44. With respect to the merits of the Newfoundland Proceeding, to the extent that such an analysis is relevant, RBC submits that there are ample grounds to find that action to be meritorious.

45. The Newfoundland Proceeding relates to an alleged breach of the Lease by Cliffs Mining Company and each of the joint venturers of "Wabush Mines". There is a considerable evidentiary record with respect to the maintenance of the disputed equipment, as well as the dispute regarding the exercise of certain purchase options under the Lease. The Newfoundland Proceeding is case managed, and has been the subject of a number of interlocutory proceedings regarding both procedure and substance. At no point has RBC's case been deemed to be without merit or otherwise struck, in whole or in part, for any such reason.

46. Further, RBC has been successful before the courts of Quebec in nearly identical litigation at both the trial and appeal levels. RBC states that the Newfoundland Proceeding has significant merit.

47. RBC therefore respectfully submits that there are sound commercial reasons for this Honourable Court to exercise its discretion to lift the stay of proceedings in respect of Wabush Iron Co. Limited.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

1. **GRANT** the present Motion;

2. **ISSUE** an order lifting the stay of proceedings in respect of Wabush Iron Co. Limited to permit RBC to bring a motion in the Newfoundland Proceeding seeking to add Wabush Iron Co. Limited as a defendant to RBC's counterclaim.

3. **THE WHOLE** with costs in the event this Motion is contested.

St. John's, August 15, 2016

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Solicitors for the Creditor/Petitioner, Royal Bank of Canada

SUPERIOR COURT
(Commercial Division)

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-11-048114-157

DATE: July 15, 2016

PRESIDING: THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

WABUSH IRON CO. LIMITED

Debtor/Respondent

\- and -

FTI CONSULTING CANADA INC.

Monitor

\- and -

ROYAL BANK OF CANADA

Creditor/Petitioner

LIST OF EXHIBITS
(In support of the *motion to lift the stay of proceedings with respect to Wabush Iron Co. Limited*)

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1 RBC application to add parties as defendants by counterclaim (Court File No. 2003 01T 3807)

2 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72

3 *Canwest Global Communications Corp., Re*, 2011 ONSC 2215

4 *Manitoba Capital Fund Ltd. Partnership v. Royal Bank*, 2001 MBQB 197

St. John's, August 15, 2016

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Solicitors for the Creditor/Petitioner, Royal Bank of Canada

311453

EXHIBIT 1

COPY

2003 01T No. 3807

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

PLAINTIFF

AND:

ROYAL BANK OF CANADA

DEFENDANT

AND BETWEEN

ROYAL BANK OF CANADA

PLAINTIFF BY COUNTERCLAIM

AND:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

DEFENDANT BY COUNTERCLAIM

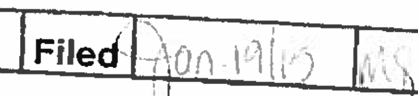
SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2003 01G 3807
Date of Filing Document:	January 19, 2015
Name of Party Filing or Person:	Royal Bank of Canada
Application to which Document being filed relates:	Application to add parties as Defendants by Counterclaim and make consequential amendments to pleadings pursuant to Rules 7.04, 15.01 and 15.02 of the *Rules of the Supreme Court, 1986*
Statement of Purpose in Filing:	To commence the Application

INTERLOCUTORY APPLICATION
(Inter Partes)

NATURE OF THE APPLICATION

1. The Defendant/Plaintiff by Counterclaim, Royal Bank of Canada ("RBC"), seeks an order:

254592 v3



(a) adding Wabush Iron Co. Limited, Stelco Inc. and Dofasco Inc. as Defendants by Counterclaim pursuant to Rules 7.04, 15.01 and 15.02;

(b) for leave to file an Amended Amended Statement of Defence and Counterclaim pursuant to Rules 15.01 and 15.02; and

(c) for costs of this Application.

PROCEDURAL HISTORY

2. The procedural history of this matter, insofar as it is relevant to the within Application, is as follows:

(a) The Statement of Claim of Cliffs Mining was issued on October 9, 2003.

(b) The Statement of Defence of RBC was issued on July 15, 2004.

(c) RBC filed a Notice of Intention to Proceed on November 1, 2010.

(d) RBC's filed its List of Documents on February 20, 2011.

(e) Cliffs Mining's filed its List of Documents on June 7, 2011.

(f) Mediation took place on January 30, 2013.

(g) RBC filed a Notice of Intention to Proceed on March 27, 2013.

(h) RBC filed an Interlocutory Application to amend the Statement of Defence to add a Counterclaim against Cliffs Mining on November 4, 2013.

(i) RBC was granted leave to file the Amended Statement of Defence and Counterclaim by order of Justice Faour on February 10, 2014.

(j) RBC filed its Amended Statement of Defence and Counterclaim on February 13, 2014.

(k) Cliffs Mining filed an Interlocutory Application seeking summary trial dismissing the Counterclaim on May 20, 2014.

(l) On June 5, 2014, Cliffs Mining's Application for summary trial was set for a hearing on October 23 – 24, 2014.

(m) RBC filed an Application to amend the Amended Statement of Defence and Counterclaim on or about September 19, 2014.

(n) RBC filed an Application for Security for Costs on or about September 19, 2014.

(o) RBC filed an Application for Case Management on or about September 19, 2014.

(p) The parties appeared before Hon. Madam Justice Butler on October 1, 2014 for a status update.

(q) The parties attended a case management conference before the Hon. Madam Justice Marshall on November 19, 2014.

(r) The parties attended a further case management conference before the Honourable Madam Justice Marshall on December 17, 2014, at which time it was determined that all outstanding applications would be heard by Her Honour on March 9 – 11, 2015, including:

(i) Cliff's Mining's Application for Summary Trial Dismissing the Counterclaim;

(ii) RBC's Application to Amend the Amended Statement of Defence and Counterclaim to add parties as Defendants to the Counterclaim and for other amendments to the pleadings to properly reflect the capacity of Cliffs Mining in the action; and

(iii) RBC's Application for Security for Costs.

MATERIAL FACTS

Background

3. In a letter dated September 4, 2003 RBC provided written notice to Cliffs Mining that it had defaulted on a condition of the Master Lease Agreement for the lease of certain mining equipment (the "**Notice**"). RBC asserted that Cliffs Mining had failed to maintain the equipment in good operating condition and repair.

4. In the Statement of Claim issued out of this Honourable Court on October 9, 2003, Cliffs Mining claimed that there had not been an Event of Default under the Master Lease Agreement and that the Notice was invalid.

5. Cliffs Mining claimed as plaintiff:

(a) A declaration that Cliffs Mining is the owner of two Bucyrus Electric Shovels (the "**Equipment**") pursuant to section 35 of the Master Lease Agreement;

(b) A declaration that the purchase price of the Equipment is $455,140.00;

(c) A declaration that Cliffs Mining owes RBC $108,020.00 in full satisfaction of the purchase price of the Equipment;

(d) An order requiring RBC to accept $108,020.00 in full satisfaction of the purchase price of the Equipment;

(e) A declaration that Cliffs Mining has not committed any Event of Default as defined in the Master Lease Agreement;

(f) An order requiring RBC to discharge any registrations made pursuant to the *Personal Property Security Act*, SNL 1998 c. P-7.1 with respect to the Equipment;

(g) Costs; and

(h) Such other relief as this Honourable Court deems just.

6. On November 4, 2013, RBC commenced an Application to amend its Statement of Defence to add a Counterclaim against Cliffs Mining. The Counterclaim alleges breach of lease by Cliffs Mining and seeks damages and interest for the lost value of the Equipment in accordance with the terms of the Master Lease Agreement.

7. In response to RBC's Application, and for the first time since Cliffs Mining filed its Statement of Claim in 2003, Cliffs Mining stated that although it commenced the 2003 action as plaintiff, it has no liability under the Master Lease Agreement and therefore it could not be a proper party to the Counterclaim. Cliffs Mining stated that any Counterclaim, if allowed, must be commenced by separate proceeding against the alleged partners to the unincorporated joint venture Wabush Mines, being Wabush Iron Co. Limited, Stelco Inc. and Dofasco Inc. (the "**Operators**"), for whom Cliffs Mining acted as Managing Agent.

8. On February 10, 2014, RBC was granted leave to file its Amended Statement of Defence and to issue a Counterclaim against Cliffs Mining by Order of Justice Faour.

9. On May 20, 2014, Cliffs Mining commenced an Application seeking summary trial dismissing the Counterclaim. Cliffs Mining repeated its assertion that it has no contractual liability to RBC under the Master Lease Agreement, and therefore cannot be sued by way of Counterclaim (or, in fact, in any other proceeding) for RBC's damages under the Master Lease Agreement.

The Quebec Proceeding

10. During the course of the within proceeding, RBC commenced a proceeding against the Operators and Cliffs Mining with respect to the same dispute under a similar Master Lease Agreement.

11. In the Quebec Proceeding, Cliffs Mining counterclaimed against RBC seeking, as it does in this proceeding, ownership of the Equipment upon payment of the Purchase Price determined by the Court. Within that counterclaim, Cliffs Mining brought a motion to amend its counterclaim to remove any rights or obligations of Cliffs Mining with respect to ownership of the Equipment. Cliffs Mining further sought to clarify that it had no liability under the Master Lease Agreement and acted only as Managing Agent for the Operators and not in its own right.

12. Cliffs Mining's application was denied, and that denial was upheld on appeal to the Quebec Court of Appeal.

13. RBC was ultimately successful at the trial of the Quebec Proceeding, which was upheld on appeal in 2010. On the issue of liability, Cliffs Mining was held 100% liable for the purchase price of the Equipment, contractual interest and taxes. The Operators were held liable jointly and severally to the extent set out in the Master Lease Agreement.

Adding the Operators and Amending RBC's Pleading

14. As a result of the foregoing and Cliffs Mining's position that it has no liability under the Master Lease Agreement, the Operators are necessary parties for the complete and effective adjudication of this proceeding.

15. If Cliffs Mining's application seeking summary trial dismissing the Counterclaim is successful, and the Operators are not first added as Defendants by Counterclaim, RBC will be seriously prejudiced. It is therefore in the interest of justice that the Operators be added as Defendants by Counterclaim.

16. Further, RBC is also seeking to make consequential amendments to the Amended Defence and Counterclaim to particularize its claim as against Cliffs Mining and the Operators.

RELIEF SOUGHT

17. RBC therefore requests an Order:

    (a) that the Operators be added as Defendants to the Counterclaim;

    (b) granting leave to RBC to file an Amended Amended Statement of Defence and Counterclaim in the form attached to this Application;

    (c) Cliffs Mining pay RBC its costs of this Application; and

    (d) such further and other relief as counsel may advise and this Honourable Court deems just.

DATED at St. John's, in the City of St. John's, in the Province of Newfoundland and Labrador, this 19th day of January, 2015.

Twila E. Reid
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TO: **Paul Burgess**
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Solicitors for the Plaintiff/Defendant by Counterclaim, Cliffs Mining Company

AND TO: **Wabush Iron Co. Limited**
200 Public Square
Suite 3300
Cleveland, OH, USA 44114

AND TO: **Junior Sirivar**
McCarthy Tétrault
Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto ON M5K 1E6
Solicitors for Stelco Inc.

AND TO: **Dofasco Inc.**
1330 Burlington Street East
P.O. Box 2460
Hamilton, ON L8N 3J5

AND TO: **Supreme Court of Newfoundland and Labrador**
Registry (General Division)
309 Duckworth Street
P.O. Box 937
St. John's, NL A1C 5M3

Issued at St John's, NL this 19 day of Jan 2015

[signature]

COURT
OFFICER

2003 01 T No. 3807

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

CLIFFS MINING COMPANY ~~in its capacity as Managing Agent of WABUSH MINES~~

PLAINTIFF

AND:

ROYAL BANK OF CANADA

DEFENDANT

AND BETWEEN

ROYAL BANK OF CANADA

PLAINTIFF BY COUNTERCLAIM

AND:

CLIFFS MINING COMPANY ~~in its capacity as Managing Agent of WABUSH MINES~~

FIRST DEFENDANT BY COUNTERCLAIM

AND:

WABUSH IRON CO. LIMITED

SECOND DEFENDANT BY COUNTERCLAIM

AND:

STELCO INC.

THIRD DEFENDANT BY COUNTERCLAIM

AND:

DOFASCO INC.

FOURTH DEFENDANT BY COUNTERCLAIM

DRAFT

AMENDED AMENDED STATEMENT OF DEFENCE AND COUNTERCLAIM

1. The Defendant, Royal Bank of Canada, admits paragraph 2 of the Statement of Claim.

2. The Defendant denies each and every other allegation in the Statement of Claim as if same were set forth herein and traversed seriatim.

3. With respect to paragraph 3 of the Statement of Claim, the Defendant admits entering into a Lease Agreement with the Plaintiff on or about December 17, 1996 (the "Master Lease Agreement"). With respect to the Master Lease Agreement, the Defendant states that same needs to be read in its entirety together with the respective Schedules being Schedule "A", Lease No. 08-73566 and Schedule "A", Lease No. 08-74187 (the "Schedules").

4. As to paragraph 4 of the Statement of Claim, the Defendant states that section 11 of the Master Lease Agreement deals with maintenance and use and states as follows:

"11. Maintenance and Use

11.1 Lessee will, as its own expense:

(a) maintain the System in good operating condition and repair (ordinary wear and tear excepted);

(b) comply in all respects with all recommendations, or requirements of the Supplier regarding the System or any part or component thereof or accessory thereto, as may be necessary to preserve all Warranties by such Supplier;

(c) repair and replace any damage to the System caused by the operation or use thereof by Lessee, its officers, employees and servants or by others; and

(d) replace any components, including power plants, as may become necessary or, in the reasonable opinion of Lessee, desirable for the proper use and operation of the System.

11.2 All replacement parts which may, in the course of maintaining the Equipment in good operating condition and repair, at any time and from time to time, during the term of each Lease, be made to, or placed in or upon, the Equipment thereby leased, shall be free and clear of all Adverse Claims.

11.3 All replacement parts, of whatever kind or nature, made to, or placed in or upon the Equipment, shall belong to, and become the property of Lessor and shall be subject to all the terms and conditions of this lease as if they formed part of the Equipment."

5. The words System and Equipment are defined terms in the Master Lease Agreement and are defined as follows in the definitions section:

"(g) "Equipment" means the equipment which Lessor purchases and leases to Lessee pursuant to the terms and conditions of any Lease and when or where required in the context or circumstances, individual items thereof.

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(v) *"System" means the Equipment and the Licensed Software."*

6. The Defendant states that the Plaintiff failed to maintain the equipment in accordance with the provisions of section 11 of the Master Lease Agreement which resulted in a deterioration of the Equipment and a reduction in the value of the Equipment for purposes of the appraisal.

7. As to paragraph 5 of the Statement of Claim, the Defendant states that the entirety of paragraph 25 of the Master Lease Agreement needs to be reviewed and same is set forth herein for ease of reference dealing with the option to purchase, return conditions, as follows:

"25. Option to Purchase/Return Conditions

25.1 Provided Lessee shall not be in default under any Obligation, Lessor hereby grants to Lessee an option to purchase whatever title Lessor may have to the Equipment for the Purchase Price and at the time or times set forth in Item 4 of the relevant Leasing Schedule.

Provided Lessee shall not be in default under any Obligation and to the extent Lessor has the right to grant such an assignment, Lessor hereby grants to Lessee the right to take an assignment of Lessor's rights under any license of Licensed Software for the option price and at the time or times set forth in the relevant item of the relevant Leasing Schedule.

25.2 Such option to purchase may be exercised by Lessee by giving to Lessor notice of Lessee's intention to exercise such option, at least thirty (30) days prior to the date of intended purchase, describing the Equipment with respect to which such option is being exercised.

The right to take an assignment of Lessor's rights under any license of Licensed Software may be exercised by Lessee by giving to Lessor notice of Lessee's intention to exercise such right, at least thirty (30) days prior to the date of intended assignment, describing the Licensed Software with respect to which such right is being exercised.

25.3 The intended purchase and sale and/or assignment of license rights shall be concluded on a date specified in the said notice falling in or after, but not before, the option date stated in the relevant item of the relevant Leasing Schedule, but in any event not later than the termination date of term pertaining to the Equipment and/or Licensed Software being purchased.

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25.4 Upon the exercise of such option, there shall be a binding agreement for the sale and purchase of the Equipment and/or assignment of license rights in the Licensed Software described in the said notice on the terms and conditions provided herein. The Purchase Price shall be paid to Lessor at the time of the conclusion of such sale.

25.5 Upon any such purchase and/or assignment of license rights and/or license rights so assigned, Lessor shall transfer the Equipment so purchased free and clear of all interests of Lessor under this Lease Agreement and any Leasing Schedule and thereupon this Lease shall terminate with respect to the Equipment and/or Licensed Software so purchased.

25.6 Lessee shall bear the cost of any Provincial or Federal taxes, licence or registration fees or other assessments or charges imposed on, or connected with, the transfer of title to and ownership of the Equipment.

25.7 Should Lessee not exercise such option, Lessee shall then return the Equipment subject to the following:

Lessee agrees that each piece of Equipment must be, as of the termination date, in strict conformance with all the following minimum physical return conditions:

1) The Equipment shall have been operated and maintained in accordance with the Manufacturer's standard operating and maintenance procedure and evidenced by all maintenance records and logs as required under the Manufacturer's available guarantee.

2) At the time of return,

a) all Equipment shall be returned in the condition in which it is required to be maintained The Equipment shall be free of any rust of corrosion, except surface rust and corrosion, that would adversely effect the structural integrity or mechanical operations of the Equipment. All advertisements, logos or identifying marks of the Lessee shall be removed;

b) Lessee agrees that 30 days prior to the expiration of the Leasing Schedule, Lessor may cause an authorized manufacturer's representative to inspect all items of Equipment, at Lessee's expense, to enable Lessor to determine the condition of the Equipment including, without limitation, a component reconciliation. Said component reconciliation shall determine, using information provided by the inspection and a review of applicable maintenance records, the number of operational hours in excess of 50% of useful life or of 50% of time between manufacturer recommended replacement, overhaul or rebuild for

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any component parts. Expected intervals between component replacement, overhaul or rebuild supplied by the manufacturer shall be used as the basis of such reconciliation. If the operational hours of any such components exceed either 50% of its remaining useful life or 50% of time recommended between replacement, overhaul or rebuild, then Lessee shall compensate Lessor by the following formula:

Amount due to Lessor = z(y-0.5x)/x

x = Total number of allowable hours between replacement, overhaul or rebuild on component.

y = Total number of hours since new, or last overhaul, rebuild or replacement.

z = The then current cost to Lessor for replacement, overhaul or rebuild of the component from the manufacturer.

The component reconciliation shall be completed not later than 10 days prior to the last day of the Lease Term of the Lease and Lessee shall be obligated to pay Lessor for such excess component usage on the last day of the Lease Term:

c) the Equipment shall be operational and able to perform its assigned task(s), normal wear and tear accepted;

d) if required by Lessor, Lessee shall provide free storage in operating condition for the Equipment on Lessee's premises in order to sell the Equipment FOB mine site if possible;

e) upon being sold the Equipment shall be deinstalled, disassembled and properly packed by Lessee at Lessee's expense;

f) the Equipment shall be loaded on an equipment trailer suitable for shipping of such equipment by Lessee at Lessee's expense; and

g) the Lessee agrees to pay at the date of return to the Lessor two per cent (2%) of Net System Cost as remarketing fee.

In the case where any of these conditions are not met, Lessee shall be deemed to have exercised its option to purchase the Equipment at the cap of Fair Market Value as stipulated in Leasing Schedule."

8. Of particular significance is the definition of the word Obligation set out in the Definition section of the Master Lease Agreement, which reads as follows:

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"(1) "Obligation" means any obligation to comply with any provision of any Lease or any other agreement between Lessor and Lessee."

9. The Defendant states that the Plaintiff failed in its Obligation under the Lease in that the Plaintiff failed to maintain the System in good operating condition and repair and that the Plaintiff has sought to benefit from its failure to comply with its obligations under the Master Lease Agreement.

10. The particular benefit being that by failing to maintain the Equipment, the Plaintiff knew that the appraised value of the Equipment would be less than if the Equipment was properly maintained and that the Plaintiff would therefore benefit from its own wrongdoing.

11. The Defendant states that the Master Lease Agreement contemplates this situation and deals with same in section 25 of the Master Lease Agreement by stipulating in subsection 25.1 that the purchase option is only exercisable when the *"Lessee shall not be in default under any Obligation"* and that failing this requirement, the Lessee is required to return the Equipment in accordance with the remainder of the provisions of section 25 and where it fails to return the Equipment in accordance with section 25, the *"Lessee shall be deemed to have exercised its option to purchase the equipment at the cap of Fair Market Value as stipulated in the Leasing Schedule."*

12. The Defendant states that the Fair Market Value cap was correctly set out in paragraph 7 of the Plaintiff's Statement of Claim, same being One Million Six Thousand Six Hundred Twenty-One Dollars and Sixty Cents ($1,006,621.60) for each Shovel (as defined in the Plaintiff's Statement of Claim) for a total value of $2,013, 324.20.

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13. The Defendant states that it has received payments to date in the amount of $347,120.00 which should be deducted from the Fair Market Value cap and that the Defendant is therefore entitled to the difference between the Fair Market Value cap and the amount received to date, which the Defendant calculates as follows:

Fair Market Value	$2,013,324.20
Less Payments Received	-$347,120.00
	$1,666,204.20

14. The Defendant states that the Plaintiff:

(a) failed to comply with section 11 of the Master Lease Agreement;

(b) purported to exercise the option to purchase set out in section 25 of the Master Lease Agreement notwithstanding the fact that the Plaintiff was in default under its Obligation(s) under the Master Lease Agreement;

(c) attempted to allow the System and Equipment to fall into state of disrepair and to benefit from its own wrongdoing by attempting to have the System and/or Equipment appraised at a value that was not in accordance with the appraisal provisions set forth in the Master Lease Agreement;

(d) the Plaintiff had the System and/or Equipment appraised by appraisers who placed an unreasonably low value on the System and/or Equipment in the circumstances; and

(e) the Plaintiff purported to exercise its option contrary to the spirit and intent of the terms of the Master Lease Agreement.

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15. The Defendant therefore claims that it is entitled to:

(a) the Fair Market Value cap less payments made to date, which the Defendant calculates as follows:

Fair Market Value	$2,013,324.20
Less Payments Received	-$347,120.00
	$1,666,204.20

(b) costs; and

(c) such further and other relief as this Honourable Court may deem just.

~~DATED at St. John's, in the Province of Newfoundland and Labrador, this 15th day of July, A.D. 2004.~~

~~Neil L. Jacobs~~
~~STEWART MCKELVEY STIRLING SCALES~~
~~Suite 1100, Cabot Place~~
~~100 New Gower Street~~
~~St. John's, NL A1C 6K3~~
~~**Solicitors for the Defendant**~~

~~TO:~~ ~~Christopher J. Cosgriffe~~
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~~70 The Esplanade, Suite 401~~
~~Toronto, ON M5E 1E2~~
~~**Solicitors for the Plaintiff**~~

~~c/o Paul Burgess~~
~~Burgess Law Offices~~
~~PO BOX 23106~~
~~Suite 308, Terrace on the Square~~
~~St. John's, NL~~
~~A1B 4J9~~

~~TO:~~ ~~Registry of the Supreme Court of Newfoundland and Labrador~~
~~Duckworth Street~~
~~St. John's, NL~~

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COUNTERCLAIM

Parties

1. The Plaintiff/Defendant by Counterclaim, Cliffs Mining Company ("Cliffs Mining"), is a company extra provincially registered to do business in the Province of Newfoundland & Labrador. Its registered office outside of NL is: 200 Public Square, Suite 3300, Cleveland, Ohio, USA, 44114. ~~is the Managing Agent on behalf of Wabush Mines, which operates a mine in Wabush, Newfoundland and Labrador. The Plaintiff operates a head office in Cleveland, Ohio and has a local office at 235 Water Street, St. John's, NL.~~

2. Cliffs Mining purports to be the Managing Agent for Wabush Iron Co Limited, Stelco Inc., and Dofasco Inc. under the name of a purported unincorporated joint venture, Wabush Mines, which operates a mine in Wabush, Newfoundland and Labrador.

3. RBC states that with respect to the within matter, Cliffs Mining acted both as an agent but also in its own right.

4. The Defendant/Plaintiff by Counterclaim, Royal Bank of Canada ("RBC"), is a chartered bank duly incorporated pursuant to the laws of the Parliament of Canada, having its head office in Toronto, Ontario and a local office at 224-226 Water Street, NL.

5. The Second Defendant by Counterclaim, Wabush Iron Co. Limited ("Wabush Iron"), is incorporated pursuant to the laws of the State of Ohio, with its head offices in the same location as Cliffs Mining. Wabush Iron is extra-provincially registered to carry on business in Newfoundland and Labrador.

6. The Third Defendant by Counterclaim, Stelco Inc. ("Stelco"), was a corporation incorporated pursuant to the laws of Canada. In 2007, Stelco was purchased by US Steel. Stelco was amalgamated with US Steel and currently carries on business as US Steel Canada Inc. In September 2014, Stelco applied for and was granted protection from creditors under the *Companies' Creditors Arrangement Act*.

7. The Fourth Defendant by Counterclaim, Dofasco Inc. ("Dofasco"), was a corporation incorporated pursuant to the laws of Canada. In 2006, Dofasco was purchased by ArcelorMittal. Dofasco was amalgamated with ArcelorMittal and currently carries on business as ArcelorMittal Dofasco Inc.

8. Together, Wabush Iron, Stelco, and Dofasco were the partners of the unincorporated Wabush Mines joint venture (the "Operators").

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Background

9. On December 17, 1996 Cliffs Mining leased two Bucryus Erie Electric Shovels (the "Equipment") from RBC pursuant to a Master Lease Agreement (the "Lease"). The term of the Lease was for 60 months commencing July 1, 1998 terminating on June 30, 2003.

10. Section 25 of the Lease has the heading "Option to Purchase/Return Conditions". It provided that Cliffs Mining had the option to purchase the Equipment. Such option could be exercised as long as there was no default in any "Obligation".

11. "Obligation" is defined in section 1.1(l) of the Lease as meaning any obligation to comply with any provision of the Lease, or any other agreement between the parties.

12. Section 11 of the Lease states, in part:

11.1 Lessee will, at its own expense:

> *(a) maintain the System in good operating condition and repair (ordinary wear and tear expected);*
>
> *(b) comply in all respects with all recommendations or requirements of the Supplier regarding the System or any part or component thereof or accessory thereto, as may be necessary to preserve all Warranties by such supplier;*
>
> *(c) repair and replace any damage to the System caused by the operation or use thereof by the Lessee, its officers, employees and servants or by others; and*
>
> *(d) Replace any components, including power plants, as may become necessary or, in the reasonable opinion of Lessee, desirable for the proper use and operation of the System.*

13. The "System" is defined in the Lease as meaning the Equipment and the licensed software.

14. Cliffs Mining provided notice on or about May 27, 2003 of its intention to exercise its option to purchase the Equipment pursuant to section 25 of the Lease.

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15. Cliffs Mining and RBC could not agree on the Fair Market Value for the purpose of determining the purchase price pursuant to the exercise of the option.

16. The Lease defines the Fair Market Value Cap (the "Cap") for the Equipment at $2,013,324.20.

17. The Lease provided in section 1(ac) that in the event of disagreement, the Fair Market Value would be determined by two independent appraisers.

18. RBC engaged High Tower Construction Services which provided an appraisal of $770,000.00 for the Equipment on or about August 18, 2003. Cliffs Mining engaged Hunyady Appraisal Services which provided an appraisal of $140,280.00 for the Equipment on or about August 29, 2003.

19. Given the appraisals represented a significant departure from the Cap, RBC asked High Tower Construction Services to complete a maintenance review of the Equipment (the "Review").

20. The Review concluded that the Equipment had not been maintained and/or repaired to the degree required by the Lease, specifically section 11 which required Cliffs Mining to maintain the Equipment in good working condition, including repairing and replacing any damage.

21. Cliffs Mining was in default of its Obligations under the Lease. Specifically, Cliffs Mining failed to maintain the Equipment in good operating condition and repair the equipment in accordance with the provisions of section 11 of the Lease. This resulted in a deterioration of the Equipment and a subsequent reduction in value.

22. Following the results of the appraisals, RBC provided Cliffs Mining with a notice that Cliffs Mining could not properly exercise the option to purchase as it was in default of complying with maintenance Obligations under the Lease. Further, Cliffs Mining was deemed to have purchased the Equipment at the Cap.

23. Section 25 of the Lease states that the purchase option is only exercisable when the "Lessee shall not be in default under any Obligation" and that failing this requirement, the Lessee is to return the Equipment. Where the Lessee fails to return the Equipment, it is "deemed to have exercised its option to purchase the Equipment at the cap of the Fair Market Value as stipulated in the Leasing Schedule".

24. Cliffs Mining has sought to benefit from its failure to comply with its Obligations under the Lease. By failing to maintain the Equipment, Cliffs Mining knew, or ought to have known, that the value of the Equipment would be reduced. Therefore Cliffs Mining would benefit from an artificially low value when exercising the option to purchase.

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25. RBC states that Cliffs Mining is liable to RBC for breach of the Lease; specifically:

   a. Failing to comply with section 11 of the Lease;

   b. Purporting to exercise the option to purchase notwithstanding the fact that it was in default under its Obligation(s) under the Lease;

   c. Attempting to allow the System and Equipment to fall into a state of disrepair and to benefit from its own wrongdoing by attempting to have the System and/or Equipment appraised at a value that was not in accordance with the appraisal provisions set forth in the Lease;

d. Having the System and/or Equipment appraised by appraisers who placed unreasonably low value on the System and/or Equipment in the circumstances;

e. Purporting to exercise its option contrary to the spirit and intent of the terms of the Lease; and

f. Such other breaches as may appear.

26. Cliffs Mining continues to hold the Equipment in its possession. RBC also pleads and relies on the equitable remedies of restitution and unjust enrichment.

27. Further and in the alternative, Cliffs Mining was required to obtain the approval of its ~~partners~~ Operators prior to exercising the option to purchase the Equipment. Cliffs Mining failed to obtain the approval thereby it did not validly exercise the option.

28. RBC states that in respect of the foregoing, Cliffs Mining's conduct was intended to secure a benefit for Cliffs Mining in its personal capacity. As a result, Cliffs Mining is liable in its personal capacity to RBC for the actions described herein.

29. In the further alternative, RBC states that the Operators are jointly and severally liable for the conduct of Cliffs Mining described herein, and are jointly and severally liable to RBC for those amounts sought herein.

30. According to the terms of the Lease, the Operators are liable for any Obligation in the Lease in respective proportions.

31. To the extent that the conduct of Cliffs Mining described herein is not attributable, in whole or in part, to Cliffs Mining in its own right, RBC states that the Operators are liable for such conduct in accordance with:

a. the terms of the Lease; and

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b. the actual and/or apparent authority of Cliffs Mining.

32. RBC by Counterclaim repeats the foregoing and states that it is entitled to the remainder of the monies owing under the Cap, being the difference between payments received to date from Cliffs Mining and the Cap. Cliffs Mining has already made payments in the amount of $347,120.00, inclusive of $24,377.82 interest, leaving $322,742.18 to be applied against the Cap (resulting in the principal amount of $1,690,582.02 owing to RBC).

33. RBC by Counterclaim claims against Cliffs Mining in its personal capacity and the Operators jointly and severally for the following:

a. The Fair Market Value Cap less payments made to date for a total of $1,690,582.02;

b. Compound Interest in accordance with Section 30 of the Lease;

c. Costs in accordance with column 5 of Rule 55 of the Rules of the Supreme Court, 1986; and

d. Such other relief as this Honourable Court deems just and appropriate.

34. Pursuant to Rule 6.07(1) of the *Rules of the Supreme Court, 1986*, this originating document shall be served upon the Second, Third, and Fourth Defendants by Counterclaim outside the Province of Newfoundland and Labrador without leave of the Court. More specifically, paragraphs (f), (g), and (i) of Rule 6.07(1) permit such service on the basis of the following facts:

a. this proceeding is in respect of enforcement of a contract made in the province;

b. this proceeding is in respect of breach of a contract made in the province; and

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c. this proceeding is brought against the Second, Third, and Fourth Defendants by Counterclaim which are necessary or proper parties to the Counterclaim.

DATED at St. John's, in the Province of Newfoundland and Labrador, this ______ day of January, 2015.

Neil L. Jacobs
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Suite 1100, Cabot Place
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St. John's, NL A1C 6K3
Solicitors for the Defendant and Plaintiff by Counterclaim

DRAFT

TO: **Christopher J. Cosgriffe**
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Solicitors for the Plaintiff and First Defendant by Counterclaim

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BURGESS LAW OFFICES
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Second Defendant by Counterclaim

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McCarthy Tétrault
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Toronto ON M5K 1E6
Solicitors for Stelco Inc.

Dofasco Inc.
1330 Burlington Street East
P.O. Box 2460

<u>Hamilton, ON L8N 3J5</u>
<u>Fourth Defendant by Counterclaim</u>

<u>TO:</u> **Supreme Court of Newfoundland and Labrador**
Registry (General Division)
309 Duckworth Street
P.O. Box 937
St. John's, NL A1C 5M3

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2003 01T No. 3807

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

PLAINTIFF

AND:

ROYAL BANK OF CANADA

DEFENDANT

AND BETWEEN

ROYAL BANK OF CANADA

PLAINTIFF BY COUNTERCLAIM

AND:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

DEFENDANT BY COUNTERCLAIM

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2003 01G 3807
Date of Filing Document:	January 19, 2015
Name of Party Filing or Person:	Royal Bank of Canada
Application to which Document being filed relates:	Application to add parties as Defendants by Counterclaim and make consequential amendments to pleadings pursuant to Rules 7.04, 15.01 and 15.02 of the *Rules of the Supreme Court, 1986*
Statement of Purpose in Filing:	In support of the Application

AFFIDAVIT

I, Twila E. Reid, of the municipality of Logy Bay, in the Province of Newfoundland and Labrador, Solicitor, make oath and say as follows:

254592 v3

1. I am a Partner at the law firm of Stewart McKelvey, the solicitors for the Defendant/Plaintiff by Counterclaim Royal Bank of Canada ("**RBC**").

2. I have read and understand the foregoing Application, and it is true to the best of my knowledge, information and belief.

3. I give this Affidavit in support of the Application of RBC for an order adding parties as Defendants by Counterclaim and making consequential amendments to the pleadings.

SWORN/AFFIRMED before me at the City of St. John's, in the Province of Newfoundland and Labrador, this 14th day of January, 2015.

Joe Thorne
A Commissioner for taking affidavits.

Twila E. Reid

2003 01T No. 3807

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

PLAINTIFF

AND:

ROYAL BANK OF CANADA

DEFENDANT

AND BETWEEN

ROYAL BANK OF CANADA

PLAINTIFF BY COUNTERCLAIM

AND:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

DEFENDANT BY COUNTERCLAIM

NOTICE OF APPLICATION

You are hereby notified that the foregoing application will be heard by the judge presiding in the chambers at the Court House, at Duckworth Street, St. John's, in the Province of Newfoundland and Labrador, on Monday, the 9th day of March, 2015, at the hour of 10 o'clock in the forenoon or so soon thereafter as the application can be heard.

TO: **Paul Burgess**
BURGESS LAW OFFICES
PO BOX 23196
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St. John's, NL A1B 4J9
Solicitors for the Plaintiff/Defendant by Counterclaim, Cliffs Mining Company

AND TO: **Wabush Iron Co. Limited**
200 Public Square
Suite 3300
Cleveland, OH, USA 44114

AND TO: **Junior Sirivar**

254592 v3

McCarthy Tétrault
Suite 5300, TD Bank Tower
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Solicitors for Stelco Inc.

AND TO: **Dofasco Inc.**
1330 Burlington Street East
P.O. Box 2460
Hamilton, ON L8N 3J5

EXHIBIT 2

THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2007 SKCA 72 Date: 20070625

Between: Docket: 1443
Docket: 1452

ICR Commercial Real Estate (Regina) Ltd.
Appellant

- and -

Bricore Land Group Ltd., Bricore Investment Group Ltd.,
624796 Saskatchewan Ltd. 603767 Saskatchewan Ltd.,
583261 Saskatchewan Ltd. and Horizon West Management Ltd.
Respondents

Coram:
Klebuc C.J.S., Jackson & Smith JJ.A.

Counsel:
Fred C. Zinkhan for the Appellant
Jeffrey M. Lee for the Respondents
Kim Anderson for the Monitor, Ernst & Young

Appeal:

From:	Q.B.G. No. 8 of 2006, J.C. Saskatoon
Heard:	June 7, 2007
Disposition:	Appeal Dismissed June 13, 2007
Written Reasons:	June 25, 2007
By:	The Honourable Madam Justice Jackson
In Concurrence:	The Honourable Chief Justice Klebuc

2007 SKCA 72 (CanLII)

The Honourable Madam Justice Smith

Jackson J.A.

I. Introduction

[1] This appeal concerns a claim arising on a "post-filing" basis after a restructuring order had been made under the *Companies' Creditors Arrangement Act*[1] (the "*CCAA*"). The restructuring failed. The principal assets of the companies have been sold and the net proceeds are being held for distribution. The post-filing claim is asserted against: (i) the companies, which are subject to the *CCAA* order; and (ii) against the companies' Chief Restructuring Officer.

[2] The post-filing claimant is ICR Commercial Real Estate (Regina) Ltd. ("ICR"). ICR claims a real estate commission with respect to the sale of a building belonging to Bricore Land Group Ltd. Bricore Land and four related companies (collectively "Bricore") are all subject to an initial order ("Initial Order") granted by Koch J. on January 4, 2006 pursuant to s. 11(3) of the *CCAA*. The Chief Restructuring Officer, Maurice Duval (the "CRO"), was appointed by Koch J. on May 23, 2006 (the "CRO Order"). Koch J. has been the supervising *CCAA* judge since the Initial Order.

[1] R.S.C. 1985, c. C-36.

2007 SKCA 72 (CanLII)

[3] The Initial Order and the CRO Order impose the usual stay of proceedings against Bricore and prohibit the commencement of new actions against Bricore and the CRO, without leave of the Court.

2007 SKCA 72 (CanLII)

[4] ICR applied to Koch J. for directions and, in the alternative, for leave to commence actions against Bricore and the CRO. By fiats dated April 9, 2007 and April 25, 2007, Koch J. held that the Initial Order and the CRO Order prohibiting the commencement of actions apply to ICR and that leave of the Court is required. He refused leave and also awarded substantial indemnity costs against ICR.

[5] On May 23, 2007, ICR applied in Court of Appeal chambers for leave to appeal, pursuant to s. 13 of the *CCAA*, and received leave to appeal the same day. The appeal was heard on June 7, 2007 and dismissed in relation to the lifting of the stay application and allowed in relation to the costs order on June 13, 2007, with reasons to follow. These are those reasons.

II. Issues

[6] The issues are:

1. Does the stay of proceedings imposed by the supervising *CCAA* judge J. under the Initial Order apply to an action commenced by ICR, a post-filing claimant, such that leave to commence an action against Bricore is required?

2. Does s. 11.3 of the *CCAA* mean that a post-filing claimant cannot be subject to the stay of proceedings imposed by the Initial Order?

3. If leave is required, did the supervising *CCAA* judge commit a reviewable error in refusing ICR leave to commence an action against Bricore?

