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Justice Eidsvik
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| COURT FILE NUMBER | 2001-05630 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| APPLICANTS | **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**<br><br>**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC, and DOMINION FINCO INC.** |
| DOCUMENT | **BENCH BRIEF OF CREDIT SUISSE AG**<br><br>**(AVO Transaction)** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **OSLER,HOSKIN & HARCOURT LLP**<br>Barristers and Solicitors<br>Brookfield Place, Suite 2700<br>225 6 Ave SW<br>Calgary, Alberta T2P IN2 |


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| Matter No. | 1210529 |

## PART I - OVERVIEW

1. This Brief is filed by Credit Suisse AG, Cayman Islands Branch, as agent (the "**Agent**") for the first secured lenders (the "**First Lien Lenders**") to Dominion Diamond Mines ULC (**"Dominion**"), Washington Diamond Investments, LLC and various of their direct and indirect subsidiaries (together, the "**Applicants**"). The Agent supports the approval by this Court of the proposed AVO Transaction[1] and submits that any attempt by Arctic Canadian Diamond Company ("**ACDC**") to block the AVO Transaction based on its spurious claims should not be countenanced.

2. ACDC objects to the AVO Transaction based on its unfounded assertion that it purchased a claim (the "**Action**") brought by Dominion against its joint venture partner, Diavik Diamond Mines (2012) Inc. ("**DDMI**"). The Action relates to the purported mismanagement of the Diavik Mine ("**Diavik**") by DDMI. The Action alleges breach (among other things) by DDMI of the joint venture agreement ("**Diavik JVA**") between DDMI and Dominion, as well as negligence by DDMI in operating Diavik for the benefit of Dominion.[2]

3. ACDC relies on the terms of an Asset Purchase Agreement, dated December 6, 2020[3] (the "**Ekati APA**") to claim that the Action is its "property". However, ACDC is the purchase vehicle for the Ekati Mine and is owned by certain of the largest second lien noteholders. ACDC expressly did not acquire the Diavik JVA, or Dominion's interest in Diavik (the "**Diavik Interest**") or any liabilities or responsibilities whatsoever associated with Diavik. ACDC's position that the Action

[1] Capitalized terms have the same meaning as in the Sixteenth Report of the Monitor, filed Oct 6, 2021 [**Monitor's Sixteenth Report**] unless otherwise noted.

[2] The named parties to the Diavik JVA are Kennecott Canada Inc. and Aber Resources Limited, which are predecessors in interest to Dominion and DDMI.

[3] The Ekati APA is attached at Appendix J to the Monitor's Sixteenth Report.

is its property is not supported by the terms of the Ekati APA or the context in which it was negotiated.

4. More importantly, given the extensive prior negotiations and disputes among the stakeholders regarding the Diavik JVA, Dominion's interest in Diavik, and the priorities as between DDMI and the First Lien Lenders over the Diavik Production, ACDC's position is commercially absurd and manifestly was not and cannot have been intended. If the Action is ACDC's "property", ACDC has effectively acquired a claim against the Diavik Interest <u>in priority to DDMI and the First Lien Lenders</u>. In fact, if there are no further proceeds from Diavik after the Cover Payments have been satisfied, ACDC's position could entitle ACDC to recover in circumstances where there is no further recovery at all for the First Lien Lenders. The First Lien Lenders would never have supported the Ekati APA if this were the intended result.

5. Even if ACDC acquired only the proceeds of the Action (which is denied), the Action has no value to ACDC, regardless of whether the AVO Transaction is consummated, because there is no money to pursue it (ACDC does not offer to bear the costs, and in fact, has disclaimed any liability for such costs in the Ekati APA). Nor does ACDC have the standing or the ability to pursue it, since it expressly did not acquire the Diavik Interest, is not a party to the Diavik JVA and does not have access to most, if not all, of the documents and other evidentiary resources that would be required in order to move it forward.

6. Moreover, even if the Action could somehow be pursued to judgment, there is no reasonable prospect that the proceeds would be sufficient to satisfy the prior ranking claims (namely, DDMI's claims for unpaid Cover Payments, as well as the outstanding letters of credit ("**LCs**") posted by the First Lien Lenders in relation to Dominion's liability for its proportionate

share of Diavik end of life obligations) which currently total in excess of $308 million.[4] This amount must be paid in full before ACDC is entitled to receive a single dollar. Such liabilities will only increase with further delay.

7. If ACDC's position is accepted, it will torpedo the only viable transaction for realizing value for the Diavik Interest, to the very material prejudice of the First Lien Lenders and DDMI, among others (including royalty holders). ACDC proposes no alternate transaction, points to no viable prospect that such a transaction could be available if further marketing efforts were undertaken (in fact, all the evidence is to the contrary) and appears to expect these proceedings to continue indefinitely while the Action is pursued. ACDC maintains this position despite putting none of its own money on the table to fund this already costly proceeding[5] or to pursue the Action. Meanwhile, the collateral of the First Lien Lenders has, and will continue to be, eroded and their exposure to Diavik liabilities will increase if the resolution of this proceeding is delayed.

8. Given these facts, ACDC's objections are a transparent hostage play, a ploy designed to force the First Lien Lenders to sacrifice value that they are entitled to receive in priority to all other stakeholders under threat that the AVO Transaction will collapse entirely, leaving the First Lien Lenders with little or no further recovery. This is an illegitimate attempt by ACDC to confer a priority on itself (and indirectly, the second lien note holders)[6] that they did not bargain for and are not entitled to.

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4 See paras 35 and 44(h) of Monitor's Sixteenth Report.

5 As at September 24, 2021, professional fees incurred in the proceeding total more than $46 million. See para 18 of the Monitor's Fourteenth Report, dated February 22, 2021 and para 76 of the Sixteenth Report.

6 The two equity holders of ACDC, together with a third party that was signatory to the Support Agreement in respect of the Ekati APA, hold approximately 45% of the second lien notes. See p. 5:2-7 of the Transcript of Proceedings from December 11, 2020, attached at Appendix D to the Monitor's Sixteenth Report [**Transcript**].

9. The Agent submits that ACDC did not acquire the Action and that the Monitor is entitled to discontinue it and release DDMI from outstanding claims to allow the AVO Transaction to proceed. In the alternative, and in any event, at best, ACDC acquired a bare subordinate right to proceeds from the Action, which in the current circumstances, can have no value to ACDC. This Court has the jurisdiction to vest the Diavik Interest and other acquired assets in DDMI free and clear of this right. In the further alternative, and in any event, regardless of whether or not ACDC acquired the Action or some other interest in the Action, this Court should exercise its well-established jurisdiction to grant a targeted release in favour of DDMI from any claims or liabilities arising from the Action to allow the AVO Transaction to be completed and facilitate the timely wind-up of this CCAA proceeding.

10. ACDC has requested that the hearing to approve the AVO Transaction be adjourned on the basis that it requires further time to present its objections to this Court. The Agent opposes this request on the basis that delay in approving the AVO Transaction could jeopardize the RVO Transaction. Unless the AVO Transaction is approved, closed and implemented, DDMI has advised that it intends to object to the assignment of the Diavik JVA to the Creditor Trust and that, in compliance with the CCAA, cure costs must be paid as a condition of any Court-ordered assignment of the Diavik JVA. The AVO Transaction and the RVO Transaction are accordingly inextricably linked. Both transactions must be considered by the Court promptly, as they represent the only remaining opportunities to maximize value for the Applicants' estate and for the priority-ranking creditors.

## PART II - LAW AND ARGUMENT

### A. The AVO Transaction is the Best (and Only) Transaction

#### (a) The AVO Transaction Should be Approved

11. The AVO Transaction provides for the acquisition by DDMI of the Diavik Interest, as well as Dominion's share of the products and inventory produced from Diavik (the "**Dominion Production**") and the cash collateral held by the First Lien Lenders as security for the LCs issued by the First Lien Lenders with respect to Diavik (the "**Cash Collateral**"). DDMI is acquiring these assets free and clear of all Claims and Encumbrances. The purchase price consists of the Assumed Liabilities of more than $300 million, which includes the Cover Payment obligations, as well as the LC obligations.[7]

12. The Agent submits that there can be little doubt that the test for approval of the AVO Transaction under section 36(1) of the CCAA and *Soundair* has been satisfied. The basis for this conclusion is set out specifically in the Bench Brief filed by the Monitor.[8] The Agent does not repeat these submissions here, but emphasizes the following.

13. It is undisputable that significant efforts have been made on multiple occasions to market the Diavik Interest. Three strategic review processes occurred prior to the CCAA proceeding to solicit a buyer for the business or assets of Dominion, with the final such process resulting in the acquisition of the equity of the Applicants by Washington Diamond Investments Holdings II LLC ("**Washington**").[9]

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7 The AVO Agreement is attached as Appendix B to the Monitor's Sixteenth Report. See also para. 44 of the Monitor's Sixteenth Report.

8 Bench Brief of the Monitor, filed October 7, 2021.

9 Monitor's Sixteenth Report, para. 4.

14. The sale and investment solicitation process ("**SISP**") was the fourth marketing process undertaken by the Applicants since 2015 and it was based on the Stalking Horse Bid made by Washington. The SISP was approved by this Court in this CCAA proceeding and was conducted over a five-month period between April and September 2020 by the Applicants and Evercore, as financial advisor to the Applicants, under the Monitor's supervision.[10] The SISP generated no third-party transactions, leaving the Stalking Horse Bid as the only option. The Stalking Horse Bid excluded the Diavik Interest and the Diviak JVA from the scope of assets to be acquired thereunder, and was eventually terminated when a condition could not be satisfied.[11]

15. The SISP did not identify any party who was willing and able to acquire the Diavik Interest, let alone at a value that would satisfy the claims of the First Lien Lenders in full, as well as the amounts owed to DDMI for Cover Payments, with proceeds left over to satisfy lower priority claims.[12] As a result, various complex disputes have remained ongoing between Dominion, the Agent and DDMI, which have only been resolved by means of the Support Agreement after lengthy discussions and concerted efforts by both DDMI and the Agent to reach a consensus on a business resolution.[13]

16. It is therefore clear – as confirmed by the Monitor – that, subject only to the resolution of the ACDC objection, the AVO Transaction is in the best interests of Dominion and its stakeholders and presents the highest realizable value for the Acquired Assets.[14] It is the only viable option that: (a) provides recoveries for the First Lien Lenders (whose priority is not disputed) and ends the accrual of ongoing interest and LC fees; (b) facilitates the payment of all outstanding royalties; (c)

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[10] Monitor's Sixteenth Report, paras. 5 and 51(a).

[11] Monitor's Sixteenth Report, paras. 7-9 and 51(b).

[12] Monitor's Sixteenth Report, paras. 5-7, 51(a) and 51(c).

[13] Monitor's Sixteenth Report, paras. 32, 37-38, and 51(k).

[14] Monitor's Sixteenth Report, paras. 51 and 65.

resolves the ongoing and costly disputes between Dominion, the Agent and DDMI regarding the appropriate treatment of the Section 4 Diamonds and the rapidly escalating amounts of cash calls and corresponding Cover Payments required by DDMI to maintain the Diavik Interest, and (d) facilitates a prompt exit in the near term from this already lengthy and costly CCAA proceeding.[15]

17. It is well-established that the business judgment of the Monitor on these matters is worthy of significant deference by this Court.[16]

### (b) ACDC Should Not Be Allowed to Derail the AVO Transaction

18. ACDC is the vehicle designated pursuant to the Ekati APA as purchaser of the Ekati Mine by certain of the substantial holders of the Applicants' senior secured second lien notes (the "**Bidders**"). The Ekati APA was approved by this Court on December 11, 2020.[17] The Bidders are the current equity holders of ACDC.

19. The Bidders fully participated in the SISP and, after evaluating the assets and completing significant due diligence, did not offer to acquire the Diavik Interest or the Diavik JVA.[18] Similarly, when the ACDC Transaction was negotiated and closed, as more discussed in the sections below, the Bidders expressly declined to acquire the Diavik Interest or the Diavik JVA.[19] The Bidders did acquire certain "Diavik Realization Assets", as defined in the Ekati APA, but such acquisition did not include the Action for the reasons submitted below and, in any event, remained subject to the continuing liens and charges of the First Lien Lenders.[20]

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15 Monitor's Sixteenth Report, para. 51.

16 See, for example, *Re Calpine Energy Ltd.*, 2007 ABQB 49 at para. 53 **[TAB 2]**; *Re AbitibiBowater*, 2010 QCCS 1742 at paras. 70 to 73 **[TAB 3]**.

17 Monitor's Sixteenth Report, para. 12.

18 Monitor's Sixteenth Report, paras. 12 and 51(b).

19 Ekati APA, Appendix J to the Monitor's Sixteenth Report at ss. 3.2(a) and 3.4(g).

20 Monitor's Sixteenth Report, para. 14; Ekati APA, Appendix J to the Monitor's Sixteenth Report at s. 3.1(b).

20. Even if ACDC has acquired the proceeds of the Action (if any), what would be the result for this CCAA proceeding and its stakeholders if ACDC's objection is upheld and DDMI walks away from the AVO Transaction, which it has said that it will do if the Monitor cannot discontinue the Action and release DDMI from all outstanding claims, including the Action? Would the Monitor have to run a new SISP, in a vain attempt to find another buyer for the Diavik Interest that would satisfy the outstanding Cover Payments and provide recoveries for both the First Lien Lenders and ACDC?

21. Or would the First Lien Lenders and DDMI be required to wait for the potentially lengthy time period required to pursue the Action to judgment, assuming ACDC even had a genuine intention of doing so (which it does not)? ACDC has taken no steps to change the solicitor of record or pursue the litigation in the eight months since closing of the Ekati APA. Only now, when there is a transaction that eliminates the priority claim of DDMI and the exposure of the First Lien Lenders does ACDC conveniently invoke its so-called rights in relation to the Action.

22. If ACDC's objection is sustained, neither available option is feasible, fair or reasonable in the circumstances. Apart from the fact that the First Lien Lenders and DDMI would lose the benefits of the AVO Transaction, both alternatives risk prolonging this proceeding indefinitely to the material and irremediable prejudice of both the First Lien Lenders and DDMI. Both options require significant funding and assume such funding would be available, which is by no means apparent.

23. With respect to the first option to run a new marketing process, there can be no suggestion that the SISP was insufficiently exhaustive or not appropriately conducted. Once such a process has received court approval, it is well-established that the fairness of the process can be presumed,

absent any unfairness in the implementation of that process, and that the integrity of such process must be maintained.[21]

24. In any event, it is far too late to impugn the fairness or the scope of the SISP. The Bidders and other stakeholders had an ample opportunity to, and did, raise such matters at the time the SISP was approved. Moreover, the fact that the Diavik Interest was not acquired either as a result of the SISP or as part of the ACDC Transaction has been well-known for almost a year, without even a flicker of interest from any potential buyer, other than DDMI.