4. Did the supervising *CCAA* judge make a reviewable error in refusing leave to commence an action against the CRO?

5. Did the supervising *CCAA* judge err in awarding costs on a substantial indemnity basis?

III. Background

[7] ICR's claim to a real estate commission arises as a result of these brief facts. Bricore owned four commercial real estate properties in Saskatoon and three such properties in Regina (the "Bricore Properties"). ICR argued that it had marketed one of the Regina properties, known as the Department of Education Building (the "Building"), to the City of Regina.

[8] Bricore sold the Building, at a purchase price of $700,000,[2] to a proposed purchaser, which assigned its interest to 101086849 Saskatchewan Ltd. 101086849 Saskatchewan in its turn sold the Building to the City of Regina for a price of $1,075,000.[3] The certificate of title to the Building issued in early January, 2007 to 101086849 Saskatchewan, and the certificate of title issued to the City of Regina in late January, 2007. The Building came to be sold pursuant to a series of Court Orders made by Koch J., which I will now summarize.

[2] Appeal Book, pp. 17a and 22a [Affidavit of Paul Mehlsen].
[3] *Ibid.* at pp. 27a and 32a.

2007 SKCA 72 (CanLII)

[9] As I have indicated, the Initial Order was made on January 4, 2006. On February 13, 2006 Koch J. appointed CMN Calgary Inc. as an Officer of the Court to pursue opportunities and to solicit offers for the sale or refinancing of the Bricore Properties. He also authorized Bricore to enter into an agreement with CMN Calgary dated as of January 30, 2006 entitled "Exclusive Authority To Solicit Offers To Purchase."

2007 SKCA 72 (CanLII)

[10] In May 2006, it was determined that Bricore could not be reorganized and, therefore, all the Bricore Properties should be sold. On May 23, 2006, Koch J. appointed Maurice Duval, C.A., of Saskatoon, Saskatchewan as an officer of the Court to act as CRO, and to assist with the sale of the assets.

[11] The CRO Order confers these powers on the CRO pertaining to the proposed sale of the Bricore Properties:

> 7 ...
>
> (e) subject to the stay of proceedings in effect in these proceedings, the power to take steps for the preservation and protection of the Bricore Properties, including, without restricting the generality of the foregoing, (i) the right to make payments to persons, if any, having charges or encumbrances on the Bricore Properties or any part or parts thereof on or after the date of this Order, which payments shall include payments in respect of realty taxes owing in respect of any of the Bricore Properties, (ii) the right to make repairs and improvements to the Bricore Properties or any parts thereof and (iii) the right to make payments for ongoing services in respect of the Bricore Properties;
>
> . . .
>
> (g) subject to paragraphs 7C, 7D and 7E hereof, **the power to work with, consult with and assist the court-appointed selling officer (CMN Calgary Inc.) to negotiate with parties who make offers to purchase** the Bricore Properties in a manner substantially in accordance with the process

> and proposed timeline for solicitation of such offers to purchase the Bricore Properties recommended by the Monitor in the Monitor's Third Report. ...[4]
> [Emphasis added.]

[12] On June 19, 2006, Koch J. authorized the CRO to accept an offer to purchase the Bricore Properties, including the Building, made by an undisclosed purchaser (the "Proposed Purchaser"), which offer to purchase was filed with the Court and temporarily sealed. The order directed that any further negotiations between the CRO and the Proposed Purchaser were to be completed by August 1, 2006.

[13] Negotiations were protracted resulting in a further series of orders:

(a) August 1, 2006: Koch J. extended the timeframe for due diligence and further negotiations to be completed by August 15, 2006;[5]

(b) August 18, 2006: Koch J. authorized the CRO to accept an Amended Offer to Purchase made the 15th day of August, 2006. The Amended Offer to Purchase contemplated the sale by Bricore to the Proposed Purchaser of six of the seven Bricore Properties including the Building;[6]

(c) September 25, 2006: The closing date for the proposed sale by Bricore to the Proposed Purchaser of the six properties was extended from October 15, 2006 to November 15, 2006;[7]

---

[4] Order (Appointment of Chief Restructuring Officer, Extension of Stay of Proceedings; Additional DIP Financing) made May 23, 2006.
[5] Order (Extension of Stay of Proceedings) made August 1, 2006.
[6] Order (Extension of Stay of Proceedings) made August 18, 2006.
[7] Order (Extension of Stay of Proceedings, Extension of Appointment of CRO and Increase in

2007 SKCA 72 (CanLII)

(d) October 10, 2006: Koch J. approved the sale of the six properties to their respective purchasers; in the case of the Building, it was sold to 101086849 Saskatchewan Ltd.[8]

Koch J. ultimately approved the sale of the Building to 101086849 Saskatchewan Ltd. as of November 30, 2006.

[14] ICR said it had introduced the City of Regina to the opportunity to purchase the Building and it was therefore entitled to a real estate commission based on the sale price to the City of Regina. Once its claim was denied by the Monitor, ICR applied to Koch J. on March 22, 2007 contending that (a) "prior Orders of this Court requiring leave to commence action" against Bricore and the CRO "do not apply in the circumstances"; and (b) in the alternative, "it is entitled to an order granting leave to commence the proposed proceedings." In support of its notice of motion, ICR filed a draft statement of claim and a supporting affidavit with exhibits.

[15] This is the substance of ICR's draft statement of claim against Bricore and the CRO:

> 4. At all material times Duval's actions in relation to the matters in issue in the within proceedings were carried out in his capacity as chief restructuring officer for the Bricore Group.
>
> ...
>
> 7. Duval, pursuant to Order of the Court under the *Companies' Creditors Arrangement Act*, was authorized in accordance in such order to market various assets of the Bricore Group, including the [Building]. [sic]

Maximum CRO Remuneration; Increase to Administrative Charge) made September 25, 2006.

[8] Order (Approving Sale; Extending Stay of Proceedings; Extending Appointment of CRO) made October 10, 2006.

2007 SKCA 72 (CanLII)

> 8. In the course of his efforts to market the [Building], Duval enlisted the aid of the plaintiff and its commercial realtors, licensed as brokers under *The Real Estate Act*.
>
> 9. The plaintiff, in its efforts to market the properties of the Bricore Group under the direction of Duval, including the [Building], introduced a prospective purchaser to Duval, namely the City of Regina.
>
> 10. By agreement dated September 27, 2006 made between the Plaintiff, the Bricore Group and Duval, it was agreed that the Plaintiff would be protected as the agent of record to a commission for the sale of any of the Bricore Group Properties for which the Plaintiff had located a purchaser.
>
> 11. The Plaintiff says that at the time of execution of the said Agreement by Duval on September 28, 2006, the City of Regina was in the process of doing its "due diligence" on the [Building] and it was expected that a sale of the [Building] to the City of Regina would be completed in the near future.
>
> 12. The Plaintiff says that, contrary to the Agreement entered into between the Plaintiff and the Defendants, Duval, **without the Plaintiff's knowledge and in bad faith,** proceeded to arrange to sell the [Building] to a third party, namely 101086849 Saskatchewan ltd., which became the owner of the [Building] on or about January 3, 2007.[9] [Emphasis added.]

[16] While the words "bad faith" are not repeated in the affidavit evidence, Paul Mehlsen, the principal of ICR, swore an affidavit in support of the application for leave, stating that he had examined the statement of claim and that to the best of his knowledge the allegations contained therein are true. His affidavit also states:

> 13. Insofar as the attached letter states that "ICR is protected as agent of record", this is commonly understood in the industry as meaning that in the event a sale of the property took place in the protected period to a purchaser introduced by the agent of record, then they would receive the usual commission for such sale, which in this case would be 5%.
>
> 14. It would appear from the attached exhibit "A" that Larry Ruf arranged to have the Respondent, Maurice Duval, agree to the arrangement, as well as adding that the protection would extend to the closing of any sale or December 31, 2006, whichever was the earlier.

[9] Appeal Book, p. 7a-8a.

2007 SKCA 72 (CanLII)

15. Attached hereto and marked as exhibit "B" to this my Affidavit is a true copy of an email dated October 31, 2006 from Larry Ruf to Evan Hubick, Jim Kambeitz and Jim Thompson of the proposed plaintiff, ICR. Such email states in part:

> I can confirm, on behalf of the CRO, that protection for the potential deals referenced in your letter of September 27, 2006 will be honoured to November 30, 2006.[10]

2007 SKCA 72 (CanLII)

[17] Exhibit "A" is a letter dated September 27, 2006 from Mr. Jim Thompson of ICR to Mr. Larry Ruf of Horizon West Management Inc. It reads, in material part, as follows:

> Please be advised that we have had ongoing discussions with potential buyers and tenants as follows:
>
> 1. 1500 – 4th Avenue [Department of Education Building] – we have been in regular contact with the City of Regina Real Estate Department for over a year regarding the possibility of this site being acquired by the City. In July a large contingent of City employees including a number from the Works and Engineering Department toured the building over several hours. We have had continuous follow up with a Real Estate Department official who confirmed recently that there still is an interest in the property and officials are in the due diligence stage. In addition, we have exposed the property to Alfords Furniture and Flooring who have an ongoing interest.
>
> . . .
>
> The purpose of this memo is to reinforce our ongoing efforts to market and represent the Bricore assets in Regina. We are aware that the properties are under contract to sell and request that ICR be protected in the specific situations as outlined.
>
> In the event we are not able to carry on in a formal fashion we would ask that you sign where indicated to acknowledge that ICR is protected as the agent of record for the Tenants/Buyers noted herein for a period to extend to December 31, 2006.[11]

---

[10] *Ibid.* at p. 12a.

[11] *Ibid.* at pp. 14a-15a.

The words "December 31, 2006" are struck out and these words are added: "Date of closing of a sale or December 31, 2006 whichever is earlier." Mr. Ruf's name is crossed out and the signature of Maurice Duval, Chief Restructuring Officer is added in its place.

2007 SKCA 72 (CanLII)

[18] Mr. Ruf, on behalf of Bricore, refuted ICR's claim in a sworn affidavit stating:

> 3. At no time did I approach ICR Regina in 2006 to initiate discussions regarding the sale or lease of the Department of Education Building.
>
> 4. I received two or three unsolicited telephone calls regarding the Department of Education Building in September of 2006 from representatives of ICR Regina (including Paul Mehlsen, Jim Kambeitz and Evan Hubick). During those calls, representatives of ICR Regina informed me that they knew of certain parties who would be interested in purchasing the Department of Education Building. In response to each of these inquiries, I informed representatives of ICR:
>
> (a) that I had no authority to participate in communications regarding a sale of the Department of Education Building, and that all such inquiries should be directed to Maurice Duval, the court-appointed Chief Restructuring Officer of Bricore Group; and
>
> (b) that further information on the status of the restructuring of Bricore Group could be obtained on the website of MLT.[12]

[19] The CRO filed a report in response to ICR:

> 6. At the time of my review of the September 27, 2006 letter from ICR Regina, I was working very hard to attempt to negotiate and conclude the final closing of the sale of the Bricore Properties to the purchasers identified in the Accepted Offer to Purchase. I fully expected that sale to close (as it ultimately did effective November 30, 2006). However, I determined that, in the event that such sale failed to close, Bricore Group would need to identify other potential purchasers of the Bricore Properties very quickly. I therefore decided that it would be appropriate for Bricore Group, by the CRO, to agree to protect ICR Regina for a commission in the unlikely event that the sale contemplated by the Accepted Offer to Purchase did not

[12] *Ibid.* at p. 46a.

close, and it subsequently became necessary for Bricore Group instead to conclude a sale of the Bricore Properties to one or more of the prospective purchasers of the three Bricore Properties located in Regina (as specifically identified in Mr. Thompson's September 27, 2006 letter). For that reason, and that reason only, I agreed to sign the September 27, 2006 letter.

7. In signing the September 27, 2006 letter, my intention, as court-appointed CRO of Bricore Group, was to strike an agreement that, in the unlikely event that:

(a) the sale of the Bricore Properties identified in the Accepted Offer to Purchase fell apart; and

(b) it subsequently became necessary for Bricore Group to sell the Bricore Properties to one or more of the prospective purchasers identified in the September 27, 2006 letter;

then Bricore Group would agree to pay a commission to ICR Regina. In regard to the Department of Education Building located at 1500 - 4th Avenue in Regina (the "Department of Education Building"), the two prospective purchasers in respect of which ICR Regina was protected for a commission were the City of Regina and Alford's Furniture and Flooring. The reference to closing date was to the closing of the Avenue Sale, which occurred effective November 30, 2006.

8. In January of 2007, after much effort and expenditure of resources, the sale of the Bricore Properties contemplated in the Accepted Offer to Purchase was unconditionally closed (effective November 30, 2006). The entity named as purchaser of the Department of Education Building in the final closing documents was a numbered Saskatchewan company controlled by Avenue Commercial Group of Calgary. Such entity was a nominee corporation operating entirely at arm's length from the City of Regina and Bricore Group. At all times after June 2006, the CRO had no authority to sell the property, as it was already sold.

9. It was subsequently brought to my attention that the numbered company which purchased the Department of Education Building had promptly "flipped" such property to the City of Regina. I knew nothing of such a proposed flip prior to learning of it from ICR Regina.[13]

[20] To rebut this, Mr. Mehlsen of ICR swore a further affidavit deposing:

3. As indicated in my Affidavit sworn March 22, 2007, ICR had an ongoing relationship with the Bricore Companies prior to 2006. This relationship continued after the Initial Order in January 2006 in that ICR continued to show Bricore Properties for lease or sale, including the [Building].

[13] *Ibid.* at pp. 38a-39a.

2007 SKCA 72 (CanLII)

4. Attached hereto and marked as Exhibit E to this my Affidavit is a true copy of an e-mail from my contact at the City of Regina ... dated April 13, 2006 advising that the City was interested in purchasing the [Building].

5. I immediately passed this information along to Larry Ruf, as evidenced in the e-mail dated April 13, 2006 attached hereto and marked as Exhibit "F" to this my affidavit.

6. In reply to paras. 2 and 12 of Mr. Duval's Report, it was not known to ICR that all of the Bricore Properties were sold as claimed; rather, it was known that some of the Bricore Properties had been sold, but not the subject property, [the Building], as it was the "ugly duckling" of the Bricore Properties and therefore had been excluded from the reported sale. ICR's efforts were directed at the sale of [the Building] and leasing the other two Regina properties.

7. In response to para. 13 of Mr. Duval's Report, it is true that there were no direct communications between ICR and Mr. Duval as all communications were with Larry Ruf, who indicated that he acted under the authority and with the knowledge of Mr. Duval.

8. As a result of contact in early summer with Mr. Ruf, ICR actively marketed the [Building] by placing signage on the property, developing an "information" or "fact" sheet detailing aspects of the building, and showed the property to the City of Regina and other prospective purchasers.

. . .

11. Because of delays on the part of the City of Regina in its due diligence and the fact that ICR has been working without any formal agreement, I caused the letter of September 27, 2006 (exhibit "A" to my Affidavit sworn March 22, 2007) to be sent.

12. At no time did either Mr. Ruf or Mr. Duval advise that the [Building] was sold and that ICR's role was merely that of a "backup offer". The signed letter of September 27, 2006 and Mr. Ruf's e-mail of October 31, 2006 make no mention of these events and this was never disclosed to myself or ICR.

. . .

14. In hindsight, it would appear that the confidential information concerning the intention of the City of Regina to purchase the [Building] that was provided by myself and representatives of ICR to Mr. Ruf and Mr. Duval was communicated to the [Proposed Purchaser], who then incorporated 101086849 Saskatchewan Ltd. to take advantage of this opportunity. Attached hereto and marked as exhibit "I" to this my Affidavit is a true copy of a Profile Report from the Corporate Registry indicating that 101086849 Saskatchewan Ltd. was incorporated by solicitors as a "shelf company" on May 31, 2006, with new Directors in the form of Garry Bobke and Steven Butt taking office on August 17, 2006.

2007 SKCA 72 (CanLII)

15. My understanding is that the [Proposed Purchaser] initially excluded the [Building] from their offer to purchase the Bricore Group properties and made a separate offer through 101086849 Saskatchewan Ltd. when they were made aware of the confidential information about the City of Regina's plans to purchase the property.[14]

2007 SKCA 72 (CanLII)

[21] In refusing ICR leave to commence action, Koch J. wrote:

[1] On January 4, 2006, I granted an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA*") protecting the respondent corporations Bricore Land Group Ltd. et al. (collectively "Bricore"), from claims of their respective creditors. The order (paragraph 5) explicitly provides in accordance with the authority conferred upon the Court pursuant to s. 11(3) of the *CCAA* that "no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property". The initial period of 30 days has been extended many times. The stay of proceedings continues in effect. Ernst & Young Inc. was appointed monitor. That appointment continues.

...

[16] Although the interpretation of s. 11.3 of the *CCAA* is not necessarily well settled in all aspects, it appears that the import of s. 11.3, which was introduced as an amendment to the Act in 1997, is this:

(a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the *CCAA* which is to promote re-organization and restructuring of companies. If s. 11.3 is interpreted too literally, it can render the stay provisions ineffective, leaving the collective good of the restructuring process subservient to the self-interest of a single creditor. Clearly, s. 11.3 must be construed so as not to defeat the overall objectives of the Act. See *Smith Brothers Contracting Ltd. (Re)* (1998), 53 B.C.L.R. (3d) 264 (B.C.S.C.).

(b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).

[14] *Ibid.* at p. 51a-52a.

(c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re), supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. Counsel have cited the case of *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, 2006 SCC 35. The circumstances in that case are somewhat analogous but it is of limited assistance because the *CCAA* does not contain a provision equivalent to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which expressly provides that no action lies against the superintendent, an official receiver, an interim receiver or a trustee in certain circumstances without leave of the Court.

2007 SKCA 72 (CanLII)

[17] For reasons outlined *supra*, I do not find the cause of action ICR asserts against Bricore to be tenable, not even as against Bricore Land Group Ltd. Therefore, the application to lift the stay of proceedings to permit the proposed action against Bricore is dismissed.

[18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court-appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell. Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in "bad faith", it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.

[19] As stated previously, the overriding purpose of the *CCAA* must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order. [15]

[15] *ICR v. Bricore*, 2007 SKQB 121.

2007 SKCA 72 (CanLII)

IV. Issue #1: Does the stay of proceedings imposed by the supervising *CCAA* judge under the Initial Order apply to an action commenced by ICR, a post-filing claimant, such that leave to commence an action against Bricore is required?

[22] ICR argues that, as a post-filing creditor, the Initial Order does not apply to it, either as a matter of law or on the basis of a proper interpretation of the Initial Order.

[23] The authority to make an order staying and prohibiting proceedings against a debtor company is contained in s. 11(3) of the *CCAA*:

> 11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

[24] Pursuant to s. 11(3) of the *CCAA*, Koch J. granted the Initial Order providing for a stay and prohibition of new proceedings in these terms:

> 5. During the 30-day period from and after the date of filing of this application on January 4, 2006 or during the period of any extension of such 30-day period granted by further order of the Court (the "Stay Period"), no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property. Any and all Enforcement or Proceedings

already commenced (as at the date of this Order) against or in respect of Bricore Group or the Property are hereby stayed and suspended.

6. During the Stay Period, no person shall assert, invoke, rely upon, exercise or attempt to assert, invoke, rely upon or exercise any rights:

a) against Bricore Group or the Property;

b) as a result of any default or non-performance by Bricore Group, the making or filing of this proceeding or any admission or evidence in this proceeding, or

c) in respect of any action taken by Bricore Group or in respect of any of the Property under, pursuant to or in furtherance of this Order.

. . .

11. Notwithstanding any of the provisions of this Order:

a) no creditor of Bricore Group shall be under any obligation, by reason only of the issuance of this Order, to advance or re-advance any monies or otherwise extend any credit to Bricore Group, except as such creditor may agree; and

b) Bricore Group may, by written consent of its counsel of record, agree to waive any of the protections that this Order provides to them, whether such waiver is given in respect of a single creditor or class of creditors or is given in respect of all creditors generally.

...

13. Any act or action taken or notice given by creditors or other Persons or their agents, from and after 12:01 a.m. (local Saskatoon time) on the date of the filing of the application for this Order to the time of the granting of this Order, to commence or continue Enforcement or to take any Proceeding (including, without limitation, the application of funds in reduction of any debt, set-off or the consolidation of accounts) is, unless the Court orders otherwise, deemed not to have been taken or given.

"Proceeding" is defined in para. 22 of Schedule "A" to the Initial Order as "a lawsuit, legal action, court application, arbitration, hearing, mediation process, enforcement process, grievance, extrajudicial proceeding of any kind or other proceeding of any kind."

2007 SKCA 72 (CanLII)

[25] The authority to extend an initial order is contained in s. 11(4) of the *CCAA:*

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Koch J., pursuant to this subsection, extended the stay many times and the stay continues in force.

[26] As authority for the proposition that the Initial Order does not stay proceedings with respect to claims that arise after the Initial Order, ICR's counsel cites Professor Honsberger's *Debt Restructuring Principles & Practice*:

> The scope of an order staying proceedings extends only to claims that arose prior to the order. A proceeding based on a claim that arose after an order was made staying proceedings is not affected by the stay.[16] [Footnote omitted.]

The only case footnoted is *Ramsay Plate Glass Co. v. Modern Wood Products Ltd.*[17] In my respectful view, the facts in *Ramsay Glass* narrow its application.

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[16] John D. Honsberger , *Debt Restructuring: Principles and Practice*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at p. 9.61.

[17] (1954) 34 C.B.R. 82 (Que. S. C.). There are no cases referring to *Ramsay Glass* on the point that Prof. Honsberger raises in his text. (*Ptarmigan Airways Ltd. v. Federated Mining Corp.*, [1973] 3

2007 SKCA 72 (CanLII)

[27] In *Ramsay Glass*, the initial *CCAA* order, dated April 12, 1951, suspended all proceedings against Modern Wood Products Ltd. Modern Wood Products made an offer of compromise that was accepted by its existing creditors and approved by the Court on May 21, 1951. Ramsay Glass sought to enforce a claim against Modern Wood Products that arose in 1953. Modern Wood Products sought to strike Ramsay Glass's claim on the basis that its proceedings were stayed by the April 1951 order.

2007 SKCA 72 (CanLII)

[28] In dismissing the application to strike, Prevost J. wrote:

> CONSIDERING that said claim is not provable in bankruptcy and that under *The Bankruptcy Act* an order staying proceedings would not apply to such a claim: *Richardson & Co. v. Storey*, 23 C.B.R. 145, [1942] 1 D.L.R. 182, Abr. Con. 301; *In re Bolf*, 26 C.B.R. 149, [1945] Que. S.C. 173, Abr. Con. 303;
>
> CONSIDERING that s. 10 of *The Companies' Creditors Arrangement Act* and the judgments rendered under its authority should receive the same interpretation in this respect as s. 40 of *The Bankruptcy Act*;
>
> CONSIDERING that the present claim is in no way affected by the judgment rendered on April 12, 1951 by Boyer J. under *The Companies' Creditors Arrangement Act*, ordering suspension of all proceedings against defendant company the present claim being posterior to said date and having not been made the subject of any compromise or arrangement homologated by this Court;
>
> CONSIDERING that the present claim arose in 1953, two years after the judgment of Boyer J. homologating the compromise following the non-payment by defendant company of merchandise purchased by it from plaintiff company during said year;[18]

I do not interpret *Ramsay Glass* as permitting a post-filing claimant to commence an action against a debtor company without obtaining leave while the *CCAA* stay is in effect. In my opinion, *Ramsay Glass* can be read as

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W.W.R. 723 (N.T.S.C.) mentions *Ramsay Glass* but not in reference to the point made here.)

[18] *Ibid.* at p. 83.

authority for the proposition that a post-filing creditor need not apply for leave after the stay has been lifted. In that respect, it parallels *360networks Inc., Re;*[19] *Stelco Inc., (Re);*[20] and *Campeau v. Olympia & York Developments Ltd.*[21]

2007 SKCA 72 (CanLII)

[29] In *360networks*, a creditor (Caterpillar Financial Services Limited) had both pre-filing and post-filing claims. Caterpillar applied, *inter alia*, for an order lifting the stay of proceedings. Tysoe J. wrote:

> 8 On the hearing of the applications, Caterpillar continued to take the position that all of its claims could properly be determined within the *CCAA* proceedings on the first of its two applications. I agree that the Deficiency Claim and the Secured Creditor Claim are properly determinable within the *CCAA* proceedings, but it is my view that it would not be appropriate to make determinations in respect of the Trust Claim or the Post-Filing Claim in the *CCAA* proceedings. The only remaining thing to be done in the *CCAA* proceedings is the determination of the validity of claims for the purposes of the Restructuring Plan (with Caterpillar's claims being the only unresolved ones). **Neither the Trust Claim nor the Post-Filing Claim falls into this category of claim because each of these types of claim is not affected by the Restructuring Plan.** Indeed, the Post-Filing Claim was not asserted in Caterpillar's proof of claim and surely cannot be adjudicated upon within Caterpillar's appeal of the disallowance of its proof of claim. The B.C. Court of Appeal has recently affirmed, in *United Properties Ltd. v. 642433 B.C. Ltd.*, 2003 BCCA 203 (B.C.C.A.), that it is appropriate for the court to decline jurisdiction to resolve a dispute in *CCAA* proceedings which, although it may relate to them, is not part and parcel of the proceedings. [Emphasis added.]
>
> . . .
>
> 11 Counsel for Caterpillar relies for the first ground on the fact that s. 12 of the *CCAA* authorizes the court to deal with secured and unsecured claims. However, s. 12 deals with the determination of claims for the purposes of the CCAA and does

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[19](2003), 45 C.B.R. (4th) 151 (B.C.S.C.), appeal dismissed (2007), 27 C.B.R. (5th) 115 (B.C.C.A.).
[20](2005), 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]).
[21] (1992), 14 C.B.R. (3d) 303 (Ont. Ct. (Gen. Div.)).

> not authorize the court to determine claims which fall outside of *CCAA* proceedings, such as the Trust Claim and the Post-Filing Claim.[22]

In the result, Tysoe J. lifted the stay so as to permit an action to be commenced to resolve all of Caterpillar's claims. The significance of the decision for our purposes is that the Court in *360networks* considered the stay as applying to claims that arose after the initial order.

[30] In *Stelco,* Farley J., relying on *360networks*, also held that the post-filing creditor's claim in that case "continues to be stayed and is to be dealt with in the ordinary course of litigation after Stelco's *CCAA* protection is terminated."[23]

[31] *Campeau* does not deal with a post-filing creditor, but it does address the situation where a creditor, whose claim is not accepted as part of the plan of arrangement, wants to commence action. Blair J. (as he then was) refused an application brought by Robert Campeau and the Campeau Corporations to lift the stay of proceeding imposed by the initial order. In doing so, he wrote:

> 24. In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with – at least for the purposes of that proceeding – in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very

[22] *360networks, supra* note 19.
[23] *Stelco, supra* note 20 at para. 11.

2007 SKCA 72 (CanLII)

effectively unless and until Olympia & York – whose alleged misdeeds are the real focal point of the attack on both sets of defendants – is able to participate.

25 In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

> 1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York Plan filed under the Act.
>
> 2. In this sense, the Campeau claim – like other secured, undersecured, unsecured, and contingent claims – must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings – i.e. the action and the CCAA proceeding – the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (United Kingdom) (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim, supra.*
>
> **I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan".** This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.[24] [Emphasis added.]

Campeau is further authority for the proposition that a supervising *CCAA* judge can refuse a prospective creditor, who is not part of the plan of arrangement, leave to commence proceedings and that the creditor may commence action after the stay is lifted.

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[24] *Campeau, supra* note 21.

2007 SKCA 72 (CanLII)

[32] Each of *360networks*[25], *Stelco*[26] and *Campeau*[27] supports the proposition that while a stay of proceedings is extant, an application to lift the stay must be made to permit an action to be commenced against a debtor that is subject to a *CCAA* order, regardless of whether the claim arises before or after the initial order, or whether the prospective creditor is able to take part in the plan of arrangement.

2007 SKCA 72 (CanLII)

[33] Prevost J. in *Ramsay Glass* points out that under the *Bankruptcy and Insolvency Act*[28] (*the* "*BIA*") the stay of proceedings does not extend to a claim not provable in bankruptcy. This is so, however, because of the definition of "claim provable in bankruptcy" and ss. 69.3(1) and s. 121. (See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*.[29]) While s. 12 of the *CCAA* defines "claim" by reference to "claim provable in bankruptcy," it has not been interpreted as limiting the extent of the stay.

[34] On the face of ss. 11(3) and (4) of the *CCAA*, the authority to safeguard the company is not limited to staying existing actions, but extends to "prohibiting, until otherwise ordered by the court, the commencement of ... any other action, suit or proceeding against the company." Unlike the *BIA* there are no words limiting this phrase to debts or claims in existence at the time of the initial order.

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[25] *360networks, supra* note 19.
[26] *Stelco, supra* note 20.
[27] *Campeau, supra* note 21.
[28] R.S.C. 1985, c. B-3.
[29] Lloyd W. Houlden & Geoffrey B. Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Carswell, 2006) at pp. 562 and 789.

[35] With respect to the wording of the Initial Order, there can be no question that it applies to post-filing creditors. The broad wording of paras. 5 and 6 of the Initial Order and the definition of "proceeding" confirm this. No distinction is made between creditors in existence at the time of the Initial Order and those who become creditors after. Paragraph 11(b) also establishes a mechanism for post-filing creditors to seek relief by obtaining an exemption from the protection afforded Bricore, which would include the prohibition of proceedings. The obvious implication is that the prohibition of proceedings applies to post-filing creditors, subject, of course, to obtaining leave of the Court to commence action.

V. Issue #2. Does s. 11.3 of the *CCAA* mean that a post-filing claimant cannot be subject to the stay of proceedings imposed by the Initial Order?

[36] ICR argued that by the addition of s. 11.3 in 1997[30] to the *CCAA*, Parliament intended to grant a post-filing creditor the right to sue without obtaining leave.

[37] In my respectful view, s. 11.3 cannot be interpreted in the way in which ICR contends. Indeed, a more logical and internally consistent reading of s. 11.3 and the other sections of the *CCAA* is to permit the supervising judge to determine, as a matter of discretion, whether an action commenced by a post-filing creditor should be permitted to proceed.

[30] *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12, s. 124.

2007 SKCA 72 (CanLII)

[38] Section 11.3 forms part of a comprehensive series of sections addressing the question of stays added in 1997 and 2001:[31]

2007 SKCA 72 (CanLII)

No stay, etc., in certain cases

11.1 (2) No order may be made under this Act **staying or restraining** the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association. (Added by S.C.1997, c. 12, s. 124)

No stay, etc., in certain cases

11.11 No order may be made under this Act **staying or restraining**

(a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act;*

(b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*. (Added by S.C. 2001, c. 9, s. 577.)

No stay, etc. in certain cases

11.2 No order may be made under section 11 **staying or restraining any action, suit or proceeding** against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company. (Added by S.C.1997, c. 12, s. 124)

11.3 No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit. (Added by S.C.1997, c. 12, s. 124)

[Emphasis added.]

[31] *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9, s. 577.

[39] In ss. 11.1(2), 11.11 and 11.2, Parliament uses the words "staying or restraining" to describe those circumstances limiting the scope of the stay power, but these words are not repeated in s. 11.3. This application of the *expressio unius* principle supports the obvious implication that s. 11.3 does not limit the authority of the court to stay all proceedings.

2007 SKCA 72 (CanLII)

[40] While the debates of the House of Commons in Hansard do not comment on s. 11.3, several text book authors assist with the task of interpretation. Professor Honsberger states:

> A distinction is made between the compulsory supply of goods and services and the extension of credit by suppliers to a debtor company in CCAA proceedings.
>
> Suppliers may be enjoined from cutting off services or discontinuing the supply of goods by reason of there being arrears of payment provided the debtor commences regular payments for current deliveries.
>
> However, no order made under s. 11 of the Act has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made.
>
> . . .
>
> ... A court could make a similar order after the 1997 amendments provided it stipulated that the debtor company made immediate payment for "goods, services, use of leased or licensed property or other valuable consideration after the order is made.[32]
>
> [Footnotes omitted.]

[41] Professor McLaren similarly comments in his text "Canadian Commercial Reorganization":[33]

> 3.800 ... Section 11.3 acts as an exemption to the stay provisions of s. 11 of the CCAA. It appears the section is meant to balance the rights of creditors with debtors. The section addresses the concern that judges had too much discretion in

[32] *Debt Restructuring Principles and Practice*, *supra* note 16 at p. 9-88.1.

[33] Richard H. McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at p. 3-17.

issuing stays. Under s. 11.3(*a*), if a person supplies goods or services or if the debtor continues to occupy or use leased or licensed property, the court will not issue a stay order with respect to the payment for such goods or services or leased or licensed property. In essence, s. 11.3(*a*) will not permit the court to prohibit these individuals from demanding payment from the debtor for goods, services or use of leased property, after a court order is made.

2007 SKCA 72 (CanLII)

[42] Finally, Professor Sarra in *Rescue! The Companies' Creditors Arrangement Act*[34] provides this insight:

While the court cannot compel a supplier to continue to extend credit to the debtor during a *CCAA* proceeding, the court can protect trade suppliers that choose to supply goods or credit during the stay period by granting them a charge on the assets of the debtor that will rank ahead of other claims. While section 11.3 of the *CCAA* states that no stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods, services or the use of leased or licensed property, or requiring the further advance of money or credit, trade suppliers were often continuing credit only to find that they had lost further assets during the workout period because of their priority in the hierarchy of claims. Hence the practice of post-petition trade credit priority charges developed, first recognized in Alberta.[35] [Footnotes omitted.]

[43] *Smith Bros. Contracting Ltd. (Re)*[36] also supports a narrow reading of s. 11.3. After citing *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[37] and *Quintette Coal Limited. v. Nippon Steel Corporation*[38] with respect to the intention of Parliament and the object and scheme of the *CCAA*, Bauman J. in *Smith Bros.* wrote:

45 It is interesting that Gibbs J.A. suggested that it would be unlikely that a court would exercise its s. 11 jurisdiction:

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[34] Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007).

[35] *Ibid.* at pp. 110-11.

[36] (1998), 53 B.C.L.R. (3d) 264 (B.C.S.C.). See also *Air Canada, Re*, (2004), 47 C.B.R. (4th) 182 (Ont. S.C.J. [Commercial List]), and *Mosaic Group Inc., Re*. (2004), 3 C.B.R. (5th) 40 (Ont. S.C.J.).

[37] [1991] 2 W.W.R. 136 (B.C.C.A.).

[38] (1990), 51 B.C.L.R. (2d) 105 (C.A.).

> ... where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries ...

> 46 Parliament has now precluded that by adding s. 11.3(a) to the CCAA. It is instructive to note, however, that the subsection has been added against the backdrop of jurisprudence which has underlined the very broad scope of the court's jurisdiction to stay proceedings under s. 11.
>
> 47 To repeat the relevant portion of the section:
>
> > 11.3 No order made under s. 11 shall have the effect of
> >
> > > (a) prohibiting a person from requiring immediate payment for ... use of leased or licenced property ... provided after the order is made;
>
> It is noted that the remedy which is preserved for creditors is a relatively narrow one; it is the right to require immediate payment for the use of the leased property.[39]

Thus, Bauman J. interpreted s. 11.3 in accordance with Parliament's intention and the object and scheme of the *CCAA* as creating a narrow right – the right to withhold services without immediate payment.

[44] I agree with Bricore's counsel. When a supplier is requested to provide goods or services on a post-filing basis to a company operating under a stay of proceedings imposed by the *CCAA*, s. 11.3 allows the supplier the right:

(a) to refuse to supply any such goods or services at all;

(b) to supply such goods or services on a "cash on demand" basis only;

(c) to negotiate with the insolvent corporation for the amendment of the *CCAA* Order to create a post-filing supplier's charge on the assets of the insolvent corporation to secure the payment by the insolvent corporation of amounts owing by it to such post-filing suppliers; or

(d) to take the risk of supplying goods or services on credit.

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[39] *Smith Bros., supra* note 36.

2007 SKCA 72 (CanLII)

Where the Initial Order imposes a stay of proceedings and prohibits further proceedings, s. 11.3 does not permit the supplier of goods or services to sue without obtaining leave of the court to do so.

2007 SKCA 72 (CanLII)

VI. Issue #3: If leave is required, did the supervising *CCAA* judge commit a reviewable error in refusing ICR leave to commence an action against Bricore?

[45] Having determined that the stay and prohibition of proceedings applies to ICR, notwithstanding its status as a post-filing creditor, the next issue is whether Koch J. erred in refusing to lift the stay on the basis that the claim was not tenable.

[46] The claim against Bricore is presumably against Bricore both in its own right and pursuant to its indemnification agreement with the CRO. Paragraph 18 of the CRO Order requires Bricore to indemnify the CRO:

> 18. Bricore Group shall indemnify and hold harmless the CRO from and against all costs (including, without limitation, defence costs), claims, charges, expenses, liabilities and obligations of any nature whatsoever incurred by the CRO that may arise as a result of any matter directly or indirectly relating to or pertaining to any one or more of:
>
> (a) the CRO's position or involvement with Bricore Group;
>
> (b) the CRO's administration of the management, operations and business and financial affairs of Bricore Group;
>
> (c) any sale of all or part of the Property pursuant to these proceedings;
>
> (d) any plan or plans of compromise or arrangement under the CCAA between Bricore Group and one or more classes of its creditors; and/or
>
> (e) any action or proceeding to which the CRO may be made a party by reason of having taken over the management of the business of Bricore Group.[40]

[40] Order (Appointment of Chief Restructuring Officer; Extension of Stay of Proceedings; Additional DIP Financing) made May 23, 2006.

[47] The authority to lift the stay imposed by the Initial Order against Bricore is contained in s. 11(4) of the *CCAA*:

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> ...
>
> (c) prohibiting, **until otherwise ordered by the court**, the commencement of or proceeding with any other action, suit or proceeding against the company. [Emphasis added.]

2007 SKCA 72 (CanLII)

[48] This is a discretionary power, which invokes the standard of appellate review stated as follows:

> [22] ... [T]he function of an appellate court is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that members of the appellate court would have exercised the discretion differently. The function of the appellate court is one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order. [41]

It is often expressed as permitting intervention where the judge acts arbitrarily, on a wrong principle, or on an erroneous view of the facts, or when the appeal court is satisfied that there is likely to be a failure of justice as a result of the refusal. See: *Martin v. Deutch.* [42]

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[41] Bayda C.J.S., for the majority, in *Smart v. South Saskatchewan Hospital Centre* (1989), 75 Sask.R. 34 (C.A.), paraphrasing Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 at 1046.

[42] [1943] O.R. 683 at 698.

[49] With respect to discretionary decisions made under the *CCAA*, there is a particular reluctance to intervene. The reluctance is justified on the basis of the specialization of the judges who have carriage of complex proceedings that are often replete with compromised solutions.[43] This does not mean that the Court of Appeal can turn a blind eye or permit an injustice, but it does provide the backdrop against which *CCAA* discretionary decisions are reviewed.

2007 SKCA 72 (CanLII)

[50] Unlike the *BIA*,[44] the *CCAA* contains no specific statutory test to provide guidance on the circumstances in which a *CCAA* stay of proceedings is to be lifted. Some guidance, nonetheless, can be found in the statute and in the jurisprudence.