25. Even if ACDC could somehow establish that it is appropriate to reopen marketing efforts for the Diavik Interest (which it cannot), there is no funding available to do so. After the ACDC Transaction closed, future funding for the Dominion estate was provided by means of a US $1 million Diavik Realization Account and a US $250,000 Wind-Down Account. The funds in the Diavik Realization Account are close to being exhausted. The remaining funds are insufficient to defray the costs of further marketing of the Diavik Interest or to pursue the Action, and neither purpose was contemplated when these accounts were established.[22]

26. The First Lien Lenders are not prepared to fund any further marketing processes. The results of past processes, including the SISP, demonstrate that the likelihood is remote (or non-existent) that any third-party transaction would materialize that would satisfy the first-ranking obligations of the First Lien Lenders and of DDMI, let alone provide excess recoveries for any lower ranking creditor, such as the second lien note holders.[23] The First Lien Lenders have already

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[21] See, for example, *Re Grant Forest Products Inc.*, 2010 ONSC 1846 at paras. 29 to 33 **[TAB 4]**.

[22] Monitor’s Sixteenth Report at para. 51(i); Transcript, Appendix D to the Monitor’s Sixteenth Report, p. 14: 27 to 38.

[23] Monitor’s Sixteenth Report at paras. 51(c) and 51(n).

provided ample opportunity and have delayed their recoveries long enough for Dominion to canvass the market for available transactions. It is now time for these proceedings to wind down.

27. Notwithstanding ACDC's apparent position that the recoveries offered by the AVO Transaction are not sufficient, ACDC has not indicated any willingness to provide the material additional funding that would be required for Dominion to engage in further marketing efforts to substantiate ACDC's vain hope that there is a better transaction out there somewhere. Nor can it provide any credible basis to conclude that such efforts would bear fruit, unlike the SISP and the other prior processes conducted at great expense to the Applicants and their stakeholders.

28. With respect to the second option, if ACDC proposes instead that the First Lien Lenders be required to wait for ACDC or the Monitor to pursue the Action to judgment, however long that may take, this approach is equally unworkable and manifestly unfair. The Action has not moved beyond the pleadings stage and will take years to resolve. More fundamentally, for the reasons set out more fully below, it is apparent that ACDC is not capable of pursuing the Action.

29. It is also apparent that even if ACDC has acquired the Action and could legally and practically pursue it (which it cannot), it has no genuine intention of actually doing so. At no time has ACDC indicated any intention to fund the costs of pursuing the Action and, in fact, expressly disclaimed in the Ekati APA any liability relating to claims, actions, litigations, and proceedings with respect to the Diavik JVA or the Diavik Interest.[24] This fact alone gives rise to the incontrovertible inference that ACDC is simply using the Action to hold the First Lien Lenders and DDMI hostage.

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[24] Ekati APA, Appendix J to the Monitor's Sixteenth Report at ss. 3.3(e) and 3.4(g).

30. Equally or more problematic is that the Notice of Civil Claim filed in the Action does not provide even a preliminary quantification of the damages claimed.[25] Nor does ACDC provide any assessment of likely recoveries (compared to costs), assuming ACDC were prepared to fund the costs of pursuing the Action to judgment.

31. If ACDC is genuinely asking the First Lien Lenders to sacrifice the "bird in the hand" for an illusory "bird in the bush" (as opposed to simply attempting to force the First Lien Lenders to make hostage payments to ACDC to allow the AVO Transaction to be completed), it is incumbent upon ACDC to demonstrate how this sacrifice will not leave the First Lien Lenders materially worse off. It is entirely fanciful to imagine that presently unquantified recoveries from the Action could possibly exceed the over $308 million of priority claims by DDMI and the First Lien Lenders.

32. Under either of the options available upon the collapse of the AVO Transaction, the collateral of the First Lien Lenders will further erode, their exposure to liabilities to DDMI in relation to the Diavik Interest will increase, and the prospect of any recovery for their claims will simply vanish. Allowing one subordinate stakeholder to hijack the only transaction available that can provide recoveries for priority-ranking stakeholders is fundamentally antithetical to principles of CCAA law and the priorities negotiated by these sophisticated parties.

## B. The Action Has No Value to ACDC

### (a) ACDC Did Not Acquire the Action

33. It is a condition of the AVO Agreement that the Monitor shall discontinue the Action and release DDMI from all outstanding claims. ACDC's challenge to the Monitor's authority to do so

[25] Notice of Civil Claim, Monitor's Sixteenth Report, Appendix E.

is based on ACDC's assertion that it acquired the Action under the Ekati APA. The Agent submits that this position is incorrect under the plain language of the Ekati APA, properly interpreted, and is commercially absurd.

34. Like any other commercial agreement, the Ekati APA must be interpreted by reading its terms as a whole, taking into account the factual matrix at the time it was negotiated and concluded.[26] Where possible, a court should not interpret a contract in a manner that generates a commercially unrealistic or absurd result.[27]

35. ACDC's position is apparently based on a literal, decontextualized interpretation of section 3.1(n) of the Ekati APA, which forms part of the description of the "Acquired Assets" under the Ekati APA. Specifically, this provision states that ACDC acquired: "all rights, options, Claims or causes of action of any Seller or other applicant against any party arising out of events occurring prior to the Closing, including and, for the avoidance of doubt, arising out of events occurring prior to the Filing Date, and including … (ii) any and all causes of action under applicable Law."[28]

36. However, ACDC is interpreting this provision out of context. It is clear from the terms of the Ekati APA, read as a whole, and from the context of the ACDC Transaction that it was never intended that ACDC would step into the shoes of Dominion in relation to the Diavik Interest. It was therefore never the intention that ACDC would acquire the Action, which relates exclusively to the Diavik Interest and the terms of the Diavik JVA. ACDC's interpretation is commercially unreasonable and therefore should be rejected.

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[26] See, for example, *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para. 47 **[TAB 5]**.

[27] See, for example, *Harco Enterprises Ltd. v. Knelsen Sand and Gravel Ltd.*, 2021 ABQB 263 at para. 159 **[TAB 6]**; *Canlanka Ventures Ltd. v. Capital Direct Lending Corp.*, 2021 ABCA 115 at paras. 31 and 32 **[TAB 7]**.

[28] Ekati APA, Appendix J to the Monitor's Sixteenth Report at section 3.1(n).

### (i) Terms of the Ekati APA

37. The express terms of the Ekati APA demonstrate that ACDC had no intention of acquiring Dominion's interest in the Diavik JVA or any liabilities associated with the Diavik Interest. Thus:

(a) Section 3.3(e) of the Ekati APA, which addresses "Assumed Liabilities" (i.e. those liabilities that ACDC was prepared to assume) includes any and all liabilities relating to Claims, Actions, suits, arbitrations, litigation matters, proceedings, investigations or other Actions arising from the operation of the Business as it relates to Ekati and the Acquired Assets, but in all cases excluding liability for "Claims, Actions, suits, arbitrations, litigation matters, proceedings, investigations or other Actions… with respect to Excluded Contracts or any other Excluded Assets."[29]

(b) "Excluded Assets" has the meaning set out in section 3.2 of the Ekati APA and expressly excludes the "Diavik Joint Venture Agreement".[30]

(c) Further, section 3.4 of the Ekati APA (which addresses "Excluded Liabilities"), expressly excludes any obligation on ACDC to "pay, perform or otherwise discharge…any all Liabilities of any Seller in respect of the Diavik Joint Venture Agreement, the Diavik Joint Venture, the Diavik Joint Venture Interest, the Diavik Diamond Mine and the Diavik Realization Assets." Section 3.4 of the Ekati APA applies "[n]otwithstanding anything in this Agreement to the contrary".[31]

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[29] Ekati APA, Appendix J to the Monitor's Sixteenth Report at section 3.3(e). (emphasis added)

[30] Ekati APA, Appendix J to the Monitor's Sixteenth Report at section 3.2.

[31] Ekati APA, Appendix J to the Monitor's Sixteenth Report at section 3.4.

38. ACDC's position that it acquired the Action under the Ekati APA results in commercial absurdity. If ACDC is correct that it has acquired the Action, it has essentially acquired the benefit of the Action (if any), without any of the related liabilities required to realize on that benefit, (including the costs required to pursue the Action to judgment, any costs that may be awarded against it by the Court, or any counterclaims that may be filed by DDMI). Instead, ACDC expressly turned its mind to the scope of litigation-related liabilities it was prepared to assume under the Ekati APA and, consistent with the scope of Acquired Assets under the Ekati APA, excluded any and all liabilities relating to claims, proceedings and litigations with respect to the Diavik JVA and the Diavik Interest.

39. The Agent therefore submits that the more commercially reasonable interpretation of the Ekati APA is that sections 3.3(e) and 3.4 effectively narrow the scope of what ACDC was acquiring under section 3.1(n). In other words, because the Action relates exclusively to Diavik and to Dominion's rights under the Diavik JVA, section 3.3(e) must be read as excluding the Action from section 3.1(n), consistent with the fact that ACDC was not acquiring either the Diavik Interest or the Diavik JVA.

40. This interpretation is further supported by the following:

(a) ACDC does not have the legal standing to pursue the Action in its own right. The Action relates solely and exclusively to the management of Diavik, alleging breach of the Diavik JVA to which ACDC is not a party either directly or indirectly, and negligence by DDMI in its operation of Diavik, in respect of which ACDC has no interest;

(b) If ACDC had intended to acquire the Action under the Ekati APA, it is anomalous that it acquired no corresponding rights to any of the operational, financial, technical, engineering, geological or other records that would be necessary in order to prove the allegations in the Action that DDMI mismanaged Diavik. These rights cannot be inferred by implication – to the contrary, all such rights would be governed by the Diavik JVA, including the confidentiality provisions of that agreement. The Diavik JVA is expressly excluded from the assets acquired by ACDC.[32]

41. Finally, given the extensive prior negotiations and disputes among the stakeholders regarding the Diavik JVA, Dominion's interest in Diavik, and the priorities as between DDMI and the First Lien Lenders over the Diavik Production, ACDC's position is commercially absurd for the further reason that, if the Action is ACDC's "property", ACDC has effectively acquired a claim against the Diavik Interest <u>in priority to DDMI and the First Lien Lenders</u>. In fact, if there are no further proceeds from Diavik after the Cover Payments have been satisfied, ACDC's position could entitle ACDC to recover in circumstances where there is no further recovery at all for the First Lien Lenders. This result was manifestly not the intention of any party. Moreover, the First Lien Lenders would never have supported the Ekati APA if this were the intended result.

**(ii) The Factual Matrix Supports this Interpretation**

42. At the time the Ekati APA was concluded, ACDC did not want to and did not intend to acquire the Diavik Interest or the Diavik JVA. It therefore goes without saying that it was manifestly not the intention that ACDC was to have the right to use the terms of the Ekati APA as a hammer in future transactions involving the Diavik JVA and the Diavik Interest, to the material prejudice of both DDMI and the First Lien Lenders.

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32 Ekati APA, Appendix J to the Monitor's Sixteenth Report at section 3.2(a).

43. Apart from anything else, this intention was made abundantly clear in the hearing to approve the Ekati APA. There are multiple examples in the transcript of the hearing in which all parties were assured that, even though DDMI objected that the words of the Ekati APA, read literally, could potentially be prejudicial to its interests, this was not the case. Specifically:

(a) "DDMI is not adversely affected by this transaction";[33]

(b) "There is nothing here that negatively impacts [DDMI] …"[34]

(c) "This transaction is irrelevant to [DDMI]…";[35]

(d) "I think it's fair to say that those provisions can also be interpreted in a way that do not prejudice DDMI at all and so the discussions and the process we went through this week resulted in the confirmation of the company and the first lien lenders and the Ad Hoc Group that, yes, they interpreted the provisions in a way that would not prejudice [DDMI]. You've heard that on the record today from Dominion and I would submit that admission on the record gives DDMI protection."[36]

(e) "I would suggest that it will be virtually impossible for Dominion or the purchaser to come back later and try to take a contrary position to what they've told you today. So we don't think there needs to be an amendment to the APA on that basis and we do believe that the interpretation of the company and the first lien lenders and the Ad Hoc Group have confirmed does not prejudice DDMI."[37]

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33 Transcript, Appendix D to the Monitor's Sixteenth Report, p. 11: 11 (Mr. Rubin).

34 Transcript, Appendix D to the Monitor's Sixteenth Report, p. 25: 21-22 (Mr. Rubin).

35 Transcript, Appendix D to the Monitor's Sixteenth Report, p. 27: 7 (Mr. Wasserman).

36 Transcript, Appendix D to the Monitor's Sixteenth Report, p. 57: 38 – 58: 2 (Mr. Simard).

37 Transcript, Appendix D to the Monitor's Sixteenth Report, p. 58: 5-9 (Mr. Simard).

44. In the context of addressing objections from DDMI's counsel to the Ekati APA, Dominion's counsel made it clear that there was no need to amend the Ekati APA to exclude everything in relation to Diavik to ensure that DDMI would not be prejudiced because the terms of the Ekati APA already had that effect.[38] Counsel for the Monitor confirmed this interpretation.[39]

45. If this Court accepts that, properly interpreted, the Ekati APA did not transfer the Action to ACDC, the Monitor is entitled to discontinue the Action and grant the release as contemplated under the AVO Agreement and this Court can and should direct the Monitor to do so.

**(b) There Will Be No Proceeds from the Action**

46. In the alternative, if ACDC acquired any rights at all in relation to the Action, the terms of the Ekati APA are plain that any such assignment was limited to the proceeds, if any, of the Action. Under this interpretation, Dominion retains the status as plaintiff, with the right and responsibility (if any) to pursue it. This interpretation is consistent with the representations made by Dominion's counsel in the hearing to approve the Ekati APA, in which it was made clear that if ACDC was purchasing anything at all in relation to Diavik (which is denied), it was merely purchasing a "receivable".[40]

47. ACDC acquired the "Diavik Realization Assets", as defined in the Ekati APA. "Diavik Realization Assets" means:

> … all of Sellers' rights and interests in relation to the receipt of realizations and recoveries from or in respect of the Diavik Joint Venture Interest (including, without limitation, all receivables, diamond production entitlements, claims, sales proceeds, cash and other collateral given for the

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38 Transcript, Appendix D to the Monitor's Sixteenth Report, p. 13: 1-19 (Mr. Rubin).

39 Transcript, Appendix D to the Monitor's Sixteenth Report, p. 57:38 – 58:9.

40 See Transcript, Appendix D to the Monitor's Sixteenth Report, p. 9: 22 to 28 (Mr. Rubin). Note that there is no reference to any "receivable" that might be generated by the Action. The submissions at the hearing related exclusively to proceeds that might flow to Dominion from the Diavik Production, once liability for the Cover Payments was satisfied.

> benefit of the First Lien Lenders or other persons, and other assets realized or realizable by or on behalf of Sellers) (collectively, the "Diavik Realization Assets"), which shall be assigned to Purchaser <u>subject only to the continuing liens and charges of the First Lien Lenders</u> pursuant to the Pre-filing Credit Agreement until such time as all letters of credit issued by the First Lien Lenders in respect of the Diavik Diamond Mine shall have been cash collateralized or cancelled and all related fees shall have been paid; (emphasis added) [41]

48. Even though the literal wording of this definition is potentially broad, there is no express reference to the Action or to any proceeds thereof. The Agent submits that this concept was intended to refer to the diamonds (and the proceeds thereof) that Dominion alleged that it was entitled to receive from DDMI, in excess of its share of the Cover Payments. This is clearly the basis on which this concept was described by Dominion's counsel and others in the hearing to approve the Ekati APA.[42]

49. This interpretation is also consistent with the fact that there is no evidence whatsoever that ACDC was of the view, in conducting its diligence in relation to the Ekati APA or in any representations made during the Ekati APA approval hearing, that it was acquiring the proceeds of the Action. There certainly is no evidence suggesting that it viewed the Action (or its proceeds) as having any value at all. In particular:

(a) In light of the extensive discussions at the Ekati APA approval hearing which emphasized that ACDC was not acquiring anything in relation to Diavik other than a potential receivable in relation to diamond collateral (that may or may not have value), it is surprising that ACDC's counsel made no mention at all of ACDC's current position that it had acquired either the Action itself or its proceeds.

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41 Ekati APA, Appendix J to the Monitor's Sixteenth Report at section 3.1(b).

42 See Transcript, Appendix D to the Monitor's Sixteenth Report, pp. 10: 18-25, 11: 21-32, 12: 14-18 (Mr. Rubin); p. 68: 28-31 (Mr. Kashuba).

(b) If ACDC genuinely believed that it was entitled to proceeds from the Action (leaving aside, for a moment, the fact that any such entitlement ranks behind the priority claims of DDMI and the First Lien Lenders), surely it would have made some provision for those proceeds to be realized, including for the funding of the Action.

(c) Even if ACDC were prepared to fund the Action, it is incumbent on ACDC to demonstrate that there is a realistic prospect that the Action will (eventually) generate sufficient proceeds to result in value flowing to ACDC. There is no basis on which this Court could reach this conclusion.

(d) There are currently in excess of $308 million of prior-ranking liabilities owed to DDMI and the First Lien Lenders. These liabilities may materially increase as Diavik approaches the end of its mine life. Further delay and costs only serve to prejudice the First Lien Lenders and DDMI – not ACDC.

50. Further, even if on the most generous reading of the Ekati APA, the Action constitutes a "Diavik Realization Asset", ACDC purchased only the "receivable" or the "proceeds" that might be realized if the Action had proceeded to judgment. As Dominion's counsel stated in the Ekati APA approval hearing, "what they're purchasing … are the receivables to the extent that they are any receivables that are paid to Dominion by DDMI."[43] ACDC can point to no assurances that any such proceeds would ever arise and there is no mechanism in the Ekati APA or elsewhere providing for the Action to be pursued to judgment.

[43] Transcript, Appendix D to the Monitor's Sixteenth Report, p. 12: 39-40 (emphasis added). Note again that this statement was made in the context of the discussion of the receivables from the diamonds, not the Action, but it applies equally to any other receivable that could fall within the definition of Diavik Realization Assets.

51. The Action can only generate a "receivable" if the Action is prosecuted to judgment and Dominion (or its successor plaintiff) is successful in obtaining a final, non-appealable damages award against DDMI. However, ACDC has no ability to cause this to occur. The Action is in the preliminary pleading stages and no party has taken any material step to move it forward since it was commenced. More to the point, ACDC is not legally and practically able to bring it forward:

(a) ACDC has no standing to do so. It is not a party to the Diavik JVA and has no legal interest in the Diavik Interest of any other kind. DDMI has never owed a duty of care to ACDC. ACDC also has no access to the complex operational, financial, technical and other documents needed to prove the allegations made in the Action.

(b) To the extent that ACDC has a bare subordinate right to proceeds from the Action, if any (which is denied), it has expressly disavowed all liabilities associated with prosecuting the Action to judgment under the terms of the Ekati APA.[44] Nor is ACDC volunteering to put up the necessary funding. The Action is in its infancy and by its nature, raises complex issues of fact and law that will be both costly and time consuming to resolve.

(c) ACDC can point to no legal basis on which it could compel Dominion to pursue the Action on its behalf. Nor is there any limitation in the Ekati APA on Dominion's right to convey the Diavik JVA or the Diavik Interest to a purchaser.

52. If this Court concludes, therefore, that ACDC acquired a bare, subordinate right to the proceeds of the Action as a "Diavik Realization Asset", the Agent submits that this subordinate right can be vested out pursuant to the Court's jurisdiction under sections 11 and 36 of the CCAA.

44 Ekati APA, Appendix J to the Monitor's Sixteenth Report at sections 3.3(e) and 3.4(g).

Section 11 gives this Court the jurisdiction to make any order it thinks fit.[45] Section 36(6) of the CCAA gives the Court the jurisdiction to vest the debtor's assets in a purchaser "free and clear of any security, charge <u>or other restriction</u>", leaving the proceeds of sale, if any, to stand in the stead of the assets for the purposes of the particular claim or restriction.[46]

53. In the circumstances, there will be no such proceeds, as all such proceeds are earmarked for DDMI and the First Lien Lenders. Those interests must be satisfied before ACDC could recover anything in relation to the Action.

### C. This Court Should Order a Release of DDMI in relation to the Action

54. In any event, whether ACDC bought the entire Action, or just a bare subordinate right to proceeds, it is abundantly clear that the Action has no value to ACDC. This Court therefore has the jurisdiction under section 11 of the CCAA and applicable case law to grant a third party release to DDMI from any liability (which is currently theoretical at best) that could potentially arise from the Action.

55. The factors that will be considered by a Court in determining whether to approve an order containing a third party release are well-established. In connection with a CCAA plan, the Ontario Court of Appeal in *Metcalfe* listed seven such factors:

(a) the parties to be released are necessary and essential to the restructuring of the debtor;

(b) the claims to be released are rationally related to the purpose of the plan and necessary for it;

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45 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [**CCAA**] at section 11. **[TAB 1]**.

46 CCAA at section 36(6) **[TAB 1]**.

(c) the plan cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan;

(e) the plan will benefit not only the debtor companies but creditors generally;

(f) the voting creditors who have approved the plan did so with knowledge of the nature and effect of the releases; and

(g) the releases are fair and reasonable and not overly broad or offensive to public policy.[47]

56. These factors are not exhaustive. They do not all have to be present in order for a third party release to be justified in particular circumstances and they do not necessarily receive equal emphasis. The Court is entitled to take into account the particular circumstances of the case and the purpose of the CCAA.[48]

57. CCAA Courts have clarified that the *Metcalfe* factors, with appropriate modifications, apply to provide guidance to a Court in determining whether to grant a third party release in an order giving effect to a sale transaction.[49]

58. When faced with an objection to a third party release, the Court is entitled, where appropriate, to examine the quality of the claims that an objecting party wishes to maintain.[50] As Koehnen J. recently held in *Green Relief*, it may be premature for the Court to fully assess the strength of a particular claim that is sought to be released. However, the Court should not ignore

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47 *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 71, leave to appeal to SCC refused **[TAB 8]**.

48 *Re SkyLink Aviation Inc.*, 2013 ONSC 2519 at para. 30 **[TAB 9]**; *Re Green Relief Inc.*, 2020 ONSC 6837 at para. 28 [*Green Relief*] **[TAB 10].**

49 *Re Nelson Education Ltd.*, 2015 ONSC 5557 at para. 49 **[TAB 11]**. See also *Green Relief* at para. 26 **[TAB 10]**, citing *Re Nemaska Lithium Inc.,* 2020 QCCS 3218.

50 *Green Relief* at para. 29 **[TAB 10]**.

the nature of the proposed claim and the Court's impression of the claim is a relevant factor to be considered in determining whether to grant the release. Although there is no formula for applying this factor, Koehnen J. held that "the thinner and more speculative a claim, the more likely a court may be to grant a release.[51]

59. The fact that the claim at issue in *Green Relief* had only nuisance value weighed heavily in favour of the requested release.[52]

60. Ultimately, the effect on the party whose claim is being released is balanced against the consequences to creditors if the proposed restructuring transaction does not go ahead. As Koehnen J. noted in agreeing to grant the release in *Green Relief*, "if I balance the right to the Objectors to pursue the releasees … against the right of the creditors to maximize recovery against the Green Relief estate, there is simply no contest."[53]

61. The *Metcalfe* factors, as modified, are clearly satisfied in this case:

(a) DDMI's participation is essential to the consummation of the AVO Transaction, and ultimately to the resolution of this already lengthy and costly CCAA proceeding in a manner that maximizes value. DDMI is the only available buyer for the Diavik Interest, which is the principal remaining asset of Dominion. Without the AVO Transaction, Dominion will be exposed indefinitely to its share of the rising costs incurred in respect of Diavik, as it nears the end of its mine life. Dominion will remain embroiled in the ongoing time-consuming and expensive

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51 *Green Relief* at para. 30 **[TAB 10]**.

52 *Green Relief* at para. 48 **[TAB 10]**.

53 *Green Relief* at para. 57 **[TAB 10]**.

disputes with DDMI regarding the operation of the Diavik Interest and the treatment of the Section 4 Diamonds.

(b) The proposed release is targeted only to relieve DDMI of all liability for the Action. It benefits no other party and affects no other claim. It is, in fact, far more targeted than third party releases granted in other CCAA proceedings. The release directly relates to the AVO Transaction, in which DDMI is acquiring the Diavik Interest. It would be commercially unreasonable to expect DDMI to provide the significant value contemplated under the AVO Agreement (anticipated to exceed $300 million) while continuing to be subject to claims by Dominion for past wrongdoing in operating a joint venture that no longer exists (and that ACDC deliberately chose not to acquire).

(c) DDMI has made it clear that it will not proceed with the AVO Transaction if the Action is not discontinued or released. This is typical of transactions of this nature. DDMI is acquiring the Diavik Interest and related assets free of all Claims. The only way to give effect to this aspect of the AVO Transaction is for the Action against DDMI to either be discontinued or released. If DDMI remained subject to the Action, there is no guarantee that it would be prepared to provide the same value.

(d) DDMI is contributing significant value under the AVO Transaction, particularly in the form of the release of the Cover Payment Obligations, as well as LC Obligations posted by the First Lien Lenders in respect of Diavik. No other stakeholder – including ACDC – has been prepared to provide any value at all for the Diavik Interest, let alone value of this magnitude.

(e) The AVO Transaction will benefit the Applicants by providing value for their principal remaining asset, and facilitating their exit in the near term from this lengthy CCAA proceeding. Since no other acquiror of the Diavik Interest has been identified, it is plain that the AVO Transaction will also maximize value for the Diavik Interest, as well as providing full recoveries for the First Lien Lenders in respect of their security.

(f) The fact that there are no recoveries for the second lien note holders is of no significance. This is a product of the priority they negotiated, together with the very material claims of DDMI and the First Lien Lenders that rank ahead of them. DDMI cannot be required to provide additional value for the second lien note holders, and there is no basis for compelling the First Lien Lenders to do so either. There is nothing unfair or nefarious in this result.

(g) The principal objector to the release – ACDC – will have notice of the proposed release and an ample opportunity to make submissions to this Court in support of its objections – including demonstrating why this Court should allow ACDC to use the Action, which has no value to ACDC, to jeopardize the only transaction that will provide value for the Diavik Interest and facilitate the Applicants' exit from these proceedings. Although it is difficult to envisage any other stakeholder who could legitimately object to the proposed release, all stakeholders on the service list have received notice of the release and are entitled to raise objections, if any.

(h) The release is fair and reasonable. It is not overly broad (in fact, the opposite) and it is not contrary to public policy. The Action has no value to ACDC for all the reasons that have been described in this Brief. Its only significance to ACDC is its threat value in ACDC's illegitimate bid to compel the First Lien Lenders to forgo value that they have bargained for in order to prevent ACDC from derailing the AVO Transaction. This would reverse the priorities that were freely and fully negotiated by the second lien note holders and should not be countenanced.

62. In summary, if ACDC acquired any interest at all in the Action (which is denied), it is entirely appropriate to grant DDMI the proposed release in furtherance of the AVO Transaction. The AVO Transaction represents the only available path out of these CCAA proceedings within a reasonable timeline. Its approval, together with the proposed release, is consistent with the objectives of the CCAA to ensure an orderly and efficient wind down of the Applicants' business that maximizes value for creditors. The AVO Transaction, together with the release, is in the best interests of the Applicants and their principal stakeholders and should therefore be approved.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF OCTOBER, 2021**

**OSLER, HOSKIN & HARCOURT LLP**

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

## LIST OF AUTHORITIES

| TAB | Description |
|---|---|
| 1. | *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 |
| 2. | *Re Calpine Energy Ltd.*, 2007 ABQB 49 |
| 3. | *Re AbitibiBowater*, 2010 QCCS 1742 |
| 4. | *Re Grant Forest Products Inc.*, 2010 ONSC 1846 |
| 5. | *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 |
| 6. | *Harco Enterprises Ltd. v. Knelsen Sand and Gravel Ltd.*, 2021 ABQB 263 |
| 7. | *Canlanka Ventures Ltd. v. Capital Direct Lending Corp.*, 2021 ABCA 115 |
| 8. | *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 |
| 9. | *Re SkyLink Aviation Inc.*, 2013 ONSC 2519 |
| 10. | *Re Green Relief Inc.*, 2020 ONSC 6837 |
| 11. | *Re Nelson Education Ltd.*, 2015 ONSC 5557 |

# TAB 1

CANADA

CONSOLIDATION

# Companies’ Creditors Arrangement Act

R.S.C., 1985, c. C-36

Current to September 22, 2021

Last amended on November 1, 2019

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CODIFICATION

# Loi sur les arrangements avec les créanciers des compagnies

L.R.C. (1985), ch. C-36

À jour au 22 septembre 2021

Dernière modification le 1 novembre 2019

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http://lois-laws.justice.gc.ca

available to any person specified in the order on any terms or conditions that the court considers appropriate.

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

### General power of court

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

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

### Relief reasonably necessary

**11.001** An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

### Rights of suppliers

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

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

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

2005, c. 47, s. 128.

### Stays, etc. — initial application

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

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

peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

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

### Pouvoir général du tribunal

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

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

### Redressements normalement nécessaires

**11.001** L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

### Droits des fournisseurs

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

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

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

2005, ch. 47, art. 128.