[51] Subsection 11(6) of the *CCAA* states:

> 11 (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

While the reference to "order" in the opening clause "[t]he court shall not make an order under s. (3) or (4)" may very well be to the Initial Order and not to the order lifting the stay, s. 11(6) and, in particular, its legislative history, are also relevant to an application to lift the stay.

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[43] *Rescue! The Companies' Creditors Arrangement Act, supra* note 34 at pp. 88-92.
[44] *Supra* note 28.

[52] Subsection 11(6) was brought into effect in 1997 by Bill C-5, which enacted "An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act." When Bill C-5 received third reading on October 23, 1996, s. 11(6) took this form:

> 11 (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that:
>
> (i) the applicant has acted, and is acting, in good faith and with due diligence,
>
> (ii) a viable compromise or arrangement could likely be made in respect of the company, if the order being applied for were made, and
>
> (iii) no creditor would be materially prejudiced if the order being applied for were made.

After Bill C-5 received third reading, it was referred to the Standing Senate Committee on Banking, Trade and Commerce.[45] The Committee reported:

> A number of insolvency experts were of the opinion that the proposed amendment would make it virtually impossible to obtain extensions of the initial 30-day stay under the CCAA and force companies to file plans of arrangement within 30 days after the making of the initial stay order.
>
> Others suggested that some CCAA reorganizations would have turned out differently if the amendment had been in place.
>
> . . .
>
> Of the submissions received about proposed subsection 11(6), all but one condemned the provision. ...
>
> The CLHIA [Canadian Life and Health Insurance Association] argued that the amendment to the bill would be a significant improvement to the CCAA for four reasons:
>
> (a) it would give direction to the courts as to the tests that must be met before the extension order was granted;

[45] Twelfth Report of the Standing Senate Committee on Banking, Trade and Commerce, February 1997, unnumbered p. 3 of the Chairman's Report, and p. 18.

2007 SKCA 72 (CanLII)

> (b) it would more closely align the CCAA with the BIA;
>
> (c) the tests are well-established under the BIA and have received extensive scrutiny and study; and
>
> (d) the tests would direct the courts to consider how the stay would affect creditors. [Footnote omitted.]
>
> . . .
>
> The Committee shares the concerns expressed about the potential impact of proposed subsection 11(6) of the CCAA, particularly the concern that the CCAA may no longer be a sufficiently flexible vehicle for large, complex corporate reorganizations.
>
> While the Committee fully supports initiatives to align the provisions of the CCAA more closely with those of the BIA, these initiatives must be the subject of thorough discussion and analysis before [making] their way into legislation. Unfortunately, such discussion did not take place prior [to] the introduction of proposed subsection 11(6).[46]

Notwithstanding the submissions of the Canadian Life and Health Insurance Association, the Standing Committee recommended that Bill C-5 be amended by striking subparagraphs 11(6)(b)(ii) and (iii).

[53] The House of Commons concurred in the Amendments recommended by the Senate on April 15, 1997.[47] Bill C-5, as thus amended, received Royal Assent on April 25, 1997 and was proclaimed in its present skeletal form on September 30, 1997.[48] Neither the amending legislation[49] nor the proposed Bill presently before the Senate[50] make any change to s. 11 in this regard.

2007 SKCA 72 (CanLII)

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[46] *Ibid.* at pp. 17-18.
[47] Canada Legislative Index, 2nd Session, 35th Parliament, Bill C-5, S.C. 1997, c. 12, pp. 1 & 2.
[48] *Ibid.*
[49] *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47, s. 128.
[50] Bill C-62, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada*, 2005, 1st Sess., 39th Parl., 2006-2007.

[54] The Senate's and Parliament's specific rejection of a limitation on the court's discretion is a strong indication of Parliamentary intention. The fact that Parliament did not see fit to limit the discretion in any significant manner, despite having been given the opportunity to do so, confirms the broad discretion given in ss. 11(3) and (4) to the supervising *CCAA* judge. Discretion is never completely unfettered, but an appellate court should be reluctant to impose rigid tests, standards or criteria where Parliament has declined to do so. Some guidance can be taken from the jurisprudence.

[55] In *Canadian Airlines Corp., Re*[51] Paperny J. (as she then was) indicated that the obligation of the supervising *CCAA* judge is to "always have regard to the particular facts" and "to balance" the interests. As Farley J. said in *Ivaco Inc., Re*,[52] the supervising *CCAA* judge must also be concerned not to permit one creditor to mount "an indirect but devastating attack on the CCAA stay" so as to give one creditor an inappropriate advantage over other unsecured creditors as well as over secured creditors with priority.

[56] In *Ivaco Inc. (Re)*[53] Ground J. stated this to be the criteria to determine whether a stay should be lifted:

> 20 It appears to me that the criteria which the court must consider in determining whether to lift a stay, being whether the proposed cause of action is tenable, the balancing of interests as between the parties, the relative prejudice to the parties, and whether the proposed action would be oppressive or vexatious or an abuse of the court process, would all be met with respect to a trial of issues to resolve

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[51](2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at para 15.
[52] (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J. [Commercial]) at para 3.
[53] [2006] O.J. No. 5029 (Ont. S.C.J.) (QL).

2007 SKCA 72 (CanLII)

interpretation of the APAs with respect to the calculation of the working capital adjustments.

Ground J. went on to confirm that finding a tenable or reasonable cause of action is not the only factor to be considered:

> 30 Even if the Statement of Claim did disclose a tenable or reasonable cause of action, there are a number of other factors which this court must consider which militate against the lifting of the stay in the circumstances of this case. The institution of the Proposed Action, even if a tight timetable is imposed, would inevitably result in considerable delay and complication with respect to the full distribution of the estate to the detriment of many small trade creditors and individual creditors as well as to pension claimants. In addition, it would appear from the evidence before this court that Heico has been aware of most of the matters alleged in the Statement of Claim for approximately 2 years and there does not appear to be any valid reason given for the delay in commencing the application to lift the stay.

2007 SKCA 72 (CanLII)

[57] Turning back to the case before us, Koch J.'s reasons for refusing to lift the stay were:

> [16] . . .
>
> (a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the *CCAA* which is to promote re-organization and restructuring of companies. ....
>
> (b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).
>
> (c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re)*, *supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz,

> *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. ...[54]

He went on to find that the proposed action against Bricore was not "tenable."

2007 SKCA 72 (CanLII)

[58] On an application made by a post-filing creditor, a supervising *CCAA* judge can refuse to lift the stay on the basis that the creditor's claim is outside the *CCAA* process and the action can be commenced after the *CCAA* order is lifted. (See *360networks*[55] and *Stelco*[56]). Koch J. did not exercise this option. He was no doubt motivated in part by the fact that by the time ICR's claim could be tried, after the stay is no longer in effect, there may be no funds for it to claim as Bricore has now liquidated all of its assets and there remains, for all intents and purposes, a pool of funds only. The funds are subject to a plan of distribution, approved by the creditors, and will be distributed over this year.

[59] Instead of simply rejecting the claim, Koch J. appears to have weighed the evidence to a certain extent as a means of deciding the next step. He concluded that the claim was not frivolous within the meaning of a Queen's Bench Rule 173 striking motion, but it was nonetheless an untenable claim. The question becomes whether a supervising *CCAA* judge can weigh a post-filing claim in this manner.

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[54] *ICR v. Bricore*, *supra* note 15.
[55] *360networks*, *supra* note 19.
[56] *Stelco*, *supra* note 20.

[60] Professor Sarra comments on the anomalous position of liquidating *CCAA* proceedings:

> One policy issue that has not to date been fully explored is whether the *CCAA* should be used to effect an organized liquidation that should properly occur under the *BIA* or receivership proceedings. Increasingly, there are liquidating *CCAA* proceedings, whereby the debtor corporation is for all intents and purposes liquidated, but not under the supervision of a trustee in bankruptcy or in compliance with all of the requirements of the *BIA*. While creditors still must vote in support of such plans in the requisite amounts, there may be some public policy concerns regarding the use of a restructuring statute, under the broad scope of judicial discretion, to effect liquidation. ...[57]

2007 SKCA 72 (CanLII)

The issue of whether the *CCAA* should be used for a liquidating, as opposed to a restructuring purpose, is not before us. In the case at bar, when the Initial Order was granted, it was thought possible that Bricore could be restructured. It was only some months after the Initial Order that it became clear that all of the assets would have to be sold. Our task at this point is to address the position of an undetermined claim arising post-filing in such a context.

[61] If a claim had some reasonable prospect of success and were otherwise meritorious in the *CCAA* context, it seems inappropriate to refuse simply to lift the stay on the basis that the claim is outside the *CCAA* process knowing that, by the time the matter is heard in the ordinary course, there will be no assets remaining. On the other hand, it also seems inappropriate to delay distribution of the assets under a plan of arrangement, or make some other accommodation, for an action that is likely to fail. I should make it clear that I am not addressing the issue of whether a meritorious claimant can share in

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[57] *Rescue! The Companies' Creditors Arrangements Act*, *supra* note 34 at p. 82.

a proposed plan of distribution as a result of the liquidation of the assets. The issue before this Court is whether a post-filing creditor should be permitted to commence action, in the context of what is now a liquidating *CCAA*, and avail itself of whatever pre-judgment remedies might be available to it as a result of its claim.

2007 SKCA 72 (CanLII)

[62] In the face of a liquidating plan of arrangement, given the broad jurisdiction conferred by the *CCAA* on the Court, it seems appropriate that the supervising judge establish some mechanism to weigh the post-filing claim to determine the next step. The next step might entail permitting the claimant to commence action and attempt to convince a chambers judge to grant it a pre-judgment remedy in relation to the funds. It is also possible that the supervising judge may delay distribution of the funds, or some portion thereof, with or without full security for costs, or on such other terms as seems fit. Mechanisms to test the claim could include referral to a special claims officer, examination of the pertinent principal parties, or a settlement conference, or, as in this case, a preliminary examination by the supervising *CCAA* judge in chambers based on affidavit evidence.

[63] In the case at bar, having determined that it was appropriate to assess ICR's claim in some way, did Koch J. err either in his statement of the appropriate test or in its application?

[64] Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.'s decision in

Ivaco,[58] but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.[59]

2007 SKCA 72 (CanLII)

[65] Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the *CCAA* proceeding.

[66] Given the broad discretion granted to a supervisory judge under the *CCAA*, as well as the knowledge and experience he or she gains from the ongoing dealings with the parties under the proceedings, it would be contrary to the purpose of the *CCAA* for the law under it to develop in a restrictive way. Having regard for this, there ought not to be rigid requirements imposed on

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[58] *Ivaco, supra* note 53.

[59] *Ma, Re* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.). See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*, supra note 29 at p. 403.

how a supervising *CCAA* judge must exercise his or her discretion with respect to lifting the stay.

[67] Nonetheless, a broad test articulated along the lines of that in *Ma, Re*[60] may be of assistance. The test from *Ma, Re* is:

> 3 ... As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

While the *Ma, Re* test was developed for use under the *BIA*, a test based on sound reasons, consistent with the scheme of the *CCAA*, to relieve against the stay imposed by ss. 11(3) and (4) of the *CCAA*, may be a better way to express the task of the chambers judge faced with a liquidating *CCAA* than a test based simply on *prima facie* case. It must be kept firmly in mind that the Court is dealing with a claimant that did not avail itself of the remedy of withholding services under s. 11.3. It is also useful to remind oneself that, in a case such as this, the *CCAA* proceeding began as a restructuring exercise with the attendant possibility of creating s. 11.3 claimants. The threshold must be a significant one, but not insurmountable.

[68] In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:

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[60] *Ibid.*

2007 SKCA 72 (CanLII)

(a) the balance of convenience;

(b) the relative prejudice to the parties;

(c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising *CCAA* judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.

[69] While Koch J. did not state the test as broadly as I have, I agree that ICR does not reach the necessary threshold. ICR did not structure its affairs or establish a claim with the specificity that justifies the development of a remedy to allow it to participate in the liquidation of the Bricore assets. There is also no aspect of the liquidation that requires the Court in this case to be concerned. In particular, the stay need not be lifted, and no other step need be taken in the context of the *CCAA* proceedings in light of these facts:

1. as of January 30, 2006, the Building was subject to an exclusive Selling Officer Agreement that provided CMN Calgary with the exclusive right to sell the property and to earn a commission of 1.25% of the purchase price,[61] which is significantly less than that being claimed by ICR at a 5% commission;

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[61]Order (Extension of Stay, DIP Financing, Sale Process & Shareholder Proceedings) of Koch J. in Chambers dated February 13, 2006.

2007 SKCA 72 (CanLII)

2. the sale to the Proposed Purchaser was a sale of six of the seven Bricore properties;
3. the trial judge received a report dated September 25, 2006 from the CRO recommending approval of the sale, which is two days before the alleged contract with ICR was proposed;[62]
4. in the September 25 report, the CRO advised the Court that "the total aggregate purchase price for the Bricore Properties obtained by Bricore in the Accepted Offer to Purchase represented the greatest value which it would be possible to obtain for all of the Bricore Properties;"[63]
5. the September 27, 2006 letter from ICR to Bricore, states "we are aware that the properties are under contract to sell ..."; and,
6. there was no sale from Bricore to the City of Regina.

[70] While ICR denies knowledge of the sale, it is important to come back to the September 27th letter from ICR to Mr. Ruf. It states:

> **We are aware that the properties are under contract to sell** and request that ICR be protected in the specific situations as outlined.[64] [Emphasis added]

The addition by the CRO of these words, "Date of closing of **a sale** or December 31, 2006 whichever is earlier," to that letter adds further support to the veracity of the CRO's report to the effect that the CRO entered into discussions with ICR to provide for the eventuality of a failed sale to the purchaser with whom Bricore already had a contractual relationship.

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[62] Order made September 25, 2006, *supra* note 7.
[63] Appeal Book, p. 37a, para. 3.
[64] *Supra* note 11.

2007 SKCA 72 (CanLII)

[71] Finally, in assessing Koch J.'s decision, and in determining the deference that is owed to it, I am not unmindful that he issued some 20 orders in 2006, pertaining to the Bricore restructuring, at least five of which dealt substantively with the Building and its prospective sale to the Proposed Purchaser.

[72] Thus, applying the standard of review previously articulated, I cannot say that Koch J. acted arbitrarily, on a wrong principle, or on an erroneous view of the facts, or that a failure of justice is likely to result from the exercise of his discretion in the manner he did.

VII. Issue #4. Did the supervising *CCAA* judge make a reviewable error in refusing leave to commence an action against the CRO?

[73] In addition to the indemnification provided by para. 18 of the CRO Order quoted above, the Order goes on to indicate the only circumstances in which the CRO can be sued personally:

> 20. For greater clarity, the CRO [*sic*]:
>
> ...
>
> (c) the CRO shall incur no liability or obligation as a result of his appointment or as a result of the fulfillment of his powers and duties as CRO, except as a result of instances of fraud, gross negligence or wilful misconduct on his part; and
>
> (d) no Proceeding shall be commenced against the CRO as a result of or relating in any way to his appointment or to the fulfillment of his powers and duties as CRO, without prior leave of the Court on at least seven days' notice to Bricore Group, the CRO and legal counsel to Bricore Group.
>
> 21. Subject to paragraph 20 hereof, nothing in this Order shall restrict an action against the CRO for acts of gross negligence, bad faith or wilful misconduct committed by him.

2007 SKCA 72 (CanLII)

Setting aside the obvious ambiguity in this Order, it can be taken that to assert a claim against the CRO personally, ICR had to claim "fraud, gross negligence, wilful misconduct or bad faith." ICR claimed "bad faith."

2007 SKCA 72 (CanLII)

[74] Based on para. 20(d) of the Initial Order, there is no question that ICR was required to obtain prior leave of the court. The issue thus becomes whether the supervising *CCAA* judge erred in exercising his discretion in refusing to lift the stay.

[75] Koch J.'s reasons for refusing to lift the stay are these:

> [18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court-appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell. Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in "bad faith", it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.
>
> [19] As stated previously, the overriding purpose of the *CCAA* must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired.

> Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order. [65]

[76] Again, Koch J. employed the same mechanism that he used to assess the claim against Bricore. He considered the status of the CRO as an officer of the court, noted the ambiguity in the Order and weighed the evidence to a certain extent. The question he was answering was the sufficiency of the claim to permit an action to be commenced against the Court's officer.

2007 SKCA 72 (CanLII)

[77] Again, applying the standard of review with respect to discretionary orders, there is no basis upon which the Court can intervene with Koch J.'s refusal to lift the stay so as to permit an action against the CRO in his personal capacity.

VIII. Issue #5. Did the supervising *CCAA* judge err in awarding costs on a substantial indemnity basis?

[78] Koch J. awarded substantial indemnity costs for this reason:

> [6] In my view, allegations of misconduct against a court officer are rare and exceptional. Therefore costs on this motion should be imposed on a substantial indemnity scale, although not on the full solicitor and client basis sought. Bricore is entitled to costs on the motion of $2,000.00, and Maurice Duval is entitled to costs of $1,000.00, payable in each instance by the applicant, ICR Commercial Real Estate (Regina) Ltd.[66]

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[65] *ICR v. Bricore, supra* note 15.
[66] *ICR v. Bricore*, 2007 SKQB 144.

[79] I note that Newbury J.A. in *New Skeena Forest Products Inc., Re*[67] dismissed a challenge to a costs award, holding that "these are the kinds of considerations which the [*CCAA*] Chambers judge ... was especially qualified to make." And, of course, all costs orders are discretionary orders.

[80] Nonetheless in this case, it would appear that the supervising *CCAA* judge erred. There is no basis upon which to order substantial indemnity costs with respect to the application to lift the stay in relation to Bricore. Bad faith was not alleged on its part. With respect to the CRO, the only basis upon which the stay could be lifted was to make an allegation of "bad faith." In the absence of some other factor, ICR cannot be faulted for making the very allegation that it was required to make in order to bring its application within the ambit of the stay of proceedings that had been granted.

[81] In addition, while Koch J. indicated he was not awarding solicitor-and-client costs, there is not a sufficient distinction between substantial indemnity costs and solicitor-and-client costs. An award approaching solicitor-and-client costs is still a punitive order and, as there is no authority for the awarding of substantial indemnity costs, relies upon the same jurisprudential base as solicitor-and-client costs. As such, the award does not seem to meet the test established in *Siemens v. Bawolin*[68] and *Hashemian v. Wilde*[69] wherein it is stated that solicitor-and-client costs are generally awarded where there

[67] [2005] 8 W.W.R. 224 (B.C.C.A.) at para. 23.
[68] 2002 SKCA 84, [2002] 11 W.W.R. 246.
[69] 2006 SKCA 126, [2007] 2 W.W.R. 52.

2007 SKCA 72 (CanLII)

has been reprehensible, scandalous or egregious conduct on the part of one of the parties in the context of the litigation.

[82] If the parties are unable to agree with respect to costs in the Court of Queen's Bench and in this Court, they may speak to the Registrar to fix a time for a conference call hearing regarding costs.

2007 SKCA 72 (CanLII)

EXHIBIT 3

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

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 PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

COUNSEL: *Douglas J. Wray and Jesse B. Kugler*, counsel for the Applicant, Communications, Energy and Paperworkers Union of Canada ("CEP")
David Byers and Maria Konyukhova, counsel for the Monitor

2011 ONSC 2215 (CanLII)

PEPALL J.

REASONS FOR DECISION

Introduction

[1] The Communications, Energy and Paperworkers Union of Canada ("CEP") requests an order lifting the stay of proceedings in respect of certain grievances and directing that they be adjudicated in accordance with the provisions of the applicable collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the subject claim to be adjudicated in accordance with the provisions of the collective agreement.

Background Facts

[2] On October 6, 2009, the CMI Entities obtained an initial order pursuant to the *CCAA* staying all proceedings and claims against them. Specifically, paragraphs 15 and 16 of that order stated:

> **NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY**

15. **THIS COURT ORDERS** that until and including November 5, 2009, 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 CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

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 CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of claim for lien.

2011 ONSC 2215 (CanLII)

[3] On October 14, 2009, as part of the CCAA proceedings, I granted a claims procedure order which established a claims procedure for the identification and quantification of claims against the CMI Entities. In that order, "Claim" is defined as any right or claim of any Person against one or more of the CMI Entities in existence on the Filing Date[1] (a "Prefiling Claim") and any right or claim of any Person against one or more of the CMI Entities arising out of the restructuring on or after the Filing Date (a "Restructuring Claim"). Claims arising prior to certain dates had to be asserted within the claims procedure failing which they were forever extinguished and barred. Pursuant to the claims procedure order, subject to the discretion of the Court, claims of any person against one or more of the CMI Entities were to be determined by a claims officer who would determine the validity and amount of the disputed claim in accordance with the claims procedure order. The Honourable Ed Saunders, The Honourable Jack Ground and The Honourable Coulter Osborne were appointed as claims officers. Other persons could also be appointed by court order or on consent of the CMI Entities and the Monitor. This order was unopposed. It was amended on November 30, 2009 and again the motion was unopposed. As at October 29, 2010, over 1,800 claims asserted against the CMI Entities had been finally resolved in accordance with and pursuant to the claims procedure order.

[4] On October 27, 2010, CEP was authorized to represent its current and former union members including pensioners employed or formerly employed by the CMI Entities to the extent, if any, that it was necessary to do so.

[5] On the date of the initial order, CEP had a number of outstanding grievances. CEP filed claims pursuant to the claims procedure order in respect of those grievances. The claim that is the subject matter of this motion is the only claim filed by CEP that has not been resolved and therefore is the only claim filed by CEP that requires adjudication. There is at least one other claim in Western Canada that may require adjudication.

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[1] The Filing Date was October 6, 2009, the date of the initial order.

2011 ONSC 2215 (CanLII)

2011 ONSC 2215 (CanLII)

[6] John Bradley had been employed for 20 years by Global Television, a division of Canwest Television Limited Partnership ("CTLP"), one of the CMI Entities. Mr. Bradley is a member of CEP. On February 24, 2010, CTLP suspended Mr. Bradley for alleged misconduct. On March 8, 2010, CEP filed a grievance relating to his suspension under the applicable collective agreement. On March 25, 2010, CTLP terminated his employment. On March 26, 2010, CEP filed a grievance requesting full redress for Mr. Bradley's termination. This would include reinstatement to his employment. On June 23, 2010 a restructuring period claim was filed with respect to the Bradley grievances on the following basis:

> The Union has filed this claim in order to preserve its rights. Filing this claim is without prejudice to the Union's ability to pursue all other remedies at its disposal to enforce its rights, including any other statutory remedies available. Notwithstanding that the Union has filed the present claim, the Union does not agree that this claim is subject to compromise pursuant [to the CCAA][2]. The Union reserves its right to make further submissions in this regard.

[7] In spite of the parties' good faith attempts to resolve the Bradley grievances and the Bradley claim, no resolution was achieved.

[8] The Plan was sanctioned on July 28, 2010 and implemented on October 27, 2010. At that time, all of the operating assets of the CMI Entities were transferred to the Plan Sponsor and the CMI Entities ceased operations. The CTLP stay was also terminated. The stay with respect to the Remaining CMI Entities (as that term is defined in the Plan) was extended until May 5, 2011. Pursuant to an order dated September 27, 2010, following the Plan implementation date the Monitor shall be:

> (a) empowered and authorized to exercise all of the rights and powers of the CMI Entities under the Claims Procedure Order, including, without limitation, revise, reject, accept,

[2] The words in brackets were omitted but presumably this was the intention.

> settle and/or refer for adjudication Claims (as defined in the Claims Procedure Order) all without (i) seeking or obtaining the consent of the CMI Entities, the Chief Restructuring Advisor or any other person, and (ii) consulting with the Chief Restructuring Advisor in the CMI Entities; and
>
> (b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims.

2011 ONSC 2215 (CanLII)

[9] The Monitor has taken the position that if the Bradley matter is not resolved, the claim should be referred to a claims officer for determination. It is conceded that a claims officer would have no jurisdiction to reinstate Mr. Bradley to his employment.

[10] CEP now requests an order lifting the stay of proceedings in respect of the Bradley grievances and directing that they be adjudicated in accordance with the provisions of the collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement.

[11] For the purposes of this motion and as is obvious from the motion seeking to lift the stay, both CEP and the Monitor agree that the stay did catch the Bradley claim and that it is encompassed by the definition of claim found in the claims procedure order.

[12] Since the commencement of the *CCAA* proceedings, CEP has only sought to lift the stay in respect of one other claim, that being a claim relating to a grievance filed by CEP on behalf of Vicky Anderson. The CMI Entities consented to lifting the stay in respect of Ms. Anderson's claim because at the date of the initial order, there had already been eight days of hearing before an arbitrator, all evidence had already been called, and only one further date was scheduled for final argument. Ultimately, the arbitrator ordered that Ms. Anderson be reinstated but made no order for compensation.

[13] Pursuant to Article 12.3 of the applicable collective agreement, discharge grievances are to be heard by a single arbitrator. All other grievances are to be heard by a three person Board of

2011 ONSC 2215 (CanLII)

Arbitration unless the parties consent to submit the grievance to a single arbitrator. The single arbitrator is to be selected within 10 days of the notice of referral to arbitration from a list of 5 people drawn by lot. An award is to be given within 30 days of the conclusion of the hearing. The list of arbitrators was negotiated and included in the collective agreement. The arbitrator has the power to reinstate with or without compensation.

[14] The evidence before me suggests that adjudications of grievances under collective agreements are typically much more costly and time consuming than adjudications before a claims officer as the latter may determine claims in a summary manner and there is more control over scheduling. The Monitor takes the position that additional cost and delay would arise if the claims were adjudicated pursuant to the terms of the collective agreement rather than pursuant to the terms of the claims procedure order.

Issues

[15] Both parties agree that the following two issues are to be considered:

(a) Should this court lift the stay of proceedings in respect of the Bradley grievances and direct that the Bradley grievances be adjudicated in accordance with the provisions of the collective agreement?

(b) Should this court amend the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement?

Positions of the Parties

[16] In brief, dealing firstly with the stay, CEP submits that the balance of convenience favours pursuit of the grievances through arbitration. CEP is seeking to compel the employer to comply with fundamental obligations that flow from the collective agreement. This includes the appointment of an arbitrator on consent who has jurisdiction to award reinstatement if he or she determines that there was no just cause to terminate Mr. Bradley's employment. Requiring that the claim and the grievances be adjudicated in a manner that is inconsistent with the collective

agreement would have the effect of depriving the griever of some of the most fundamental rights under a collective agreement. Furthermore, permitting the grievances to proceed to arbitration would prejudice no one.

[17] Alternatively, CEP submits that the claims procedure order ought to be amended. It is in conflict with the terms of the collective agreement. Pursuant to section 33 of the *CCAA*, the collective agreement remains in force during the *CCAA* proceedings. The claims procedure order must comply with the express requirements of the *CCAA*. Lastly, orders issued under the *CCAA* should not infringe upon the right to engage in associational activities which are protected by the *Charter of Rights and Freedoms*.

[18] The Monitor opposes the relief requested. On the issue of the lifting of the stay, it submits that the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. The stay of proceedings permits the *CCAA* to accomplish its legislative purpose and in particular enables continuance of the company seeking *CCAA* protection.

[19] The lifting of a stay is discretionary. Mr. Bradley is no more prejudiced than any other creditor and the claims procedure established under the order has been uniformly applied. The claims officer has the power to recognize Mr. Bradley's right to reinstatement and monetize that right. The efficacy of *CCAA* proceedings would be undermined if a debtor company was forced to participate in an arbitration outside the *CCAA* proceedings. This would place the resources of an insolvent *CCAA* debtor under strain. The Monitor submits that CEP has not satisfied the onus to demonstrate that the lifting of the stay is appropriate in this case.

[20] As for the second issue, the Monitor submits that the claims procedure order should not be amended. Courts regularly affect employee rights arising from collective agreements during *CCAA* proceedings and recent amendments to the *CCAA* do not change the existing case law in this regard. Furthermore, amending the claims procedure order would undermine the purpose of the *CCAA*. Lastly, relying on the Supreme Court of Canada's statements in *Health Services and*

2011 ONSC 2215 (CanLII)

Support – Facilities Subsector Bargaining Assn. v. British Columbia[3], the claims procedure order does not interfere with freedom of association.

[21] Following argument, I requested additional brief written submissions on certain issues and in particular, to what employment Mr. Bradley would be reinstated if so ordered. I have now received those submissions from both parties.

2011 ONSC 2215 (CanLII)

Discussion

1. Stay of Proceedings

[22] The purpose of the *CCAA* has frequently been described but bears repetition. In *Lehndorff General Partner Limited*[4], Farley J. stated:

> The *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.

[23] The stay provisions in the *CCAA* are discretionary and very broad. Section 11.02 provides that:

> (1) A court may, on an initial application in respect of the debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding Up and Restructuring Act;

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[3] [2007] S.C.J. No. 27.

[4] (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) at para. 6.

> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> > (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an *Act* referred to in paragraph (1)(a);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

2011 ONSC 2215 (CanLII)

[24] As the Court of Appeal noted in *Nortel Networks Corp.*[5], the discretion provided in section 11 is the engine that drives this broad and flexible statutory scheme. The stay of proceedings in section 11 should be broadly construed to accomplish the legislative purpose of the *CCAA* and in particular to enable continuance of the company seeking *CCAA* protection: *Lehndorff General Partner Limited*[6].

[25] Section 11 provides an insolvent company with breathing room and by doing so, preserves the status quo to assist the company in its restructuring or arrangement and prevents any particular stakeholder from obtaining an advantage over other stakeholders during the

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[5] [2009] O.J. No. 4967 at para. 33.

[6] *Supra*, note 4 at para. 10.

restructuring process. It is anticipated that one or more creditors may be prejudiced in favour of the collective whole. As stated in *Lendorff General Partner Limited*[7]:

> The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the *CCAA* because this effect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the *CCAA* must be for the debtor and all of the creditors.

2011 ONSC 2215 (CanLII)

[26] In *Canwest Global Communications Corp.*[8], I had occasion to address the issue of lifting a stay in a *CCAA* proceeding. I referred to situations in which a court had lifted a stay as described by Paperny J. (as she then was) in *Re Canadian Airlines Corp.*[9] and by Professor McLaren in his book, "*Canadian Commercial Reorganization: Preventing Bankruptcy*"[10]. They included where:

a) a plan is likely to fail;

b) the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

c) the applicant shows necessity for payment;

d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

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[7] *Ibid.* at para. 6.

[8] (2009) O.J. 5379.

[9] (2000) 19 C.B.R. (4th) 1.

[10] (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

e) it is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;

f) after the lapse of a significant period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;

g) there is a real risk that a creditor's loan will become unsecured during the stay period;

h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;

i) it is in the interests of justice to do so.

2011 ONSC 2215 (CanLII)

[27] The lifting of a stay is discretionary. As I wrote in *Canwest Global Communications Corp.*[11]:

> There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.

[28] There appears to be no real issue that the grievances are caught by the stay of proceedings. In *Luscar Ltd. v. Smoky River Coal Limited*[12], the issue was whether a judge had

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[11] *Supra*, note 8 at para. 32.

[12] [1999] A.J. No. 676.

the discretion under the *CCAA* to establish a procedure for resolving a dispute between parties who had previously agreed by contract to arbitrate their disputes. The question before the court was whether the dispute should be resolved as part of the supervised reorganization of the company under the *CCAA* or whether the court should stay the proceedings while the dispute was resolved by an arbitrator. The presiding judge was of the view that the dispute should be resolved as expeditiously as possible under the *CCAA* proceedings. The Alberta Court of Appeal upheld the decision stating:

> The above jurisprudence persuades me that "proceedings" in section 11 includes the proposed arbitration under the B.C. *Arbitration Act*. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by section 15(5) of the *Rules*. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision making process. Thus, the efficacy of *CCAA* proceedings (many of which are time sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-*CCAA* arbitration. For these reasons, having taken into account the nature and purpose of the *CCAA*, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under section 11 of the *CCAA*.[13]

[29] I do recognize that the *Luscar* decision did not involve a collective agreement but an agreement to arbitrate. That said, the principles described also apply to an arbitration pursuant to the terms of a collective agreement.

[30] In considering balance of convenience, CEP's primary concerns are that the claims procedure order does not accord with the rights and obligations contained in the collective agreement. Firstly, a claims officer is the adjudicator rather than an arbitrator chosen pursuant to the terms of the collective agreement and secondly, reinstatement is not an available remedy

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[13] *Ibid*, at para. 33.

2011 ONSC 2215 (CanLII)

before a claims officer. Thirdly, an arbitration imports rules of natural justice and procedural fairness whereas the claims procedure is summary in nature.

[31] The claims officers who were identified in the claims procedure order are all former respected and experienced judges who are well suited and capable of addressing the issues arising from the Bradley claim. Furthermore, had this been a real issue, CEP could have raised it earlier and identified another claims officer for inclusion in the claims procedure order. Indeed, an additional claims officer still could be appointed but no such request was ever advanced by CEP.

[32] Should the claims officer find that CTLP did not have just cause to terminate Mr. Bradley's employment, he can recognize Mr. Bradley's right to reinstatement by monetizing that right. This was done for a multitude of other claims in the *CCAA* proceedings including claims filed by CEP on behalf of other members. I note that Mr. Bradley would not be receiving treatment different from that of any other creditor participating in the claims process.

[33] The claims process is summary in nature for a reason. It reduces delay, streamlines the process, and reduces expense and in so doing promotes the objectives of *CCAA*. Indeed, if grievances were to customarily proceed to arbitration, potential exists to significantly undermine the *CCAA* proceedings. Arbitration of all claims arising from collective agreements would place the already stretched resources of insolvent *CCAA* debtors under significant additional strain and could divert resources away from the restructuring. It is my view that generally speaking, grievances should be adjudicated along with other claims pursuant to the provisions of a claims procedure order within the context of the CCAA proceedings.

[34] That said, it seems to me that this case is unique. While the claims procedure order and the meeting order of June 23, 2010 provide that all claims against CTLP and others arising prior to certain dates must be asserted within the claims procedure failing which they are forever extinguished and barred, the stay relating to CTPL was terminated on October 27, 2010. CTLP has emerged from CCAA protection and is currently operating in the normal course having changed its name to Shaw Television Limited Partnership ("STLP"). If the grievance relating to

2011 ONSC 2215 (CanLII)

Mr. Bradley's termination is successful, he could be reinstated to his employment at STLP. The position of CEP, Mr. Bradley and the Monitor is that reinstatement, if ordered, would be to STLP. Counsel for CEP advised the court that notice of the motion was given to STLP and that a representative was present in court for the argument of the motion although did not appear on the record. The Monitor has also confirmed that Shaw Communications Inc., the parent of STLP, was aware of the motion and its counsel has confirmed its understanding that any reinstatement of Mr. Bradley, if ordered, would be to STLP.

2011 ONSC 2215 (CanLII)

[35] As mentioned, Mr. Bradley was a 20 year employee. While I do not consider the identity of the arbitrator and the natural justice arguments of CEP to be persuasive, given the stage of the CCAA proceedings, the fact that the stay relating to CTLP has been lifted, and Mr. Bradley's employment tenure, I am persuaded that he ought to be given the opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by a claims officer if so ordered. Counsel for the Monitor has confirmed that the timing of the distributions would not appear to be affected by the outcome of this motion. No meaningful prejudice would ensue to any stakeholder. It seems to me that the balance of convenience and the interests of justice favour lifting the stay to permit the grievances to proceed through arbitration rather than before the claims procedure officer. Therefore, CEP's motion to lift the stay is granted and the Bradley grievances may be adjudicated in accordance with the terms of the collective agreement.

2. Amendment of the Claims Procedure Order

[36] In light of my decision on the stay, it is not strictly necessary to consider whether the claims procedure order should be amended as requested by CEP as alternative relief. As this issue was argued, however, I will address it.

[37] Section 33 of *CCAA* was added to the statute in September, 2009. The relevant sub-sections now provide:

> 33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in

> force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.
>
> 33(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

2011 ONSC 2215 (CanLII)

[38] Justice Mongeon of the Québec Superior Court had occasion to address the effect of section 33 of the *CCAA* in *White Birch Paper Holding Company*[14]. He stated that the fact that a collective agreement remains in force under a *CCAA* proceeding does not have the effect of "excluding the entire collective labour relations process from the application of the *CCAA*." [15] He went on to write that:

> It would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process.[16]

[39] In *Canwest Global Communications Corp.*[17], I wrote that section 33 of the *CCAA* "maintains the terms and obligations contained in the collective agreement but does not alter priorities or status."[18] In that case when dealing with the issue of immediate payment of severance payments, I wrote:

> There are certain provisions in the amendments that expressly mandate certain employee related payments. In those

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[14] 2010, Q.C.C.S. 2590.

[15] *Ibid*, at para. 31.

[16] *Ibid*, at para. 35.

[17] [2010] O.J. No. 2544.

[18] *Ibid*, at para. 32.

> instances, section 6(5) dealing with a sanction of a plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.[19]

2011 ONSC 2215 (CanLII)

[40] I agree with the Monitor's position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the *CCAA* and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament's intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the *CCAA* or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the *Act*.

[41] Furthermore, I note that over 1,800 claims have been processed and dealt with by way of the claims procedure order, many of them involving claims filed by CEP on behalf of its members. CEP was provided with notice of the motion wherein the claims procedure order and the claims officers were approved. CEP did not raise any objection to the claims procedure order, the claims officers or the inclusion of grievances in the claims procedure at the time that the order was granted. The claims procedure order was not an order made without notice and none of the prerequisites to variation of an order has been met. Had I not lifted the stay, I would not have amended the claims procedure order as requested by CEP.

[42] CEP's last argument is that the claims procedure order interferes with Mr. Bradley's freedoms under the Canadian *Charter of Rights and Freedoms*. In this regard I make the

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[19] *Ibid*, at para. 33.

following observations. Firstly, this argument was not advanced when the claims procedure order was granted. Secondly, CEP is not challenging the validity of any section of the *CCAA*. Thirdly, nothing in the statute or the claims procedure inhibits the ability to collectively bargain. In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*[20], the Supreme Court of Canada stated:

> We conclude that section 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute or guarantee access to any particularly statutory regime. ...
>
> In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.[21]

[43] In my view, nothing in the claims procedure or the *CCAA* impacts the procedure known as collective bargaining.

<u>Conclusion</u>

[44] Under the circumstances, the request to lift the stay as requested by CEP is granted. Had it been necessary to do so, I would have dismissed the alternative relief requested.

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[20] *Supra*, note 3.

[21] *Ibid*, at at paras. 19 and 29.

2011 ONSC 2215 (CanLII)

Pepall J.

Released: April 7, 2011

2011 ONSC 2215 (CanLII)

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

2011 ONSC 2215 (CanLII)

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 PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

REASONS FOR DECISION

Pepall J.

Released: April 7, 2011

EXHIBIT 4

Date: 20010727
Docket: CI 00-01-20164
Indexed as: Manitoba Capital Fund Limited Partnership et al v. Royal Bank of Canada
Cited as: 2001 MBQB 197
(Winnipeg Centre)

2001 MBQB 197 (CanLII)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

MANITOBA CAPITAL FUND LIMITED PARTNERSHIP, by its General Partner, MCF CAPITAL INC., VISION CAPITAL FUND LIMITED PARTNERSHIP, by its General Partner, MSBG LIMITED, GOVERNMENT OF MANITOBA, FORMATIONS INC., and SAUDER INDUSTRIES LIMITED,	)	For the plaintiffs: Kenneth A. Filkow, Q.C., Robert J. Graham and Diane M. Stasiuk
plaintiffs,	)	For the defendant: Paul A. MacDonald, David R.M. Jackson and Gina Rogakos
- and -	)	For KPMG Inc., Trustee: R.A. Dewar, Q.C.
ROYAL BANK OF CANADA,	)	
defendant.	)	JUDGMENT DELIVERED: JULY 27, 2001

MACINNES, J.