### Suspension : demande initiale

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

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

### Restriction on disposition of business assets

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

### Notice to creditors

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

### Factors to be considered

**(3)** In deciding whether to grant the authorization, the court is to consider, among other things,

**(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

**(b)** whether the monitor approved the process leading to the proposed sale or disposition;

**(c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

**(d)** the extent to which the creditors were consulted;

**(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and

**(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

### Additional factors — related persons

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

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

**(b)** the consideration to be received is superior to the consideration that would be received under any other

### Restriction à la disposition d'actifs

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

### Avis aux créanciers

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

### Facteurs à prendre en considération

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

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

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

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

**d)** la suffisance des consultations menées auprès des créanciers;

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

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

### Autres facteurs

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

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

**b)** d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de offer made in accordance with the process leading to the proposed sale or disposition.

### Related persons

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

**(a)** a director or officer of the company;

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

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

### Assets may be disposed of free and clear

**(6)** The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

### Restriction — employers

**(7)** The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

### Restriction — intellectual property

**(8)** If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269.

toute autre offre reçue dans le cadre du projet de disposition.

### Personnes liées

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

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

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

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

### Autorisation de disposer des actifs en les libérant de restrictions

**(6)** Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

### Restriction à l'égard des employeurs

**(7)** Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(5)a) et (6)a) s'il avait homologué la transaction ou l'arrangement.

### Restriction à l'égard de la propriété intellectuelle

**(8)** Si, à la date à laquelle une ordonnance est rendue à son égard sous le régime de la présente loi, la compagnie est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (6), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78; 2017, ch. 26, art. 14; 2018, ch. 27, art. 269.

# TAB 2

2007 ABQB 49
Alberta Court of Queen's Bench

Calpine Canada Energy Ltd., Re

2007 CarswellAlta 156, 2007 ABQB 49, [2007] A.W.L.D. 1172, 155 A.C.W.S. (3d) 77, 28 C.B.R. (5th) 185

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

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

B.E. Romaine J.

Heard: January 22, 2007
Judgment: February 8, 2007
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Q.C., Sean I. Collins, Fred Myers, Jay A. Carfagnini, Brian Empey for CCAA Debtors
Patrick McCarthy, Q.C., Josef A. Krueger for Monitor
A. Robert Anderson, Q.C., Kevin P. McElcheran (present by telephone) for Independent Trustees of Calpine Commercial Trust
John Finnigan, Robert Thornton for ULC2 Ad Hoc Committee of Bondholders
Sean Dunphy, Elizabeth Pillon for ULC2 Trustee
Frank Dearlove for HSBC Bank
Howard Gorman, Randal Van de Mosselaer for ULC1 Noteholders
Peter H. Griffin for Calpine Corporation and other U.S. Debtors
Peter T. Linder, Q.C., Emi R. Bossio for HCP Acquisition Inc.
Richard Billington for Catalyst Capital Group Inc.
Glenn Solomon for certain creditors

**Related Abridgment Classifications**
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

**Headnote**
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues
Corporation went into receivership — Corporation had closely intertwined relationship with commercial trust and income fund — Group representing corporation sought to sell various assets relating to such relationship between entities, including certain trust units — Group reached settlement agreement with fund and applied for order approving of such agreement — Receiver received offer from third party for trust units — Court directed monitor to prepare report comparing third party offer and settlement agreement — Monitor initially advised that settlement agreement be accepted — Following complaints by certain stakeholders and creditors, court directed monitor to create new report considering new offer put forth by third party — Monitor advised that third party's new offer be accepted — Group brought application for approval of third party's offer — Application granted — Best interests of all parties would not be served by continuation of process in search of better offers — Potential for

increased consideration was outweighed by risks and potential delay that would follow — Final recommendation of monitor was sound and reasonable — Rejection of recommendations in any but most exceptional circumstances materially diminished and weakened role and functions of receiver — Such casual rejection would lead to conclusion that decision of receiver was of little weight and that real decision was always made by court upon application for approval — Third party's final offer was only route which assured avoidance of prolonged litigation.

**Table of Authorities**

**Cases considered by *B.E. Romaine J.*:**

*Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

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

*Salima Investments Ltd. v. Bank of Montreal* (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 1985 CarswellAlta 332 (Alta. C.A.) — considered

**Statutes considered:**

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

Generally — referred to

*Courts of Justice Act*, R.S.O. 1990, c. C.43

Generally — referred to

***B.E. Romaine J.*:**

**Introduction**

1 These reasons describe the complicated and controversial course of an application to sell certain assets. The application was made by the above-noted applicants (collectively, the "Calpine Applicants"), who, pursuant to an initial order dated December 20, 2005, are under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

**Facts**

2 This saga began when the Calpine Applicants decided to attempt to sell certain assets that form part of the complex, intertwined relationship of Calpine Canada Power Ltd. ("CCPL") with the Calpine Commercial Trust (the "Trust") and the Calpine Power Income Fund (the "Fund").

3 On December 21, 2006, the Calpine Applicants filed a Notice of Motion, returnable on December 28, 2006, seeking authorization to market and sell the following assets (the "Fund-related Assets"):

a) certain contracts, being a management agreement, an administration agreement and some operating agreements (collectively, the "MA&O Agreements") relating to the Fund, the Trust and Calpine Power L.P. ("CLP") and to the operation of two power plants owned by CLP; and

b) the Class B Units in CLP.

4 An affidavit sworn on December 21, 2006 by Toby Austin, President and CEO of CCPL, includes at para. 10 a simplified diagram of the structure of CCPL's relationship with the Fund, the Trust and CLP.

5 Briefly, CLP is a limited partnership with Calpine Power L.P. Ltd. ("CLPGP") as its general partner and the Trust and CCPL as limited partners. CLPGP has assigned its rights and obligations as a general partner to CCPL. The Trust is an open-ended trust, the sole beneficiary of which is the trustee of the Fund. The Fund is a publicly held income fund listed on the TSX. Since CCPL and the other Canadian Calpine entities sought the protection of the CCAA, the Trust and the Fund have been governed by the independent trustees of the Trust and the independent directors of CLPGP (who are also trustees).

6 The Trust's principal asset is its interest in CLP. CLP indirectly owns two power plants, the Island Cogen Facility in British Columbia and the Calgary Energy Centre. CLP granted a participating unsecured loan to Calpine Canada Whitby Holdings Company, an entity that owns 50% of a joint venture that is developing a cogeneration facility in Ontario.

7 The Trust owns A Units in the CLP limited partnership. CCPL owns B Units. The B Units, which represent 30% of the equity of CLP, are subordinate to the A Units. Further complicating this already intertwined relationship, the Trust purchased from CCPL in May 2004 a promissory note with a face value of approximately $53.5 million pursuant to a loan known as the Manager's Loan. As security for the Manager's Loan, CCPL granted to the Trust a pledge of the B Units.

8 CCPL administers the Fund and the related entities pursuant to the MA&O Agreements. The MA&O Agreements all provide that they may be assigned by CCPL only with the consent of either the Trust or CLP, which consent shall not be unreasonably withheld. In support of their motion for authorization to sell the Fund-related Assets, the Calpine Applicants advised that on December 19, 2006, Harbinger Capital Partners ("Harbinger") had announced its intention to launch a take-over bid for the publicly-traded trust units of the Fund and that the Calpine Applicants believed that this presented them with an opportunity to negotiate the sale of the Fund-related Assets with bidders who might be interested in acquiring the Fund.

9 In response to the Calpine Applicants' motion, the Fund advised that it intended to bring a cross-application to terminate the MA&O Agreements. The Christmas break intervened and the application and proposed cross-application were adjourned to a date in January 2007. The Fund was to circulate materials with respect to its cross-application by Friday, January 12, 2007.

10 During the days leading up to and including Saturday, January 13, 2007, the Fund and the Calpine Applicants negotiated and entered into a settlement agreement (the "Settlement Agreement"). A notice of motion and supporting affidavit with respect to this Settlement Agreement was circulated to the service list on January 13 and 14, 2007. The Calpine Applicants applied for an order:

a) authorizing CCPL to enter into the Settlement Agreement;

b) approving the Settlement Agreement and the various transaction agreements that accompanied it;

c) terminating the MA&O Agreements upon the closing of the Settlement Agreement and lifting the stay of proceedings under the CCAA proceedings for that limited purpose;

d) directing that a confidential supplemental report on the Settlement Agreement that was to be prepared by Ernst & Young Inc. (the "Monitor") be sealed until closing of the Settlement Agreement; and

e) miscellaneous other relief.

11 The Fund prepared a Notice of Motion bearing the same date in which the independent trustees of the Trust and the directors of CLPGP applied to lift the stay imposed under the CCAA for the purpose of terminating the MA&O Agreements if the Settlement Agreement was not approved by the Court. The motion to approve the Settlement Agreement was to be heard on Wednesday, January 17, 2007.

12 On Monday, January 15, 2007, I heard from various stakeholders in this CCAA proceeding who were aggrieved about both the timing of the application and the stringent requirements of confidentiality that had been imposed by the Fund on information relating to the Settlement Agreement. That day was a holiday in the United States where a number of stakeholders are resident and several counsel had been unable to receive instructions from their clients on these issues. I directed that the application to approve the Settlement Agreement be set over to Monday, January 22, 2007 and that the issue of the terms of confidentiality be adjourned to Wednesday, January 17, 2007 so that counsel could obtain adequate instructions from their clients.

13 Late on January 16, 2007, the Monitor received an offer (the "Harbinger Offer") for the Fund-related Assets from HCP Acquisition Inc. ("HCP"), the subsidiary of Harbinger that is the vehicle for Harbinger's take-over bid for the public Trust units. The Monitor provided the Court with a copy of the offer, together with an application for advice and directions, shortly before

Court opened to hear submissions on the confidentiality issue. The Harbinger Offer for the Fund-related Assets was publicly disclosed by press release, but most parties had only recently become aware of its terms. The Monitor, of course, was not in a position at that time to provide advice on the offer and how it compared to the terms of the Settlement Agreement. It became apparent during the course of the hearing that the stakeholders wanted the Monitor to prepare a comparison of the Settlement Agreement and the Harbinger Offer. Submissions from that point focussed on how much, if any, of the Monitor's report with respect to that comparison should be subject to confidentiality, and whether the confidentiality provisions imposed by the Fund on the Settlement Agreement and on the Monitor's Supplemental Report (as defined below) should be lifted. Some stakeholders argued vigorously for a different process more akin to an open auction or tender for the assets.

14 At this point, the Monitor had prepared two reports, a Sixteenth Report that discussed the Settlement Agreement in general terms, without disclosing its specific financial terms, which was disclosed without restriction to the service list, and a Supplemental Report to the Sixteenth Report (the "Supplemental Report") that disclosed those financial terms, together with the Monitor's comments on the value of the MA&O Agreements and the B Units. These latter comments included a review of CCPL's discounted cash flow financial model of the B Units. The Supplemental Report was made available only to stakeholders who entered into confidentiality agreements as required by the Settlement Agreement.

15 The Calpine Applicants and the Fund submitted that the Settlement Agreement and the Supplemental Report were confidential and commercially sensitive to both parties. The Calpine Applicants were concerned that pricing and valuation information contained in the Supplemental Report would have a negative impact on any subsequent marketing process if the Settlement Agreement was not approved. The Fund had concerns relating to its response to the Harbinger take-over bid of the publicly-traded trust units and submitted that disclosure of the pricing and financial terms could be used by Harbinger to the disadvantage of the Fund. The Fund also asserted strenuously that it did not want to be placed in the position of a stalking horse for the Fund-related Assets and that, if it was put in that position, it would withdraw its offer.

16 The parties who sought access to the terms of the Settlement Agreement and the Supplemental Report were offered certain choices of confidentiality agreements, but it is clear that the Fund sought to ensure that such parties would be precluded from using the information for any purpose other than evaluating the Settlement Agreement, and particularly from making any kind of competing bid for the Fund's public trust units. One version of confidentiality agreement proffered by the Fund allowed stakeholders to establish an internal confidential screen that would remain in effect for two years in order to evaluate the information without requiring confidentiality to be imposed on the stakeholder's entire organization. Another allowed legal advisors to review the material without allowing them to disclose confidential terms to their clients. Although an attempt to impose this degree of restriction on access to information is exceptional in litigation generally, it is not without precedent in cases involving CCAA proceedings and receivers where assets of a business are sought to be sold: See In the matter of a Plan of Compromise and Arrangement of Air Canada, *et al.*, under the CCAA, R.S.C. 1985, c. C-36, as amended; see also In the matter of the CCAA, R.S.C. 1985, c. C-36, as amended, and In the Matter of the Courts of Justice Act, R.S.O. 1990 c. C-43, as amended and In the Matter of a Plan of Compromise or Arrangement of Royal Oak Mines, *et al.* (all unreported).

17 I concluded that, although the Settlement Agreement was negotiated under stringent terms of confidentiality and the Supplemental Report was prepared pursuant to an assumption of confidentiality and on the assumption that the likelihood of CCPL receiving any offers whose benefits to CCPL exceeded those of the Settlement Agreement was remote, the situation had changed with the introduction of the Harbinger Offer. I was concerned, however, that it could be prejudicial to the primary goal of maximizing value to stakeholders if I ordered unrestricted disclosure of the Settlement Agreement or of the Supplemental Report during the short period of time between January 17 and January 22, 2007, when the Monitor's new report comparing the offers became available, particularly if I determined after hearing full submissions on January 22, 2007 that a different process should be followed.

18 I therefore declined either to endorse the confidentiality provisions imposed by the Fund to that date or to order greater disclosure, on the basis that the fairness of the process that led to the Settlement Agreement and the confidentiality requirements that had been imposed by it were live issues for submissions on January 22, 2007 and would be factors in any decision on whether or not to approve the Settlement Agreement. I directed the Monitor to prepare its comparison report with the analysis of the Settlement Agreement remaining subject to restricted disclosure, but with the Monitor's conclusions and recommendations

being available on an unrestricted basis to stakeholders. I asked the Monitor to address the issue of whether a broader auction or marketing process should be undertaken.

19 The Monitor's Seventeenth Report was prepared and circulated on Friday, January 19, 2007. The Monitor concluded that, taking into account the material variables affecting the comparison between the Harbinger Offer and the Settlement Agreement, the completion of the Settlement Agreement proposal was the prudent approach. The Monitor stipulated, however, that the Calpine stakeholders should have the benefit of the Seventeenth Report and that the Monitor and the Court "should consider the stakeholders' tolerance for increased risk and potentially incremental realizations for the Fund-related Assets when considering the motion to approve the [Settlement Agreement] on January 22, 2007."