[1] The defendant moves:

(1) for a declaration pursuant to s. 69.4 of the ***Bankruptcy and Insolvency Act*** ("BIA") that the stay of proceedings ("BIA Stay") against Delano Cabinetry Inc., Schmidtke Millwork (1993) Ltd., Northstar Gaming Ltd., Form-Right Countertops Ltd., Century Craft Marine Products Ltd., Mark Trent Commercial Furnishings Inc., and

TSG Capital Corp. (collectively "TSG Companies"), no longer operates against the defendant; and

(2) for an order granting the defendant leave to amend its Statement of Defence, assert a counterclaim, and join the TSG Companies and KPMG Inc. in its capacity as trustee of the estates of each of the TSG Companies, as defendants to the counterclaim.

[2] The plaintiffs move for an order to expunge paragraph 19 of the Statement of Defence filed in this action by the defendant.

[3] For the reasons which follow, I allow the defendant's application to amend its Statement of Defence, to assert a counterclaim, and to join the TSG Companies and KPMG Inc. in its capacity as trustee of the estates of each of the TSG Companies as defendants to the counterclaim, all as requested in the defendant's Notice of Motion. I also grant the declaration pursuant to s. 69.4 of the BIA that the BIA Stay against TSG Companies no longer operates against the defendant for purposes of this litigation. As well, I dismiss plaintiffs' application to strike or expunge paragraph 19 of the defendant's Statement of Defence.

[4] By orders made June 27, 2000 in the bankruptcy estates of Northstar, Schmidtke and Delano, Manitoba Capital Fund Limited Partnership ("MCF") was authorized under s. 38 of the BIA to commence and prosecute proceedings (the "s. 38 action") in its own name, at its own expense and risk:

(a) challenging the validity and enforceability of a loan arrangement made between the Royal Bank as lender and the Bankrupt (Northstar, Schmidtke and Delano), as it then was, *inter alia* as

2001 MBQB 197 (CanLII)

borrower and the security taken by the Royal Bank from the Bankrupt, as it then was, under the said loan arrangement;

(b) challenging the integrity at law of an off-set by the Bank of monies in the account of the Bankrupt, prior to the bankruptcy, as against overdrafts, and the integrity at law of related transactions.

[5] Following the making of such orders, MCF wrote to each of the creditors of the TSG Companies advising of the orders, of its intent to proceed with action and of the effect and consequences of an action brought under s. 38 of the BIA. As well, it invited other creditors to indicate whether they wished to join in such action as plaintiffs with MCF. Four other creditors, namely, Vision Capital Fund Limited Partnership, Government of Manitoba, Formations Inc., and Sauder Industries Limited, signified their intention to join in the s. 38 action.

[6] After obtaining an extension of time for the purpose of considering and determining its position, the defendant signified its intention to likewise participate in the s. 38 action and sought leave to do so. One of the concerns that had to be addressed in the defendant's application was that it was to be the defendant in the proposed s. 38 action. While the defendant wished to preserve its interest in the proceeds of the s. 38 litigation and was prepared to contribute pro rata to the cost of prosecuting the action, it could not participate as a full plaintiff in the sense of participating in the strategy and prosecution of the action given its status as defendant. By orders made September 8, 2000, the Court varied the July 27, 2000 orders to provide that the defendant could maintain a contingent interest in the monetary benefits which might be derived from the s. 38 action, subject to the terms of the September 8, 2000 orders.

2001 MBQB 197 (CanLII)

[7] On October 5, 2000, the s. 38 plaintiffs issued their Statement of Claim. In it, they alleged that the loan agreements and related security which the defendant holds with respect to the TSG Companies contravene s. 42 of ***The Corporations Act*** (Manitoba), and being illegal are therefore void and unenforceable.

[8] On November 2, 2000, the defendant filed its defence. It denied any contravention of s. 42 of ***The Corporations Act***. In addition, in para. 19 of its Statement of Defence, it pled:

> 19. The defendant specifically denies the allegations contained in para. 22 of the Statement of Claim. In any event, regardless of the validity and enforceability of the lending arrangement, each of Delano, Northstar and Schmidtke and the other TSG Companies is jointly and severally liable to the defendant for damages suffered by the defendant as a consequence of an unlawful conspiracy engaged in by the TSG Companies and their directing mind, Michael Shamray, to defraud the defendant (the "Conspiracy to Defraud"). The damages suffered by the defendant as a result of the Conspiracy to Defraud, for which each of Delano, Northstar and Schmidtke is jointly and severally liable, exceeds $35,000,000.00. If the lending arrangement or any part thereof is void and unenforceable (which is expressly denied), the bank is entitled to recover the said damages from the estates in bankruptcy of each of Delano, Northstar and Schmidtke.

[9] As previously indicated herein, the defendant now moves to amend its defence, to advance a counterclaim, and to add the TSG Companies and KPMG as trustee as party defendants to the counterclaim. The proposed amendments to the defence can be grouped into five broad categories:

(a) general "clean-up" amendments;

2001 MBQB 197 (CanLII)

(b) amendments to plead the defendant's right to recover overdraft advances under Financial Services Agreements signed by the defendant with each of the TSG Companies;

(c) amendments relating to the alleged insolvency of the TSG Companies and the "no notice" defence afforded by s. 42(3) of ***The Corporations Act***;

(d) amendments relating to the alleged fraudulent activities of the TSG Companies; and

(e) amendments relating to equitable principles of unjust enrichment.

[10] The plaintiffs take no issue with the amendments proposed under (a), (b) or (c) above. The contest on this motion relates to the proposed amendments under (d) and (e) and the consequent adding of parties, and the request to lift the BIA Stay which would necessarily follow.

[11] On the motions before me, defendant's counsel first argued its motion for leave to amend and then its motion to lift the stay. In these reasons I propose to deal with those issues in the order in which they were argued.

LEAVE TO AMEND

[12] As a general rule, the law is clear that the Court on motion at any stage of an action may grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. This simple statement has been amplified in the leading case of ***Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells Ltd.*** (1989), 35

2001 MBQB 197 (CanLII)

C.P.C. (2d) 117, a decision of my colleague Jewers J., affirmed by the Manitoba Court of Appeal (1990), 41 C.P.C. (2d) 280 and, in my view, has been further usefully amplified by the decision of my colleague Oliphant A.C.J.Q.B. in ***Lloyd's Bank Canada v. Sherwood*** (1990), 64 Man. R. (2d) 288.

2001 MBQB 197 (CanLII)

[13] This action is somewhat out of the ordinary in that it is an action within or related to certain bankruptcy estates and commenced by the plaintiffs pursuant to court orders granted under s. 38 of the BIA.

[14] As a result the plaintiffs, in opposing the application for leave to amend, assert that the terms of the s. 38 orders circumscribe the defendant's interest in the litigation and foreclose the defendant from entitlement to amend either to raise the defences which it seeks to raise or, more particularly, to advance the counterclaim and add parties as defendants by counterclaim, which the defendant likewise seeks to do. The plaintiffs assert that pursuant to the terms of the s. 38 orders, the defendant's only entitlement is to raise as defences to the action those defences which would fall squarely within the parameters of s. 42 of ***The Corporations Act*** and, further, that any claim which the defendant might advance in the action should relate only to direct advances made by the defendant to the TSG Companies under the lending agreements executed between them. The plaintiffs argue that at the time they agreed to commit as s. 38 plaintiffs and to agree to share pro rata in the financing of the litigation, they did so on the understanding that the defendant would be so restricted in the action. The s. 38 plaintiffs further assert that the defendant, as far back as the

fall of 1998, had knowledge of and believed the TSG Companies to be guilty of the fraudulent conduct it now wishes to allege, yet made no mention of any intention to advance a defence or counterclaim based upon that fraud at the time of the court appearances leading to the June 27 or September 8, 2000 orders. The s. 38 plaintiffs argue that for that reason and based upon the language of those orders, the defendant should be precluded from now doing so.

[15] My recollection is similar to that enunciated by plaintiffs' counsel. On the motions leading to the June 27 and September 8, 2000 orders, there was no discussion or assertion by the defendant of any fraudulent conduct on the part of the TSG Companies, nor any suggestion that it intended to raise any defence(s) nor to advance any counterclaim based upon this conduct. However, I am not aware of any agreement between plaintiffs and defendant which would limit the scope of this litigation, and the orders were not consent orders. Both orders were granted on the basis of the issues argued before me at the time. Furthermore, I see nothing in the orders which limits the rights of the defendant as to the scope of its defence, or as to the advancing of any counterclaim. I conclude, therefore, that neither the materials filed nor the submissions made by counsel in obtaining the July 27 and September 8, 2000 orders, nor the language of the orders themselves, limit the defendant from attempting to advance, or (subject to meeting the requirements for leave to amend) from advancing, the defences and/or counterclaim which it now proposes.

2001 MBQB 197 (CanLII)

[16] Ordinarily, the estate, rights and obligations of a bankrupt become vested in its trustee. In this case, KPMG refused to commence the action which the s. 38 plaintiffs desired and those plaintiffs then sought and obtained the orders in question. In ***Re Zammit*** (1998), 3 C.B.R. (4th) 193 the Court stated:

> In a s. 38 proceeding, the creditor obtaining a s. 38 order advances not his or her own cause of action, but the trustee's cause of action. Section 38 does not create a cause of action in the creditor, but merely allows the creditors standing in the trustee's place to advance a cause of action vested in the trustee which the trustee has refused to take.

[17] In effect, the s. 38 plaintiffs in this action are in essence representatives of the trustee. It seems clear to me that if the trustee had advanced this action against the defendant, attacking, as the s. 38 plaintiffs do, the defendant's loan agreements and resulting security with the TSG Companies, the defendant would be entitled to advance any defences or counterclaims against the TSG Companies which might assist it in defending the action, and/or providing it with a basis in law for recovery of all of the monies which it has lost whether as a secured or unsecured creditor. Where, as here, the plaintiffs pursuant to s. 38 of the BIA are, in essence, advancing not their own cause of action but the cause of action vested in the trustee which the trustee has refused to take, it follows logically, in my view, that the defendant ought to be entitled to advance any defence and/or counterclaim which it would have been able to advance in an action commenced by the trustee. In my view, therefore, the defendant should be entitled to advance any such defence or counterclaim in this s. 38 action and, subject to the lifting of the BIA Stay, should be entitled to add the trustee in the TSG Companies as party defendants to the counterclaim.

2001 MBQB 197 (CanLII)

[18] Is there anything to prevent the defendant from receiving leave to amend its Statement of Defence and to advance a counterclaim at this time? In my view there is not. The law is clear that as a general rule, an amendment should be allowed unless it will cause prejudice to the other side which cannot be compensated for by costs or an adjournment. The material filed in support of the application to amend must indicate that the proposed amendments present issues worthy of trial and *prima facie meritorious*. An amendment should not be allowed which, if it were originally pleaded, would have been struck out as embarrassing. It is not for me on this application to consider the ultimate merits of the issues proposed to be raised by amendment. That is for the trial judge. My role on an application such as this is to determine only whether there is *prima facie* merit in the proposed amendments.

[19] Here, in addition to denying any contravention of s. 42 of ***The Corporations Act***, and alternatively raising the defence provided under s. 42(3) of that Act, the defendant proposes by amendment to raise the following defences:

(1) That the TSG Companies obtained credit by fraudulent misrepresentation. More specifically, that the TSG Companies fraudulently induced the defendant to extend credit by forging customer invoices, deliberately overstating receivables and deliberately delivering false financial statements, margin reports and compliance certificates upon which the defendant relied;

2001 MBQB 157 (CanLII)

(2) The defendant asserts that if the Court finds a breach of s. 42 of ***The Corporations Act***, it must then consider whether it and the TSG Companies are in *pari delicto*. The defendant's intended argument is that the fraud of the TSG Companies is a relevant factor in considering the issue of *pari delicto*. It says that if the parties are found to be not in *pari delicto* in the sense that the TSG Companies were more at fault because of their fraudulent conduct, then the defendant ought to be entitled to enforce the lending agreement and its security against the TSG Companies despite any contravention of s. 42 of ***The Corporations Act***;

(3) Alternatively, the defendant wishes to plead that even if it loses its right to recover under the loan agreement, each of the TSG Companies is jointly and severally liable to it under the security agreements executed by them in favour of the defendant for damages that the defendant has suffered as a result of the fraudulent activities of the TSG Companies. The defendant asserts that these damages exceed $46,000,000.00 and are a secured liability, so that the defendant would be entitled to recover such damages as a secured creditor whether or not the loan agreements are void and unenforceable by reason of a breach of s. 42 of ***The Corporations Act***.

2001 MBQB 197 (CanLII)

(4) Lastly, the defendant wishes to plead that regardless of its right to recover under the loan agreement, it is entitled to retain all of the funds which have been claimed by the s. 38 plaintiffs in their Statement of Claim based upon the application of the equitable principle of unjust enrichment.

[20] The fraud allegations are central to all of these proposed defences. Furthermore, the fraud allegations in each of the defences are the basis for the defendant's counterclaim. Whether the defendant can prove fraud and/or succeed on any of the defences it now proposes to advance will ultimately be a matter for the trial judge. For purposes of the present application before me, however, I am satisfied that there is *prima facie* merit in them.

[21] As regards the issue of prejudice, the current action is in its infancy. There has been no production of documents nor examinations for discovery. The onus is on the plaintiffs to show on a balance of probabilities that prejudice will result if the amendment is allowed and that the prejudice cannot be compensated by costs or an adjournment. Having considered the arguments advanced and the authorities provided, I am satisfied that there is no prejudice in law to the s. 38 plaintiffs if the application were allowed.

[22] There has been no delay of any significance on the part of the defendant in moving for its amendment and to the extent that there has been delay, it has been adequately explained. The defendant says two things in response to plaintiffs' assertion that it did not sooner advance the fraud issue or propose the

2001 MBQB 197 (CanLII)

amendments which it now seeks. Firstly it asserts, quite rightly in my view, that until the s. 38 order was obtained there had been no attack against the defendant's lending agreement or its security, and being a secured creditor of such magnitude as to be entitled if not to all, to very nearly all of the monies available, there was no need to get into the issues now proposed. Furthermore, the s. 38 order required that, once granted, action be commenced and a defence filed within a strict time frame. The defendant filed its defence as required, but its counsel asserts that it did not have sufficient time in which to draft its defence or formulate a counterclaim as it now wishes to do. Further and in any event, given the infancy of the action itself and the total lack of prejudice to the plaintiffs by reason of the proposed amendments, the issue of delay is of no moment or merit.

2001 MBQB 197 (CanLII)

SHOULD THE BIA STAY BE LIFTED?

[23] Section 69.4 of the BIA provides that the Court may grant a declaration to lift the BIA Stay if it is satisfied that:

(a) the creditor is likely to be materially prejudiced by the continued operation of the BIA Stay; or

(b) it is equitable on other grounds to make such a declaration.

[24] In ***Re Advocate Mines Ltd.*** (1984), 52 C.B.R. (N.S.) 277, the Court enunciated certain circumstances which warranted granting leave to commence or continue proceedings against a bankrupt. Two of those circumstances, the defendant asserts, are present here, namely:

(1) actions in respect of a contingent or unliquidated debt, the proof and valuation of which have the degree of complexity that makes the summary procedure prescribed by the BIA inappropriate;

(2) actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.

I agree. Having concluded that the defendant ought to be entitled to raise in this action any defences and to advance any counterclaim which it would be entitled to do against the trustee in respect of the bankrupt companies, it is in my view both appropriate and necessary to do so in this action and, consequently, to lift the stay and enable the defendant to add the trustee and the TSG Companies as parties.

[25] There is no question but that the allegations which the defendant now proposes to make involve only the bankrupt companies and do not involve the s. 38 plaintiffs. While this decision will undoubtedly make the s. 38 action more complex, lengthy and costly than would be the case if the defendant were required to commence separate proceedings against the trustee and the bankrupt companies, it is in my view, both from a legal and practical point of view, essential that all of these issues be resolved in one action rather than in separate proceedings. From a legal point of view, it is important that we avoid the possibility of two separate decisions perhaps inconsistent with one another, respecting the validity of the loan agreement and/or the security. From a practical standpoint, I note the following:

2001 MBQB 197 (CanLII)

(1) If there were two separate actions, there would undoubtedly be no distribution of the bankrupts' estates until after both actions were completed. Accordingly, going ahead with the current action would not result in the plaintiffs' receiving payment of any distribution out of the bankrupts' estates until the second or separate action was completed;

(2) One would expect that the s. 38 plaintiffs would want to have some direct input into a proceeding whose outcome could materially affect the amount of their realization. Yet, if the defendant were not allowed to proceed with its claim in this action, but instead was required to commence a separate action against the trustee and the bankrupt companies, the result would be that the outcome of that action could materially affect the s. 38 plaintiffs' entitlement without their having had any opportunity to participate in that action. That is particularly so where, as in this case, the trustee declined to take the proceedings now commenced by the s. 38 plaintiffs and might decline to defend proceedings commenced against it and the bankrupt companies in any separate action. The bankrupt companies, being bankrupt, might do likewise. In the result, if the action were required to proceed separate and apart from this action, the issues of fraud and the consequences of such a finding could go by default. It may be that the s. 38 plaintiffs will

2001 MBQB 197 (CanLII)

> decide not to participate in any way in respect of the fraud or consequent unjust enrichment defences or counterclaim. That is their choice. However, by including them in the present action, the s. 38 plaintiffs are allowed the opportunity to have direct input into these defences and/or the counterclaim, one decision will ultimately result, and at the conclusion of the one action distribution will be made accordingly without the need for it to be withheld pending the outcome of other litigation.

[26] In short, I conclude that this is a case where the amendments proposed by the defendant should be allowed, where the defendant should be entitled to advance the counterclaim which it proposes, and where the stay under BIA should be lifted so as to permit the defendant to add the trustee and bankrupt companies as party defendants.

[27] In light of the foregoing, there is in my view no merit in the plaintiffs' motion to expunge or strike paragraph 19 of the defendant's Statement of Defence, and plaintiffs' motion is therefore dismissed.

[28] If the parties cannot agree upon costs, they may be spoken to.

____

J.

2001 MBQB 197 (CanLII)

SUPERIOR COURT
(Commercial Division)

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-11-048114-157

DATE: July 15, 2016

PRESIDING: THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

WABUSH IRON CO. LIMITED

Debtor/Respondent

- and -

FTI CONSULTING CANADA INC.

Monitor

- and -

ROYAL BANK OF CANADA

Creditor/Petitioner

MOTION TO LIFT THE STAY OF PROCEEDINGS WITH RESPECT TO WABUSH IRON CO. LIMITED

Section 11 of the *Companies' Creditors Arrangement Act*

AFFIDAVIT OF GARY IVANY

I, the undersigned, Gary Ivany, a Senior Manager of Royal Bank of Canada, having a place of business at 20 King Street West, 9th Floor, Toronto, ON M5H 1C4, solemnly affirm:

1. I have read the attached *Motion To Lift The Stay Of Proceedings With Respect To Wabush Iron Co. Limited* and all the facts set forth therein are true to the best of my knowledge, information, and belief.

2. I have previously sworn affidavits with respect to the Newfoundland Proceeding (as defined in this Motion) on October 15, 2014 and January 26, 2015. Copies of my affidavits in the Newfoundland Proceeding are attached hereto and marked as **Exhibit A and B**.

3. I make this affidavit in support of RBC's *Motion To Lift The Stay Of Proceedings With Respect To Wabush Iron Co. Limited*, and for no other purpose.

AND I HAVE SIGNED:

Gary Ivany

SOLEMNLY DECLARED before me at Toronto, in the Province of Ontario, this 14th day of July, 2016.

Commissioner/Notary Public

Peter John Gordon, a Commissioner, etc.,
City of Toronto, for
the Royal Bank of Canada.
Expires June 10, 2017.

Attached is Exhibit A to the Affidavit
of Gary Ivany, sworn before me
this 14th day of July, 2016

Commissioner for Oaths in the Province of Ontario

Peter John Gordon, a Commissioner, etc.,
City of Toronto, for
the Royal Bank of Canada.
Expires June 10, 2017.

2003 01T No. 3807

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

PLAINTIFF

AND:

ROYAL BANK OF CANADA

DEFENDANT

AND BETWEEN

ROYAL BANK OF CANADA

PLAINTIFF BY COUNTERCLAIM

AND:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

DEFENDANT BY COUNTERCLAIM

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2003 01G 3807
Date of Filing Document:	October 15, 2014
Name of Party Filing or Person:	Royal Bank of Canada
Application to which Document being filed relates:	Whether the Plaintiff (Cliffs Mining Company in its capacity as managing agent of Wabush Mines) and the Defendant by Counterclaim (Cliffs Mining Company in its capacity as managing agent of Wabush Mines) are properly named; Application for Security for Costs
Statement of Purpose in Filing:	To Request and Order that: (1) the Plaintiff cannot bring an action as a Managing Agent of Wabush Mines and (2) to Request Security

AFFIDAVIT OF GARY IVANY

I, Gary Ivany, of Pickering, in the Province of Ontario, make oath and state as follows:

1. I am employed by the Royal Bank of Canada ("**RBC**") as Senior Manager. I have been employed with RBC for 22 years. As such, I have knowledge of the within matter.

2. I have been advised by Stewart McKelvey, legal counsel to RBC, that they have conducted searches at the Registry of Companies and Deeds and these searches show:

    (a) Cliffs Mining Company ("**Cliffs Mining**") is a company extra provincially registered to do business in the Province of Newfoundland & Labrador. Its registered office outside of NL is: 200 Public Square, Suite 3300, Cleveland, Ohio, USA, 44114.

    (b) Wabush Iron Co. Limited is a company extra provincially registered to do business in the Province of Newfoundland & Labrador. Its registered office outside of NL is the same as that of Cliffs Mining, namely: 200 Public Square, Suite 3300, Cleveland, Ohio, USA, 44114.

    (c) Stelco Inc. was a company incorporated under the laws of Canada and was extra-provincially registered to do business in the Province of Newfoundland & Labrador. In 2007, Stelco Inc. was amalgamated and renamed US Steel Canada Inc.

    (d) Dofasco Inc. was a company incorporated under the laws of Canada and was extra-provincially registered to do business in the Province of Newfoundland & Labrador. In 2006, Dofasco Inc. was amalgamated and renamed ArcelorMittal Dofasco Inc.

    (e) There is no registered legal entity within the Province of Newfoundland and Labrador known as "Wabush Mines", nor is there a known joint venture legal entity among Wabush Iron Co. Limited, Stelco Inc. and/or Dofasco Inc. (collectively referred to as the "**Operators**").

3. I have also been advised by Stewart McKelvey, counsel for RBC, that in September 2014, Stelco Inc. filed for and was granted protection from creditors under the *Companies' Creditors Arrangement Act*.

4. I am aware of a Management Agreement, executed January 1, 1967, between Cliffs Mining and each of Wabush Iron Co. Limited, Stelco Inc. and Dofasco Inc. A copy of the Management Agreement is attached as **Exhibit A**.

5. On September 21, 2014, counsel for RBC posed several interrogatories to Cliffs Mining regarding its corporate status, the status of the Operators and the relationships between them. On October 8, 2014, Cliffs Mining delivered its Answers to Interrogatories. Copies of the Interrogatories and Answers to Interrogatories are attached as **Exhibit B**.

6. On December 17, 1996 Cliffs Mining leased two Bucyrus Erie Electric Shovels ("**Equipment**") from RBC pursuant to a Master Lease Agreement ("**Lease**"). The term of the Lease was for 60 months commencing July 1, 1998 terminating on June 30, 2003. A copy of the Master Lease Agreement is attached as **Exhibit C**.

7. Cliffs Mining, as managing agent for the "Wabush Mines Joint Venture", provided notice of its intention to exercise its option to purchase the Equipment on May 27, 2003. In this correspondence, they reference an appraisal noting the Fair Market Value as $200,000 US per Shovel, for a total of $400,000 US for the Equipment. A copy of that correspondence is attached as **Exhibit D**.

8. Cliffs Mining and RBC could not agree on Fair Market Value. The Lease provided in s. 1(ac) that, in the event of disagreement, the Fair Market Value would be determined by the average of two independent appraisers.

9. The Lease states that the final purchase price will be "the lesser of the Fair Market Value and the Fair Market Value Cap". The Fair Market Value Cap ("**Cap**") is defined in the Lease as $1,006,621.00 for each Shovel for a total of $2,013,324.20 for the Equipment.

10. The independent appraisers were engaged around July 2003. RBC engaged High Tower Construction Services ("**High Tower**") which provided an appraisal of $770,000 for the Equipment on August 18, 2003.

11. Given the significant departure from the Cap, RBC engaged High Tower to complete a maintenance review of the Equipment. High Tower provided this review to RBC on August 20, 2003. The maintenance review concluded that the Equipment had not been maintained and/or repaired to the degree required by the Lease, specifically s. 11 which required Cliffs Mining to maintain the Equipment in good operating condition, including repairing and replacing any damage.

12. Cliffs Mining engaged Hunyady Appraisal Services ("**Hunyady**") which provided an appraisal of $140,280.00 for the Equipment on August 29, 2003.

13. The difference between the two appraisals is significant, and both are substantially different from the Cap. The average of the two appraisals is $455,140.00.

14. Following the results of the High Tower Appraisal, RBC provided Cliffs Mining with a notice that Cliffs Mining could not properly exercise the option to purchase as they were in default of complying with maintenance obligations under the Lease. Further, given that the Lease had since expired, Cliffs Mining was deemed to have purchased the Equipment at the Cap.

15. As of September 15, 2003 Cliffs Mining had made payments pursuant to the Letter Agreement of $347,120.00 plus an amount for HST.

16. On September 15, 2003 Cliffs Mining provided RBC with a cheque for $108,020.00. Cliffs Mining took the position that this was the proper balance owing from the option to purchase ($455,140.00 - $347,120.00). RBC refused to accept this amount and did not cash the cheque. On September 22, 2003 Cliffs Mining delivered to RBC a second cheque for the same amount. Again, it was not cashed and not accepted by RBC.

17. In the meantime, Cliffs Mining and RBC were parties to litigation in Quebec disputing the exact same issue. The terms of the Lease in the within matter are the same as the lease in the Quebec matter.

18. RBC was successful at the trial of the Quebec Proceeding, which was upheld on appeal. On the issue of liability, Cliffs Mining personally was held 100% liable for the purchase price of the Equipment, contractual interest and taxes. The Operators were held liable jointly and severally to the extent set out in the material Lease.

19. Once the Quebec litigation was concluded, RBC sought to move forward with the litigation in the within proceeding. RBC amended its Statement of Defence to include a Counterclaim. The Counterclaim alleges breach of the Lease by Cliffs Mining and seeks damages and interest for the lost value of the Equipment in accordance with the terms of the Lease.

20. The Counterclaim also alleges in paragraphs 14 – 18 that Cliffs Mining failed to properly maintain the Equipment, and Cliffs Mining failed to obtain the necessary approvals prior to purporting to exercise the option to purchase. These allegations involve the actions of Cliffs Mining directly as operator of the mine.

21. I have been advised by Stewart McKelvey, legal counsel to RBC, that they have conducted searches of the Registry of Deeds and there is no real property registered as belonging to Cliffs Mining within the Province of Newfoundland and Labrador. The printout of the Registry of Deeds search for Cliffs Mining (and its predecessor companies) is attached as **Exhibit E**.

22. Prior to 2010, Cliffs Natural Resources, the parent of Cliffs Mining, held 26.8% of Wabush Mines through Wabush Iron Co. Limited. In February 2010, Cliffs Natural Resources completed its acquisition of the remaining 73.2% interest in the Wabush Mines from Stelco Inc. and Dofasco Inc. A copy of excerpts from Cliffs Natural Resources' 2010 Annual Report to shareholders regarding the acquisition is attached as **Exhibit F**.

23. On February 11, 2014, media reported that Cliffs Natural Resources shut down production at the Wabush Mine:

> *"Update February 11, 2014: Cliffs expects to idle the Wabush Mine in the Province of Labrador-Newfoundland by the end of 1Q 2014 after determining that its cost structure is not sustainable and not economically viable to continue operating."*

A copy of the announcement on Cliffs Natural Resources' website is attached as **Exhibit G**.

24. Since that time, there have been several media reports regarding the intentions of Cliffs Natural Resources to sell Wabush Mines. Several media articles are attached to this Affidavit as **Exhibit H**:

(a) "Wabush Mines owner in talks with potential buyer" (CBC News, July 22, 2014: http://www.cbc.ca/news/canada/newfoundland-labrador/wabush-mines-owner-in-talks-with-potential-buyer-1.2714323);

(b) "Union agrees to 5-year contract to work if Wabush Mines sold to MFC" (CBC News, July 24, 2014: http://www.cbc.ca/news/canada/newfoundland-labrador/union-agrees-to-5-year-contract-to-work-if-wabush-mines-sold-to-mfc-1.2717262);

(c) "Wabush Mines sale talks off between Cliffs, MFC Industrial" (CBC News, October 8, 2014: http://www.cbc.ca/news/canada/newfoundland-labrador/wabush-mines-sale-talks-off-between-cliffs-mfc-industrial-1.2792559).

25. RBC anticipates that its costs to defend Cliffs Mining's claim will be approximately $104,000.00. A draft bill of costs is attached as **Exhibit I**.

26. I make this affidavit in support of RBC's application to strike or amend the Statement of Claim, and for security for its costs to defend the action, and for no other purpose.

SWORN at Toronto, in the Province of Ontario, this 15th day of October, 2014 before me:

A commissioner for oaths in the Province of Ontario

Diane Manon Martella, Notary Public, City of Toronto, limited to the attestation of instruments and the taking of the affidavits for Royal Bank of Canada
Expires August 26, 2017

Gary Ivany

TO: **Paul Burgess**
BURGESS LAW OFFICES
PO BOX 23196
Suite 308, Terrace on the Square
St. John's, NL A1B 4J9
Solicitors for the Plaintiff/Defendant by Counterclaim, Cliffs Mining Company

AND TO: **Supreme Court of Newfoundland and Labrador**
Registry (General Division)
309 Duckworth Street
P.O. Box 937
St. John's, NL A1C 5M3

Attached is Exhibit A to the Affidavit
of Gary Ivany, sworn before me
this 15th day of October, 2014

Commissioner for Oaths in the Province of Ontario

Diane Manon Martella, Notary Public,
City of Toronto, limited to the attestation
of instruments and the taking of the affidavits
for Royal Bank of Canada
Expires August 26, 2017

(B)

[CONFORMED COPY]

WABUSH MINES

MANAGEMENT AGREEMENT

Among

WABUSH IRON CO. LIMITED

THE STEEL COMPANY OF CANADA, LIMITED

DOMINION FOUNDRIES AND STEEL, LIMITED

and

PICKANDS MATHER & CO.

Dated as of January 1, 1967

WABUSH MINES

MANAGEMENT AGREEMENT

MANAGEMENT AGREEMENT entered into as of January 1, 1967, by and among Wabush Iron Co. Limited, an Ohio corporation, The Steel Company of Canada, Limited, a Canadian corporation, Dominion Foundries and Steel, Limited, a Canadian corporation, and Pickands Mather & Co., a Delaware corporation.

WHEREAS:

1. Wabush Iron, Stelco, Dofasco, Mannesmann Canadian Iron Ores Ltd., Hoesch Iron Ores Ltd. and Pickands are parties to the Wabush Mines Management Agreement, dated as of June 1, 1962, as amended, pursuant to which Pickands is performing the functions of manager of the Wabush Mines joint venture and Wabush Iron (as successor by merger to Wabush Pellet Company, a Delaware corporation), Stelco, Dofasco and Pickands are parties to the Arnaud Pellet Management Agreement, dated as of February 15, 1964, pursuant to which Pickands is performing the function of manager of the Arnaud Pellets joint venture;

2. Concurrently with the execution and delivery hereof, Mannesmann Canadian Iron Ores Ltd. and Hoesch Iron Ores Ltd. are withdrawing from the Wabush Mines joint venture and the Wabush Mines joint venture and the Arnaud Pellet joint venture are being consolidated into a single joint venture known as Wabush Mines (as more fully described or referred to in the recitals to the Joint Venture Agreement); and

3. Wabush Iron, Stelco, Dofasco and Pickands desire to supersede the aforesaid management agreements and to enter into this Management Agreement to establish the terms and conditions pur-

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suant to which Pickands will perform the function of manager of the consolidated joint venture;

Now, THEREFORE, it is covenanted and mutually agreed as follows:

ARTICLE I

DEFINITIONS

The parties hereto have, with others, entered into an agreement of even date herewith which, with any contracts or agreements supplemental thereto hereafter entered into in accordance with the provisions thereof, is therein defined as, and herein referred to as, the General Provisions Agreement. The parties hereto have with others also entered into an agreement of even date herewith which, with any contracts or agreements supplemental thereto hereafter entered into in accordance with the provisions thereof, is therein defined as, and herein referred to as, the Participants Agreement. The terms used and capitalized in this Management Agreement which are defined in the General Provisions Agreement or in the Participants Agreement shall have the respective meanings set forth in the General Provisions Agreement or in the Participants Agreement, unless the context of this Management Agreement otherwise requires or unless such terms are herein defined or assigned definitions, and terms so defined in the General Provisions Agreement or the Participants Agreement shall continue to have such meanings notwithstanding any termination of either of such agreements. Any terms specifically defined in this Management Agreement shall have the meaning set forth herein.

"Seven Islands Value" means the fair market value broadly recognized in the iron ore trade of pellets of a kind, grade and analysis similar to that of Pellets, loaded on vessels at Pointe Noire, Quebec, as recognized for Canadian income tax purposes by the appropriate Canadian authorities; *provided, however,* that in the event the income tax laws of

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Canada are changed in the future so that there is no recognition of "fair market value" by such authorities, or such recognized value becomes obviously at variance with a fair market value of Pellets loaded on vessels at Pointe Noire, Quebec, the "Seven Islands Value" of Pellets shall be as determined by the vote of 65% of the Shares of the Joint Venturers in accordance with the provisions of Section 3.03 of the Joint Venture Agreement and as consented to by the Project Manager, and failing such a determination and consent, or either of them, by arbitration as provided in Article VIII hereof.

ARTICLE II

DUTIES OF THE PROJECT MANAGER

SECTION 2.01. Each Joint Venturer hereby commits to the Project Manager, and the Project Manager hereby agrees to perform, the duties of Project Manager hereunder, and under each other Instrument to which such Joint Venturer is a party, upon and subject to the terms and conditions set forth herein and therein. The Project Manager shall perform such duties for the account of, and for and on behalf of, each Joint Venturer, using its best efforts in so doing to comply with all agreements, Mining Leases, Permits, Facilities Servitudes and Crown Leases relating to the Project (including this Management Agreement), subject, however, in carrying out all activities of the Project Manager, to the control and direction of the Joint Venturer or Joint Venturers on whose behalf such duties are to be performed. The Project Manager shall use its best efforts, skill and judgment to make all installations and conduct all operations in a good and workmanlike manner in accordance with methods and practices customarily in use by efficient operators in similar operations. The Project Manager shall select and utilize employees, experts and advisors who are competent in their respective fields. The Project Manager does not, however, guarantee results.

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SECTION 2.02. The Project Manager shall be responsible for the general organization and planning of all engineering and construction work which is a part of the Project (including construction of the facilities of the Project Subsidiaries) including, without limitation:

(a) general analysis of such work into appropriate parts for engineering and construction;

(b) selection of engineering firms and construction firms to perform work on each part;

(c) coordination and scheduling of engineering and construction firms to perform work on each part;

(d) either with its own forces or with the assistance of contractors, all purchasing and expediting;

(e) coordination and supervision of design to assure the construction of a balanced mining, production, treatment, transportation and harbor unit;

(f) administration of all matters pertaining to labor relations, salaries, wages, working conditions, hours of work, safety, recruiting, housing, etc.; and

(g) all accounting and disbursing services.

SECTION 2.03. The Project Manager shall, to the extent necessary funds are made available to it under the Joint Venture Agreement and the Supplemental Joint Venture Agreement, on behalf of the Joint Venturers:

(a) acquire properties, land and rights which may be useful in connection with the exploration, development and operation of the Project;

(b) explore lands included in the Joint Venture Property;

(c) carry out experiments and studies designed to develop efficient and practicable methods for producing ore from the iron ore or iron-bearing materials available on Joint Venture Property and therefrom producing Pellets;

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(d) locate, open, develop and operate iron ore mines on Joint Venture Property;

(e) produce Concentrates from Crude Ore mined from Joint Venture Property and pelletize such Concentrates in the Pelletizing Plant;

(f) stockpile and transport Crude Ore, Concentrates and Pellets;

(g) maintain and protect the Joint Venture Property and the interests of the Joint Venturers therein;

(h) protect the interests of the Joint Venturers in connection with the valuation by public authorities for tax purposes of properties included in the Joint Venture Property;

(i) prepare and file with governmental authorities all tax and other reports required by law pertaining to the Project (except returns for taxes on or measured by income);

(j) disburse funds for all taxes, other than taxes on or measured by income, imposed on the Joint Venturers by virtue of their conduct of the Project;

(k) secure adequate and reasonable insurance covering insurable risks of the Joint Venturers with respect to the Joint Venture, including risks growing out of personal injuries to, or deaths of, employees, risks of war damage (if and to the extent available) and other risks ordinarily insured against in similar operations and adjust losses and claims pertaining to or arising out of such insurance;

(l) comply with all laws applicable to the Joint Venturers by virtue of the construction and operation of the Project, including particularly laws relating to safety requirements, working conditions and compensation and benefits to employees;

(m) obtain (*i*) competent superintendents, engineers and labor and (*ii*) materials, supplies and equipment, all as required for the conduct of the Joint Venture;

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(n) sample and analyze Crude Ore, Concentrates and Pellets produced by the Joint Venturers pursuant to the Joint Venture Agreement and the Supplemental Joint Venture Agreement;

(o) make all reports and disburse funds for all payments required under the Mining Leases and under the operating agreements, permits, franchises and concessions pursuant to which the Joint Venture is to be conducted;

(p) keep full and accurate accounts of all business transactions entered into on behalf of the Joint Venturers;

(q) arrange for shipment of Concentrates produced by the Joint Venturers under the Joint Venture Agreement and the Supplemental Joint Venture Agreement to the Pelletizing Plant, and for transfer of Pellets from the Pelletizing Plant to the Dock Property;

(r) purchase such materials, supplies, equipment and services as may be required in connection with the construction and operation of the Project and enter into such contracts as may be necessary in connection therewith;

(s) sell or dispose of any tools, equipment, supplies and facilities included in the Joint Venture Property that may be worn out, obsolete or no longer useful; and

(t) do all such acts and things and conduct all such operations as may be necessary or advisable for the efficient and economical operation and care of the Project, the mining of Crude Ore, the production of Concentrates and Pellets, and the conduct of the business of the Joint Venturers with respect to, and the protection of their rights and interests in, the Project.

SECTION 2.04. The Project Manager shall diligently carry to completion the construction of the Project and do all things necessary and proper to place the Project in full operation as contemplated by the Joint Venture Agreement. The Project Manager (a) shall not begin or contract for any item of development work, construction or equipment which constitutes an expansion of the Project, except pursuant

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to supplemental agreements entered into in conformity with the provisions of Section 19.01 of the Participants Agreement and (b) shall not, after the Completion Date, begin or contract for any such item even though it constitutes a replacement or improvement (rather than an expansion) of the Project if such item or program of which it is a part has a cost in excess of $50,000, Canadian Dollars, unless and until such proposed expenditure shall have been first submitted to and authorized by the vote of 65% of the shares of the Joint Venturers in accordance with the provisions of Section 3.03 of the Joint Venture Agreement.

SECTION 2.05. All actions to be taken by the Project Manager on behalf of the Joint Venturers pursuant to this Management Agreement shall, in the discretion of the Project Manager, be taken under either the style of "Wabush Mines, Pickands Mather & Co., Managing Agent", or, the style of "Wabush Mines (an unincorporated Joint Venture of Wabush Iron Co. Limited, The Steel Company of Canada, Limited and Dominion Foundries and Steel, Limited), Pickands Mather & Co., Managing Agent". Any contract or agreement entered into by the Project Manager in connection with the execution of its agency hereunder may be made by the Project Manager under either of said styles, and shall be for the account of the Joint Venturers.

SECTION 2.06. All books and records of the Project Manager relating to its activities hereunder shall be open to the inspection of the Joint Venturers and the Participants at all reasonable times and shall be audited as of the end of each calendar year by Price Waterhouse & Co., or such other certified or chartered accountants as shall be selected by the Project Manager and approved by the Joint Venturers. Copies of such audits shall be furnished to the Joint Venturers and the Participants as soon as available. All statements of transactions and accounts rendered by the Project Manager to the Joint Venturers and Participants under this Management Agreement, the

Joint Venture Agreement, the Supplemental Joint Venture Agreement and the Participants Agreement shall be rendered on the basis of Canadian Dollars. Any payment which the Project Manager is required or shall make in United States Dollars shall be reflected in the records and accounts in Canadian Dollars, converted in accordance with accepted practices.

ARTICLE III

Shipments of Concentrates and Pellets

The Project Manager shall, for the account of the Joint Venturers, make all arrangements for transportation of Concentrates from the Concentrating Plant to the Pelletizing Plant and of Pellets from the Pelletizing Plant to the Dock Property. Each Joint Venturer shall instruct the Project Manager as to the carriers, consignees and destinations of the Pellets to which such Joint Venturer is entitled. When Pellets are loaded on vessels at the Harbor in accordance with such instructions, the Project Manager's responsibility with respect thereto under this Management Agreement shall terminate.

ARTICLE IV

Disposition of Other Minerals or Quarried Materials

In the event that any materials other than Crude Ore shall be mined or quarried from the Joint Venture Property, the Project Manager is authorized to sell such other materials to such purchasers and upon such provisions, terms and conditions as it shall deem to be in the best interests of the Joint Venturers, and the net proceeds from any sales thereof shall be credited against calls for funds on the Joint Venturers under the Joint Venture Agreement and the Supplemental Joint Venture Agreement.

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ARTICLE V

Other Activities of the Project Manager

The Joint Venturers understand that the Project Manager is, and will be, interested, directly or indirectly, by ownership, contract, agency and otherwise, in mining, transportation, coal and other businesses and in various other undertakings not included in the Project. The Joint Venturers also understand that the performance by the Project Manager of its duties as Project Manager may involve business dealings with such mining, transportation, coal and other businesses or undertakings. The Joint Venturers hereby agree that the assumption by the Project Manager of its duties under this Management Agreement and the Instruments shall be without prejudice to its rights to have such other interests and activities and to receive and enjoy profits or compensation therefrom; *provided, however,* that (a) all contracts and dealings involving any such mining, transportation, coal and other businesses and other undertakings made or undertaken by the Project Manager in the performance of its agency hereunder shall be upon prices and terms not less favorable to the Joint Venturers than could be secured from others in the market at the time such contracts or dealings shall be made or undertaken or shall be approved by the Joint Venturers, (b) the Joint Venturers shall be entitled upon request to full information regarding the Project Manager's interest in any business or other venture in which it may be interested and with which it enters into any business transaction on behalf of the Joint Venturers and (c) the Project Manager shall give notice to the Joint Venturers if the Project Manager shall hereafter become interested in any business or undertaking with which it may have business dealings in discharge of its duties as Project Manager which are in a different field or of a different type or character from those in which it is now interested.

ARTICLE VI

Compensation of Project Manager

Section 6.01. The Joint Venturers agree that the Project Manager shall be paid as compensation for its services hereunder the sum of the following:

(a) Reimbursement of its out-of-pocket costs (in the currency in which such costs were incurred) of management, which out-of-pocket costs shall include a fair *pro rata* share of all operating, handling, managing, overhead and other expenses of a general or common nature incurred by the departments of the Project Manager which serve or manage the operation not only of the Project but also the properties or businesses of others, including expenses for group insurance, safety, hospitalization, pensions, retirement and other fringe allowances but excluding expenses for (i) salaries or fringe benefits paid to or for any director, the President or any Vice President of the Project Manager, and (ii) any profit-sharing payments made to employees of the Project Manager; and

(b) An operating fee that shall be equal to 1% of the Seven Islands Value of all Pellets shipped during the year for which said fee is payable.

Section 6.02. The payments provided for in paragraph (b) of Section 6.01 hereof (and/or Section 6.03 hereof, if applicable) shall accrue as the Pellets in respect of which they are payable are loaded on board vessels at the Harbor and shall be based on dock weights. On or before the 10th day of each calendar month, the Project Manager shall invoice the Joint Venturers for (i) one-twelfth of the reimbursement referred to in paragraph (a) of Section 6.01 hereof incurred and estimated to be incurred by the Project Manager during the then current calendar year and (ii) that part of the Project Manager's compensation payable pursuant to paragraph (b) of Sec-

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tion 6.01 hereof (and/or that compensation payable pursuant to Section 6.03 hereof, if applicable) which shall have accrued during the preceding calendar month. Payment shall be made from the Joint Venture accounts on or before the 25th day of each month on the basis of such invoices. On the basis of the audit of the records of the Project Manager made in accordance with Section 2.06 hereof appropriate adjustments shall be made in the Project Manager's compensation under Section 6.01 hereof.

SECTION 6.03. If the Joint Venturers supplement or revise the Project so that products other than or in addition to Pellets are shipped, they shall pay to the Project Manager (in lieu of the operating fee provided for by paragraph (b) of Section 6.01 hereof, if such other products are in substitution for all Pellets previously produced and in addition to such fee if Pellets continue to be produced and shipped), such other operating fee (i) as all parties hereto may agree upon at the time the Project is so supplemented or revised or (ii), failing such an agreement, as may be determined by arbitration as provided in Article VIII hereof.

SECTION 6.04. The amounts heretofore paid pursuant to the superseded Management Agreements referred to in Section 7.01 and the amounts hereafter payable to the Project Manager pursuant to this Article VI and the amounts, if any, payable to the Project Manager pursuant to Section 7.04 (if Article VII shall become applicable) shall constitute full compensation to the Project Manager for all services rendered or to be rendered by it under such superseded Management Agreements, this Management Agreement, the Joint Venture Agreement, the Supplemental Joint Venture Agreement and the Participants Agreement and in connection with the organization of the previously separate Wabush Mines and Arnaud Pellets joint ventures which were the subject of such superseded Management Agreements, and the organization of the Project and the acquisition of Joint Venture Assets held or to be acquired, both prior to and after the date of this

Management Agreement. Nothing in this Management Agreement shall operate to diminish reimbursements due to the Project Manager under any agreement between the Project Manager, on the one hand, and Wabush Iron, Arnaud or Wabush Railway, on the other hand, relating to administrative services and office facilities; *provided, however,* that no item of costs shall be reimbursed to the Project Manager under this Management Agreement which is reimbursed to it under any of such agreements.

SECTION 6.05. Each Joint Venturer shall pay to the Project Manager its Share of the foregoing amounts or such other portion thereof as it may, from time to time, be obligated to pay under or pursuant to the provisions of the Supplemental Joint Venture Agreement.

ARTICLE VII

TERMINATION

SECTION 7.01. The parties hereto agree that the Wabush Mines Management Agreement dated as of June 1, 1962, as amended, and the Arnaud Pellet Management Agreement dated as of February 15, 1964, are hereby terminated, without any rights, obligations, or liabilities remaining outstanding under any of them, without, however, prejudice to transactions which have already been consummated or rights or liabilities which have already accrued thereunder.

SECTION 7.02. While the operations of the Project Manager during the period from January 1, 1967, to the actual date of execution and delivery hereof were governed by the provisions of the Wabush Mines Management Agreement dated as of June 1, 1962, as amended, and the Arnaud Pellet Management Agreement dated as of February 15, 1964, with the consent of the Participants, Wabush Iron and the Project Manager operations were so conducted during such period as to put the parties in the positions they would have been in had this Management Agreement been in effect since January 1, 1967.

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SECTION 7.03. The employment of the Project Manager under this Management Agreement and all provisions of this Management Agreement shall continue until December 31, 1986, and from year to year thereafter until terminated, as of the last day of any calendar year, on not less than one year's prior written notice, by (a) the Project Manager or (b) the vote of 65% of the Shares of the Joint Venturers determined in accordance with the provisions of Section 3.03 of the Joint Venture Agreement.

SECTION 7.04. Notwithstanding the provisions of Section 7.03 hereof, the employment of the Project Manager under this Management Agreement may be terminated by the vote of 65% of the Shares of the Joint Venturers, determined in accordance with the provisions of Section 3.03 of the Joint Venture Agreement, as of the last day of any calendar year, on one year's prior written notice given at any time after December 31, 1971. From and after any termination of employment of the Project Manager by a notice given by the Joint Venturers under this Section 7.04, the Project Manager shall continue to be entitled to an amount, payable quarterly, equal to one-half of (i) the amount payable pursuant to paragraph (b) of Section 6.01 and/or (ii) the amount payable in lieu thereof or in addition thereto pursuant to Section 6.03 if said Section has become or shall thereafter become applicable. Such amount or amounts shall be payable until December 31, 1986.

ARTICLE VIII

ARBITRATION

Each party hereto hereby consents to arbitration, in accordance with the procedures set forth in the General Provisions Agreement, of any dispute between the Joint Venturers and the Project Manager as to (a) the Seven Islands Value of Pellets or (b) the operating fee payable under Section 6.03 hereof.

JML

ARTICLE IX

Amendments

This Management Agreement may be changed or amended only by a written instrument signed by the Project Manager and all Joint Venturers. If any such proposed written instrument is acceptable to the Project Manager and has been approved by the vote of 65% of the Shares of the Joint Venturers determined in accordance with the provisions of Section 3.03 of the Joint Venture Agreement, all Joint Venturers shall execute such instrument and shall be bound thereby.

ARTICLE X

Communications

All communications hereunder to any party hereto shall be given in the manner provided in Article XIV of the General Provisions Agreement for the giving of notice to such party.

ARTICLE XI

Several Liability of Joint Venturers

All agreements and undertakings of each Joint Venturer under this Management Agreement are several and not joint or joint and several.

ARTICLE XII

Reliance of Project Manager

Except as expressly set forth in this Management Agreement and the Instruments, the Project Manager shall be entitled to rely upon action or approval determined by the vote of 65% of the Shares of the Joint Venturers determined in accordance with the provisions of Section 3.03 of the Joint Venture Agreement on all occasions on which action by or approval of the Joint Venturers is required.

ARTICLE XIII

Project Manager's Status as a Participant

As of the date of this Management Agreement the Project Manager is also a Participant. So long as it shall continue as such, notwithstanding the provisions of the definition of Seven Islands Value, Sections 7.03 and 7.04 and Article IX of this Management Agreement, the portion (equal to the Wabush Stock Proportion of the Project Manager) of the votes which Wabush Iron is entitled to cast under such provisions shall be cast in such a way as to reflect differences, if any, of positions among the Participants other than the Project Manager.

ARTICLE XIV

Successors and Assigns

This Management Agreement shall inure to the benefit of and be binding upon the successors and assigns of the respective parties hereto; *provided, however,* that the Project Manager shall not assign this Management Agreement without the prior written consent of all the Joint Venturers.

ARTICLE XV

Governing Law

This Management Agreement shall be governed by, and construed in accordance with, the laws of the Province of Newfoundland.

In witness whereof, the parties hereto have duly executed this Management Agreement, as of the day and year first above written.

Wabush Iron Co. Limited,

[Seal]

By D. M. Chisholm
Vice President

Attest:

Robert McInnes
Secretary

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THE STEEL COMPANY OF CANADA,
LIMITED,

By N. J. BROWN
Vice President

[SEAL]

and J. W. YOUNGER
Secretary

DOMINION FOUNDRIES AND STEEL,
LIMITED,

By J. G. SHEPPARD
Executive Vice President

[SEAL]

and T. VAN ZUIDEN
Assistant Secretary

PICKANDS MATHER & CO.,

By D. M. CHISHOLM
Vice President

[SEAL]

Attest:

ROBERT McINNES
Secretary

JMS

Attached is Exhibit B to the Affidavit
of Gary Ivany, sworn before me
this 15th day of October, 2014

Commissioner for Oaths in the Province of Ontario

Diane Manon Martella, Notary Public,
City of Toronto, limited to the attestation
of instruments and the taking of the affidavits
for Royal Bank of Canada
Expires August 26, 2017

ROYAL BANK OF CANADA

DEFENDANT

AND BETWEEN

ROYAL BANK OF CANADA

PLAINTIFF BY COUNTERCLAIM

AND:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

DEFENDANT BY COUNTERCLAIM

INTERROGATORIES

TO: **Paul Burgess**
BURGESS LAW OFFICES
PO BOX 23196
Suite 308, Terrace on the Square
St. John's, NL A1B 4J9
Solicitors for the Plaintiff/Defendant by Counterclaim, Cliffs Mining Company

AND TO: **Wabush Iron Co. Limited**
200 Public Square
Suite 3300
Cleveland, OH, USA 44114

AND TO: **Stelco Inc.**
368 Wilcox Street
Hamilton, ON L8L 8K5

AND TO: **Dofasco Inc.**
1330 Burlington Street East
P.O. Box 2460
Hamilton, ON L8N 3J5

235736 v1

2003 01T No. 3807

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

CLIFFS MINING COMPANY in its capacity as
Managing Agent of WABUSH MINES

PLAINTIFF

It is hereby required that the following interrogatories be answered by you, and that the answers be served upon the Defendant/Plaintiff by Counterclaim within 10 days from the time these interrogatories are served on you.

1. Set out the corporate structure of your organization from the date of execution of the Master Lease Agreement to present, including:

   (a) any change in ownership or corporate status as a result of restructuring, bankruptcy, amalgamation, or other reorganization; and

   (b) any proceeding or other transaction that affected, or is purported to have affected, your liability to:

      (i) the partners of the unincorporated joint venture operating as Wabush Mines,

      (ii) Cliffs Mining Company as Managing Agent under the Master Lease Agreement, or

      (iii) Royal Bank of Canada in respect of the matters raised in this proceeding.

2. Set out the status and organizational structure of the unincorporated joint venture operating as Wabush Mines, including:

   (a) any constating documents related to the joint venture, including but not limited to any partnership agreement, articles of the joint venture, and by-laws;

   (b) any agreement respecting liability for actions of the joint venture in the operation of Wabush Mines, to the extent that such liability is not established in the Master Lease Agreement or the Management Agreement (referred to in the Statement of Defence to Counterclaim of Cliffs Mining, dated February 24, 2014).

3. Explain your organization's liability as it relates to actions taken by the joint venture partners individually or in the name of the joint venture, or Cliffs Mining Company actually or purportedly taken in its capacity as Managing Agent for the joint venture, under the Master Lease Agreement.

4. Provide copies of any documents related to the answers to the questions above.

DATED at St. John's, Newfoundland and Labrador, this 21 day of September, 2014.

Twila E. Reid
STEWART MCKELVEY
Suite 1100, Cabot Place
100 New Gower Street
St. John's, NL A1C 6K3
Solicitors for the Defendant/Plaintiff by Counterclaim

2003-01T-3807

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

BETWEEN:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

PLAINTIFF

AND:

ROYAL BANK OF CANADA

DEFENDANT

AND BETWEEN:

ROYAL BANK OF CANADA

PLAINTIFF BY COUNTERCLAIM

AND:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

DEFENDANT BY COUNTERCLAIM

ANSWERS TO INTERROGATORIES

In answer to the interrogatories served by the Defendant, Royal Bank of Canada, and dated the 21st day of September, 2014. I make oath and say as follows:

1. That I am employed by Cliffs Natural Resources Inc. ("Cliffs Natural Resources") as Senior Attorney. The Plaintiff, Cliffs Mining Company in its capacity as Managing Agent of Wabush Mines ("Cliffs Mining") is a wholly-owned

subsidiary of Cliffs Natural Resources. Cliffs Mining does not have any in-house legal counsel, as such all in-house legal services that are required by Cliffs Mining are provided to it by Cliffs Natural Resources including support for this action. I have been involved with providing in-house legal services to Cliffs Mining since September, 2010 and as such have personal knowledge of the facts and things deposed to unless otherwise stated, and I am duly authorized to make this affidavit solely on behalf of Cliffs Mining. Where I do not have actual knowledge of the facts to answer the interrogatories I have made enquiries of others and reviewed the files of Cliffs Mining to inform myself, and I verily believe such information to be true.

2. As to the first interrogatory, I say that since December 17, 1996 when Cliffs Mining Company in its capacity as Managing Agent of Wabush Mines and the Defendant Royal Bank of Canada ("RBC") entered into a lease agreement (the "Master Lease Agreement") that the corporate structure has been that Cliffs Mining is a wholly owned subsidiary of Cleveland-Cliffs Inc., now known as Cliffs Natural Resources Inc.

   a. There has been no change in ownership of Cliffs Mining since execution of the Master Lease Agreement.
   b. Cliffs Mining has not been a party to any proceeding or transaction that has impacted any liability Cliffs Mining may owe, which is not admitted, to:

      i. The partners of the unincorporated joint venture operating as Wabush Mines
      ii. Itself; or
      iii. RBC.

3. As to the second interrogatory, I say that as set out in the Master Lease Agreement the owners of Wabush Mines at the time of the alleged breach of the Master Lease Agreement in 2003 were as set out in the Master Lease Agreement

being Wabush Iron Co. Limited ("Wabush Iron"), Stelco Inc. ("Stelco") and Dofasco Inc. ("Dofasco").

a. Cliffs Mining is not a party to any agreement or constating document between the owners of Wabush Mines;

b. Cliffs Mining liability to the owners of Wabush Mines is as set out in The Management Agreement dated January 1, 1967 referred in and attached to the Master Lease Agreement.

4. As to the third interrogatory, I say that to the best of my knowledge, information and belief I am unable to answer the same since the foundation of the question does not apply to Cliffs Mining. Cliffs Mining has no liability pursuant to the Master Lease Agreement. Cliffs Mining's obligations with respect to Wabush Mines are set out in the Management Agreement.

5. As to the fourth interrogatory, copies of all of the documents referred to above have been previously produced and are in the possession of RBC.

SWORN TO before me at the City of Cleveland , in the State of Ohio, this 8th day of October, 2014

JASON VELOSO

NOTARIAL SEAL STATE OF OHIO

ADAM D. MUNSON, Atty.
NOTARY PUBLIC
STATE OF OHIO
My Commission Has No Expiration Date
Section 147.03 R.C.

Attached is Exhibit C to the Affidavit
of Gary Ivany, sworn before me
this 15th day of October, 2014

Commissioner for Oaths in the Province of Ontario

Diane Manon Martella, Notary Public,
City of Toronto, limited to the attestation
of instruments and the taking of the affidavits
for Royal Bank of Canada
Expires August 26, 2017

Master Lease Agreement

WITH RELATION TO EQUIPMENT IN THE PROVINCE OF NEWFOUNDLAND

Between

Royal Bank of Canada, a Company incorporated under the laws of Canada, having an office at 700, Place d'Youville, Québec (Québec) G1R 3P2

Lessor

And

Cliffs Mining Company, the Managing Agent, acting only for and on behalf of Wabush Mines (an unincorporated joint venture of Wabush Iron Co., Limited, Stelco Inc. and Dofasco Inc.), having an office at 1100 Superior Avenue, Cleveland, Ohio 44114-2589, which declares to be duly authorized in virtue of a Management Agreement (copy of which is attached) to act on behalf of Wabush Mines and bind each of Wabush Iron Co., Limited, Stelco Inc. and Dofasco Inc. in accordance with their respective liability stated in paragraph 53.1 hereof;

Lessee

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Master Lease Agreement

WITH RELATION TO EQUIPMENT IN THE PROVINCE OF NEWFOUNDLAND

Lease agreement (the "Lease Agreement") made

between

Royal Bank of Canada, a Company incorporated under the laws of Canada, having an office at 700, Place d'Youville, Québec (Québec) G1R 3P2

(hereinafter called "Lessor")

and

Cliffs Mining Company, the Managing Agent, acting only for and on behalf of Wabush Mines (an unincorporated joint venture of Wabush Iron Co., Limited, Stelco Inc. and Dofasco Inc.), having an office at 1100 Superior Avenue, Cleveland, Ohio 44114-2589, which declares to be duly authorized in virtue of a Management Agreement (copy of which is attached) to act on behalf of Wabush Mines and bind each of Wabush Iron Co., Limited, Stelco Inc. and Dofasco Inc. in accordance with their respective liability stated in paragraph 53.1 hereof;

(hereinafter called "Lessee")

Whereas

1. Lessor and Lessee have agreed that, from time to time, Lessee may request Lessor to purchase equipment and to license software required for use in Lessee's operations, to be leased by Lessor to Lessee.

2. Forthwith upon the purchase of such equipment and licensing of such software by Lessor, Lessee shall lease the same from Lessor, the whole in accordance with the terms and conditions of this Lease Agreement.

Now therefore this agreement witnesseth:

1. Definitions

1.1 For the purpose of this Lease Agreement and Leasing Schedule hereto:

(a) "Adverse Claim" means any lien, privilege, charge, security interest, attachment, seizure, sequestration, distress, levy or encumbrance of any nature, other than Permitted Liens.

(b) "Aggregate Rental" means, with respect to System, the total rental required to be paid by Lessee to Lessor during the term of the Lease.

(c) "Bond" means a guarantee, suretyship, bond or other indemnification satisfactory to Lessor, provided by a Person acceptable to Lessor, in such form, for such amount and on such terms and conditions as are reasonably satisfactory to Lessor.

(d) "Cost of Disposition", means with respect to the sale, leasing or other disposition of any Equipment or Licensed Software by Lessor, all costs, disbursements, commissions and other expenses, which Lessor may incur, pay or be or become liable for, in the course of, or in connection with, recovering possession of, dismantling, removing, transporting, repairing, reconditioning, selling, leasing, otherwise disposing of, delivering, reassembling, or reinstalling the Equipment or Licensed Software.

(e) "Date of Loss" means the actual date of Loss of Equipment or Licensed Software.

(f) "Depreciation Class" means that depreciation class established by Regulations presently or hereafter enacted pursuant to the Federal and Provincial (where applicable) Income Tax Act(s), stated in Item 7 of the Leasing Schedule, permitting Lessor to claim Capital Cost Allowance in respect of the Equipment or Licensed Software for income tax purposes at the rate stated in Item 7 of the Leasing Schedule, calculated either on the reducing balance or the straight line basis, as the case may be, stated in Item 7 of the Leasing Schedule.

(g) "Equipment" means the equipment which Lessor purchases and leases to Lessee pursuant to the terms and conditions of any Lease and when or where required in the context or circumstances, individual items thereof.

(h) "Lease" means this Lease Agreement and any Leasing Schedule with respect to specific items of Equipment or Licensed Software.

(i) "Leasing Schedule" means a document to be completed by Lessor and executed by Lessee in, or substantially in, the form set forth in Schedule "A" hereto.

(j) "Loss of Equipment or Licensed Software" means:

i) a total loss, or a loss that amounts, in the opinion of both the Lessor and a professional insurance adjuster from the Lessee carrier, to a total loss, of the Equipment or Licensed Software through damage, destruction or otherwise, or

ii) any expropriation or other compulsory taking or use of the Equipment or Licensed Software by any government or other authority, "de facto" or "de jure", for a continuous and uninterrupted period of the lesser of 180 days or such other period of time as Lessor and Lessee may mutually agree upon in writing.

(k) "Net System Cost" means the total of all amounts required to be expended or other liabilities to be incurred by Lessor in order to make the System in all respects ready for use by Lessee at the location and for the purpose intended by Lessee, including, without limitation, the Supplier's invoiced price, all sales, excise, customs and other taxes or levies required to be paid and cost of transportation, installation, assembly and related expenses.

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(l) "Obligation" means any obligation to comply with any provision of any Lease or any other agreement between Lessor and Lessee.

(m) "Overdue Payment" means any monthly instalment of rental and any other payment due and owing by Lessee under any Lease which is not paid as and when required.

(n) "Person" means a natural person, a corporation, firm or partnership.

(o) "Proceeds of Loss" means the proceeds of insurance or any indemnity, award or other moneys payable in respect of the Loss of Equipment or Licensed Software.

(p) "Purchase Price" means with respect to:

i) the option to purchase dates stated in Item 4 of the relevant Leasing Schedule, the corresponding sum stated therein; and

ii) the option to purchase the Equipment and/or to take an assignment of the Licensed Software exercisable by Lessee on, but not before or after, the expiry date of the term of any Lease or any renewal thereof, the market value of the Equipment and/or the Licensed Software, as mutually agreed upon between Lessor and Lessee, or, in the absence of such agreement, as determined by a qualified professional appraiser mutually selected by Lessor and Lessee or as selected by Lessor in the event the parties cannot agree on an appraiser.

(q) "Relevant Period" means the then current twelve month period shown in Item 5 of the respective Leasing Schedule, from the commencement date of the term shown therein.

(r) "Settlement Date" means a date falling within 180 days of the Date of Loss on which Lessee shall pay to Lessor the Settlement Value of the Equipment and/or Licensed Software.

(s) "Settlement Value" means, if the Settlement Date is the first day of a Relevant Period, a sum determined by multiplying the corresponding percentage rate for such Relevant Period as set forth in Item 5 of the Leasing Schedule by the Net System Cost of the Equipment and/or Licensed Software lost, and if the Settlement Date is other than the first day of the Relevant Period, the Settlement Value determined as aforesaid, prorated as follows:

i) by determining the difference between the Settlement Value determined as aforesaid and the Settlement Value similarly determined for the first day of the next following Relevant Period, and

ii) by deducting from the Settlement Value determined as aforesaid the percentage of such difference which the portion of such Relevant Period expired to the Settlement Date bears to the full Relevant Period.

(t) "Supplier" means the Person from whom Lessor shall purchase or otherwise acquire the Equipment and/or Licensed Software.

(u) "Warranties" means all conditions, warranties, guarantees, representations, service contracts, contracts to stock spare parts or other agreements of any nature whatsoever, oral or written, express or implied, legal, statutory, conventional, collateral or other, in respect of, or which shall in any manner apply to, any Equipment and/or Licensed Software.

(v) "System" means the Equipment and the Licensed Software.

(w) "Licensed Software" means the operating system and application software programs which Lessor licenses and in turn sub-licenses to Lessee pursuant to the terms and conditions of any Lease and when or where required in the context or circumstances, individual items thereof.

(x) "Purchase Agency Agreement" means an agreement between Lessor and Lessee, in the same form and content as in Schedule B attached hereto, defining and limiting Lessee's authority to act as purchasing agent for Lessor in the acquisition of the System.

(y) "Permitted Liens" means:

(i) all unregistered rights, interests and privileges in favour of the Crown under or pursuant to any applicable statute or regulation provided same do not arise as a result of some failure to comply with a governmental requirement;

(ii) liens for taxes, charges, rates and assessments not yet due, or if due, the validity of which is being contested in good faith by Lessee;

(iii) undetermined or inchoate liens and charges incidental to current operations which have not been filed or registered in accordance with applicable law, or of which written notice has not at the time been duly given in accordance with the applicable law, or which relate to obligations neither due nor delinquent, or which have by operation of law expired or been extinguished;

(iv) any unregistered lien created or imposed by law which has not yet become enforceable;

(v) any privilege, charge or security interest in favour of the Lessor.

(z) "Joint Venture" means an unincorporated Joint Venture known as Wabush Mines;

(aa) "Joint Venturer" means the joint venturer of the Joint Venture, namely Wabush Iron Co. Limited, Stelco Inc. and Dofasco Inc.

(ab) "Lessee" means each of the Joint Venturer as party of the Joint Venture.

(ac) "Fair Market Value" shall be determined on the basis of, and shall be equal in amount to, the value which would be obtained in an arms-length transaction between an informed and willing buyer under no compulsion to buy, and an informed and willing seller under no compulsion to sell. This amount will be determined by agreement between the Lessor and Lessee. If a mutual agreement cannot be reached, two independent appraisers will be engaged, cost to be shared equally. The average of the two appraisals will be considered fair market value.

(ad) "Prime Rate" means the annual rate of interest announced by the Royal Bank of Canada from time to time as its reference rate then in effect for determining interest rates on Canadian dollar commercial loans made by the Royal Bank of Canada.

(ae) "Interim Rental Factor" means the Prime Rate divided by 365.

1.2 "This Lease", "hereto", "herein", "hereof", "hereby", "hereunder", and similar expressions refer to this Lease and not to any particular section, paragraph, sub-paragraph or other portion thereof. All of the provisions of this Lease Agreement and any Leasing Schedule are to be construed as covenants as though the words importing such covenants were used in each separate clause, paragraph or sub-paragraph hereof.

1.3 Any terms herein defined in the singular number shall have a corresponding meaning when used in the plural.

1.4 Any act or deed required to be observed, performed or done hereunder falling on a Saturday, Sunday or other statutory holiday shall be observed, performed or done on the business day next following but any delay hereby granted shall not extend to relieve either party from the due performance and fulfilment of its Obligations hereunder.

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2. Leasing of System

2.1 Lessor and Lessee acknowledge that the System is being acquired by Lessor at the request of Lessee for Lessee's

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ultimate use and that Lessor is relying on Lessee's selection of the System and therefore Lessor and Lessee shall enter into a Purchase Agency Agreement for the purpose of selecting and acquiring the System.

2.2 After receipt by Lessor of the Lease Agreement and the Purchase Agency Agreement, duly executed by Lessee (and such other documentation satisfactory to Lessor as to Lessee's commitment to lease Equipment and sub-license Licensed Software from Lessor), Lessee may order Equipment and Licensed Software from Suppliers using purchase orders approved by Lessor and will immediately notify Lessor of each such order.

2.3 Upon receipt of the invoice(s) for the Equipment and/or Licensed Software ordered by and delivered to Lessee, Lessor shall prepare and deliver to Lessee, in duplicate, a Leasing Schedule(s) for such Equipment and/or Licensed Software.

2.4 Lessee shall conduct such acceptance testing of the Equipment and/or Licensed Software which is the subject of the purchase order as may be contemplated by the related purchase or license agreement and, promptly upon successful completion of such acceptance testing in accordance with the terms and conditions of such purchase or license agreement, Lessee, by an authorized representative, shall promptly sign the Leasing Schedule(s) for such Equipment and/or Licensed Software and return such fully executed Leasing Schedule(s) to Lessor. It shall be the sole responsibility of Lessee acting under the Purchase Agency Agreement to include in any purchase or license agreement such terms and conditions pertaining to acceptance testing as Lessee considers necessary or desirable to protect Lessee's interests.

2.5 Lessor shall have no responsibility under any purchase order or any purchase or license agreement or any Leasing Schedule if Lessee does not accept the Equipment and/or Licensed Software and deliver to Lessor the Leasing Schedule(s) for such Equipment and/or Licensed Software. Each purchase or license agreement shall provide that the Supplier shall refund to Lessor all amounts (including but not limited to instalments of purchase price and/or license fees, sales and other taxes, transportation charges and other charges, if any) paid by Lessor to Supplier for or on account of the equipment or software which is the subject of the related purchase or license agreement in the event that acceptance testing is not satisfactorily completed in accordance with the terms and conditions thereof.

2.6 The return of the signed Leasing Schedule(s) by Lessee to Lessor shall, as between Lessor and Lessee, constitutes acceptance and conclusive proof that Lessee has inspected and tested the Equipment and/or Licensed Software which is the subject of such Leasing Schedule(s) and acknowledges completion to Lessee's satisfaction of all acceptance testing procedures, and shall preclude Lessee from thereafter asserting against Lessor any claim, demand or action based upon the selection of the Equipment and/or Licensed Software or its or their condition, durability or suitability for any particular use intended by Lessee.

2.7 Each Leasing Schedule shall constitute a separate Lease of the Equipment and/or Licensed Software described therein on the terms and conditions of such Leasing Schedule and this Lease Agreement. In the event of a conflict between the terms of this Lease Agreement and any Leasing Schedule with respect to any Lease, the terms of the Leasing Schedule shall govern.

3. Payment of Net System Cost

3.1 Lessor will pay the Net System Cost of the Equipment and/or Licensed Software acquired pursuant to a particular Leasing Schedule or group of related Leasing Schedules on or before the due date for such payment. Where Lessee has advanced on behalf of Lessor instalment or other payments to a Supplier prior to completion of acceptance testing, with a balance to be paid to the Supplier upon successful completion of acceptance testing, Lessee shall so advise Lessor, providing such proof of payment as Lessor may reasonably request, and Lessor will allocate the payment of Net System Cost as between Lessee and Supplier so as to pay such remaining balance to Supplier and to reimburse Lessee for such prior instalment or other payments. Lessor shall give Lessee prompt written notice of the date and amount of all such payments made by Lessor to Supplier(s).

4. Rental

4.1 Lessee shall pay to Lessor the Aggregate Rental in equal consecutive monthly instalments each in the amount of the total monthly rental instalment, the first such instalment payable on the commencement date of the term and the last of such instalments payable on the termination date of the term, all as shown on the Leasing Schedule (Items 2 and 3).

5. Interim Rental

5.1 If payment by Lessor of the Net System Cost of the Equipment and Licensed Software occurs on the first day of any month, the first monthly instalment of rental shall fall due and be paid on the day of such payment. If payment of the Net System Cost occurs on any day other than the first day of any month, the first monthly instalment of rental shall fall due and be paid on the first day of the next succeeding month and on that date, in addition to the first monthly instalment of rental, Lessee shall pay an interim rental calculated by multiplying the portion of the Equipment cost paid out during the relevant month by the Interim Rental Factor based on the Royal Bank of Canada Prime Rate (5.50%) as of October 3, 1996) and by multiplying the result thereof by the number of days from and including the day on which payment is made, to and including the last day of the month, and by adding thereto an amount calculatd by multiplying the total monies paid out to the end of the previous month(s) by the said interim rental factor and by multiplying the result thereof by the number of days in the relevant month.

5.2 Lessor will submit to Lessee such information concerning the purchase of the Equipment and Licensed Software as may be reasonably requested by Lessee and shall submit to Lessee copies of all invoices received by Lessor from any Supplier of the Equipment or Licensed Software.

6. Rent Payment

6.1 The monthly rental instalments shall be paid at the office of Lessor, at the address set out on page 1 of this Lease Agreement, or at such other place in Canada as Lessor may from time to time designate by notice.

7. Ownership

7.1 Title to, ownership of, and property in, the Equipment shall at all times be and remain solely and exclusively in the name of the Lessor subject only to the rights of Lessee to use the same pursuant to the terms, conditions and

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provisions of this Lease, and to purchase the same in pursuance of any option granted in any relevant Leasing Schedule or agreement relevant thereto.

Primary license rights in the Licensed Software shall at all times be and remain in the Lessor, subject only to the sub-license thereof in favour of the Lessee and the right of the Lessee to take an assignment of the primary license rights in pursuance of any option to do so granted or evidenced in any relevant Leasing Schedule or agreement relevant thereto.

8. Personal Property

8.1 Notwithstanding any purposes for which the Equipment may be used or that it may become in any manner affixed or attached to or embedded in or permanently rested upon land or any structure thereon, it shall remain moveable personal property or a chattel personal, and subject to all of the rights of Lessor under the Lease to which it is subject.

8.2 Lessee agrees to use all reasonable commercial efforts to obtain a waiver, if required by and in a form satisfactory to Lessor, from any landlord, mortgagee, hypothecary creditor or other encumbrancee or any person having any interest in Lessee's moveable personal property or chattel personal, consenting to this Lease Agreement and any relevant Leasing Schedule, and to the exercise by Lessor of its right thereunder and hereunder and declaring that such encumbrances do not affect the Equipment.

9. Licence

9.1 In respect of any System which is, or at any time or from time to time may be, located on, or in, lands and premises owned or leased by Lessee, the Lessee:

(a) agrees that Lessor may at any time and from time to time, upon becoming entitled to possession of the System, enter upon the said lands and premises with all such forces as may be reasonably required, and dismantle, detach and remove such System; and

(b) agrees that Lessor shall not be liable for any damage done to the said lands or premises by, or in the course of, such dismantling, detaching or removing, save only such damage as may be caused by the gross negligence or wilful act of Lessor or its agents or servants; and

(c) hereby grants to Lessor a licence, irrevocable during the term of the relevant Leasing Schedule and for such length of time thereafter as may be reasonably required to effect such dismantling, detaching and removing, to enter upon the said lands and premises in the manner and for the purposes aforesaid; and

(d) agrees that Lessor may, at its election, register, by way of caveat or otherwise, against the said lands and premises to give notice of its right of access for the purposes aforesaid.

10. Exclusion of Warranties

10.1 Lessee acknowledges that the System will be personally chosen and selected by Lessee and that it will be of a make, size, design and capacity desired by Lessee for the purpose intended by Lessee.

10.2 Lessor does not make or give any representation or warranties, express or implied, as to the System, its condition, durability or suitability for any particular use intended by Lessee and Lessee hereby confirms that Lessor has not given any such representations or warranties.

10.3 Lessor will not be liable to Lessee for any loss, cost, damage or expense of any kind or nature, direct, indirect or consequential caused by the System or the use or maintenance thereof, or by any interruption of service or loss of use thereof.

10.4 If the System is not properly constructed or repaired or does not operate as intended by Lessee or as represented by the manufacturer or the seller, totally fails to function or perform so as to give rise to a fundamental breach or alleged fundamental breach or is unacceptable for any reason whatsoever, Lessee shall not claim against Lessor and shall nevertheless unconditionally pay Lessor all rent and other amounts payable hereunder.

11. Maintenance and Use

11.1 Lessee will, at its own expense:

(a) maintain the System in good operating condition and repair (ordinary wear and tear excepted);

(b) comply in all respects with all recommendations, or requirements of the Supplier regarding the System or any part or component thereof or accessory thereto, as may be necessary to preserve all Warranties by such Supplier;

(c) repair and replace any damage to the System caused by the operation or use thereof by Lessee, its officers, employees and servants or by others; and

(d) replace any components, including power plants, as may become necessary or, in the reasonable opinion of Lessee, desirable for the proper use and operation of the System.

11.2 All replacement parts which may, in the course of maintaining the Equipment in good operating condition and repair, at any time and from time to time, during the term of each Lease, be made to, or placed in or upon, the Equipment thereby leased, shall be free and clear of all Adverse Claims.

11.3 All replacement parts, of whatever kind or nature, made to, or placed in or upon the Equipment, shall belong to, and become the property of, Lessor and shall be subject to all the terms and conditions of this lease as if they formed part of the Equipment.