20 The Monitor considered two broad options, the completion of the Settlement Agreement and an auction marketing process. The Monitor noted that the Fund had advised the Court that it would not participate in an auction process and had indicated that, if the Settlement Agreement was not approved on January 22, 2007, it would proceed on January 26, 2007 with its motion to terminate the MA&O Agreements. If the Fund removed itself from the auction process, there would be no competitive tension with the Harbinger Offer unless other parties came forward. The Monitor believed that a limited number of new parties would be available to participate in an auction process because parties who might otherwise be interested might have become restricted in submitting an offer because of participation in the Fund's efforts to find a "white knight" with respect to the Harbinger take-over bid for the Fund public trust units. The Monitor pointed out that the B Units are an illiquid, subordinated minority position in a private entity, attractive primarily to parties who may be interested acquiring the Fund. He also noted that the Harbinger Offer could be terminated at any point prior to acceptance. Given all of these factors, the Monitor believed there was substantial risk in pursuing an auction process.

21 On the morning of January 22, 2007, shortly before the motion to approve the Settlement Agreement was heard, Harbinger submitted a revised offer for the Fund-related Assets (the "Harbinger Revised Offer") that increased the price offered from the greater of $100 million or the value of the Settlement Agreement transaction price plus $2 million, as set out in the Harbinger Offer, to the greater of $110 million and 110% of the value of the Settlement Agreement transaction price. The Harbinger Revised Offer also removed Harbinger's ability to withdraw the offer without the Monitor's permission before the earlier of:

a) February 16, 2007;

b) Court approval of an alternate proposal; and

c) Harbinger making a replacement offer that the Monitor concludes is superior to the Harbinger Revised Offer.

22 At the hearing, the Ad Hoc Committee of ULC II Bondholders, which includes Harbinger as a member, and the ULC II Indenture Trustee were in vehement opposition to the motion to approve the Settlement Agreement, suggesting that the process that led to the Settlement Agreement and the restrictions on access to financial information imposed by the Fund had resulted in a "fatally flawed secret marketing process" that placed the stakeholders and the Court in an untenable position. In answer to the Monitor's suggestion that the Court hear from the stakeholders regarding their tolerance for increased risk and potentially incremental realizations for the Fund-related Assets, the Ad Hoc Committee advised that its members, absent Harbinger, had conferred and that "they are prepared to forego the secret benefits of the Settlement Agreement and either take their chances with a properly supervised process, or if need be, revert to the status quo where the marketing of this asset had not yet been commenced." Counsel for the ULC II Bondholders and Trustee submitted that an expedited sales process should be conducted, and that there was still time, given the status of the Harbinger take-over bid, for there to be an auction between the two existing bidders.

23 The Ad Hoc Committee of the ULC II Bondholders and the ULC II Indenture Trustee were the only major creditor group who had not entered into a form of confidentiality agreement with CCPL and the Trust so as to obtain access to the financial terms of the Settlement Agreement and the restricted portions of the Monitor's reports. As noted by counsel, the ULC II Bondholders are in the business of trading in distressed bonds, and the possession of non-public information relating to the B Units would preclude them from trading in any Calpine securities until the information became public. While the alternatives

offered by CCPL and the Trust would allow counsel to the Bondholders to evaluate the Settlement Agreement with a view to the interests of their clients, it would not allow them direct access to information without the unpalatable result to their business of restricting their freedom to trade in Calpine securities. Thus, for this group of stakeholders, anything less than full public disclosure of information about the B Units would be problematic. This placed these creditors in direct conflict with the Trust and the Fund in their efforts to maintain confidentiality of commercially-sensitive information and to avoid becoming a "stalking-horse" for higher offers. While neither of these private commercial interests is of primary significance to this Court in the context of CCAA proceedings, which have as a primary goal the maximization of value of the debtors' assets for the benefit of stakeholders as a whole, they are factors to be weighed in a determination of the fairness and integrity of the sale process.

24 Counsel for the Ad Hoc ULC I Noteholders Committee, who had access to all information relating to the Settlement Agreement through a "counsel's eyes only" confidentiality agreement, noted that his clients were in favour of a short auction between the Fund and Harbinger, with the Fund publicly releasing the details of the Settlement Agreement.

25 Harbinger submitted that the Harbinger Revised Offer addressed a number of the Monitor's concerns, including the elimination of the right to withdraw the offer at any time prior to acceptance, and called for an open auction/marketing process for the assets.

26 The Fund pointed out that eighteen creditors or creditor groups had signed a form of confidentiality agreement, leaving only the ULC II Bondholders and the ULC II Indenture Trustee among the major creditors who had not had access to the financial terms of the Settlement Agreement and the restricted portions of the Monitor's Reports. It "strongly objected" to the marketing of the MA&O Agreements and set out the requirements it indicated it would insist that an assignee of those agreements and a purchaser of the B Units must fulfill if the Settlement Agreement was not approved.

27 When it became apparent that the Settlement Agreement likely would not be approved on the day of hearing, counsel for the Fund noted that the Settlement Agreement expired at midnight on January 23, 2007 and he could not indicate if the independent trustees and directors would extend the deadline or would let the Settlement Agreement lapse. He stated that the Fund would not participate if the process became an auction. Counsel for the Fund suggested that the terms of the Settlement Agreement be disclosed to all parties other than Harbinger for a very brief period of two hours that day, after which the Monitor would prepare a supplemental report on any additional offers that this disclosure would generate overnight, with the hearing continuing the next day. The Calpine Applicants pointed out that they were bound to support the Settlement Agreement and that they, too, were reluctant to prolong the process beyond the time the Settlement Agreement would expire, as they feared losing the benefits of that agreement.

28 This one-day proposal, which excluded Harbinger, was characterized by the ULC II Bondholders group and the ULC I Noteholders group as being unworkable and wholly ineffective in maximizing value. Harbinger, through its counsel, suggested that the process required at least 10 days, the creation of a data room and a general invitation to bidders.

29 The duties a court must perform when deciding whether a receiver has acted appropriately in selling an asset are summarized succinctly in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.) at para. 16 as follows:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

While the *Soundair* case involved a receivership and this is a situation of a debtor-in-possession under the CCAA overseen by a Monitor, these duties remain relevant to the issues before me, with some adaptation for the differences in the form of proceedings. It is noteworthy that *Soundair* did not suggest that a formal auction process was necessary or advisable in every case, and the Court in fact referred to *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 (Alta. C.A.), where the Alberta Court of Appeal suggests that a court on an application to approve a sale is not necessarily bound to conduct a judicial auction.

30 I have no doubt that in negotiating the Settlement Agreement with the Fund, the Calpine Applicants made efforts to get the best price possible, and that they did not act improvidently. While there were submissions to the contrary, it is telling that the Monitor was prepared to recommend the Settlement Agreement despite the lack of negotiation with parties other than the Fund, due primarily to the unique and difficult character of the Fund-related Assets and the backdrop of the Harbinger take-over bid for the Fund's public trust units, which created a time-limited window of opportunity. I also am not persuaded that the Settlement Agreement was not responsive to the interests of all parties, particularly to the primary interest of the creditors in maximizing value, given the circumstances facing the Calpine Applicants at the time the Settlement Agreement was negotiated.

31 There was, however, a lack of sufficient transparency and open disclosure, which resulted in a process lacking the degree of integrity and fairness necessary when the court is involved in a public sale of assets under the CCAA. The CCAA insulates a debtor from its creditors for a period of time to allow it to attempt to resolve its financial problems through an acceptable plan of arrangement. It allows the debtor to carry on business during that period of time and to exercise a degree of normal business judgment under the supervision of the court and a Monitor. What may be commercially reasonable and even advantageous when undertaken by parties outside the litigation process, however, may be restricted by the requirement that fairness be done, and be seen to be done, when the process is supervised by the court. While a more open process may not lead to greater value, and may, as in this case, give rise to the possibility that an existing bidder may exit the process, the nature of a court-supervised process demands a process that meets at least minimal requirements of fairness and openness. The process undertaken to the point of the hearing on January 22, 2007, particularly with its emphasis on control of information and confidentiality for the primary benefit of the Fund, did not pass the test.

32 In addition, the fact of the Harbinger Offer necessitated closer consideration of the Monitor's assumption, reasonable as it may have been at the time it was made, that the likelihood that the Calpine Applicants would receive any offers that would exceed the benefits to CCPL of the Settlement Agreement was remote.

33 I concluded that circumstances had conspired to produce a situation that was neither fish nor fowl, a kind of lop-sided auction where different bidders were privy to different information and bound by different constraints. What had already occurred could not be changed, but a different process was required from that point forward. While there were differences of opinion as to how much time was available to conduct a sales process with an acceptable degree of integrity, it was necessary that such process be conducted quickly, given the circumstances affecting the two interested bidders. It appeared clear that it would be to the benefit of all stakeholders if the process were accelerated. I decided that an abbreviated sales process was necessary in order to balance the competing requirements of fairness, speed imposed by external circumstances and protection of *bona fide* proprietary or commercially-sensitive information.

34 While not dismissing the application to approve the Settlement Agreement, I directed that:

a) the Monitor issue its Eighteenth Report which would disclose the financial terms of the Settlement Agreement to all stakeholders, including HCP, by noon on January 23, 2007;

b) offers for the Fund-related Assets were to be submitted to the Monitor by noon on Thursday, January 25, 2007;

c) the Monitor would issue its Nineteenth Report comparing offers received by 2:00 p.m. on Friday, January 26, 2007; and

d) the hearing would resume on Tuesday, January 30, 2007.

35 These time limits were later changed by agreement of affected parties so that final offers were to be received by noon on Friday, January 26, 2007 and the Monitor would issue its Nineteenth Report by noon on Saturday, January 27, 2007.

36 I directed that HCP would be able to meet and discuss issues relating to its offer with the Monitor and/or, if the Fund decided not to extend the Settlement Agreement, the Calpine Applicants.

37 I did not release the Supplemental Report generally, on the basis that it had been prepared in the scenario of a single offer and on the assumption of confidentiality. Nor did I release the confidential portion of the Monitor's Seventeenth Report, which had been superceded by events.

38 The Monitor issued its Nineteenth Report providing a summary and analysis of offers received for the Fund-related Assets by noon on January 26, 2007. However, immediately prior to releasing the report, the Monitor was contacted by HCP and the Fund, acting jointly, requesting a delay of two hours to allow time for the submission of a revised offer. The Monitor advised me of the receipt of such revised offer when it delivered the Nineteenth Report to me on January 26, 2007 and provided a copy of the newly-revised offer (the "Harbinger Final Offer"). The Monitor indicated that it would be canvassing major stakeholders to receive their input on the offers and would issue a supplemental report to the Nineteenth Report prior to the court hearing on January 30, 2007. On Monday, January 29, 2007, I asked the Monitor to include in such report an analysis of the Harbinger Final Offer and any other offers it might receive prior to the release of this supplemental report.

39 The Monitor issued its Twentieth Report late in the day on January 29, 2007. In addition to the Harbinger Final Offer, the Monitor had received a letter from Catalyst Capital Group Inc. ("Catalyst") varying certain of the terms of an offer it had submitted by Friday's deadline in view of the press release issued by HCP relating to the Harbinger Final Offer. These revised terms were incorporated into the Monitor's analysis of the Catalyst offer.

40 Four offers were presented to the Court on Tuesday, January 30, 2007. One was a revised offer from the Fund. One was a revised offer from HCP received by the Monitor on January 26, 2007 (the "Second Revised HCP Offer"). One was an offer from Catalyst as revised on January 29, 2007 (the "Revised Catalyst Offer"). One was the Harbinger Final Offer. The Monitor recommended the Harbinger Final Offer.

41 The Harbinger Final Offer provides certainty of price and certainty of closing. It eliminates risks associated with the splitting and realization of certain claims CLP has made against the Calpine Applicants, and it facilitates the capture of value for creditors with respect to the Whitby cogeneration project by allowing the prepayment of a loan related to the project and the sale by CCPL of its interest in the project. It has no material conditions, and eliminates the uncertainty of future litigation with the Fund as the Fund has undertaken to support the offer and to provide the necessary consents.

42 This certainty, of course, comes with a price, which is that between approximately $10 million and $34 million of additional potential consideration would be forgone compared to the Second Revised HCP Offer, the Revised Catalyst Offer or a new Catalyst offer briefly described by counsel during the hearing (the "New Catalyst Offer").

43 As the Monitor points out, there is substantial closing risk associated with the Second Revised HCP Offer and the Revised Catalyst Offer, risks that likely would erode the potential financial upside of those offers. The Second Revised HCP Offer, which carries the least risk, could not guarantee the consent of the Fund to either the transfer of the MA&O Agreements and the B Units or the outcome of an application to hold in abeyance the Fund's application to terminate the MA&O Agreements for a reasonable time following closing. Nor could it guarantee the outcome of an application for a permanent stay of any claim by the Trust or the Fund to terminate the MA&O Agreements for default due to the CCAA proceedings. These are risks not only of outcome but of time, as litigation would be required not only in this Court, but also might be prolonged by appeal.

44 The Revised Catalyst Offer and the New Catalyst Offer carry the same risks and more. Although the Fund may be constrained in rationalizing a refusal of consent with respect to the Second Revised HCP Offer by reason of its support of the Harbinger Final Offer, it would not be so constrained in refusing consent with respect to Catalyst. The Revised Catalyst Offer (and presumably the New Catalyst Offer, although this was not made clear) were subject to due diligence, regulatory approval, and, with respect to its higher range of value, the ability of Catalyst to come to an agreement with CCPL and perhaps the Fund to achieve value from the Whitby project. Originally, the Revised Catalyst Offer could be terminated at any time before

acceptance. While Catalyst, in its submissions during the hearing, stated that it was prepared to abandon this condition, it was not clear how long it was prepared to leave its offers open.

45 The Ad Hoc ULC I Noteholders Committee expressed the wish to continue the process to see if greater value could be achieved. While the temptation to continue the process is understandable, given the carrot of higher offers and the suggestion of late-breaking developments in the take-over bid for the Fund's public trust units, prolonging the process would not allow Catalyst or any other new bidder the opportunity to overcome the serious contract transfer and contract termination risks that shadow their offers, given that the Fund is now bound to support the Harbinger Final Offer. Only the Harbinger Final Offer can provide the assurance that prolonged litigation with the Fund will be avoided, at least in the time frame imposed on this process by the take-over bid.

46 In addition, given my decision on January 22, 2007 to allow an abbreviated process, and not the more leisurely time-frame requested by some of the bidders, it would be unfair to extend the process on the basis of Catalyst's last-minute, in-Court efforts to improve its bid.

47 I also considered the objection raised by the Ad Hoc ULC I Noteholders Committee to the transfer of value to the public unitholders arising from the Harbinger Final Offer. It is true that value that potentially existed under the Second Revised HCP Offer has been transferred from the Calpine creditors to the public unitholders of the Fund under the Harbinger Final Offer through the sweetening of the HCP take-over bid, but this did not occur without the significant advantage of greater certainty. It is noteworthy that the Monitor in his Seventeenth Report was prepared to recommend the Settlement Agreement with its lower consideration over the Harbinger Offer on the basis of that uncertainty.