12. Inspection

12.1 The representatives of Lessor shall have the right to inspect the System at any reasonable time upon reasonable notice to Lessee, and Lessee shall afford all reasonable facilities required by such representatives for the purpose of such inspection, and for such purpose may enter any premises where the System is located.

12.2 Any misuse, fault of erection or installation, want of maintenance or repair of the System which shall be disclosed by such inspection shall, forthwith upon notice from Lessor, be discontinued, made good, serviced or repaired, as the case may be, by the Lessee.

13. Insurance

13.1 As and from the earlier of the date upon which Lessor acquires ownership of, or title to, the Equipment or the date on which Lessor assumes risk, responsibility and liability therefor, and thereafter throughout the term of each relevant Leasing Schedule, Lessee shall, at its sole expense:

(a) place and maintain physical damage insurance on the Equipment, in amounts satisfactory to Lessor, consistent with Lessee's normal and usual practice for insuring

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equipment of the same general classification. Said physical damage insurance shall specifically state by its wording or by endorsement that it:

i) includes Lessor (as owner) as an additional named insured,
ii) includes a loss payable clause in favour of Lessor, as respects to total loss,
iii) includes a waiver of subrogation clause in favour of Lessor;

(b) place and maintain general liability insurance, or automobile liability insurance in the case of leased licensed motor vehicles, with limits of liability no less than three million U.S. dollars (US $3,000,000) for injury to or death of any one or more persons per loss and not in the aggregate for injury to or death of any one or more persons or damage to property. Said general liability insurance shall specifically state by its wording or by endorsement that it:

i) extends to cover the liabilities assumed by Lessee under this Lease arising out of the use or possession of the Equipment,
ii) includes Lessor as an additional named insured,
iii) include a permission to rent or lease endorsement clause in favour of the Lessee.

c) Lessee will not knowingly do or omit to do anything that will invalidate or otherwise adversely affect the interest of the Lessor as a named insured under any policy placed and maintained by the Lessee hereunder.

d) Lessor shall not be responsible for payment of any premiums or insurance coverage required to be placed and maintained by Lessee by the terms of this Section.

13.2 All policies of insurance shall cover and protect Lessor and Lessee as their respective interests may appear and without in any way limiting the generality of the foregoing shall contain endorsements providing that:

(a) ten (10) business days prior written notice shall be given the Lessor in the event the policy is materially altered or twenty (20) business days prior written notice shall be given the Lessor in the event the policy is cancelled,

(b) the insurance provided shall be primary and shall not be contributory with any other insurance carried by Lessor.

13.3 Lessee shall supply Lessor with certificate of insurance evidencing the foregoing coverage and evidence of their renewal or replacement from time to time, so long as any Leasing Schedule remains in force and effect.

13.4 Lessee shall, at its own expense, have the complete duty and responsibility to make all proofs of loss and take all other steps necessary to effect recovery from insurers under any insurance carried pursuant to the provisions of this Section. If Lessee shall fail to or refuse to make all proofs of loss and take all steps necessary to effect recovery from insurers Lessor shall be entitled, at the cost of Lessee, to make such proof and to take all other steps necessary to effect such recovery. If Lessee makes proof of loss and takes all other steps necessary to effect such recovery, Lessor shall sign all papers and take all other actions reasonably requested by Lessee in order to effect such recovery, including abandonment of the Equipment to insurers.

13.6 Effecting or obtaining insurance pursuant to this Section shall not excuse or relieve Lessee from the due observance and fulfilment of any of its Obligations hereunder or under any Lease.

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14. Taxes

14.1 Lessee shall duly and punctually pay all sales taxes, licence fees, business taxes, levies and assessments of every nature and kind whatsoever which be or become payable at any time or from time to time upon, or in respect of, the Equipment and/or Licensed Software, this Lease Agreement and any Leasing Schedules, monthly rental instalments, or any other payments made hereunder. However, Lessee shall have no liability for taxes imposed by Canada or any Province or subdivision thereof which are income taxes on or measured by the net income of Lessor or franchise taxes measured by Lessor's capital, capital stock or net worth.

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15. Liens

15.1 Lessee shall keep the System free and clear of any and all Adverse Claims subject to the right of Lessee to contest with all due dispatch any such Adverse Claims upon providing, at the option of Lessor, a Bond or other satisfactory indemnification in respect of any loss, cost or damage which might be sustained or incurred by Lessor or for which Lessor might be or become liable for as a result of, or by reason of, any such Adverse Claim or the contestation thereof by Lessee. Lessee shall give Lessor notice of the possibility of such Adverse Claim where Lessee is aware or ought reasonably to be aware of such possibility.

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16. Laws and Regulations

16.1 Lessee shall, at its sole expense, comply with all laws and regulations made by competent authority relating to the use, operation or possession of the Equipment or the ownership thereof by Lessor.

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17. Alterations

17.1 Lessee may make any alterations, additions or improvements to the System, provided that:

(a) such alterations, additions or improvements shall not materially decrease the value of the System nor interfere with, or frustrate the intended use of the System;

(b) all such alterations, additions or improvements shall, at all times, be free and clear of all Adverse Claims; and

(c) the making of any such alterations, additions or improvements shall not subject the System to any Adverse Claim.

17.2 All such alterations, additions or improvements of whatever kind or nature made by Lessee to the System shall be at Lessee's expense and shall belong to and become the property of Lessor and be subject to all the terms, conditions and provisions of this Leasing Agreement and the relevant Leasing Schedule.

17.3 Lessee, at its expense, will transfer to Lessor title to and ownership of any such alteration, addition or improvement free and clear of all Adverse Claims and will do and perform all such acts, matters and things as Lessor may reasonably require to vest such title and ownership in Lessor.

17.4 Upon the expiration, by affluxion of time and not otherwise, of the term of each Leasing Schedule, provided Lessee is not then in default in the due observance and performance of, and has committed no act in breach of, any Obligation, Lessee may, at its expense, remove any such alterations, additions or improvements which it has made to the System thereby leased, provided that any such removal may be made by Lessee without damage to such System and upon

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any such removal Lessee shall, at its expense, restore the System to its original state and condition, reasonable wear and tear excepted.

17.5 At the written request of Lessee, Lessor will transfer and convey to Lessee title to, and ownership of, any alterations, additions or improvements which have been removed by Lessee pursuant to the provisions of the preceding Paragraph 17.4 of this Section.

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18. Depreciation Class

18.1 Lessee represents, warrants and covenants with respect to each Lease that:

(a) on the commencement date of the term of such Lease, the Equipment and/or Licensed Software described therein is included in the Depreciation Class; and

(b) it shall not, by an act of commission or omission, effect any change in the nature or the intended use and purpose of the Equipment and/or Licensed Software which could or would result in the Equipment and/or Licensed Software being included in any other Depreciation Class or to be depreciable on the reducing balance or the straight line balance, as the case may be, of capital cost at a rate less than that stated in Item 7 of each Leasing Schedule.

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19. Loss of Equipment

19.1 On the occurrence of Loss of Equipment and/or Licensed Software, Lessee shall:

(a) within ninety (90) days of the Date of Loss, give Lessor written notice of the Settlement Date;

(b) on the Settlement Date, pay to Lessor the Settlement Value of the Equipment and/or Licensed Software in exchange for a Bill of Sale from Lessor to Lessee selling and conveying, subject to the rights of any underwriters or other persons therein, all its right, title, and interest in and to the Equipment and/or Licensed Software and any claim for proceeds of Loss thereof;

whereupon the Lease shall terminate with respect to such Equipment and/or Licensed Software, and no further rental shall be payable thereafter with respect to such Equipment and/or Licensed Software.

19.2 The Bill of Sale from Lessor to Lessee shall contain no warranties on the part of Lessor except that Lessor shall warrant that it has not done any act or created any security interest in the Equipment and/or Licensed Software which would adversely affect its title thereto.

19.3 All Federal and Provincial sales or transfer taxes, licence fees and similar assessments connected with the transfer of title to and of ownership of the Equipment to Lessee and/or the assignment to Lessee of Lessor's rights in the Licensed Software shall be paid by Lessee.

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20. Lessee's Acknowledgements - Forseeable Damages

20.1 Lessee hereby acknowledges that it has been informed by Lessor and is aware that:

(a) The System was or will be acquired by Lessor at the request and direction of Lessee and for the express purpose of leasing same to Lessee under a Leasing Schedule;

(b) Lessor intends to treat the lease of the System to the Lessee as a true lease and to claim over the term of the lease all available fiscal benefits thereby deriving its anticipated return on its investments;

(c) On leasing System to Lessee, Lessor may incur certain setup costs, fees, and disbursements which Lessor may amortize and intend to recover over the whole or part of the term of lease of any System;

(d) Lessor may finance or fund its cost of acquisition of System with a third party financier and any premature termination of such funding or financing may expose Lessor to an increased liability.

Lessee expressly acknowledges and agrees that by reason of the occurrence of any Event of Default Lessor's return on its investment may be adversely affected and in that case Lessor may, in addition to its immediate loss of interest on its investments, sustain and claim from Lessee other foreseeable damages which cannot be quantified on the date of execution of this Lease Agreement or any Leasing Schedule and which may include, without limitation, loss of fiscal benefits for the remainder of the term of any lease of any System or increased tax liabilities or both, unanticipated increased administrative costs, amortized but unrecovered setup costs, fees and disbursements as well as additional or increased monetary liabilities towards any third party lender, under or by reason of such Event of Default and the premature termination of any lease of any System and the funding thereof (all of which are hereinafter collectively referred to as "Forseeable Damages").

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21. Lessee's Events of Default

21.1 The following shall, for the purpose of the Lease, be events of default by Lessee (each such event being hereinafter referred to as an "Event of Default"):

(a) if Lessee defaults in any Obligation of it hereunder, and if any such default shall continue for thirty (30) days after Lessor shall have given written notice thereof to Lessee;

(b) if Lessee shall make any assignment for the general benefit of creditors or be adjudged bankrupt within the meaning of the Bankruptcy Act of Canada or any amending or replacing legislation;

(c) if Lessee ceases or threatens to cease to carry on business or makes or proposes to make any sale of the whole or a substantial portion of its assets in bulk, or out of the usual course of its business;

(d) if any proposal is made or petition filed by Lessee under any law having for its purpose the extension of time for payment, composition or compromise of the liabilities of Lessee;

(e) if any resolution is passed for, or judgement or order given by any court of competent jurisdiction ordering, the winding-up or other liquidation of Lessee unless and for so long as Lessee shall be contesting such resolution, judgment or order in good faith;

(f) if a petition or other application is made for a receiving order or for the winding-up of Lessee unless and for so long as Lessee shall be contesting such petition or other application in good faith;

(g) if any execution, sequestration or any other similar process of any court of competent jurisdiction becomes and remains enforceable against, or if a distress or analogous process is levied upon, the property of Lessee or on any part thereof, save for any such process which is contested by Lessee in good faith and Lessee provides, at the option of Lessor, a Bond or other satisfactory indemnification in respect of any loss, cost or damage, which may be sustained by Lessor by reason of such execution, sequestration or other similar process or the contestation thereof by Lessee;

(h) if Lessee defaults under any other agreement it may then have with Lessor and such default continues beyond any

period of grace, remedy or notice permitted by such other agreement;

(i) if any receiver, administrator or manager of the property, assets or undertaking of Lessee is appointed pursuant to the terms of any Trust Deed, Trust Indenture, Debenture or similar instrument or by or under any judgement or order of any court;

(j) if the System is seized under legal process, confiscated, sequestrated or attached or if distress is levied thereon and any Bond or other indemnification provided by Lessee is insufficient to satisfy any loss, cost or damage sustained by Lessor by reason of such seizure, confiscation, sequestration, attachment or distress or Lessor acting in good faith surrenders such Bond or other indemnification to Lessee without having availed itself of same;

(k) if any insurance placed or maintained pursuant to the terms of any Lease shall lapse or be cancelled and shall not have been replaced by another policy or policies complying with clause 13 hereof;

(l) if the Lessee amalgamates with any other corporation or organization without the permission of Lessor;

(m) if the Lessee fails to provide the Lessor with prior notice of the existence or potential existence of any Adverse Claim in breach of Section 15.1 hereof; or

(n) if any encumbrance set out in Section 8 occurs and Lessee is unable within a reasonable period of time thereafter to obtain a waiver described in Section 8.2.

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22. Lessor's Remedies on Default

22.1 If an Event of Default shall occur, Lessor may:

(a) at its option without notice to Lessee take possession of any System, wherever the same be located, without the necessity of obtaining a court order or other process of law, and sell, lease or otherwise dispose of such System for such consideration and upon such terms and conditions as Lessor may deem reasonable, including, without limitation, the right in the name of and as the irrevocable appointed agent and attorney for Lessee to lease the System or any portion thereof to any other person on such terms and conditions, for such rental and for such period of time as Lessor may deem reasonable, without terminating or being deemed to have terminated this Lease Agreement or any relevant Leasing Schedule, and to receive such rental and hold the same and apply it against any Obligations of Lessee, the whole without prejudice to Lessor's other rights and recourses at law or equity; and

(b) after having taken possession of the System or any part thereof or without taking possession of the System, claim by written notice to Lessee, sue for and recover liquidated damages calculated as follows:

    i) by calculating the discounted present value of all monthly rent payments remaining to be paid during the remainder of the term of any Leasing Schedule using an assumed rate of interest of 5% per annum calculated and compounded monthly in advance; and

    ii) by adding to the sum calculated according to sub paragraph (i) the amount of any Foreseeable Damages suffered or sustained by Lessor and not recovered pursuant to sub paragraph (i) and any Overdue Payment; and

    iii) by deducting from the sum determined according to subparagraph (ii) the amount of any deposit remaining in the hands of Lessor and, where Lessor has taken possession and re-let or disposed of any System, any proceeds of such re-letting or other disposition after deducting from such proceeds all costs and expenses including costs of repossession and sale, repairs to or reconditioning of the System incurred by Lessor in connection with such disposition;

the whole without prejudice to Lessor's additional right to recover from Lessee any monies due and payable by Lessee prior to the date of that notice.

22.2 For the purposes of this Section, the proceeds of any releasing of the Equipment and/or Licensed Software shall be conclusively deemed to be an amount equal to the total of the rental payment payable during the full term of the re-lease discounted to present value using an assumed per annum rate of interest equal to the implicit rate used by Lessor in establishing the amount of the rental payment under such re-lease.

22.3 Lessee agrees that Lessor may, at its own discretion, choose to exercise any right, recovery, recourse, action, proceeding or claim against one or all of Joint Venturer. If Lessor obtains a favourable decision against any such party, then, each of Joint Venturer shall be liable in accordance with its liability stated in paragraph 53 and each of Joint Venturer undertakes to be liable as such. Should Lessor choose not to sue all the Joint Venturer, the parties being sued shall forward a copy of any action, proceeding, recovery, recourse, action, proceeding or claim to the others, provided, however, that the failure to do so shall not in any way prejudice the rights of Lessor against each Joint Venturer.

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23. Lessor's Option to Terminate

23.1 Lessee agrees that neither this Lease Agreement nor any Leasing Schedule, nor any interest therein or in any Equipment and/or Licensed Software, shall be assignable or transferable by operation of law and it is agreed and covenanted by and between the parties hereto that if any event of default as defined in Section 21 hereof shall occur or happen, then this Lease Agreement and any and all Leasing Schedules shall, at the option of the Lessor to be exercised by notice hereunder, immediately end and terminate and neither this Lease Agreement nor any Leasing Schedule or any interest therein shall be an asset of Lessee after the exercise of that option; provided that no such termination shall terminate or affect any right or remedy which shall have arisen under the Lease prior to such termination.

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24. Lessee's Remedies

24.1 If any of the following events of default shall occur or happen namely:

(a) if Lessor shall fail to observe and perform its obligations under the Lease; or

(b) if Lessor shall commit any act in breach of the Lease;

then provided that such event of default shall not have been remedied within thirty (30) days after notice thereof to Lessor and if Lessee is, by reason of the occurrence or happening of such event of default, denied peaceable and quiet enjoyment of the System and the benefits of any Lease, Lessee may exercise the following remedy:

    (i) terminate the Lease with respect to which such event of default has occurred or happened and is continuing; and

    (ii) prior to termination, purchase the System leased to Lessee under such Lease, for a purchase price

equal to the Settlement Value, for the time being, thereof.

24.2 Upon any purchase by Lessee pursuant to the provision of this Section, Lessee shall accept the System in whatever condition or location it may be on the date of purchase and agrees that any expenses of delivery and removal of the System shall be borne and paid by Lessee. The sale by Lessor shall be without any Warranties on the part of Lessor, affecting or relating to the System, Lessor's title thereto, or to the sale thereof, all Warranties being expressly excluded.

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25. Option to Purchase/Return Conditions

25.1 Provided Lessee shall not be in default under any Obligation, Lessor hereby grants to Lessee an option to purchase whatever title Lessor may have to the Equipment for the Purchase Price and at the time or times set forth in Item 4 of the relevant Leasing Schedule.

Provided Lessee shall not be in default under any Obligation and to the extent Lessor has the right to grant such an assignment, Lessor hereby grants to Lessee the right to take an assignment of Lessor's rights under any license of Licensed Software for the option price and at the time or times set forth in the relevant item of the relevant Leasing Schedule.

25.2 Such option to purchase may be exercised by Lessee by giving to Lessor notice of Lessee's intention to exercise such option, at least thirty (30) days prior to the date of intended purchase, describing the Equipment with respect to which such option is being exercised.

The right to take an assignment of Lessor's rights under any license of Licensed Software may be exercised by Lessee by giving to Lessor notice of Lessee's intention to exercise such right, at least thirty (30) days prior to the date of intended assignment, describing the Licensed Software with respect to which such right is being exercised.

25.3 The intended purchase and sale and/or assignment of license rights shall be concluded on a date specified in the said notice falling on or after, but not before, the option date stated in the relevant item of the relevant Leasing Schedule, but in any event not later than the termination date of term pertaining to the Equipment and/or Licensed Software being purchased.

25.4 Upon the exercise of such option, there shall be a binding agreement for the sale and purchase of the Equipment and/or assignment of license rights in the Licensed Software described in the said notice on the terms and conditions provided herein. The Purchase Price shall be paid to Lessor at the time of the conclusion of such sale.

25.5 Upon any such purchase and/or assignment of license rights and/or license rights so assigned, Lessor shall transfer the Equipment so purchased free and clear of all interests of Lessor under this Lease Agreement and any Leasing Schedule and thereupon this Lease shall terminate with respect to the Equipment and/or Licensed Software so purchased.

25.6 Lessee shall bear the cost of any Provincial or Federal taxes, licence or registration fees of other assessments or charges imposed on, or connected with, the transfer of title to and ownership of the Equipment.

25.7 Should Lessee not exercise such option, Lessee shall then return the Equipment subject to the following:

Lessee agrees that each piece of Equipment must be, as of the termination date, in strict conformance with all the following minimum physical return conditions:

1) The Equipment shall have been operated and maintained in accordance with the Manufacturer's standard operating and maintenance procedure and evidenced by all maintenance records and logs as required under the Manufacturer's availability guarantee.

2) At the time of return,
   a) all Equipment shall be returned in the condition in which it is required to be maintained. The Equipment shall be free of any rust or corrosion, except surface rust and corrosion, that would adversely effect the structural integrity or mechanical operation of the Equipment. All advertisements, logos or identifying marks of the Lessee shall be removed;
   b) Lessee agrees that 30 days prior to the expiration of the Leasing Schedule, Lessor may cause an authorized manufacturer's representative to inspect all items of Equipment, at Lessee's expense, to enable Lessor to determine the condition of the Equipment including, without limitation, a component reconciliation. Said component reconciliation shall determine, using information provided by the inspection and a review of applicable maintenance records, the number of operational hours in excess of 50% of useful life or of 50% of time between manufacturer recommended replacement, overhaul or rebuild for any component parts. Expected intervals between component replacemenet, overhaul or rebuild supplied by the manufacturer shall be used as the basis of the reconciliation. If the operational hours of any such components exceed either 50% of its remaining useful life or 50% of time recommended between replacement, overhaul or rebuild, then Lessee shall compensate Lessor by the following formula:

   Amount due to Lessor = $z(y-0.5x)/x$

x =	Total number of allowable hours between replacement, overhaul or rebuild on component.
y =	Total number of hours since new, or last overhaul, rebuild or replacement.
z =	The then current cost to Lessor for replacement, overhaul or rebuild of the component from the manufacturer.

The component reconciliation shall be completed not later than 10 days prior to the last day of the Lease Term of the Lease and Lessee shall be obligated to pay Lessor for such excess component usage on the last day of the Lease Term;

   c) the Equipment shall be operational and able to perform its assigned task(s), normal wear and tear accepted;
   d) if required by Lessor, Lessee shall provide free storage in operating condition for the Equipment on Lessee's premises in order to sell the Equipment FOB mine site if possible;

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e) upon being sold the Equipment shall be deinstalled, disassembled and properly packed by Lessee at Lessee's expense;

f) the Equipment shall be loaded on an equipment trailer suitable for the shipping of such equipment by Lessee at Lessee's expense; and

g) the Lessee agrees to pay at the date of return to the Lessor two per cent (2%) of Net System Cost as remarketing fee.

In the case where any of these conditions are not met, Lessee shall be deemed to have exercised its option to purchase the Equipment at the cap of Fair Market Value as stipulated in Leasing Schedule.

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26. Remedying Defaults

26.1 If Lessee shall fail to perform or comply with any of its Obligations under this Lease Agreement or any Leasing Schedule, Lessor at its discretion may do all such acts and make all such disbursements as may be necessary to cure such default and any costs incurred or disbursements made by Lessor incurring any such default shall be payable by Lessee on demand.

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27. Indemnification

27.1 Lessee will indemnify Lessor and save Lessor harmless from and against all loss, costs, charges, expenses, liabilities, claims, demands, penalties and damages of every nature and kind whatsoever sustained or suffered by Lessor, or for which the Lessor may be or become liable, and caused by, resulting from, occasioned by or in any way connected with:

(a) the execution of the Lease Agreement or any Leasing Schedule by Lessor or the purchase or ownership by Lessor of the Equipment or the licensing by Lessor of the Licensed Software or the sub-licensing thereof to Lessee pursuant to the terms hereof;

(b) the non-acceptance by Lessee or the failure, refusal or neglect of Lessee to accept the System pursuant to the terms of Section 2.2 hereof; or

(c) the moving, delivery, maintenance, repair, use, operation or possession of the Equipment and/or Licensed Software by Lessee or the ownership thereof or other rights held therein by Lessor;

unless caused by the act or neglect of Lessor, its servants or agents.

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28. Enforcement of Warranties

28.1 Lessor hereby assigns expressly to Lessee the Warranties resulting from the sale entered into with the Supplier and irrevocably constitutes and appoints Lessee, or the person designated by Lessee, its agent and attorney in fact, for and in Lessor's own name and behalf, to make and enforce from time to time at Lessee's sole cost and expense, whatever claim or claims Lessor may have against any Supplier of the Equipment and/or Licensed Software under any Warranties, express or implied, in respect thereto. Lessee shall obtain from the Supplier of the Equipment and/or Licensed Software its acceptance without reserve of such conveyance of Warranties.

28.2 Lessor may, at Lessee's expense and request, agree to join with Lessee in any claim, action, suit or proceeding arising out of, or connected with the Lease, any Leasing Schedule hereto or the Equipment and/or Licensed Software, or to assign to Lessee, Lessor's right to do so, the whole upon the option of Lessor. Notwithstanding the foregoing, Lessee shall be entitled, except in the Province of Quebec, to use the name of Lessor, with the Lessor's written consent and on provision of any indemnity Lessor may require, in any such claim, action, suit or proceeding. If the Lessor agrees to join Lessee in any such claim, action, suit or proceeding Lessee shall indemnify and save harmless Lessor from any and all loss, costs, damages or expense arising therefrom.

28.3 In all circumstances relating to any such claim, action, suit or proceeding, Lessor shall cooperate fully with Lessee and shall furnish promptly to Lessee all relevant documents or copies thereof and other assistance within Lessor's knowledge, possession or control and which are reasonably required in connection with such claim, action, suit or proceeding.

28.4 Any amounts of money or money's worth recovered by Lessor shall be held for Lessee's account and shall be paid to it forthwith.

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29. Patent Infringement

29.1 Lessee shall defend and hold Lessor free and harmless from any cost, loss or damage assessed against Lessor in any suit, proceeding or otherwise so far as the same is based on any claim that the use or operation of the Equipment and/or Licensed Software by Lessee shall infringe any patent or copyright.

29.2 Settlement of any suit or proceeding instituted against Lessor or Lessee may include modification of the Equipment and/or Licensed Software to avoid infringement or, with the written consent of Lessor, replacement of the Equipment and/or Licensed Software with non-infringing equipment or software.

29.3 If any action, suit or proceeding be instituted against Lessor based on any claim that the use, operation or ownership of the Equipment and/or Licensed Software shall infringe on any patent or copyright, Lessee may defend the same and the provisions of this Section shall apply mutatis mutandis to any such defense.

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30. Overdue Payment

30.1 Any Overdue Payment shall bear interest at the rate of eighteen per cent (18%) per annum calculated and compounded monthly whether before or after judgement, from the date it is due until paid

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31. Authorized Representatives

31.1 For the purposes of the Leasing Schedules hereto:

(a) any officer of Lessee who holds office by appointment of, or any other person who is appointed by, the Board of Directors of Lessee; and

(b) the President, a Director, a Vice-President holding office in Lessor, or any other person duly authorized by Lessor;

shall be an authorized representative of Lessee and Lessor respectively.

31.2 Lessor and Lessee may designate from time to time by notice to the other any other person or persons who thereafter shall be an authorized representative or representatives for the purposes of Leasing Schedules hereto.

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32. Delivery at Termination

32.1 If so requested by notice from Lessor, and subject to the provisions of Sections 19, 24 and 25 hereof, Lessee shall on the expiration or sooner termination of the Lease of the System, surrender the System to Lessor at a place in Canada designated by Lessor in good order and repair, ordinary wear and tear excepted.

32.2 In the event that with or without the consent of Lessor, Lessee remains in the possession of or uses the System after the expiration of the term of the Lease pertaining thereto, all the provisions of the Lease shall apply thereto unless and until the same has been surrendered pursuant to the term this Section, or Lessor has relieved Lessee from its obligations under the Lease with respect to the System. Nothing in this Section shall have the effect of extending or renewing the term of any such Lease.

33. Terminal Disposition

33.1 Subject to the provision of Section 32 hereof, Lessee undertakes and agrees, if Lessor shall, by notice to Lessee, so request at the expiration of the term of any Leasing Schedule, to dispose of the Equipment and/or Licensed Software thereby leased (other than any Equipment or Licensed Software as may have been previously assigned to Lessee), at Lessee's expense, in such manner as Lessor may by notice direct and as may be prudent so as to avert any dangerous use thereof or damage or injury to persons or property.

34. Notice

34.1 Any notice required to be given hereunder shall be in writing and may be personally delivered or may be forwarded by independent overnight courier. If any such notice is so sent it shall be deemed to have been given by the sender and received by the party hereto to whom it has been addressed forty-eight (48) hours after the due dispatching thereof by independent overnight courier addressed to the address shown on page 1 of this Lease Agreement. Any notice to be given hereunder by Lessor may be given to Managing Agent and any such notice given to Managing Agent shall be deemed to have been given by Lessor and received by Managing Agent and each of Joint Venturer.

34.2 Any person to whom a notice is required to be addressed may from time to time give notice of any change of address and in such event the foregoing addresses shall be deemed to have been changed accordingly.

35. Assignment and Sub-Letting

35.1 Lessee will not assign any Lease or sub-let the System without the prior consent in writing of Lessor, such consent not to be unreasonably withheld. Nothing in this section shall prevent Lessee from assigning or sub-leting any System to any corporation of which Lessee is a wholly owned subsidiary, or to any corporation which is a wholly owned subsidiary of the Lessee, or to any affiliated corporation of the Lessee, provided that Lessee shall promptly notify Lessor of such sub-letting, and provide such agreements from the sub-lessee as the Lessor may require, obligating the sub-lessee to comply with the provisions of this Lease Agreement and the relevant Leasing Schedule with respect to the System, and shall advise the Lessor of the new location of the System. No assignment of the Lease or sub-letting of any System shall relieve the Lessee of its Obligations hereunder nor shall any-subletting be for a term which extends beyond the expiration of the term of the Lease Agreement.

36. Forbearance and Indulgence

36.1 Forbearance and indulgence by either of the parties hereto in any instance shall not constitute a general waiver of the covenant or condition to which the same may apply.

37. Corporate Waiver

37.1 Lessee waives its right to receive a copy of any financing statement or financing change statement registered by Lessor (applies only in Alberta and British Columbia).

37.2 To the extent permitted by law, the Lessee hereby waives all its rights, benefits or protection given to it by the Seizure Act of the Province of Alberta, insofar as they extend to or relate to any Lease or other security collateral thereto. The Lessee hereby acknowledges that seizure or repossession of the System referred to in any Lease shall not, by implication of law, extinguish the Lessee's indebtedness under any such Lease or other collateral security. The Lessee hereby confers upon the Lessor the right to recover from the Lessee by action on covenant for payment contained in any Lease or in any other security collateral thereto the full rental payable under such Lease and all other money from time to time due thereunder or under any other collateral security, notwithstanding any seizure or repossession.

38. Limitation of Civil Rights - Saskatchewan

38.1 Lessee covenants and agrees with Lessor that The Limitation of Civil Rights Act of the Province of Saskatchewan shall have no application to:

(a) any Lease;

(b) any mortgage, charge or other security for the payment of money made, given or created by any Lease or any agreement or instrument collateral hereto;

(c) any agreement or instrument renewing or extending or collateral to any mortgage, charge or security referred to or mentioned in sub-paragraph (b) of this Section; or

(d) the rights, powers or remedies of Lessor under any Lease or under any mortgage, charge, other security, agreement or instrument referred to or mentioned in sub-paragraphs (b) or (c) of this Section.

39. Successors and Assigns

39.1 The Lease Agreement shall enure to the benefit of, and be binding upon Lessor and Lessee, their successor and permitted assigns and the sub-lessees of Lessee. Lessor shall be at liberty to assign or sub-let its rights under any Lease and without restricting the generality of the foregoing may assign, transfer, mortgage, charge, pledge, hypothecate, or otherwise encumber for security purposes its rights hereunder and any assignee, transferee, mortgagee, chargee, pledgee, or similar person having acquired similar rights hereunder, shall be unrestricted in the disposal of such rights.

40. Location of Equipment

40.1 Lessee shall not part with possession of the System nor remove the same from the territorial limits of Canada.

40.2 Lessee declares that the System will be located at the Place of Use disclosed in the relevant Leasing Schedule.

40.3 On the occasion of each permanent change in the Place of Use, Lessee will promptly give to Lessor notice of the new Place of Use, which notice shall be given not later than fifteen (15) days after the change.

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41. Records

41.1 Lessee shall maintain throughout the term hereof pertaining to the System at its office located at the address stated on Page 1 of this Lease Agreement a record:

(a) describing each item of Equipment and Licensed Software, the Net System Cost thereof, all changes, replacements, modifications and alterations thereto and the cost thereof; and

(b) in the case of any Equipment and/or Licensed Software assigned or sub-let pursuant to Section 35, names and addresses of any and all assignees and sub-lessees of the Equipment and/or Licensed Software, the duration of the term of the respective sub-lease, the amount of the monthly rental and the description of the location for the time being, of any Equipment and/or Licensed Software so assigned or sub-let.

41.2 The record described in this Section shall be available at Lessee's office located at the address set forth on Page 1 of this Lease Agreement, to Lessor, its representatives or agents for inspection, at any reasonable time, upon reasonable notice, to Lessee, and upon making any such inspection Lessor, its representative or agents may make such extractions from such records as they deem fit or necessary.

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42. Offset

42.1 Lessee hereby waives any and all existing and future claims and offsets against any rental instalment or other payment due to Lessor hereunder and agrees to pay the rent and other amounts due hereunder regardless of any offset or claim which may be asserted by Lessee or on its behalf.

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43. Remedies Cumulative

43.1 All rights and remedies of Lessor and Lessee hereunder are cumulative and not alternative and may be exercised by Lessor and Lessee separately or together, in any order, sequence or combination.

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44. Time

44.1 Time is and shall be in all respects of the essence of any Lease.

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45. Section Headings

45.1 Section headings appearing in this Lease Agreement and any Leasing Schedule are for convenience of reference only and are not to be considered as an aid to interpretation hereof.

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46. Effective Date

46.1 Notwithstanding the actual date of execution hereof, this Lease Agreement shall have force and effect and shall bind the parties hereto as and from the date first hereinabove written.

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47. Entire Transaction

47.1 This Lease Agreement and Leasing Schedules represent the entire transaction between the parties hereto relating to the subject matter.

47.2 No agreement purporting to amend or modify this Lease Agreement or any Leasing Schedule or any document, paper or written relating hereto or thereto, or connected herewith or therewith, shall be valid and binding upon the parties hereto unless in writing and signed and accepted in writing by both parties hereto.

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48. Severability

48.1 Any term, condition or provision of this Lease Agreement or of any Leasing Schedule which is, or shall be deemed to be, void, prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be severable herefrom or therefrom, be ineffective to the extent of such avoidance, prohibition or unenforceability without in any way invalidating the remaining terms, conditions and provisions hereof or thereof, and any such avoidance, prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such term, condition or provision in any other jurisdiction.

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49. No Merger in Judgment

49.1 The taking of any judgment under this Lease Agreement or any Leasing Schedule shall not operate as a merger of any term, condition or provision hereof or thereof.

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50. Further Assurances/Copy of Agreement

50.1 Lessee and Lessor shall give further assurances and do, execute and perform all such acts, deeds, documents and things as may be requisite to enable the other party to have the full benefit of all rights and remedies intended to be reserved or created hereby.

50.2 Lessee acknowledges receipt of a copy of this Lease Agreement.

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51. Proper Law

51.1 This Lease Agreement and each Leasing Schedule hereto shall be governed, construed and enforced in accordance with the laws of the Province of Newfoundland.

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52. Currency

52.1 All sums payable by Lessee to Lessor under this Lease Agreement or any Leasing Schedule hereto shall be paid in Canadian dollars.

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53. Liability of each Joint Venturer

53.1 The liability of each Joint Venturer in respect of any Obligation in the Lease and Leasing Schedules shall be as follows:

- Wabush Iron Co. Limited: 37.87% thereof
- Stelco Inc.: 37.87% thereof
- Dofasco Inc.: 24.26% thereof.

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54. Dispute resolution

54.1 All disputes, controversy or claim arising out of or in connection with or in relation to the Lease Agreement or Leasing Schedule, including any question regarding its

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existence, validity or termination, shall be submitted to and be subject to the jurisdiction of the Courts of the Province of Newfoundland which shall have exclusive jurisdiction in the event of any dispute. The parties irrevocably submit to the jurisdiction of such court to finally adjudicate or determine any suit, action or proceeding arising out of or in connection with this Lease Agreement or Leasing Schedule. Each party hereby elects domicile in the judicial district of St-John's, Newfoundland.

55. Language

55.1 This Lease Agreement and each Leasing Schedule are drawn up in the English language at the request of both parties.

Le présent contrat de location a été rédigé en langue anglaise à la demande des deux parties.

In witness whereof the parties hereto have executed this Lease Agreement on the respective dates set forth below and this Leasing Schedule shall be deemed to have been executed on the later of such dates over the hands of their proper signing officers duly authorized in that behalf:

ROYAL BANK OF CANADA	CLIFFS MINING COMPANY, the Managing Agent acting for and on behalf of Wabush Mines
Per: G.R. Bernard, Vice president, Corporate Banking, Quebec East.	Per: C.B. BEZIK, duly authorized
Per: A.G. Bolduc, Manager, Leasing - Quebec East.	Per: ______, duly authorized
Date: 12/17/96	Date: 12/10/96

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Schedule A with Relation to Equipment in Province of Newfoundland

Royal Bank of Canada, as Lessor, hereby leases to Cliffs Mining Company, the Managing Agent, acting only for and on behalf of Wabush Mines (an unincorporated joint venture of Wabush Iron Co., Limited, Stelco Inc. And Dofasco Inc.), having an office at 1100 Superior Avenue, Cleveland, Ohio 44114-2589, which declares to be duly authorized in virtue of a Management Agreement (copy of which is attached to the Master Lease Agreement) to act on behalf of Wabush Mines and bind each of Wabush Iron Co., Limited, Stelco Inc. and Dofasco Inc. in accordance with their respective liability stated in paragraph 53.1 of the Master Lease Agreement, as Lessee, the Equipment hereinafter described, in consideration of the rental and for the term herinafter set forth, the whole pursuant to and subject to the terms and conditions set forth in that certain Master Lease Agreement entered into between Lessor and Lessee as of the ____________ day of ________ 19____.

1. Equipment	Quantity	Make and Description		Model No.	Serial No.
2. Term	Term Commencement Date of Term Termination Date of Term			________ Months ________ ________	
3. Rental	Aggregate Rental Monthly Rental Instalment Provincial Sales Tax Goods & Services Tax Total Monthly Rental Instalment Interim Rental Factor			$________ $________ $________ $________ $________ ________	
4. Option to Purchase	Select one of the following:				
☐	Option to Purchase Date ________	Purchase Price $________			
☐	Option to Purchase Date ________	Purchase Price* Fair Market Value		Fair Market Value Cap $________	
	* The final purchase price will be the lesser of the Fair Market Value and the Fair Market Value Cap.				
5. Settlement Value	Twelve month Period Percentage of Net System Cost	1	2	3	4 5
6. Place of use	________				
7. Depreciation	Class No.	Capital Cost Allowance Rate ____%	☐ Straight Line	☐ Reducing Balance	

The parties hereto have each executed this Leasing Schedule on the respective dates set forth below and this Leasing Schedule shall be deemed to have been executed on the later of such dates.

ROYAL BANK OF CANADA	CLIFFS MINING COMPANY, the Managing Agent acting for Wabush Mines
Per:________	Per:________
Per:________	Per:________
Date:________	Date: ________

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This is Schedule "A" referred to in Paragraph 1.1 (f) of the Section entitled "Definitions" of the Master Lease Agreement entered into between the Lessor and the Lessee as of the ________ day of ________ 19__.
Lessee acknowledges receipt of a copy of this Schedule "A".

SCHEDULE B

PURCHASE AGENCY AGREEMENT

WITH RESPECT TO THE EQUIPMENT IN THE PROVINCE OF NEWFOUNDLAND

BETWEEN: Royal Bank of Canada, a Company incorporated under the laws of Canada, having an office at 700, Place d'Youville, Québec (Québec) G1R 3P2;

(hereinafter called "Royal Bank").

OF THE FIRST PART

AND: Cliffs Mining Company, the Managing Agent, acting only for and on behalf of Wabush Mines (an unincorporated joint venture of Wabush Iron Co., Limited, Stelco Inc. and Dofasco Inc.), having an office at 1100 Superior Avenue, Cleveland, Ohio 44114-2589, which declares to be duly authorized in virtue of a Management Agreement (copy of which is attached) to the Master Lease Agreement to act on behalf of Wabush Mines and bind each of Wabush Iron Co., Limited, Stelco Inc. and Dofasco Inc. in accordance with their respective liability stated in paragraph 19 hereof;

(hereinafter called "Agent")

OF THE SECOND PART

WHEREAS the parties hereto agreed that Royal Bank would acquire for the purpose of leasing to Agent certain equipments, namely new production loader, spiral replacement, service truck with boom, front end loader 1½ yd (hereinafter called the "Equipment") having a Net System Cost, as defined in the Master Lease Agreement hereinafter referred to, not exceeding seven million nine hundred and sixteen thousand dollars ($7,916,000);

AND WHEREAS the parties have entered into a Master Lease Agreement, in respect of the Equipment;

AND WHEREAS it is a condition of the Master Lease Agreement that the Equipment will be selected by Agent and will be of a make, size, specifications, quality, durability, design and capacity desired by Agent for the purposes intended by it;

AND WHEREAS it is deemed expedient, in the interest and to the mutual benefit of both parties that Agent shall act as the agent of and for Royal Bank for the purposes of purchasing such Equipment and placing, affixing or installing the same in, on or about the premises (hereinafter referred to as the "Premises") for which the same are to be acquired, the location of which Premises is ~~Pointe-Noire~~ WABUSH LABRADOR, Province of ~~Quebec~~ NEWFOUNDLAND, so as to ensure that such Equipment is in accordance with the requirements of Agent and to avoid duplication of effort and unnecessary complication and documentation.

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the sum of ONE DOLLAR ($1.00) and other good and valuable consideration, the receipt whereof is by Agent hereby acknowledged, and of the mutual covenants and agreements herein set forth, the parties hereto covenant and agree as follows:

1. The terms, conditions and provisions of this Purchase Agency Agreement shall apply to the purchasing by Agent and the placing, affixing and installing by Agent of the Equipment in, on or about the Premises.

2. Subject to all the terms, conditions and provisions hereof, Royal Bank hereby names, constitutes and appoints Agent as its sole and exclusive mandatory and agent for the following purposes; namely,

   a) to select the Equipment to be placed in, upon or about the Premises and the supplier thereof; and

   b) to negotiate with such suppliers of the Equipment as shall be chosen by Agent at its discretion, the purchase price and the terms and conditions of the sale and purchase of such Equipment; and

   c) to purchase the Equipment as agent of and for and on behalf of Royal Bank; and

   d) to arrange the delivery of the Equipment in such manner, by such carriers, on such terms and conditions and at such time or times as Agent shall, in its discretion, determine; and

   e) to arrange with such contractors as shall be selected by Agent, the installation, affixing or placing of the Equipment in the Premises in such manner, for such price, and on such terms and conditions as Agent shall, in its discretion, determine; and

   f) to pay for and on behalf of Royal Bank the purchase price, cost of delivery and cost of installation, affixing and placing of the Equipment in the Premises and all applicable taxes, excise, customs, goods and services and other taxes, levies and duties payable on the foregoing; and

   g) to do all such other acts, matters and things as may be necessary to have the Equipment installed in, affixed to or placed in or upon the Premises, in all respects ready and available at the time or times and for the use intended by Agent.

3. Any purchase order given by Agent with respect to Equipment supplied hereunder shall state on the face of the said purchase order that Agent is purchasing as agent for Royal Bank. Royal Bank shall have the right to review and approve the purchase order form used by Agent or to require that such purchase order form be amended in accordance with Royal Bank's instructions.

4. Provided, however, and it is expressly agreed, that the sum of all liabilities assumed or to be assumed or in any way incurred or to be incurred by Agent pursuant to this Purchase Agency Agreement including, without limiting the generality of the foregoing, the suppliers' invoiced price, all sales, excise, customs and other taxes or levies payable and the cost of transportation, installation, assembly and related expenses, shall in no event exceed the Net System Cost as hereinabove stated.

5. The Equipment so purchased by Agent but for the account of Royal Bank shall be owned by and shall be the property of Royal Bank at all times whether prior to or subsequent to the leasing of the same by Agent, subject only to the right of Agent to purchase the Equipment from Royal Bank in pursuance of any option granted to Agent by Royal Bank with respect to the same; provided and it is expressly agreed, that the Equipment shall not be subject to any reservation of title, vendor's lien, or privilege or any security or other interest whatsoever by, in or to the vendor thereof, or any other person or corporation.

6. Agent shall pay to the persons entitled thereto, as and when due, the purchase price, costs of delivery, and costs of installation, affixing and placing of the Equipment purchased by Agent in accordance with the terms hereof.

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7. Any monies disbursed or paid by Agent pursuant to this Purchase Agency Agreement shall bear no interest and shall be paid by Royal Bank to Agent on or before December 31, 1997, or at such other date as may be mutually agreed upon in writing by the parties hereto.

8. Prior to paying to Agent monies which it shall have paid or disbursed pursuant to this Agreement, Agent shall submit to Royal Bank, and Royal Bank shall be entitled to receive copies of, all invoices for the purchase of the Equipment, and the installation, affixing and placing thereof of the same, proof satisfactory to Royal Bank of payment therefor and such other evidence relating to the purchase, installing, transportation, affixing or placing of the Equipment as Royal Bank may reasonably require, including evidence that there exists no arrears of rental on the aforesaid Premises.

9. The terms, conditions and provisions contained in Sections 7, 10, 11, 12, 13, 14, 15, 16, 19 and 27 of the Master Lease Agreement previously referred to are hereby incorporated into this Purchase Agency Agreement by reference to form part hereof as if herein fully set out at length with all references to Lessor and Lessee to apply to Royal Bank and Agent respectively.

10. Agent shall ensure that all contractors comply with the laws, by-laws, rules and regulations in or about the work of installing, affixing or placing the Equipment in, on or upon the Premises and Agent shall further ensure that no lien, hypothec, charge, security interest, or encumbrance of any nature whatsoever is hereby created on the Equipment.

11. Agent shall not be entitled to and will receive no commission, compensation, fees or other remuneration of any nature whatsoever for acting as agent hereunder.

12. Agent shall indemnify and save Royal Bank free and harmless against and from all loss, costs, damages of any nature whatsoever which Royal Bank may sustain, incur, be or become liable for as a result of, occasioned by or in any way related to any failure of Agent to comply with or any breach of Agent, of any of the terms, conditions or provisions hereof or any act done by Agent beyond the authority hereby conferred.

13. Royal Bank agrees to ratify and confirm all acts and deeds of Agent duly executed within the scope of this Purchase Agency Agreement.

14. This Purchase Agency Agreement shall be governed, construed and enforced in accordance with the laws of the Province of Newfoundland.

15. No amendment hereto shall be valid or binding upon the parties hereto unless the same is in writing, signed by the parties hereto.

16. Provided, however, and it is expressly agreed that Agent shall complete and fulfil in accordance with this Purchase Agency Agreement by the date stated in paragraph (7) of this Purchase Agency Agreement, or such earlier or later date as may be mutually agreed upon in writing by Agent and Royal Bank, the obligations imposed on, and assumed by, Agent under paragraph (2) of this Purchase Agency Agreement.

17. This Purchase Agency Agreement shall enure to the benefit of and be binding upon the parties hereto, their respective successors and administrators and permitted assigns.

18. Notwithstanding the actual date of execution hereof, this Purchase Agency Agreement shall have force and effect and shall be binding upon the parties hereto as and from the date first hereinabove written.

19. The liability of each Joint Venturer in respect of any Obligation in this Purchase Agency Agreement shall be as follows:

- Wabush Iron Co. Limited: 37.87% thereof
- Stelco Inc.: 37.87% thereof
- Dofasco Inc.: 24.26% thereof.

20. The Purchase Agency Agreement has been drawn up in the English language at the request of both parties. Le présent contrat de mandat a été rédigé en langue anglaise à la demande des deux parties.

IN WITNESS WHEREOF the parties hereto have executed this Purchase Agency Agreement on the respective dates set forth below and this Purchase Agency Agreement shall be deemed to have been executed on the later of such dates over the hands of their proper signing officers duly authorized in that behalf:

ROYAL BANK OF CANADA

Per: ____________________
G.R. Bernard, Vice president,
Corporate Banking, Quebec East.

Per: ____________________
A.G. Bolduc, Manager,
Leasing, Quebec East.

Date: 12/9/96

CLIFFS MINING COMPANY, the Managing Agent acting for and on behalf of Wabush Mines

Per: ____________________
C.B. BEZIK, duly authorized

Per: ____________________

Date: 12/10/96

96-634.ag3

AMENDMENT TO THE MASTER LEASE AGREEMENT WITH RELATION TO EQUIPMENT IN THE PROVINCE OF NEWFOUNDLAND

Each of the undersigned party to the Master Lease Agreement with relation to equipment in the province of Newfoundland signed by Cliffs Mining Company, the Managing Agent acting for and on behalf of Wabush Mines on December 10, 1996 and by Royal Bank of Canada on December 17, 1996 (the "Master Lease Agreement") acknowledges and accepts the following and agrees that the following constitutes an amendment to the Master Lease Agreement:

i) In section 25.7 2) b of the Master Lease Agreement, in the event that the equipment leased is used, the words "useful life" shall be defined as being equal to the remaining life of the used equipment at the time the lease is executed.

This amendment has been drawn up in English language at the request of both parties.

Le présent amendement a été rédigé en langue anglaise à la demande des deux parties.

IN WITNESS whereof the parties hereto have executed this Amendment on the respective dates set forth below and this Amendment shall be deemed to have been executed on the later of such dates over the hands of their proper signing officers duly authorized in that behalf.

ROYAL BANK OF CANADA
Per: [signature]
A.G. BOLDUC, Manager,
Leasing - Quebec -East

Date: June 5, 1997

CLIFFS MINING COMPANY
the Managing Agent acting for and
on behalf of Wabush Mines
Per: [signature]
C.B. BEZIK, duly authorized

Date: JUNE 6, 1997

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Attached is Exhibit D to the Affidavit
of Gary Ivany, sworn before me
this 15th day of October, 2014

Commissioner for Oaths in the Province of Ontario

Diane Manon Martella, Notary Public,
City of Toronto, limited to the attestation
of instruments and the taking of the affidavits
for Royal Bank of Canada
Expires August 26, 2017

Cliffs Mining Company
Subsidiary of Cleveland-Cliffs Inc

May 27, 2003

Mr. Stéfane Chaput
Royal Bank of Canada
Leasing Services
1 Place Ville Marie, 8th floor, North Wing
Montreal, Quebec, H3C 3A9
CANADA

RE: Master Lease Agreement With Cliffs Mining Company, Managing Agent for Wabush Mines
Lease 08-73566 and Lease 08-74187
2 - 295-B Bucyrus Erie Electric Shovels

Dear Stéfane:

Pursuant to the above captioned master lease and respective Schedule A's, there is an option to purchase the leased equipment on June 30, 2003 for the lesser of Fair Market Value or a Fair Market Value Cap of $1,006,622 per shovel. Enclosed is a professional appraisal for the two shovels recently performed by Dom-Ex. According to the appraisal, the Fair Market Value is US$200,000 per shovel. It is our intent, subject to partner approval, to purchase the shovels for Fair Market Value.

Please invoice accordingly, or contact me if you have any questions.

Very truly yours,
WABUSH MINES JOINT VENTURE
Cliffs Mining Company, Managing Agent

Joyce E. Waschura
Senior Manager – Finance

Enclosure

cc: S. Fontanals, Wabush Mines (w/o enclosure)

1100 Superior Avenue • Cleveland, OH 44114-2589 • Telephone: 216/694-5700 • Fax: 216/694-4880

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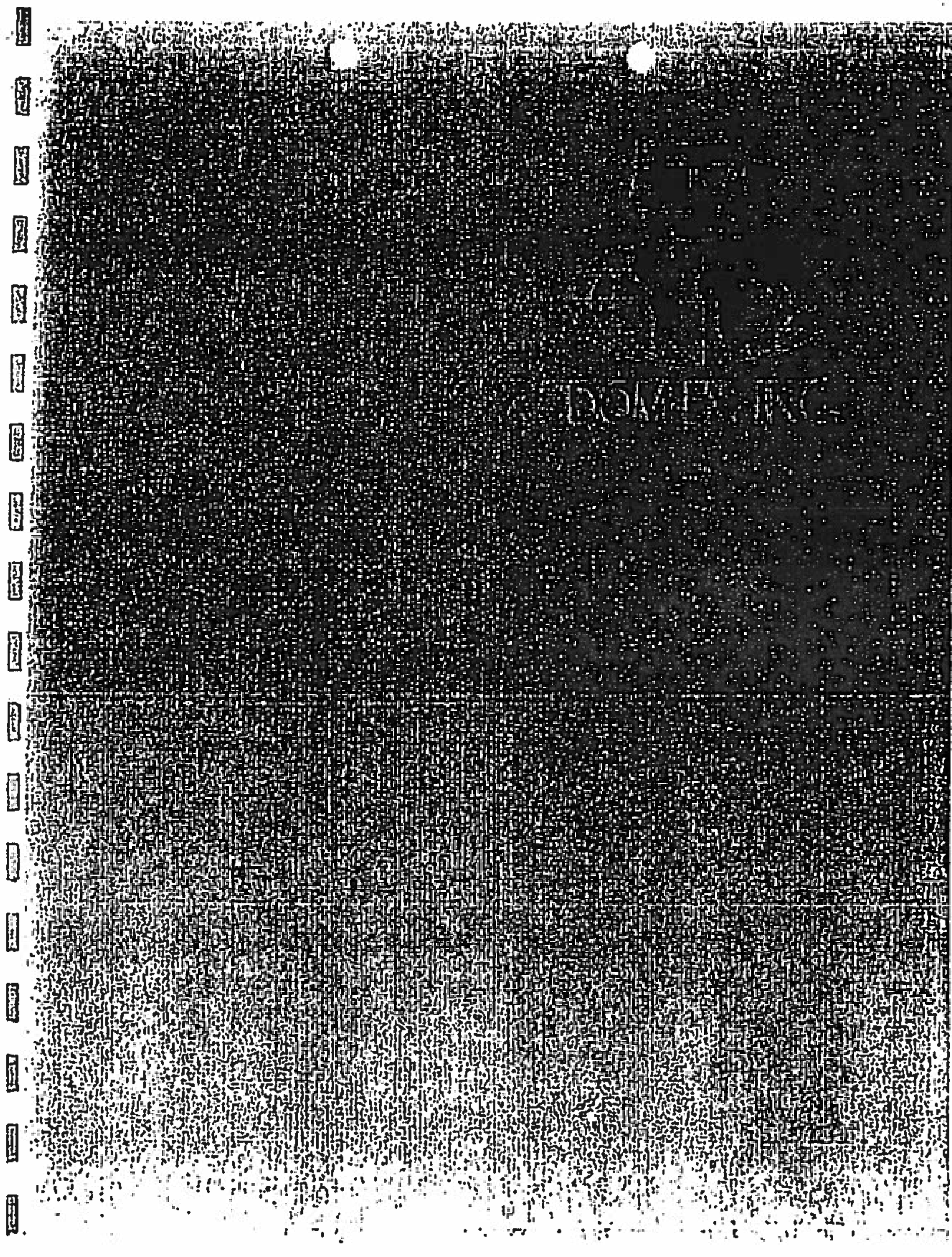

Cliffs Mining Company
Wabush Mines

Bucyrus Erie 295B Shovel Inspection

April 29, 2003

Performed By: Dana Ellefson

Dom-Ex, Inc.
109 Grant Street • Hibbing, MN 55746 USA
Ph: 218.262.6116 • Fax: 218.263.8611
www.dom-ex.com

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Cliffs Mining Company
Wabush Mines

BUCYRUS ERIE 295B SHOVEL INSPECTION
April 29, 2003 Performed By: Dana Ellefson

Wabush Mines presently has two operating Bucyrus Erie 295B's in their shovel fleet. We are pleased to submit an inspection covering the following areas.

I. General Information
II. Component History and Comments
III. Shovel photos
IV. Comparative Survey
V. Market Value and Summary Statement

I. General Information

Purchased by the mine July 1997

Both shovels were used shovels, previously operated in coal mining, prior to their arrival at Wabush. Both shovels were in good condition when purchased by the mine, but the mine had Bucyrus Erie perform extensive rebuilds on them prior to their arriving at the mine to ensure a good availability. They have accumulated 25,000 and 29,000 hours respectively since their arrival at the mine. During this time, they have had repairs performed on many of the major components to keep the shovels at a high availability. The mining environment these shovels operate in is severe, with a continuous 24-hour, seven day a week mining operation, digging in an abrasive hard rock application, under severe climate conditions. Due to the mines application, as well as its remote location, they have accumulated a good stock of spare swing components to exchange out on the shovels during periods of scheduled repair. The electrical systems on both shovels are original systems and are quite antiquated compared to the current systems now being offered by all shovel manufacturers.

Unit Number 655-1010 Bucyrus Erie 295B Serial Number 139500

Year of manufacture: 1980	
Accumulated hours prior to arriving at the mine:	52,000
Hours accumulated at the mine:	29,046
Total hours:	81,046

Unit Number 655-1011 Bucyrus Erie 295B Serial Number 136917

Year of manufacture: 1978	
Accumulated hours prior to arriving at the mine:	61,000
Hours accumulated at the mine:	25,783
Total hours:	86,783

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Both shovels are equipped as follows:

- 18-cubic yard dippers (buckets). This dipper is sized specifically for Wabush Mines, as most operations use larger capacity dippers. The weight of the material dictates the capacity size of the dipper used.
- First suppression system was installed. The model chosen was an Ansul A101 with dry chemical.
- Newer style disc brakes systems on propel, swing, hoist, and crowd functions.
- They are equipped with the standard 50' booms with little to no visible cracking or structural repairs.
- Shovels have the newer, thick wall dipper handles, which offer better life in more severe mining operations like Wabush. Both dipper handles have been replaced since the shovel's arrival to the mine.
- Tracks: The mine operates 60" width track pads. There are a few different width tracks based on the softness of the ground the shovel operates in.
- Kellog compressors
- Units have the Wenco Dispatch Systems in place. This system is custom designed specifically for the mine.
- Shovels are equipped with the Lincoln auto lube systems.

II. Component History and Comments

This is a brief overview, however the next section lists out hours on the major components used on a shovel. These hours are hours accumulated since the shovels arrived at the minesite. The accumulated hours prior to arriving here are not recorded in this component hour report.

	Unit 11	Unit 10
Castings		
Car Body (main chassis)	25,783	29,046
Dipper Handle (stick)	2,303	3,531
Boom	25,783	29,046
Dipper (Bucket)	2,211	6,357
Crowd Assembly		
Drum	25,783	29,046
Gear 1st Intermediate	6,964	6,357
Gear 2nd Intermediate	25,783	17,152
Hoist Assembly		
Drum	25,783	29,046
Hoist Gear	19,364	29,046
Hoist Motor Pinion		

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Swing System		
Swing Rack (larger gear everything rotates on)	25,783	29,046
Swing Transmission Left Hand	2,303	4,024
Swing Transmission Right Hand	2,303	4,024
Propel Assembly		
Propel Transmission Left Hand	3,250	29,046
Propel Transmission Right Hand	25,783	29,046
Propel Clutches		
Undercarriage		
Tracks Left Hand	1,766	6,372
Tracks Right Hand	1,547	6,372
Drive Tumbler Left Hand	3,250	2,587
Drive Tumbler Right Hand	2,303	3,041
Final Drive Gears Left Hand	1,766	6,372
Final Drive Gears Right Hand	5,488	6,372
Side Frame Left Hand	3,250	6,372
Side Frame Right Hand	1,547	6,372
Electrical Components		
Crowd Generator	11,934	3,370
Exciter Generator	11,934	3,370
Hoist Generator	6,364	3,370
Swing Generator	8,597	3,770
Swing Motor LH	6,195	189
Swing Motor RH	2,303	29,046
Crowd Motor	1,751	5,988
Propel Motor	3,900	2,870

General Comments

The cabs were fairly clean with operating air-conditioners and heaters. The sheet metal including ladders, house panels, boarding ladders, and walkways, were in good working order, with exception of the left hand walkway on Unit 10. They were planning on repairing in the next week. The shovel is dirty and greasy, but this is to be expected from an operating unit. Opened electrical panel doors and the electrics were orderly and clean.

The expected life of components between rebuilding is also an important factor in component evaluation. Each mine can vary dramatically depending on the severity of the mining operation and the level of preventative maintenance performed.

I would estimate Wabush would realize the following hours on the following:

a. Electrical motors/generators 15,000 hours

JMS

b. Undercarriage 15,000 hours on major exchanges, though there will be roller and tumblers replaced within the 15,000 hour range.
c. Propel transmissions should realize 30,000 hours, hoist transmission should realize 25,000 hours, swing transmissions go roughly 25,000 between rebuilds.
d. Swing Gear: This is a very expensive item and labor-intensive to replace. The life expectancy would be in the 40,000 to 45,000 hour range.

Though these shovels have high total hours, the mine has had good success in realizing a high operating availability on these shovels. This is realized through a good maintenance program, as well as having a good supply of parts readily available. Maintaining older equipment requires financial commitment in support stock, but more importantly a commitment in understanding, learning, and troubleshooting such equipment. This could be compared to operating an older car that requires more effort and expense to keep operating. Unfortunately these repairs, though costly, do not significantly increase the value of mining equipment, again not unlike an older car value. These repairs are needed for the owner, but don't appreciate the value significantly.

One major consideration, which makes these shovels difficult to market, is the fact that the electrical systems are 1978-1980 technology. This is the earlier style DC drive (Amplistat) system, which is a night and day difference from the new digital drive with PLC systems offered today. Not only is maintaining this older system more difficult, but parts availability is becoming a major concern. Wabush Mine fortunately has a work force with experience in this earlier design of shovels, from their previously operated smaller B.E. shovels.

Dom-Ex, Inc. has provided refurbished and used equipment to the mining and quarry industries worldwide for over 20 years. Previously a Bucyrus Erie dealer, with experience in marketing B.E. shovels and drills, we are also known for our knowledge and experience in second hand mining equipment, trucks, shovels, drills, loaders and dozers. This includes participation in surplus buys, equipment auctions and inspections. We have also disassembled roughly 15 electric rope shovels in the last several years.

We presently own a 1978 Bucyrus Erie 295B serial number 136868, which is the same year as one of Wabush's shovels. See enclosed photos of our machine taken last month (Page 7). It also was used in an eastern US coal operation, with an excellent maintenance program. This shovel maintained 95% availability right up to the time it was parked, due to the mine going underground. We owned the shovel beginning in December 2000, and have actively tried to market this shovel to mining companies worldwide, especially focusing on mines operating 295B's. We were allowed to store the shovel at the mine site during this period, while promoting, which was a great help in controlling costs. We were asking $350,000, which we thought was a great value. However the disassembly, transportation, repairs, and reassembly of this type shovel is what made it costly to purchase as an operating shovel by another mining group. One interested party looked at the unit and commented it was better than their own 295B's, but still were not able to purchase, principally due to the following reasons.

J.M.L.

a. Cost to disassemble and load out was roughly $190,000
b. Cost to transport to say Wyoming where the largest fleet of 295B's still operate was roughly $175,000
c. Cost to reassemble is roughly $200,000.
d. If the dipper does not match what the mine is using, they would have to purchase a new dipper which runs in excess of $300,000.
e. Generally there would be updates/rebuilds required on any older used piece of equipment that would be factored in.
f. Older style electrical system mentioned above.

You can quickly add the true cost to purchase our shovel is over 1.2 million, which is actually a conservative figure. In the last month we opted to disassemble this shovel for its parts value after two years plus of active marketing. We did this before we lost the window of parts demand on the older 295B's.

We made this decision also based on market trends we are experiencing.

- The mining industry overall is slowing from where it was previously, making the demand for older, smaller equipment less desirable
- As larger equipment with late technology is being introduced, mines are upgrading to larger equipment in an effort to keep mining costs down.
- Labor costs are also driving mines to do more with less equipment. With newer, larger equipment you require fewer operators and fewer maintenance people with the same amount of production.
- We also have experienced a growth in the use of hydraulic shovels and large front-end loaders in the last five to eight years, at mining properties that previously operated electric rope shovels. Two mines in Minnesota for example have scrapped out their older rope shovels and have gone to either large front-end loaders in one case and hydraulic shovels in the other case. We believe that mines needing loading equipment in 25-cubic yard capacity and less have gravitated to hydraulic front end loaders and hydraulic shovels. This is primarily due to the initial purchase price being less, loaders and hydraulic shovels are more mobile within the mine, and the transportation and erection costs are a fraction of the electric rope shovels.
- There is a perception today that buying older, second hand, mining equipment is buying someone else's hand-me-downs. So mines which have a hard time getting capital dollars to invest in equipment, with an expectation to run for several years, want to begin with something fairly late model or new.

III. Shovel Photos

I have included several photos of each shovel (pages 8-10). These were taken during my three days spent at the mine the last week of April.

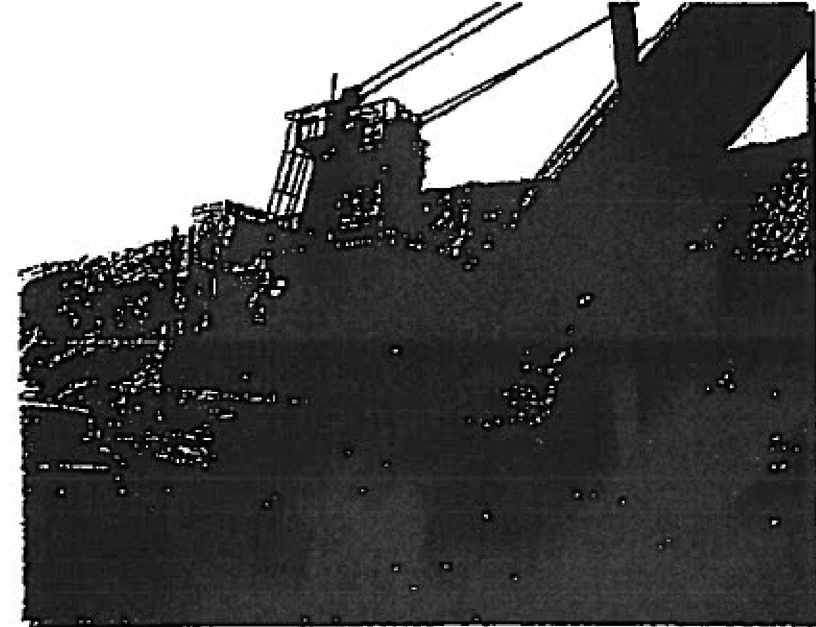
IV. Comparative Survey

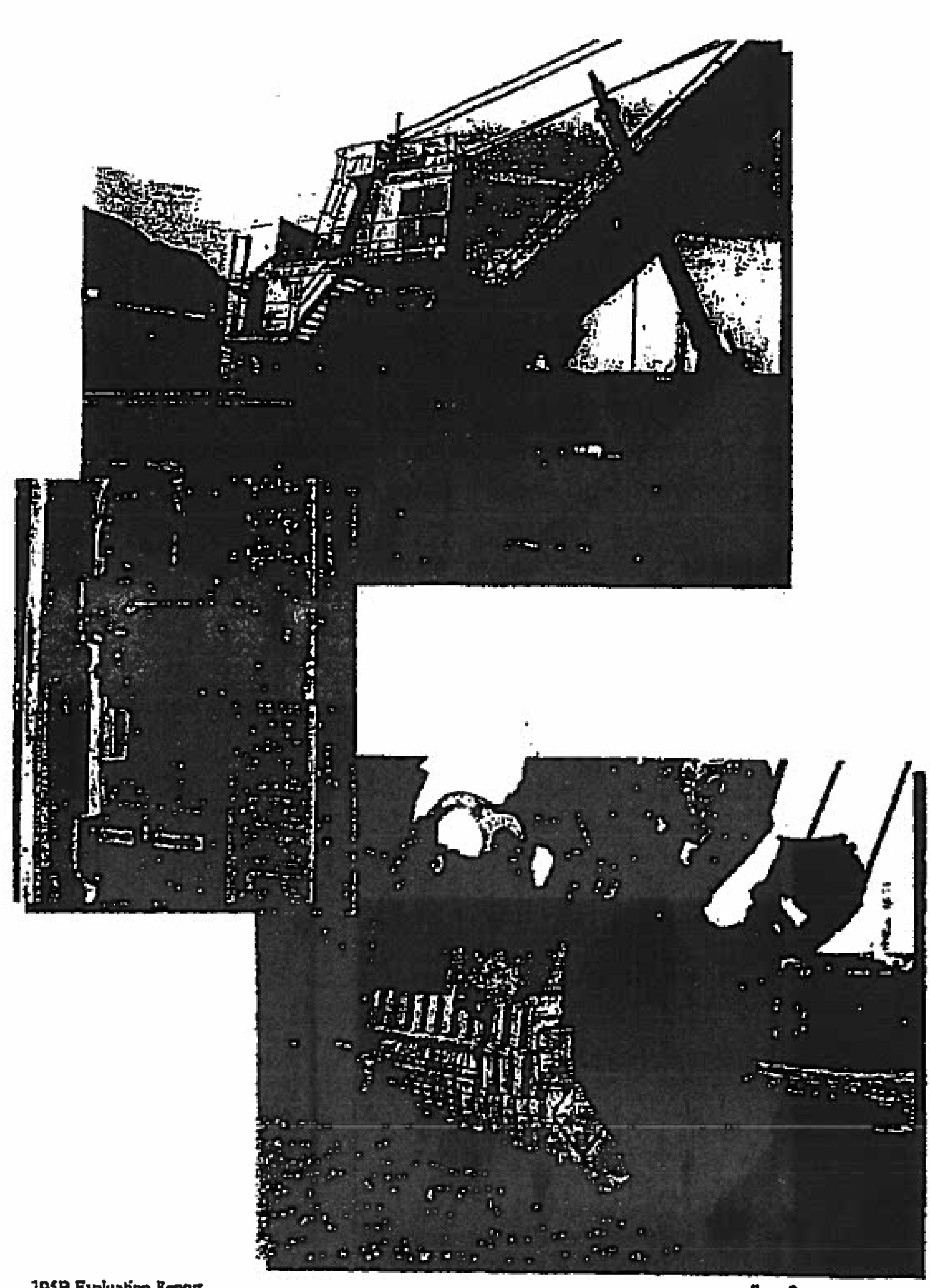
As far as a value for the Wabush 295B's, I offer the following comments:

1. Maybe the biggest valuation point is the shovel, we were not able to find a customer for after two years plus of promoting at $350,000, conveniently located in eastern US coal. Our company's focus is mining equipment, so needless to say there was disappointment in not finding a customer for our 295B.
2. A couple mines have discarded their B.E. 295B's in the last twelve months at scrap value pricing. We did not express interest in these shovels based on our current inventory levels and the cost to disassemble and transport.
3. An auction in Michigan last year at a Cliffs property yielded interesting results on four P&H1900's, which is smaller electric drive shovel. All four shovels and related inventory were sold for roughly $50,000 US. One of the four shovels had a significant amount of repairs performed on it prior to being sold. We were at this auction but did not bid on them based principally on current market trends mentioned above.

V. Market Value and Summary Statement

To summarize we would place a value of $200,000 USD each for the two B.E. shovels located at Wabush Mine. I would say this value is based on a component value and not a value for these shovels to be operated at another property. It would be highly unlikely that these shovels would ever leave this remote location and be relocated anywhere in the world to be operated as complete shovels.





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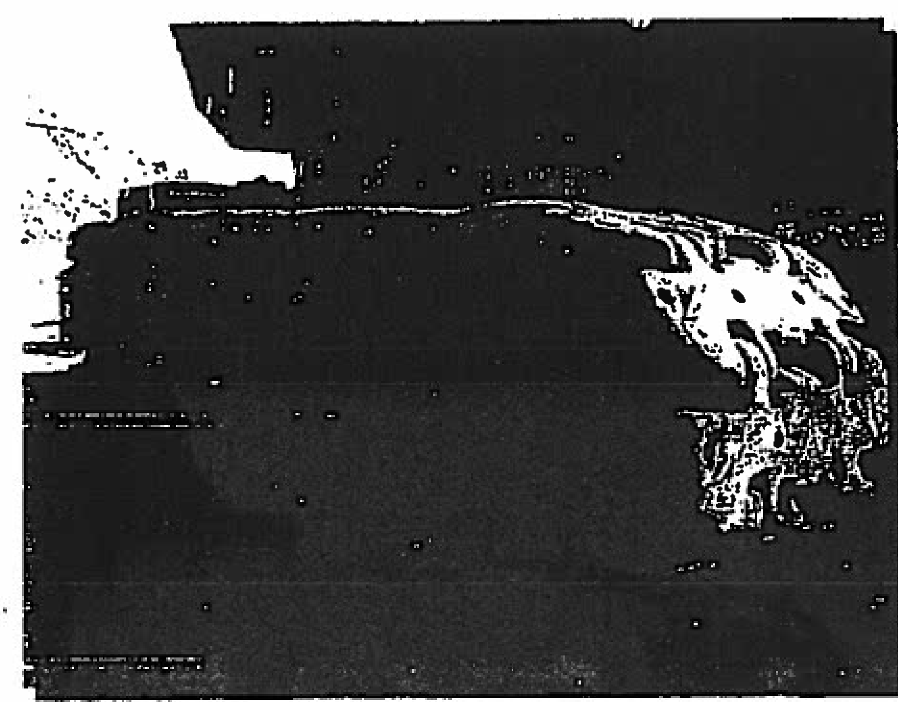

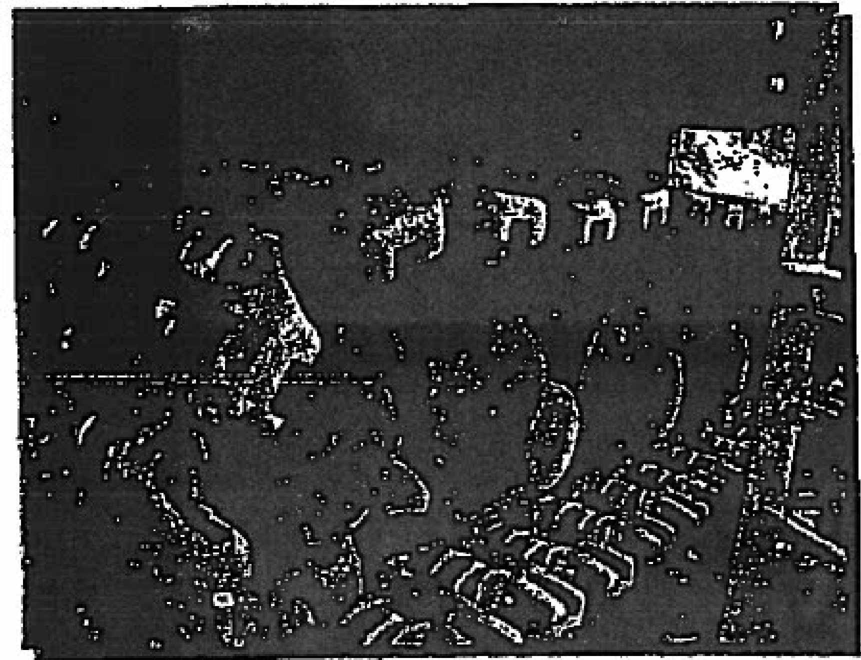

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Attached is Exhibit E to the Affidavit
of Gary Ivany, sworn before me
this 15th day of October, 2014

Commissioner for Oaths in the Province of Ontario

Diane Manon Martella, Notary Public,
City of Toronto, limited to the attestation
of instruments and the taking of the affidavits
for Royal Bank of Canada
Expires August 26, 2017

Registry of Deeds - Selected Search Results List

Search Criteria:
Company Name Contains cliffs mining company

Records Selected by User: 1 **Date Printed:** 2014-10-14

	Reference Number	Document Status	Document Type	Registration Date / Time	From	To	Location, Community
1	380307	Approved	Power Of Attorney	2010-03-18	Wabush Iron Co. Ltd. HLE Mining GP Inc. Wabush Resources Inc.	Cliffs Mining Company	

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that we, WABUSH IRON CO. LIMITED, a company incorporated in the State of Ohio, United States of America, duly qualified to transact business in the Province of Newfoundland and Labrador (hereinafter called "**Wabush Iron**"); HLE MINING GP INC., a corporation incorporated under the *Canada Business Corporations Act*, duly qualified to transact business in the Province of Newfoundland and Labrador (hereinafter called "**HLE**"); and WABUSH RESOURCES INC., a corporation incorporated pursuant to the *Canada Business Corporations Act*, duly qualified to transact business in the Province of Newfoundland and Labrador (hereinafter called "**WRI**" and together with Wabush Iron and HLE, the "**Registered Owners**") as the registered holders of certain undivided interests in residential real property in the Province of Newfoundland and Labrador (the "**Real Estate**"), have constituted and do by these presents constitute and appoint CLIFFS MINING COMPANY, a company incorporated in the State of Delaware, United States of America, duly qualified to transact business in the Province of Newfoundland and Labrador to be our Attorney, for and in our names (1) to sell, assign, convey and transfer the Real Estate for and on behalf of the Registered Owners, such Real Estate consisting of surface lands with such buildings and erections (if any) as may have been erected thereon to individuals and companies, including but not limited to, employees of Wabush Mines, Cliffs Mining Company, Managing Agent, upon such terms as the Attorney shall deem proper; (2) to sign and execute certain Agreements for Sale for the sale of such Real Estate for and on behalf of the Registered Owners and consisting of surface lands and such buildings and erections (if any) as may have been erected thereon within the province of Newfoundland and Labrador; and (3) to sign and execute all deeds of conveyance or confirmation, and all such other documents and assurances in relation to such sales, assignments, conveyances and transfers of Real Estate as aforesaid and do all such other things as our said Attorney may consider necessary or advisable, the whole in the sole discretion of our said Attorney.

HEREBY ratifying and confirming and agreeing to ratify and confirm all and whatsoever our said Attorney shall lawfully do or cause to be done by virtue of these presents.

REGISTRY OF DEEDS
Registered 18 day of March
2010 at 2:20 O'Clock P.m
Registration No. 380307
Fee Paid $ 100 Receipt No. 3291602
[signature]
Registrar of Deeds

21973437.3

IN WITNESS WHEREOF the parties have caused these presents to be signed by their duly authorized officers as of the dates set out below.

In the presence of:

WABUSH IRON CO. LIMITED

James D. Graham _______________ [signature] _______________

Date Mar. 12, 2010 _______________ Date 12 · Mar · 10 _______________

HLE MINING GP INC.

_______________ _______________

Date _______________ Date _______________

WABUSH RESOURCES INC.

_______________ _______________

Date _______________ Date _______________

STATE OF OHIO
COUNTY OF CUYAHOGA

On this 12th day of March, 2010, before me, a Notary Public in and for the said County and State personally appeared George W. Hauck, Jr. who being by me first duly sworn did say that he/she is the Secretary of Wabush Iron Co. Limited, an Ohio corporation, that the foregoing instrument was executed by him/her in behalf of the corporation and he/she duly acknowledged that he/she executed the same in behalf of said corporation and as its and their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto subscribed and set my name and affixed my official seal at Cleveland, Ohio this 12th day of March, 2010.

Athina M. Thomas

NOTARY PUBLIC

NOTARIAL SEAL
STATE OF OHIO

Athina M. Thomas
Notary Public - Ohio
Cuyahoga County
My Commission Expires
September 26, 2012

21973457.3

IN WITNESS WHEREOF the parties have caused these presents to be signed by their duly authorized officers as of the dates set out below.

In the presence of:

WABUSH IRON CO. LIMITED

______________________	______________________
Date ______________________	Date ______________________

HLE MINING GP INC.

P. Bodde	[signature]
Date 2010.03.12	Date 2010.03.12

WABUSH RESOURCES INC.