48 The process was certainly not pretty. It started with a privately-negotiated Settlement Agreement that could not be disclosed in a way that would create a level playing field for all interested parties. There were good-faith reasons for the negotiation of such an agreement, set out in the affidavits and cross-examinations of the Calpine Applicants and the Fund, reasons rooted in attempting to achieve a balance between the Calpine Applicants' goal of value maximization and the Fund's need for confidentiality arising from both commercial proprietary interest and the threat of the take-over bid. Nevertheless, as I indicated earlier, the restrictions on disclosure arising from these circumstances could not be sanctioned in the context of a public CCAA proceeding with many stakeholders.

49 The Fund-related Assets are, as many parties noted, unique and unusual assets. They are part of a web of intertwined relationships in a complex corporate structure. As the Calpine Applicants recognized, the value of these assets could be optimized because of the take-over bid and the strategic challenges facing Harbinger and the Fund relating to that take-over bid. While advantageous to the Calpine creditors in that respect, the situation foreclosed a more traditional court-supervised auction that may have been appropriate for a different kind of asset and created a brief window of time for maximizing value. Perfection of process was highly unrealistic in these circumstances.

50 Has value been maximized under the abbreviated sales process? As some of the case law on process notes, a good test of whether a process has produced improvident bids is whether a substantially higher bid surfaces at the approval stage. In this case, while the last-minute bid by Catalyst was higher, it was not substantially so, and the improvements offered at the last minute by Catalyst to eliminate conditions in its bid were not so attractive as to lead to the concern that unrealized value lurked in the market if only the process had been extended.

51 There was criticism of the Harbinger Final Offer on the basis that it came in after the deadline for final offers had expired. However, Catalyst was afforded the same opportunity to revise its previous offer. In fact, it did so, and its revised offer was considered by the Monitor. This was not a formal tender process with an elaborate set of terms and conditions. Given the short time line forced by external circumstances, a certain amount of flexibility was necessary and was afforded to both HCP and Catalyst, but the integrity of the process required that that flexibility end at the time of hearing on January 30, 2007. The ability afforded to both HCP and Catalyst to revise their bids prior to the completion of the Monitor's Twentieth Report was not unfair, nor did it materially compromise the process.

52 It must be emphasized that the Monitor recommended that the HCP Final Offer be accepted and set out thorough and thoughtful reasons for that recommendation in its Twentieth Report. That recommendation was unshaken by Catalyst's last-minute attempts to improve its bid. While this application involves a Monitor under the CCAA, rather than a court-appointed receiver, I endorse the view of the Anderson, J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320 (note), 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (Ont. H.C.) set out at page 112:

> If the court were to reject the recommendations of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

53 The Monitor in this case has been intimately involved in the proposed sale of the Fund-related Assets from the beginning and for more than a year has accumulated valuable knowledge and insight into the complications and intricacies of the very complex corporate structure of the Calpine Applicants. The opinion of the Monitor deserves respect and deference. If, as the Court in *Soundair* commented at para. 14, "(t)he best method of selling an airline at the best price is something far removed from the expertise of a court", so is navigating the difficult shoals of selling unique, illiquid assets forming part of a complex corporate network with bidders preoccupied with broader external challenges. The recommendation of the Monitor, who was faced with a number of difficult variables and a rapidly-changing set of circumstances, was sound and reasonable.

54 I therefore found that the Harbinger Final Offer should be approved, as it provided for a reasonable balance of price and closing certainty, was endorsed by many of the stakeholders and was recommended by the Monitor.

55 Given the unique nature of the assets being sold, the nature of the closing risks, and in particular the nature of the material conditions affecting the value of the Revised Catalyst Offer, I agree with the Monitor, the Calpine Applicants, the independent trustees, the ULC II Bondholder groups and the U.S. Calpine entities that the potential for increased consideration through a continuation of the process or acceptance of the more conditional offers is outweighed by the risks and potential delay that would follow.

*Application granted.*

# TAB 3

2010 QCCS 1742
Quebec Superior Court

AbitibiBowater, Re

2010 CarswellQue 4082, 2010 QCCS 1742, 190 A.C.W.S. (3d) 679, 71 C.B.R. (5th) 220, J.E. 2010-962, EYB 2010-173333

# In the Matter of A Plan of Compromise or Arrangement of: AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The other Petitioners listed on Schedules "A", "B" and "C" (Debtors) and Ernst & Young Inc. (Monitor) and The Land Registrar for the Land Registry Office for the Registration Division of Montmorency, The Land Registrar for the Land Registry Office for the Registration Division of Portneuf, The Land Registrar for the Restigouche County Land Registry Office, The Land Registrar for the Thunder Bay Land Registry Office and The Registrar of the Register of Personal and Movable Real Rights (mis en cause)

Clément Gascon, J.C.S.

Heard: April 26, 2010
Judgment: May 3, 2010
Docket: C.S. Montréal 500-11-036133-094

Counsel: Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, for the Debtors
Me Avram Fishman for the Monitor
Me Robert E. Thornton for the Monitor
Me Serge F. Guérette for the Term Lenders
Me Nicolas Gagné for Ville de Beaupré
Me Éric Vallière for the Intervenor, American Iron & Metal LP
Me Marc Duchesne for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders
Me Frederick L. Myers for the Ad hoc Committee of Bondholders
Me Bertrand Giroux for the Intervenor, Recyclage Arctic Béluga Inc.

**Related Abridgment Classifications**
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.9 Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

**Headnote**
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Pulp and paper corporation experienced financial problems and placed itself under protection of Companies' Creditors Arrangement Act (CCAA) — In context of its restructuring, it contemplated sale of four closed mills to American bidder — While most parties supported and recommended contemplated sale, including monitor, unsuccessful bidder objected to it — Corporation brought motion seeking approval of sale — Motion granted — Court had jurisdiction to approve sale of assets in course of CCAA proceedings — Criteria for determining whether sale should be approved were established in previous decision of Ontario Court of Appeal — Here, evidence showed that over sixty potential purchasers were contacted and provided with

bid package during sale process — Evidence also showed that proposed transaction reflected current fair market value of assets — Court was of view that sale process was beyond reproach and that corporation sought to achieve best possible results — Therefore, nothing justified refusing corporation's request and setting aside monitor's recommendation.

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Pulp and paper corporation experienced financial problems and placed itself under protection of Companies' Creditors Arrangement Act (CCAA) — In context of its restructuring, it contemplated sale of four closed mills to American bidder — While most parties supported and recommended contemplated sale, including monitor, unsuccessful bidder objected to it — Corporation brought motion seeking approval of sale — Motion granted — As was decided by previous decision of Ontario Court of Appeal, when deciding upon sale approval motion, court should consider best interests of parties who have direct interest in proceeds of sale, i.e. creditors — Author recently confirmed validity of that precedent in both CCAA and US proceedings — Here, none of creditors supported unsuccessful bidder's contestation — As such, unsuccessful bidder's interest was merely commercial and its contestation actually delayed sale process — Therefore, unsuccessful bidder's legal standing appeared to be most probably inexistent.

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

Société papetière a connu des difficultés financières et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, elle a considéré la possibilité de vendre quatre usines désaffectées à un soumissionnaire américain — Tandis que la plupart des parties intéressées, y compris le contrôleur, étaient en faveur de la vente en question et la recommandaient, un soumissionnaire déçu s'y est opposé — Société a déposé une requête visant à obtenir l'approbation de la vente — Requête accueillie — Tribunal avait la compétence pour approuver la vente des actifs dans le cadre de procédures entamées sous le régime de la Loi — Test servant à déterminer si une vente devrait être approuvée a été établi dans une décision antérieure de la Cour d'appel de l'Ontario — En l'espèce, la preuve démontrait qu'on avait contacté plus de soixante acheteurs potentiels et qu'on leur avait fourni une trousse d'appel d'offres au cours du processus de la vente — Preuve démontrait également que l'opération proposée reflétait la juste valeur marchande des actifs — Tribunal était d'avis que le processus de vente était sans reproche et que la société visait à obtenir les meilleurs résultats possibles — Par conséquent, rien ne justifiait que l'on refuse la demande de la société et que l'on fasse fi de la recommandation du contrôleur.

Faillite et insolvabilité --- Procédure devant les tribunaux — Divers

Société papetière a connu des difficultés financières et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, elle a considéré la possibilité de vendre quatre usines désaffectées à un soumissionnaire américain — Tandis que la plupart des parties intéressées, y compris le contrôleur, étaient en faveur de la vente en question et la recommandaient, un soumissionnaire déçu s'y est opposé — Société a déposé une requête visant à obtenir l'approbation de la vente — Requête accueillie — Tel que l'a décidé la Cour d'appel de l'Ontario dans une décision antérieure, lorsqu'il s'agit de rendre une décision concernant une requête visant l'autorisation d'une vente, le tribunal devrait prendre en considération les meilleurs intérêts des parties qui ont un intérêt direct dans le produit de la vente, soit les créanciers — Auteur a récemment confirmé la validité de ce précédent dans le cadre des procédures instituées sous le régime de la Loi ainsi que sous le régime américain — En l'espèce, aucun créancier n'appuyait l'opposition du soumissionnaire déçu — Comme tel, l'intérêt du soumissionnaire déçu était purement commercial et sa contestation avait en fait retardé le processus de la vente — Par conséquent, l'intérêt pour agir du soumissionnaire déçu était probablement inexistant.

**Table of Authorities**

**Cases considered by *Clément Gascon, J.C.S.*:**

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

*BDC Venture Capital Inc. v. Natural Convergence Inc.* (2009), 256 O.A.C. 372, 2009 CarswellOnt 5098, 2009 ONCA 637 (Ont. C.A. [In Chambers]) — referred to

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

*Beauty Counsellors of Canada Ltd., Re* (1986), 1986 CarswellOnt 171, 58 C.B.R. (N.S.) 237 (Ont. S.C.) — considered

*Boutique Euphoria inc., Re* (2007), 2007 QCCS 7128, 2007 CarswellQue 14282 (C.S. Que.) — referred to

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

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

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

*Canwest Global Communications Corp., Re* (2010), 64 C.B.R. (5th) 221, 2010 ONSC 1176, 2010 CarswellOnt 1077 (Ont. S.C.J. [Commercial List]) — referred to

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

*Grant Forest Products Inc., Re* (2010), 2010 CarswellOnt 2445, 2010 ONSC 1846, 67 C.B.R. (5th) 258 (Ont. S.C.J. [Commercial List]) — referred to

*Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

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

*Rail Power Technologies Corp., Re* (2009), 2009 QCCS 2885, 2009 CarswellQue 6503 (C.S. Que.) — referred to

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

*Selkirk, Re* (1987), 1987 CarswellOnt 177, 64 C.B.R. (N.S.) 140 (Ont. S.C.) — considered

*Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 (Ont. S.C.J. [Commercial List]) — referred to

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

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

*Tiger Brand Knitting Co., Re* (2005), 19 C.B.R. (5th) 53, 2005 CarswellOnt 8387 (Ont. C.A.) — referred to

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

*Canadian Commercial Corporation Act*, R.S.C. 1985, c. C-14

Generally — referred to

*Code civil du Québec*, L.Q. 1991, c. 64

en général — referred to

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*Personal Property Security Act*, S.N.B. 1993, c. P-7.1

Generally — referred to

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Generally — referred to

*Registry Act*, R.S.N.B. 1973, c. R-6

Generally — referred to

***Clément Gascon, J.C.S*:**

*REASONS FOR JUDGMENT AND VESTING ORDER IN RESPECT OF THE BEAUPRÉ, DALHOUSIE, DONNACONA AND FORT WILLIAM ASSETS (#513)*

**Introduction**

1 This judgment deals with the approval of a sale of assets contemplated by the Petitioners in the context of their CCAA restructuring.

2 At issue are, on the one hand, the fairness of the sale process involved and the appropriateness of the Monitor's recommendation in that regard, and on the other hand, the legal standing of a disgruntled bidder to contest the approval sought.

**The Motion at Issue**

3 Through their Amended Motion for the Issuance of an Order Authorizing the Sale of Certain Assets of the Petitioners (Four Closed Mills)(the "*Motion*"), the Petitioners seek the approval of the sale of four closed mills to American Iron & Metal LP ("*AIM*") and the issuance of two Vesting Orders [1] in connection thereto.

4 The Purchase Agreement and the Land Swap Agreement contemplated in that regard, which were executed on April 6, 15 and 21, 2010, are filed in the record as Exhibits R-1, R-1A and R-2A.

5 In short, given the current state of the North American newsprint and forest products industry, the Petitioners have had to go through a process of idling and ultimately selling certain of their mills that they no longer require to satisfy market demand and that will not form part of their mill configuration after emergence from their current CCAA proceedings.

6 So far, the Petitioners, with the assistance of the Monitor, have in fact undertaken a number of similar sales processes with respect to closed mills, including:

(a) the pulp and paper mill in Belgo, Quebec that was sold to Recyclage Arctic Beluga Inc. ("*Arctic Beluga*"), as approved and authorized by the Court on November 24, 2009;

(b) the St-Raymond sawmill that was sold to 9213-3933 Quebec Inc., as approved and authorized by the Court on December 11, 2009; and

(c) the Mackenzie Facility that was sold to 1508756 Ontario Inc., as approved and authorized by the Court on March 23, 2010.

7 The transaction at issue here includes pulp and paper mills located in Dalhousie, New Brunswick (the "*Dalhousie Mill*"), Donnacona, Quebec (the "*Donnacona Mill*"), Fort William, Ontario (the "*Fort William Mill*") and Beaupré, Quebec (the "*Beaupré Mill*") (collectively, the "*Closed Mills*").

8 The assets comprising the Closed Mills include the real property, buildings, machinery and equipment located at the four sites.

9 The Closed Mills are being sold on an "as is/where is" basis, in an effort to (i) reduce the Petitioners'ongoing carrying costs, which are estimated to be approximately CDN$12 million per year, and (ii) mitigate the Petitioners'potential exposure to environmental clean-up costs if the sites are demolished in the future, which are estimated at some CDN$10 million based on the Monitor's testimony at hearing.

10 The Petitioners marketed the Closed Mills as a bundled group to maximize their value, minimize the potential future environmental liability associated with the sites, and ensure the disposal of all four sites through their current US Chapter 11 and CCAA proceedings.

11 According to the Petitioners, the proposed sale is the product of good faith, arm's length negotiations between them and AIM.

12 They believe that the marketing and sale process that was followed was fair and reasonable. While they did receive other offers that were, on their faces, higher in amount than AIM's offer, they consider that none of the other bidders satisfactorily demonstrated an ability to consummate a sale within the time frame and on financial terms that were acceptable to them.

13 Accordingly, the Petitioners submit that the contemplated sale of the Closed Mills to AIM is in the best interest of and will generally benefit all of their stakeholders, in that:

a) the sale forms part of Petitioners' continuing objective and strategy to elaborate a restructuring plan, which will allow them (or any successor) to be profitable over time. This includes the following previously announced measures of (a) disposing of non-strategic assets, (b) reducing indebtedness, and (c) reducing financial costs;

b) the Closed Mills are not required to continue the operations of the Petitioners, nor are they vital to successfully restructure their business;

c) each of the Closed Mills faces potential environmental liabilities and other clean-up costs. The Petitioners also incur monthly expenses to maintain the sites in their closed state, including tax, utility, insurance and security costs;

d) the proposed transaction is on attractive terms in the current market and will provide the Petitioners with additional liquidity. In addition to realizing cash proceeds from the Closed Mills and additional proceeds from the sales of the paper machines, the projected sale will also relieve the Petitioners of potentially significant environmental liabilities; and

e) the Petitioners' creditors will not suffer any prejudice as a result of the proposed sale and the issuance of the proposed vesting orders since the proceeds will be remitted to the Monitor in trust and shall stand in the place and stead of the Purchased Assets (as defined in the contemplated Purchase Agreement). As a result, all liens, charges and encumbrances on the Purchased Assets will attach to such proceeds, with the same priority as they had immediately prior to the sale.

14 In its 38th Report dated April 24, 2010, the Monitor supports the Petitioners' position and recommends that the contemplated sale to AIM be approved.

15 Some key creditors, notably the Ad Hoc Committee of the Bondholders, also support the Motion. Others (for instance, the Term Lenders and the Senior Secured Noteholders) indicate that they simply submit to the Court's decision.

16 None of the numerous Petitioners' creditors opposes the contemplated sale. None of the parties that may be affected by the wording of the Vesting Orders sought either.

17 However, Arctic Beluga, one of the unsuccessful bidders in the marketing and sale process of the Closed Mills, intervenes to the Motion and objects to its conclusions.

18 It claims that its penultimate bid[2] for the Closed Mills was a proposal for CDN$22.1 million in cash, an amount more than CDN$8.3 million greater than the amount proposed by the Petitioners in the Motion.

19 According to Arctic Beluga, the AIM bid that forms the basis of the contemplated sale is for CDN$8.8 million in cash, plus 40% of the proceeds from any sale of the machinery (of which only CDN$5 million is guaranteed within 90 days of closing), and is significantly lower than its own offer of over CDN$22 million in cash.

20 Arctic Beluga argues that it lost the ability to purchase the Closed Mills due to unfairness in the bidding process. It considers that the Court has the discretion to withhold approval of the sale where there has been unfairness in the sale process or where there are substantially higher offers available.

21 It thus requests the Court to 1) dismiss the Motion so that the Petitioners may consider its proposal for the Closed Mills, 2) refuse to authorize the Petitioners to enter into the proposed Purchase Agreement and Land Swap Agreement, and 3) declare that its proposal is the highest and best offer for the Closed Mills.

22 The Petitioners reply that Arctic Beluga has no standing to challenge the Court's approval of the sale of the Closed Mills contemplated in these proceedings.

23 Subsidiarily, in the event that Arctic Beluga is entitled to participate in the Motion, they consider that any inquiry into the integrity and fairness of the bidding process reveals that the contemplated sale to AIM is fair, reasonable and to the advantage of the Petitioners and the other interested parties, namely the Petitioners' creditors.

24 To complete this summary of the relevant context, it is worth adding that at the hearing, in view of Arctic Beluga's Intervention, AIM also intervened to support the Petitioners' Motion.

25 It is worth mentioning as well that even though he did not contest the Motion *per se*, the Ville de Beaupré's Counsel voiced his client's concerns with respect to the amount of unpaid taxes [3] currently outstanding in regard to the Beaupré Mill located on its territory.

26 Apparently, part of these outstanding taxes has been paid very recently, but there is a potential dispute remaining on the balance owed. That issue is not, however, in front of the Court at the moment.

**Analysis and Discussion**

27 In the Court's opinion, the Petitioners' Motion is well founded and the Vesting Orders sought should be granted.

28 The sale process followed here was beyond reproach. Nothing justifies refusing the Petitioners' request and setting aside the corresponding recommendation of the Monitor. None of the complaints raised by Arctic Beluga appears justified or legitimate under the circumstances.

29 On the issue of standing, even though the Court, to expedite the hearing, did not prevent Arctic Beluga from participating in the debate, it agrees with Petitioners that, in the end, its legal standing appeared to be most probably inexistent in this case.

30 This notwithstanding, it remains that in determining whether or not to approve the sale, the Court had to be satisfied that the applicable criteria were indeed met. Because of that, the complaints raised would have seemingly been looked at, no matter what. As part of its role as officer of the Court, the Monitor had, in fact, raised and addressed them in its 38th Report in any event.

31 The Court's brief reasons follow.

**The Sale Approval**

32 In a prior decision rendered in the context of this restructuring [4], the Court has indicated that, in its view, it had jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale was in the best interest of the stakeholders generally [5].

33 Here, there are sufficient and definite justifications for the sale of the Closed Mills. The Petitioners no longer use them. Their annual holding costs are important. To insure that a purchaser takes over the environmental liabilities relating thereto and to improve the Petitioners' liquidity are, no doubt, valid objectives.

34 In that prior decision, the Court noted as well that in determining whether or not to authorize such a sale of assets, it should consider the following key factors:

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

35 These principles were established by the Ontario Court of Appeal in the *Royal Bank v. Soundair Corp.* [6] decision. They are applicable in a CCAA sale situation [7].

36 The *Soundair* criteria focus first and foremost on the "integrity of the process", which is integral to the administration of statutes like the CCAA. From that standpoint, the Court must be wary of reopening a bidding process, particularly where doing so could doom the transaction that has been achieved [8].

37 Here, the Monitor's 38th Report comprehensively outlines the phases of the marketing and sale process that led to the outcome now challenged by Arctic Beluga. This process is detailed at length at paragraphs 26 to 67 of the Report.

38 The Court agrees with the Monitor's view that, in trying to achieve the best possible result within the best possible time frame, the Petitioners, with the guidance and assistance of the Monitor, have conducted a fair, reasonable and thorough sale process that proved to be transparent and efficient.

39 Suffice it to note in that regard that over sixty potential purchasers were contacted during the course of the initial Phase I of the sale process and provided with bid package information, that the initial response was limited to six parties who submitted bids, three of which were unacceptable to the Petitioners, and that the subsequent Phase II involved the three finalists of Phase I.

40 By sending the bid package to over sixty potential purchasers, there can be no doubt that the Petitioners, with the assistance of the Monitor, displayed their best efforts to obtain the best price for the Closed Mills.

41 Moreover, Arctic Beluga willingly and actively participated in these phases of the bidding process. The fact that it now seeks to nevertheless challenge this process as being unfair is rather awkward. Its active participation certainly does not assist its position on the contestation of the sale approval [9].

42 In point of fact, Arctic Beluga's assertion of alleged unfairness in the sale process is simply not supported by any of the evidence adduced.

43 Arctic Beluga was not treated unfairly. The Petitioners and the Monitor diligently considered the unsolicited revised bids it tendered, even after the acceptance of AIM's offer. It was allowed every possible chance to improve its offer by submitting a proof of funds. However, it failed to do enough to convince the Petitioners and the Monitor that its bid was, in the end, the best one available.

44 Turning to the analysis of the bids received, it is again explained in details in the Monitor's 38th Report, at paragraphs 45 to 67.

45 In short, the Petitioners, with the Monitor's support, selected AIM's offer for the following reasons:

(a) the purchase price was fair and reasonable and subjected to a thorough canvassing of the market;

(b) the offer included a sharing formula, based on future gross sale proceeds from the sale of the paper machines located at the Closed Mills, that provided for potential sharing of the proceeds from the sale of any paper machines;

(c) AIM confirmed that no further due diligence was required;

(d) AIM had provided sufficient evidence of its ability to assume the environmental liabilities associated with the Closed Mills; and

(e) AIM did not have any financing conditions in its offer and had provided satisfactory evidence of its financial ability to close the sale.

46 Both the Petitioners and the Monitor considered that the proposed transaction reflected the current fair market value of the assets and that it satisfied the Petitioners'objective of identifying a purchaser for the Closed Mills that was capable of mitigating the potential environmental liabilities and closing in a timely manner, consistent with Petitioners'on-going reorganization plans.

47 The Petitioners were close to completing the sale with AIM when Arctic Beluga submitted its latest revised bid that ended up being turned down.

48 The Petitioners, again with the support of the Monitor, were of the view that it would not have been appropriate for them to risk having AIM rescind its offer, especially given that Arctic Beluga had still not provided satisfactory evidence of its financial ability to close the transaction.

49 The Court considers that their decision in this respect was reasonable and defendable. The relevant factors were weighed in an impartial and independent manner.

50 Neither the Petitioners nor the Monitor ignored or disregarded the Arctic Beluga bids. Rather, they thoroughly considered them, up to the very last revision thereof, albeit received quite late in the whole process.

51 They asked for clarifications, sometimes proper support, finally sufficient commitments.

52 In the end, through an overall assessment of the bids received, the Petitioners and the Monitor exercised their business and commercial judgment to retain the AIM offer as being the best one.

53 No evidence suggests that in doing so, the Petitioners or the Monitor acted in bad faith, with an ulterior motive or with a view to unduly favor AIM. Contrary to what Arctic Beluga suggested, there was no "fait accompli" here that would have benefited AIM.

54 The Petitioners and the Monitor rather expressed legitimate concerns over Arctic Beluga ultimate bid. These concerns focused upon the latter's commitments towards the environmental exposures issues and upon the lack of satisfactory answers in regard to the funding of their proposal.

55 In a situation where, according to the evidence, the environmental exposures could potentially be in the range of some CDN$10 million, the Court can hardly dispute these concerns as being anything but legitimate.

56 From that perspective, the concerns expressed by the Petitioners and the Monitor over the clauses of Arctic Beluga penultimate bid concerning the exclusion of liability for hazardous material were, arguably, reasonable concerns [10]. Mostly in the absence of similar exclusion in the offer of AIM.

57 Similarly, their conclusion that the answers [11] provided by that bidder for the funding requirement of their proposal were not satisfactory when compared to the ones given by AIM [12] cannot be set aside by the Court as being improper.

58 In that regard, the solicitation documentation [13] sent to Arctic Beluga and the other bidders clearly stated that selected bidders would have to provide evidence that they had secured adequate and irrevocable financing to complete the transaction.

59 A reading of clauses 4 and 5 of the "funding commitment" initially provided by Arctic Beluga [14] did raise some question as to its adequate and irrevocable nature. It did not satisfy the Petitioners that Arctic Beluga had the ability to pay the proposed purchase price and did not adequately demonstrate that it had the funds to fulfill, satisfy and fund future environmental obligations.

60 The subsequent letter received from Arctic Beluga's bankers [15] did appear to be somewhat incomplete in that regard as well.

61 Arctic Beluga's offer, although highest in price, was consequently never backed with a satisfactory proof of funding despite repeated requests by the Petitioners and the Monitor.

62 In the situation at hand, the Phase I sale process was terminated as a result of the decision to remove the Mackenzie Mill from the process. However, prior to that, the successful bidder had failed to provide satisfactory evidence that it would be able to finance the transaction despite several requests in that regard.

63 If anything, this underscored the importance of requesting and appraising evidence of any bidder's financial wherewithal to close the sale.

64 The applicable duty during a sale process such as this one is not to obtain the best possible price at any cost, but to do everything reasonably possible with a view to obtaining the best price.

65 The dollar amount of Arctic Beluga's offer is irrelevant unless it can be used to demonstrate that the Petitioners, with the assistance of the Monitor, acted improvidently in accepting AIM's offer over theirs [16].

66 Nothing in the evidence suggests that this could have been the case here.

67 In that regard, Arctic Beluga's references to the findings of the courts in *Beauty Counsellors of Canada Ltd., Re* [17] and *Selkirk, Re* [18] hardly support its argument.

68 In these decisions, the courts first emphasized that it was not desirable for a purchaser to wait to the last minute, even up to the court approval stage, to submit its best offer. Yet, the courts then added that they could still consider such a late offer if, for instance, a substantially higher offer turned up at the approval stage. In support of that view, the courts explained that in doing so, the evidence could very well show that the trustee did not properly carry out its duty to obtain the best price for the estate.

69 This reasoning has clearly no application in this matter. As stated, the process followed was appropriate and beyond reproach. The bids received were reviewed and analyzed. Arctic Beluga's bid was rejected for reasonable and defendable justifications.

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

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

72 In prior decisions rendered in similar context [19], courts in this province have emphasized that they should intervene only where there is clear evidence that the Monitor failed to act properly. A subsequent, albeit higher, bid is not necessarily a valid enough reason to set aside a sale process short of any evidence of unfairness.

73 In the circumstances, the Court agrees that the Petitioners and the Monitor were "entitled to prefer a bird in the hand to two in the bush" and were reasonable in preferring a lower-priced unconditional offer over a higher-priced offer that was subject to ambiguous caveats and unsatisfactory funding commitments.

74 AIM has transferred an amount of $880,000 to the Petitioners' Counsel as a deposit required under the Purchase Agreement. It has the full financial capacity to consummate the sale within the time period provided for [20].

75 As a result, the Court finds that the Petitioners are well founded in proceeding with the sale to AIM on the basis that the offer submitted by the latter was the most advantageous and presented the fewest closing risks for the Petitioners and their creditors.

76 All in all, the Court agrees with the following summary of the situation found in the Monitor's 38 th Report, at paragraph 79:

(a) the Petitioners have used their best efforts to obtain the best purchase price possible;

(b) the Petitioners have acted in a fair and reasonable manner throughout the sale process and with respect to all potential purchasers, including Arctic Beluga;

(c) the Petitioners have considered the interests of the stakeholders in the CCAA proceedings;

(d) the sale process with respect to the Closed Mills was thorough, extensive, fair and reasonable; and

(e) Arctic Beluga had ample opportunity to present its highest and best offer for the Closed Mills, including ample opportunity to address the issues of closing risk and the ability to finance the transaction and any future environmental liabilities, and they have not done so in a satisfactory manner.

77 The contemplated sale of the Closed Mills to AIM will therefore be approved.

**The Standing Issue**

78 In view of the Court's finding on the sale approval, the second issue pertaining to the lack of standing of Arctic Beluga is, in the end, purely theoretical.

79 Be it as a result of Arctic Beluga's Intervention or because of the Monitor's 38th Report, it remains that the Court had, in any event, to be satisfied that the criteria applicable for the approval of the sale were met. In doing so, proper consideration of the complaints raised was necessary, no matter what.

80 Even if this standing issue does not consequently need to be decided to render judgment on the Motion, some remarks are, however, still called for in that regard.

81 Interestingly, the Court notes that in the few reported decisions [21] of this province's courts dealing with the contestation of sale approval motions, the standing issue of the disgruntled bidder has apparently not been raised or analyzed.