______________________	______________________
Date ______________________	Date ______________________

PROVINCE OF ONTARIO

On this 12th day of March, 2010, before me, a Notary Public in and for the said Province personally appeared Michael A. McQuade, who being by me first duly sworn did say that he is the Vice President of HLE Mining GP Inc., a corporation incorporated under the *Canada Business Corporations Act*, that the foregoing instrument was executed by him on behalf of the corporation and he duly acknowledged that he executed the same in behalf of said corporation and as its and his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto subscribed and set my name and affixed my official seal at Hamilton, Ontario this 12th day of March, 2010.

NOTARY PUBLIC

21973437.3

IN WITNESS WHEREOF the parties have caused these presents to be signed by their duly authorized officers as of the dates set out below.

In the presence of:

WABUSH IRON CO. LIMITED

______________________	______________________
Date ______________________	Date ______________________

HLE MINING GP INC.

______________________	______________________
Date ______________________	Date ______________________

WABUSH RESOURCES INC.

[signature]	[signature]
Date March 12, 2010	Date March 12, 2010

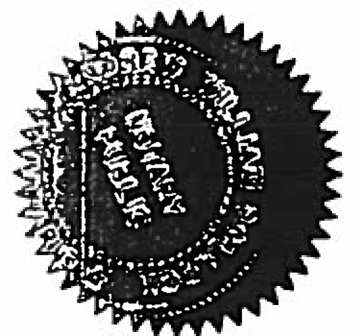
21973437.3

PROVINCE OF ONTARIO
CITY OF TORONTO

On this 12th day of March, 2010, before me, a Notary Public in and for the said province personally appeared Thomas A. McKee, who being by me first duly sworn did say that he is a Director of Wabush Resources Inc., a corporation incorporated pursuant to the *Canada Business Corporations Act*, that the foregoing instrument was executed by him/her in behalf of the corporation and he/she duly acknowledged that he/she executed the same in behalf of said corporation and as its and his/her free act and deed.

IN TESTIMONY WHEREOF, I have hereunto subscribed and set my name and affixed my official seal at Toronto, Ontario this 12th day of March, 2010.

NOTARY PUBLIC



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Attached is Exhibit F to the Affidavit
of Gary Ivany, sworn before me
this 15th day of October, 2014

Commissioner for Oaths in the Province of Ontario

Diane Manon Martella, Notary Public,
City of Toronto, limited to the attestation
of instruments and the taking of the affidavits
for Royal Bank of Canada
Expires August 26, 2017

CLIFFS

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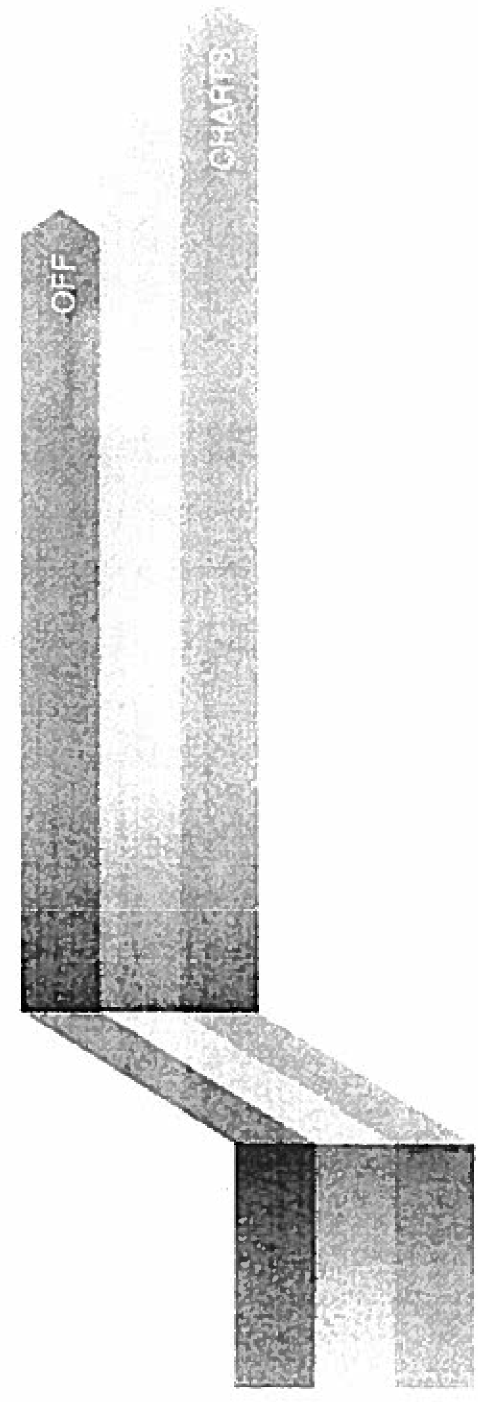
ANNUAL

REPORT



UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the fiscal year ended December 31, 2010

OR

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from to .

Commission File Number: 1-8944

CLIFFS

CLIFFS NATURAL RESOURCES INC.

(Exact Name of Registrant as Specified in Its Charter)

Ohio	**34-1464672**
(State or Other Jurisdiction of Incorporation or Organization)	*(I.R.S. Employer Identification No.)*
200 Public Square, Cleveland, Ohio	**44114-2315**
(Address of Principal Executive Offices)	*(Zip Code)*

Registrant's Telephone Number, Including Area Code: (216) 694-5700

Securities registered pursuant to Section 12(b) of the Act:

Title of Each Class	Name of Each Exchange on Which Registered
Common Shares, par value $0.125 per share	New York Stock Exchange and Professional Segment of NYSE Euronext Paris

Securities registered pursuant to Section 12(g) of the Act:
NONE

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act YES ☒ NO ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. YES ☐ NO ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. YES ☒ NO ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). YES ☒ NO ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (§229.405 of this chapter) is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer ☒ Accelerated filer ☐ Non-accelerated filer ☐ Smaller reporting company ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). YES ☐ NO ☒

As of June 30, 2010, the aggregate market value of the voting and non-voting stock held by non-affiliates of the registrant, based on the closing price of $47.16 per share as reported on the New York Stock Exchange — Composite Index, was $6,354,612,868 (excluded from this figure is the voting stock beneficially owned by the registrant's officers and directors).

The number of shares outstanding of the registrant's Common Shares, par value $0.125 per share, was 135,462,509 as of February 14, 2011.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the registrant's proxy statement for its annual meeting of shareholders scheduled to be held on May 17, 2011 are incorporated by reference into Part III.

Golden West

During 2008, we acquired 24.3 million shares of Golden West, a Western Australia iron ore exploration company. Golden West owns the Wiluna West exploration ore project in Western Australia, containing a resource of 126 million metric tons of ore. The investment provides Asia Pacific Iron Ore a strategic interest in Golden West and Wiluna West. Our ownership in Golden West represents approximately 14.8 percent of its outstanding shares at December 31, 2010. Acquisition of the shares represented an original investment of approximately $22 million. We do not exercise significant influence, and at December 31, 2010 and 2009, the investment is classified as an available-for-sale security. Accordingly, we record unrealized mark-to-market changes in the fair value of the investment through *Accumulated other comprehensive income (loss)* each reporting period, unless the loss is deemed to be other than temporary.

Quest

Through our acquisition of the remaining shares of Freewest in January 2010, we acquired 4.2 million shares of Quest, a Canadian-based exploration company focused on the discovery of rare earth deposit opportunities. We sold approximately 3.6 million of our acquired ownership interest in Quest during the second half of 2010 for proceeds of $17.2 million, resulting in a realized gain of $6.3 million recognized as *Other non-operating income* on the Statements of Consolidated Operations. Our remaining interest in Quest, consisting of 0.6 million shares as of December 31, 2010, is classified as an available-for-sale security and we record unrealized mark-to-market changes in the fair value of the investment through *Accumulated other comprehensive income (loss)* each reporting period, unless the loss is deemed to be other than temporary.

NOTE 5 — ACQUISITIONS AND OTHER INVESTMENTS

Acquisitions

We allocate the cost of acquisitions to the assets acquired and liabilities assumed based on their estimated fair values. Any excess of cost over the fair value of the net assets acquired is recorded as goodwill.

Wabush

We acquired entities from our former partners that held their respective interests in Wabush on February 1, 2010, thereby increasing our ownership interest to 100 percent. Our full ownership of Wabush has been included in the consolidated financial statements since that date. The acquisition date fair value of the consideration transferred totaled $103 million, which consisted of a cash purchase price of $88 million and a working capital adjustment of $15 million. With Wabush's 5.5 million tons of production capacity, acquisition of the remaining interest has increased our North American Iron Ore equity production capacity by approximately 4.0 million tons and has added more than 50 million tons of additional reserves. Furthermore, acquisition of the remaining interest has provided us additional access to the seaborne iron ore markets serving steelmakers in Europe and Asia.

Prior to the acquisition date, we accounted for our 26.8 percent interest in Wabush as an equity-method investment. We initially recognized an acquisition date fair value of the previous equity interest of $39.7 million, and a gain of $47.0 million as a result of remeasuring our prior equity interest in Wabush held before the business combination. The gain was recognized in the first quarter of 2010 and was included in *Gain on acquisition of controlling interests* in the Statements of Unaudited Condensed Consolidated Operations for the three months ended March 31, 2010.

In the months subsequent to the initial purchase price allocation, we further refined the fair values of the assets acquired and liabilities assumed. Additionally, we also continued to ensure our existing interest in Wabush was incorporating all of the book basis, including amounts recorded in *Accumulated other comprehensive income (loss)*. Based on this process the acquisition date fair value of the previous equity interest was adjusted to $38 million. The changes required to finalize the U.S. and Canadian deferred tax valuations and to incorporate

additional information on assumed asset retirement obligations offset to a net decrease of $1.7 million in the fair value of the equity interest from the initial purchase price allocation. Thus, the gain resulting from the remeasurement of our prior equity interest, net of amounts previously recorded in *Accumulated other comprehensive income (loss)* of $20.3 million, was adjusted to $25 million for the period ended December 31, 2010.

Under the business combination guidance in ASC 805, prior periods, beginning with the period of acquisition, are required to be revised to reflect changes to the original purchase price allocation. In accordance with this guidance, we have retrospectively recorded the adjustments to the fair value of the acquired assets and assumed liabilities and the resulting *Goodwill* and *Gain on acquisition of controlling interests*, made during the second half of 2010, back to the date of acquisition. Accordingly, such amounts are reflected in the Statements of Consolidated Operations for the year ended December 31, 2010, but have been excluded from the three months ended September 30, 2010 and December 31, 2010, respectively. We finalized the purchase price allocation for the acquisition of Wabush during the fourth quarter of 2010. A comparison of the initial and final purchase price allocation has been provided in the following table.

	(In Millions)		
	Initial Allocation	Final Allocation	Change
Consideration			
Cash	$ 88.0	$ 88.0	$ —
Working capital adjustments	15.0	15.0	—
Fair value of total consideration transferred	103.0	103.0	—
Fair value of Cliffs' equity interest in Wabush held prior to acquisition of remaining interest	39.7	38.0	(1.7)
	$ 142.7	$ 141.0	$ (1.7)
Recognized amounts of identifiable assets acquired and liabilities assumed			
ASSETS:			
In-process inventories	$ 21.8	$ 21.8	$ —
Supplies and other inventories	43.6	43.6	—
Other current assets	13.2	13.2	—
Mineral rights	85.1	84.4	(0.7)
Plant and equipment	146.3	147.8	1.5
Intangible assets	66.4	66.4	—
Other assets	16.3	19.3	3.0
Total identifiable assets acquired	392.7	396.5	3.8
LIABILITIES:			
Current liabilities	(48.1)	(48.1)	—
Pension and OPEB obligations	(80.6)	(80.6)	—
Mine closure obligations	(39.6)	(53.4)	(13.8)
Below-market sales contracts	(67.7)	(67.7)	—
Deferred taxes	(20.5)	—	20.5
Other liabilities	(8.9)	(8.8)	0.1
Total identifiable liabilities assumed	(265.4)	(258.6)	6.8
Total identifiable net assets acquired	127.3	137.9	10.6
Goodwill	15.4	3.1	(12.3)
Total net assets acquired	$ 142.7	$ 141.0	$ (1.7)

The significant changes to the final purchase price allocation from the initial allocation were due primarily to the allocation of deferred taxes between the existing equity interest in Wabush and the acquired portion, and additional asset retirement obligations noted related to the Wabush operations.

Of the $66.4 million of acquired intangible assets, $54.7 million was assigned to the value of a utility contract that provides favorable rates compared with prevailing market rates and will be amortized on a straight-line basis over the five-year remaining life of the contract. The remaining $11.7 million was assigned to the value of an easement agreement that is anticipated to provide a fee to Wabush for rail traffic moving over Wabush lands and will be amortized over a 30-year period.

The $3.1 million of goodwill resulting from the acquisition was assigned to our North American Iron Ore business segment. The goodwill recognized is primarily attributable to the mine's port access and proximity to the seaborne iron ore markets. None of the goodwill is expected to be deductible for income tax purposes.

Refer to NOTE 6 — GOODWILL AND OTHER INTANGIBLE ASSETS AND LIABILITIES for further information.

Freewest

During 2009, we acquired 29 million shares, or 12.4 percent, of Freewest, a Canadian-based mineral exploration company focused on acquiring, exploring and developing high-quality chromite, gold and base-metal properties in Canada. On January 27, 2010, we acquired all of the remaining outstanding shares of Freewest for C$1.00 per share, including its interest in the Ring of Fire properties in Northern Ontario Canada, which comprise three premier chromite deposits. As a result of the transaction, our ownership interest in Freewest increased from 12.4 percent as of December 31, 2009 to 100 percent as of the acquisition date. Our full ownership of Freewest has been included in the consolidated financial statements since the acquisition date. The acquisition of Freewest is consistent with our strategy to broaden our geographic and mineral diversification and allows us to apply our expertise in open-pit mining and mineral processing to a chromite ore resource base that could form the foundation of North America's only ferrochrome production operation. The planned mine is expected to produce 1 million to 2 million metric tons of high-grade chromite ore annually, which would be further processed into 400 thousand to 800 thousand metric tons of ferrochrome. Total purchase consideration for the acquisition was approximately $185.9 million, comprised of the issuance of 0.0201 of our common shares for each Freewest share, representing a total of 4.2 million common shares or $173.1 million, and $12.8 million in cash. The acquisition date fair value of the consideration transferred was determined based upon the closing market price of our common shares on the acquisition date.

Prior to the acquisition date, we accounted for our 12.4 percent interest in Freewest as an available-for-sale equity security. The acquisition date fair value of the previous equity interest was $27.4 million, which was determined based upon the closing market price of the 29 million previously owned shares on the acquisition date. We recognized a gain of $13.6 million in the first quarter of 2010 as a result of remeasuring our ownership interest in Freewest held prior to the business acquisition. The gain is included in *Gain on acquisition of controlling interests* in the Statements of Consolidated Operations for the year ended December 31, 2010.

Attached is Exhibit G to the Affidavit
of Gary Ivany, sworn before me
this 15th day of October, 2014

Commissioner for Oaths in the Province of Ontario

Diane Manon Martella, Notary Public,
City of Toronto, limited to the attestation
of instruments and the taking of the affidavits
for Royal Bank of Canada
Expires August 26, 2017

Home | About Us | Investors | News Center | Corporate Responsibility | Careers

Industry Outlook
Operational Imperatives
Bloom Lake Mine
Wabush Mine

Eastern Canadian Iron Ore
Wabush Mine

Wabush Mine

Update February 11, 2014: Cliffs expects to idle the Wabush Mine in the Province of Labrador-Newfoundland by the end of 1Q 2014 after determining that its cost structure is not sustainable and not economically viable to continue operating. You can read the complete news release here.

Unfortunately this will impact approximately 500 employees at our Wabush Scully Mine and Pointe Noire rail and port operation in Quebec. We understand this is a hardship for those employees and their families. During this transition, we will be working with them as we safely and responsibly bring the mine to idle.

Resources and contact names for Wabush employees are available in the list below; expand or contract the resource categories for more information. We will also be posting updates on the "Latest Announcements" page.

+ **Resource : Downloadable Forms** (3)

+ **Resource : Online Resources** (3)

+ **Resource : Wabush HR Coordinators** (2)

© 2011 Cliffs Natural Resources. All Rights Reserved
200 Public Square, Suite 3300, Cleveland, OH 44114-2544 - Phone: 216.694.5700

Attached is Exhibit H to the Affidavit
of Gary Ivany, sworn before me
this 15th day of October, 2014

____
Commissioner for Oaths in the Province of Ontario

Diane Manon Martella, Notary Public,
City of Toronto, limited to the attestation
of instruments and the taking of the affidavits
for Royal Bank of Canada
Expires August 26, 2017

Wabush Mines owner in talks with potential buyer

Cliffs Natural Resources has 'constructive dialogue' with MFC Industrial

CBC News Posted: Jul 22, 2014 4:00 PM NT Last Updated: Jul 22, 2014 4:04 PM NT

The U.S. company that idled Wabush Mines this winter confirms that it is talking with another company about the potential sale of the iron ore operation.

Cliffs Natural Resources has had "constructive dialogue" with MFC Industrial about a purchase of Wabush Mines, which was idled in February when U.S.-based Cliffs determined that costs at the operation had become unsustainably high.

Arlene Beaudin, district manager for public affairs with Cliffs' eastern Canadian operations, said "no definitive agreement" has yet been reached, but added that the company is holding "meetings with major stakeholders in Labrador West and St. John's."

On Sunday, members of the United Steelworkers met for an hour in Wabush, but union officials refused to discuss what was said.

A letter of intent between Cliffs and MFC has been presented to stakeholders. MFC already has a connection with Cliffs, as it owns the mineral rights tied to the land and receives millions of dollars in royalties each year.

"This is good news," Beaudin told CBC News. "I hope it is a win-win."

Support needed from union

For a deal to work, there will be need to be support from unionized workers.

MFC, which specializes in turning around troubled and undervalued businesses, has said it is exploring investment options for the mine in Wabush, but is not commenting for now on its plans

Under the proposed arrangement, MFC would effectively "become a client" of Cliffs Natural Resources.

The move comes as an annual shareholders meeting looms for Cliffs Natural Resources on July 29.

The company is under pressure from Casablanca Capital, the activist investing company that is one of the company's largest shareholders, to make a radical change: spinning off the eastern Canadian iron ore operations.

Cliffs calls Casablanca's plan a "fire sale" of assets.

Asked if Cliffs was under pressure to reach a deal before the annual shareholders meeting, Beaudin said no.

"There's no timeline," she said.

Union agrees to 5-year contract to work if Wabush Mines sold to MFC

CBC News Posted: Jul 24, 2014 5:36 PM NT Last Updated: Jul 24, 2014 7:44 PM NT

Union employees at Wabush Mines have told CBC News they've agreed to a 5-year contract on Thursday to work for MFC Industrial if the company ends up purchasing the idled iron-ore operation.

- **Wabush Mines owner in talks with potential buyer**

According to some members of the United Steelworkers Union, workers voted 87 per cent in favour of the deal.

Earlier this week, Cliffs Natural Resources confirmed it was in talks with MFC Industrial about the potential sale of the iron ore mine, which it idled in February.

Jason Penney, USW Local 6285 president, said union members are happy that progress is being made, but there's no done deal in sight just yet.

"MFC's hoping that if the deal's concluded that we go back and work together as a team and that we have a workforce that's going to be happy and it's going to be productive," said Penney.

"The only role that we're playing right now is, again, that MFC wants to ensure that they have a workforce that's going to be engaged, that's going to be a partner and a team approach in order to make [the mine] viable."

Penney added while about half the workers left without jobs when the mine shut down have found work, things have been hard for the remainder, who are excited about the possibility of the operation resuming.

In February, U.S.-based Cliffs determined costs of the operation had become unsustainably high.

A sale of the mine has yet to be confirmed.

Breaking

Wabush Mines sale talks off between Cliffs, MFC Industrial

CBC News Posted: Oct 08, 2014 2:07 PM NT Last Updated: Oct 08, 2014 2:09 PM NT

The local president of the union representing steel workers in Labrador City says MFC Industrial has called off talks to purchase Wabush Mines from Cliffs Natural Resources.

Jason Penney, with United Steelworkers Union, tells CBC News the potential sale of the idled iron ore operation won't be going ahead.

More to come

Attached is Exhibit I to the Affidavit
of Gary Ivany, sworn before me
this 15th day of October, 2014

____
Commissioner for Oaths in the Province of Ontario

Diane Manon Martella, Notary Public,
City of Toronto, limited to the attestation
of instruments and the taking of the affidavits
for Royal Bank of Canada
Expires August 26, 2017

2003 01T No. 3807

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

PLAINTIFF

AND:

ROYAL BANK OF CANADA

DEFENDANT

AND BETWEEN

ROYAL BANK OF CANADA

PLAINTIFF BY COUNTERCLAIM

AND:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

DEFENDANT BY COUNTERCLAIM

BILL OF COSTS OF THE DEFENDANT/PLAINTIFF BY COUNTERCLAIM, ROYAL BANK OF CANADA

II.	**SERVICES**	**UNITS (Per Column 3)**
A.	**Originating documents and other pleadings**	
	Preparation and filing of defence and counterclaim	2.0
	Preparation and filing of amendment to defence and counterclaim	1.0
B.	**Applications**	
	Preparation and filing of application to amend defence and counterclaim	2.0
	Preparation and filing of application to strike/amend statement of claim and for security for costs	4.0
	Preparation and filing of application for case management	2.0

	Preparation and filing of Affidavit of Gary Ivany	2.0
	Preparation of memorandum of fact and law for application to amend defence and counterclaim	4.0
	Preparation of memorandum of authorities for application to amend defence and counterclaim	2.0
	Preparation of memorandum of fact and law for application to strike/amend statement of claim and for security for costs	8.0
	Preparation of memorandum of authorities for application to strike/amend statement of claim and for security for costs	2.0
	Preparation of memorandum of fact and law for application for case management	4.0
	Counsel fee on contested application (8.5 units per half day)	
	Application to amend defence and counterclaim	17.0
	Application to strike and for security for costs	42.5
	Application for case management (estimated)	4.25
C.	**Discovery and Examinations**	
	Preparation and filing of list of documents	2.0
	Preparation of interrogatories	2.0
	Preparation for and attendance at examination for discovery	4.0
D.	**Pre-Trial and Pre-Hearing Procedures**	
	Preparation of brief for pre-trial conference, settlement conference, mini-trial, Court ordered mediation, case management meeting or similar conference	4.0
	Preparation for and attendance at pre-trial conference, settlement conference, mini-trial, Court ordered mediation, case management meeting, summary judgment hearing under Rule 56A, judicial case conference under Rule 56A or similar conference, per half day	4.0
	Attendance at case management meeting under Rule 56A or trial readiness inquiry under Rule 56A	0.5
E.	**Trial or Appeal Hearing in the Trial Division or Hearing under Rule 56A**	
	Preparation of trial brief and when directed by the Court, written argument	4.0
	Counsel fee (**estimated trial time: 15 days**)	
	First counsel, first day	25.0
	First counsel, second and subsequent days	175.0
	Additional counsel, first day	17.0
	Additional counsel, second and subsequent days	119.0
G.	**Miscellaneous**	

	Preparation of Order	1.0
	Preparation of Bill of Costs	1.0
	Attendance on taxation, per half day	1.0

III. **WITNESSES (estimated witnesses in defence: 5)**

Experts Witnesses (2)	$3,000
Fact Witnesses (3)	$1,000

IV.	**EXAMINERS (estimated hours: 15)**	11.25

V. **MASTERS AND TAXING OFFICERS**

Fee chargeable by Taxing Officer for taxing Bill of Costs	0.15

VII. **COURT FEES**

Law Society Levy	$35.00

VIII. **OTHER**

1(a)	cost of service of documents			$250
1(b)	cost of expert reports (**2 experts estimated**)			$40,000
1(c)	fees charged by mediators, and third party expenses incurred, for Court ordered mediation			unknown
1(e)	Photocopies @ $0.25 per page	# pages	# copies	
	Affidavits	100	4	$100
	Memorandums of Fact and Law	100	4	$100
	Memorandums of Authorities	800	4	$800

SUMMARY

Total awarded under Part II: 456.25 units x $100 + HST	$51,556.25
Total awarded under Part III: $4,000 + HST	$4,520.00
Total awarded under Part IV: 11.25 units x $100 + HST	$1,271.25
Total awarded under Part V: 0.15 units x $100 + HST	$16.95
Total awarded under Part VII:	$35.00
Total awarded under Part VIII: $41,250 + HST	$46,612.50
TOTAL:	**$104,011.95**

I appoint , the day of October, 2014 at for the taxing of the within costs.

____
TAXING MASTER

The above costs were taxed and allowed, this day of October, 2014 in the amount of ____________________.

____
TAXING MASTER

Attached is Exhibit B to the Affidavit
of Gary Ivany, sworn before me
this 14th day of July, 2016

Commissioner for Oaths in the Province of Ontario

Peter John Gordon, a Commissioner, etc.,
City of Toronto, for
the Royal Bank of Canada.
Expires June 10, 2017.

2003 01T No. 3807

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

PLAINTIFF

AND:

ROYAL BANK OF CANADA

DEFENDANT

AND BETWEEN

ROYAL BANK OF CANADA

PLAINTIFF BY COUNTERCLAIM

AND:

CLIFFS MINING COMPANY in its capacity as Managing Agent of WABUSH MINES

DEFENDANT BY COUNTERCLAIM

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2003 01G 3807
Date of Filing Document:	January 26, 2015
Name of Party Filing or Person:	Royal Bank of Canada
Application to which Document being filed relates:	Cliff's Mining's Application for Summary Trial dismissing the Counterclaim of Royal Bank of Canada
Statement of Purpose in Filing:	To oppose the Application

SUPPLEMENTARY AFFIDAVIT OF GARY IVANY

I, Gary Ivany, of Pickering, in the Province of Ontario, make oath and state as follows:

1. I am employed by the Royal Bank of Canada ("**RBC**") as Senior Manager. I have been employed with RBC for 22 years. As such, I have knowledge of the within matter.

Where I have been advised of facts, I state the source of such facts and that I believe such facts to be true.

2. I previously swore an affidavit in this proceeding on October 15, 2014. I repeat and rely on the statements in my previous affidavit, which should be read together with this supplementary affidavit.

Cliffs Mining's Authority in the Action

3. I understand that Cliffs Mining Company ("**Cliffs Mining**") claims that it acted at all times only in its capacity as "Managing Agent" for the unincorporated joint venture referred to as "Wabush Mines". As a result, it denies any personal liability to RBC for any matters raised or relief sought by RBC in its Counterclaim.

4. Cliffs Mining bases its authority to act as Managing Agent on the "Management Agreement" (attached as **Exhibit A** to my previous affidavit) with the alleged joint venture members: Stelco Inc., Dofasco Inc., and Wabush Iron Co. Limited (the "**Operators**").

5. The Management Agreement refers to several other agreements that appear to establish the contractual basis of the alleged joint venture known as "Wabush Mines", including:

   (a) a "Joint Venture Agreement";

   (b) a "General Provisions Agreement"; and

   (c) a "Participants Agreement".

6. I am advised by Stewart McKelvey, legal counsel to RBC, and do believe, that Cliffs Mining has never produced those agreements, nor has Cliffs Mining ever confirmed that they even exist. Therefore, to the best of my knowledge, information and belief, there is no Joint Venture Agreement, no General Provisions Agreement and no Participants Agreement.

7. I am advised by Stewart McKelvey, and do believe, that RBC has filed an application seeking an order to compel Cliffs Mining to produce those documents and any other documents establishing the nature of the "Wabush Mines" joint venture and Cliffs Mining's authority thereunder.

8. In the Affidavit of Jason Veloso, sworn May 7, 2014, filed by Cliffs Mining in support of its application for summary trial, Mr. Veloso refers to Cliffs Mining (not the Operators) as having exercised the Option to purchase the Equipment in a letter dated May 27, 2003 (attached as **Exhibit D** to my previous affidavit).

9. However, in that letter, Ms. Waschura on behalf of Cliffs Mining told RBC:

> *It is our intent, **subject to partner approval**, to purchase the [Equipment] for Fair Market Value.* [Emphasis added.]

10. I am advised by Stewart McKelvey, legal counsel to RBC, and do believe, that Cliffs Mining has never produced documentation or any other substantiation of the "partner approval" referred to in Ms. Waschura's letter.

11. Therefore, to the best of RBC's knowledge, information, and belief, Cliffs Mining acted outside of the scope of its authority as "Managing Agent" when it purported to exercise the option to purchase.

12. As stated in my previous affidavit, in September 2003 Cliffs Mining delivered two checks to RBC each in the amount of $108,200.00, taking the position that those amounts satisfied the purchase price under the Master Lease Agreement. Both checks were made payable from "Wabush Mines, Cliffs Mining Company, Managing Agent", and were drawn on a Cliffs Mining account. Attached hereto and marked as **Exhibit A** are copies of the September 2003 checks from Cliffs Mining.

13. As stated in my previous affidavit, as of February 2010, Cliffs Mining's parent company, Cliffs Natural Resources, purchased all the remaining interest in Wabush Mine from the successors to Stelco Inc. and Dofasco Inc. To the best of RBC's knowledge, information, and belief, the Operators have no remaining interest in Wabush Mine.

14. Since the date of my previous affidavit, Cliffs Natural Resources has confirmed that it is closing Wabush Mine. Attached hereto and marked as **Exhibit B** is a copy of an online news article from CBC titled "Cliffs Resources officially closing Wabush Mines", dated October 31, 2014.

15. To the best of RBC's knowledge, information, and belief, the Equipment has been in the control of Cliffs Mining and/or Cliffs Natural Resources since 2003, and further that as of

February 2010 Cliffs Natural Resources is both legal and beneficial owner of Wabush Mine and all of its assets and liabilities.

16. I am advised by Stewart McKelvey, and do believe, RBC has also filed an application to add the Operators as Defendants by Counterclaim.

17. To date, RBC has not had an opportunity to request documents or conduct examinations of either Cliffs Mining or the Operators, particularly with respect to the status of the "Wabush Mines" joint venture or Cliffs Mining's authority thereunder historically and at present, as well as the status of the assets and liabilities of Wabush Mine.

18. As a result of all of the above, RBC has no information regarding the status of the "Wabush Mines" joint venture, including, among other things:

    (a) whether the joint venture still exists;

    (b) if the "Wabush Mines" joint venture no longer exists, the basis for Cliffs Mining's authority to institute and maintain this proceeding in a representative or any capacity;

    (c) if the "Wabush Mines" joint venture still exists, the status and respective liability of the Operators given intervening events of reorganization and amalgamation;

    (d) any limitation on Cliffs Mining's authority to take actions in the name of the Operators without written or other authorization;

    (e) whether the purchase of Wabush Mine by Cliffs Mining's parent company has affected the relationship between Cliffs Mining and the Operators.

Quebec Proceeding

19. As set out in my previous affidavit, Cliffs Mining and RBC were parties to litigation in Quebec based upon a nearly identical "Master Lease Agreement". In fact, the same section (section 53.1) in both Master Lease Agreements is relied upon by Cliffs Mining to attribute liability only to the Operators in respective proportions.

20. RBC was wholly successful in the Quebec Proceeding, with the Quebec Court of Appeal finding Cliffs Mining 100% liable in its personal capacity, with Wabush Iron Co. Limited,

Stelco Inc. and Dofasco Inc. jointly and severally liable to the extent set out in Section 53.1 of the Quebec "Master Lease Agreement".

21. To the best of RBC's knowledge, information, and belief, in this proceeding Cliffs Mining purported to exercise the Option without authority from the Operators, and as a result of the subsequent purchase of Wabush Mine by Cliffs Mining's parent company, Cliffs Mining (or its affiliated companies) would be liable for the purchase price of the Equipment and would take legal and beneficial ownership of the Equipment upon payment.

22. I make this affidavit in response to Cliffs Mining's application for summary trial dismissing RBC's counterclaim, and for no other purpose.

SWORN at Toronto in the Province of Ontario, this 26th day of January, 2015 before me:

A commissioner for oaths in the Province of Ontario Peter John Gordon, a Commissioner, etc., City of Toronto, for the Royal Bank of Canada. Expires June 10, 2017.

Gary Ivany

TO: **Paul Burgess**
BURGESS LAW OFFICES
PO BOX 23196
Suite 308, Terrace on the Square
St. John's, NL A1B 4J9
Solicitors for the Plaintiff/Defendant by Counterclaim, Cliffs Mining Company

AND TO: **Supreme Court of Newfoundland and Labrador**
Registry (General Division)
309 Duckworth Street
P.O. Box 937
St. John's, NL A1C 5M3

Attached is Exhibit A to the Affidavit of Gary Ivany,

sworn before me this 26th day of January, 2015

Commissioner for Oaths in the Province of Ontario

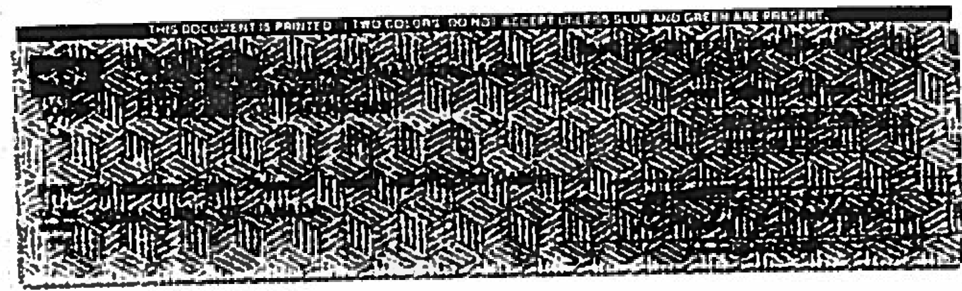
Peter John Gordon, a Commissioner, etc.,
City of Toronto, for
the Royal Bank of Canada.
Expires June 10, 2017.

IN FULL PAYMENT OF ITEMS DESCRIBED BELOW. IF INCORRECT, RETURN BOTH CHECK AND STATEMENT.
PLEASE DETACH BEFORE DEPOSITING.

INVOICE	DATE	DEDUCTION	GROSS	DISCOUNT	NET
[illegible]-2003	[illegible]/2003	[illegible]	[illegible]	[illegible]	[illegible]
		[illegible]	[illegible]	[illegible]	[illegible]

REMOVE DOCUMENT ALONG THIS PERFORATION

THIS DOCUMENT IS PRINTED IN TWO COLORS. DO NOT ACCEPT UNLESS BLUE AND GREEN ARE PRESENT.



⑈000243⑈ ⑆00011⑉001⑆1024⑉892⑈

SEE REVERSE SIDE FOR OPENING INSTRUCTIONS

WABUSH MINES
CLIFFS MINING COMPANY, MANAGING AGENT
1100 SUPERIOR AVENUE
CLEVELAND, OH 44114-2589

ROYAL BANK OF CANADA

SEE REVERSE SIDE FOR OPENING INSTRUCTIONS

WABUSH MINES
CLIFFS MINING COMPANY, MANAGING AGENT
1100 SUPERIOR AVENUE
CLEVELAND, OH 44114-2589

IN FULL PAYMENT OF ITEMS DESCRIBED BELOW. IF INCORRECT, RETURN BOTH CHECK AND STATEMENT.
PLEASE DETACH BEFORE DEPOSITING

September 22, 2003 — CHECK 245

INVOICE	DATE	DEDUCTION	GROSS	DISCOUNT	NET
WM-EQUIVELS A R	09/23/2003	$0.00	$108,020.00	$0.00	$108,020.00
		$0.00	$108,020.00	$0.00	$108,020.00

REMOVE DOCUMENT ALONG THIS PERFORATION

THIS DOCUMENT IS PRINTED IN TWO COLORS. DO NOT ACCEPT UNLESS BLUE AND GREEN ARE PRESENT.

WABUSH MINES
CLIFFS MINING COMPANY, MANAGING AGENT
1100 SUPERIOR AVENUE
CLEVELAND, OH 44114-2589

BANK OF MONTREAL (CANADIAN FUNDS)
No 245
DATE September 22, 2003

THIS AMOUNT ONLY
$**108,020.00

VOID VOID VOID

PAY One Hundred Eight Thousand Twenty and NO/100 Dollars

TO THE ORDER OF ROYAL BANK OF CANADA

AUTHORIZED SIGNATURE

⑈000245⑈ ⑆00011⑉001⑆1024⑉892⑈

Attached is Exhibit B to the Affidavit of Gary Ivany,

sworn before me this 26th day of January, 2015

Commissioner for Oaths in the Province of Ontario

Peter John Gordon, a Commissioner, etc.,
City of Toronto, for
the Royal Bank of Canada.
Expires June 10, 2017.

Cliffs Resources officially closing Wabush Mines

CBC News Posted: Oct 31, 2014 12:26 PM NT Last Updated: Oct 31, 2014 12:35 PM NT

The provincial government has been notified by Cliffs Natural Resources of the company's plans to officially close Wabush Mines in Labrador.

"We have all known for some time that the closure of the mine in Wabush was a possibility. However, this does not make it any easier for the workers of the mine and their families as well as residents in the Labrador West area," Natural Resources Minister Derrick Dalley said in a statement on Friday.

"Our government is aware of this and will continue to support those impacted."

Dalley said government will ensure Cliffs follows provincial legislation, and has a closure and rehabilitation plan in place.

In February, the company idled operations at the site, citing the rising cost of production at the iron ore mine.

MFC Industrial was in talks with Cliffs about the potential sale of the mine, but a spokesperson with MFC told CBC News discussions had been terminated earlier in October.

Roughly 500 workers employed at the site will be affected. Of the 50 employees still currently working at the mine, Cliffs said that number will be reduced to 10 before the end of the year.

With files from Chris Ensing

SUPERIOR COURT
(Commercial Division)

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-11-048114-157

DATE: July 15, 2016

PRESIDING: THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

WABUSH IRON CO. LIMITED

Debtor/Respondent

\- and -

FTI CONSULTING CANADA INC.

Monitor

\- and -

ROYAL BANK OF CANADA

Creditor/Petitioner

NOTICE OF PRESENTATION

TO SERVICE LIST

TAKE NOTICE that the present Motion to lift the stay of proceedings with respect to Wabush Iron Co. Limited will be presented for adjudication before the Honourable Stephen W. Hamilton, j.s.c., or another of the Honourable judges of the Superior Court of Quebec, Commercial Division, sitting in and for the district of Montreal, at the Montreal Courthouse located at 1, Notre-Dame Street East, Montreal, Quebec, on August 30, 2016 at a time to be determined.

St. John's, August 15, 2016

Joe Thorne
STEWART MCKELVEY
Suite 1100, Cabot Place
100 New Gower Street
St. John's, NL A1C 6K3
Solicitors for the Creditor/Petitioner, Royal Bank of Canada

311453

SUPERIOR COURT
(Commercial Division)

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-11-048114-157

DATE: August 15, 2016

PRESIDING: THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

WABUSH IRON CO. LIMITED

Debtor/Respondent

- and -

FTI CONSULTING CANADA INC.

Monitor

- and -

ROYAL BANK OF CANADA

Creditor/Petitioner

MOTION TO LIFT THE STAY OF PROCEEDINGS WITH RESPECT TO WABUSH IRON CO. LIMITED
Section 11 of the *Companies' Creditors Arrangement Act*

ORIGINAL

Joe J. Thorne
Stewart McKelvey
Lawyers & Avocats
Cabot Place, 1100-100 New Gower Street
P.O. Box 5038
St. John's, NL A1C 5V3
Our File: 4262-554