82 In comparison, in a leading case on the subject [22], the Ontario Court of Appeal has ruled, a decade ago, that a bitter bidder simply does not have a right that is finally disposed of by an order approving a sale of a debtor's assets. As such, it has no legal interest in a sale approval motion.

83 For the Ontario Court of Appeal, the purpose of such a motion is to consider the best interests of the parties who have a direct interest in the proceeds of sale, that is, the creditors. An unsuccessful bidder's interest is merely commercial:

> 24 [...] If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.
>
> 25 There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg*, supra.
>
> 26 Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

84 The Ontario Court of Appeal explained as follows the policy reasons underpinning its approach to the lack of standing of an unsuccessful prospective purchaser [23] :

> 30 There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court-approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands of a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

85 Along with what appears to be a strong line of cases [24] , Morawetz J. recently confirmed the validity of the *Skyepharma* precedent in the context of an opposition to a sale approval filed by a disgruntled bidder in both Canadian proceedings under the CCAA and in US proceedings under Chapter 11 [25] .

86 Here, Arctic Beluga stood alone in contesting the Motion. None of the creditors supported its contestation. Its only interest was to close the deal itself, arguably for the interesting profits it conceded it would reap in the very good scrap metal market that exists presently.

87 Arctic Beluga's contestation did, in the end, delay the sale approval and no doubt brought a level of uncertainty in a process where the interested parties had a definite interest in finalizing the deal without further hurdles.

88 From that perspective, Arctic Beluga's contestation proved to be, at the very least, a good example of the "à propos" of the policy reasons that seem to support the strong line of cases cited before that question the standing of bitter bidder in these debates.

**For these Reasons, The Court:**

1 **AUTHORIZES** Abitibi-Consolidated Company of Canada ("*ACCC*"), Bowater Maritimes Inc. ("*BMI*") and Bowater Canadian Forest Products Inc. ("*BCFPI*" and together with ACCC and BMI, the "*Vendors*") to enter into, and Abitibi-Consolidated Inc. ("*ACI*") to intervene in, the agreement entitled *Purchase and Sale Agreement* (as amended, the "*Purchase Agreement*"), by and between ACCC, BMI and BCFPI, as Vendors, American Iron & Metal LP (the "*Purchaser*") through its general partner American Iron & Metal GP Inc., as Purchaser, American Iron & Metal Company Inc., as Guarantor, and to which ACI intervened, copy of which was filed as Exhibits R-1 and R-1(a) to the Motion, and into all the transactions contemplated therein (the "*Sale Transactions*") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor;

2 **ORDERS** and **DECLARES** that this Order shall constitute the only authorization required by the Vendors to proceed with the Sale Transactions and that no shareholder or regulatory approval shall be required in connection therewith, save and except for the satisfaction of the Land Swap Transactions and the obtaining of the U.S. Court Order (as said terms are defined in the Purchase Agreement);

3 **ORDERS** and **DECLARES** that upon the filing with this Court's registry of a Monitor's certificate substantially in the form appended as *Schedule "D"* hereto, (the "*First Closing Monitor's Certificate*"), all right, title and interest in and to the Beaupré Assets, Donnacona Assets and Dalhousie Assets (each as defined below and collectively, the "*First Closing Assets*"), shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, liabilities, obligations, interests, prior claims, hypothecs, security interests (whether contractual, statutory or otherwise), liens, assignments, judgments, executions, writs of seizure and sale, options, adverse claims, levies, charges, liabilities (direct, indirect, absolute or contingent), pledges, executions, rights of first refusal or other pre-emptive rights in favour of third parties, mortgages, hypothecs, trusts or deemed trusts (whether contractual, statutory or otherwise), restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise (collectively, the "*First Closing Assets Encumbrances*"), including without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order issued on April 17, 2009 by Justice Clément Gascon, J.S.C., as amended, and/or

any other CCAA order; and (ii) all charges, security interests or charges evidenced by registration, publication or filing pursuant to the *Civil Code of Québec*, the Ontario *Personal Property Security Act*, the New Brunswick *Personal Property Security Act* or any other applicable legislation providing for a security interest in personal or movable property, excluding however, the permitted encumbrances, easements and restrictive covenants listed on *Schedule "E"* hereto (the "*Permitted First Closing Assets Encumbrances*") and, for greater certainty, *ORDERS* that all of the First Closing Assets Encumbrances affecting or relating to the First Closing Assets be expunged and discharged as against the First Closing Assets, in each case effective as of the applicable time and date set out in the Purchase Agreement;

4 **ORDERS** and **DECLARES** that upon the filing with this Court's registry of a Monitor's certificate substantially in the form appended as *Schedule "F"* hereto, (the "*Second Closing Monitor's Certificate*"), all right, title and interest in and to the Fort William Assets (as defined below), shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, liabilities, obligations, interests, prior claims, hypothecs, security interests (whether contractual, statutory or otherwise), liens, assignments, judgments, executions, writs of seizure and sale, options, adverse claims, levies, charges, liabilities (direct, indirect, absolute or contingent), pledges, executions, rights of first refusal or other pre-emptive rights in favour of third parties, mortgages, hypothecs, trusts or deemed trusts (whether contractual, statutory or otherwise), restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise (collectively, the "*Fort William Assets Encumbrances*"), including without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order issued on April 17, 2009 by Justice Clément Gascon, J.S.C., as amended, and/or any other CCAA order; and (ii) all charges, security interests or charges evidenced by registration, publication or filing pursuant to the Ontario *Personal Property Security Act* or any other applicable legislation providing for a security interest in personal or movable property, excluding however, the permitted encumbrances, notification agreements, easements and restrictive covenants generally described in *Schedule "G"* (the "*Permitted Fort William Assets Encumbrances*") upon their registration on title. This Order shall not be registered on title to the Fort William Assets until all of such generally described Permitted Fort William Assets Encumbrances are registered on title, at which time the Petitioners shall be at liberty to obtain, without notice, an Order of this Court amending the within Order to incorporate herein the registration particulars of such Permitted Fort William Assets Encumbrances in Schedule "G";

5 **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Montmorency, upon presentation of the Monitor's First Closing Certificate, in the form appended as Schedule "D", and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser as the absolute owner in regards to the First Closing Purchased Assets located at Beaupré, in the Province of Quebec, corresponding to an immovable property known and designated as being composed of lots 3 681 089, 3 681 454, 3 681 523, 3 681 449, 3 682 466, 3 681 122, 3 681 097, 3 681 114, 3 681 205, 3 682 294, 3 681 022 and 3 681 556 of the Cadastre of Quebec, Registration Division of Montmorency, with all buildings thereon erected bearing civic number 1 du Moulin Street, Beaupré, Québec, Canada, G0A 1E0 (the "*Beaupré Assets*"); and (ii) proceed with the cancellation of any and all First Closing Assets Encumbrances on the Beaupré Assets, including, without limitation, the following registrations published at the said Land Registry:

- Hypothec dated February 17, 2000 registered under number 140 085 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency (legal construction);

- Hypothec dated April 1, 2008 registered under number 15 079 215 and assigned on January 21, 2010 under number 16 882 450 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

- Hypothec dated August 18, 2008 registered under number 15 504 248 in the index of immovables with respect to lot 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

- Hypothec dated October 30, 2008 registered under number 15 683 288 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency (legal construction);

• Hypothec dated April 20, 2009 registered under number 16 123 864 in the index of immovables with respect to lot 3 681 454 (legal construction) and Prior notice for sale by judicial authority dated July 23, 2009 registered under number 16 400 646 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency; and;

• Hypothec dated May 8, 2009 registered under number 16 145 374 and subrogated on January 1, 2010 under number 16 851 224 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

• Hypothec dated May 8, 2009 registered under number 16 145 375 and subrogated on January 1, 2010 under number 16 851 224 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency; and

• Hypothec dated December 9, 2009 registered under number 16 789 817 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

6 **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Portneuf, upon presentation of the Monitor's First Closing Certificate, in the form appended as Schedule "D", and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser as the absolute owner in regards to the First Closing Purchased Assets located at Donnacona, in the Province of Québec, corresponding to an immovable property known and designated as being composed of lots 3 507 098, 3 507 099, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf, with all buildings thereon erected bearing civic number 1 Notre-Dame Street, Donnacona, Québec, Canada, G0A 1T0 (the "*Donnacona Assets*"); and (ii) proceed with the cancellation of any and all First Closing Assets Encumbrances on the Donnacona Assets, including, without limitation, the following registrations published at the said Land Registry:

• Hypothec dated March 9, 2009 registered under number 16 000 177 with respect to lot 3 507 098 (legal construction) and Notice for sale by judicial authority dated September 24, 2009 registered under number 16 573 711 with respect to lots 3 507 098, 3 507 099, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf;

• Hypothec dated April 30, 2009 registered under number 16 122 878 and assigned on May 22, 2009 under number 16 184 386 with respect to lots 3 507 098, 3 507 099, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf;

• Hypothec dated March 18, 1997 registered under number 482 357 modified on August 30, 1999 under registration number 497 828 with respect to lots 3 507 098, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf; and

• Hypothec dated November 24, 1998 registered under number 493 417 and modified on August 30, 1999 under registration number 497 828 with respect to lots 3 507 098, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf;

7 **ORDERS** the Quebec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Vesting Order and the First Closing Monitor's Certificate, to reduce the scope of the hypothecs registered under numbers: 06-0308066-0001, 08-0674019-0001, 09-0216695-0002, 09-0481801-0001 and 09-0236637-0016 [26] in connection with the Donnacona Assets and 08-0163796-0002, 08-0163791-0002, 08-0695718-0002, 09-0481801-0002, 09-0256803-0016 [27], 09-0256803-0002 [28] and 09-0762559-0002 in connection with the Beaupré Assets and to cancel, release and discharge all of the First Closing Assets Encumbrances in order to allow the transfer to the Purchaser of the Beaupré Assets and the Donnacona Assets, as described in the Purchase Agreement, free and clear of any and all encumbrances created by those hypothecs;

8 **ORDERS** that upon registration in the Land Registry Office for the Registry Division of Restigouche County of an Application for Vesting Order in the form prescribed by the *Registry Act* (New Brunswick) duly executed by the Monitor, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in *Schedule "H"* hereto (the "*Dalhousie Assets*") in fee simple, and is hereby directed to delete and expunge from title to the Dalhousie Assets any and all First Closing Assets Encumbrances on the Dalhousie Assets;

9 **ORDERS** that upon the filing of the First Closing Monitor's Certificate with this Court's registry, the Vendors shall be authorized to take all such steps as may be necessary to effect the discharge of all liens, charges and encumbrances registered against the Dalhousie Assets, including filing such financing change statements in the New Brunswick Personal Property Registry (the "*NBPPR*") as may be necessary, from any registration filed against the Vendors in the NBPPR, provided that the Vendors shall not be authorized to effect any discharge that would have the effect of releasing any collateral other than the Dalhousie Assets, and the Vendors shall be authorized to take any further steps by way of further application to this Court;

10 **ORDERS** that upon registration in the Land Registry Office:

(a) for the Land Titles Division of Thunder Bay of an Application for Vesting Order in the form prescribed by the *Land Registration Reform Act* (Ontario), (and including a law statement confirming the filing of the Second Closing Monitor's Certificate, as set out in section 4 above, has been made) the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in *Schedule "I"*, *Section 1* (the "*Fort William Land Titles Assets*") hereto in fee simple, and is hereby directed to delete and expunge from title to the Fort William Land Titles Assets all of the Fort William Assets Encumbrances, which for the sake of clarity do not include the Permitted Fort William Land Titles Assets Encumbrances listed on Schedule G, Section 1, hereto;

(b) for the Registry Division of Thunder Bay of a Vesting Order in the form prescribed by the *Land Registration Reform Act* (Ontario), (and including a law statement confirming the filing of the Second Closing Monitor's Certificate, as set out in section 4 above, has been made) the Land Registrar is hereby directed to record such Vesting Order in respect of the subject real property identified in *Schedule "I"*, *Section 2* (the "*Fort William Registry Assets*");

11 **ORDERS** that upon the filing of the Second Closing Monitor's Certificate with this Court's registry, the Vendors shall be authorized to take all such steps as may be necessary to effect the discharge of all liens, charges and encumbrances registered against the Fort William Assets, including filing such financing change statements in the Ontario Personal Property Registry ("*OPPR*") as may be necessary, from any registration filed against the Vendors in the OPPR, provided that the Vendors shall not be authorized to effect any discharge that would have the effect of releasing any collateral other than the Fort William Assets, and the Vendors shall be authorized to take any further steps by way of further application to this Court;

12 **ORDERS** that the proceeds from the sale of the First Closing Assets and the Fort William Assets, net of the payment of all outstanding Taxes (as defined in the Purchase Agreement) and all transaction-related costs, including without limitation, attorney's fees (the "*Net Proceeds*") shall be remitted to Ernst & Young Inc., in its capacity as Monitor of the Petitioners, until the issuance of directions by this Court with respect to the allocation of said Net Proceeds;

13 **ORDERS** that for the purposes of determining the nature and priority of the First Closing Assets Encumbrances, the Net Proceeds from the sale of the First Closing Assets shall stand in the place and stead of the First Closing Assets, and that upon payment of the First Closing Purchase Price (as defined in the Purchase Agreement) by the Purchaser, all First Closing Assets Encumbrances except those listed in Schedule E hereto shall attach to the Net Proceeds with the same priority as they had with respect to the First Closing Assets immediately prior to the sale, as if the First Closing Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

14 **ORDERS** that for the purposes of determining the nature and priority of the Fort William Assets Encumbrances, the Net Proceeds from the sale of the Fort William Assets shall stand in the place and stead of the Fort William Assets, and that upon payment of the Second Closing Purchase Price (as defined in the Purchase Agreement) by the Purchaser, all Fort William Assets Encumbrances except those listed in Schedule G hereto shall attach to the Net Proceeds with the same priority as they

had with respect to the Fort William Assets immediately prior to the sale, as if the Fort William Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

15 **ORDERS** that notwithstanding:

(i) the proceedings under the CCAA;

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

(iii) the provisions of any federal or provincial legislation;

the vesting of the First Closing Assets and the Fort William Assets contemplated in this Vesting Order, as well as the execution of the Purchase Agreement pursuant to this Vesting Order, are to be binding on any trustee in bankruptcy that may be appointed, and shall not be void or voidable nor deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it give rise to an oppression or any other remedy;

16 **ORDERS AND DECLARES** that the Sale Transactions are exempt from the application of the *Bulk Sales Act* (Ontario);

17 **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order, including without limitation, the United States Bankruptcy Court for the District of Delaware, and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order;

18 **ORDERS** the provisional execution of this Vesting Order notwithstanding any appeal and without the necessity of furnishing any security;

19 **WITHOUT COSTS**.

*Motion granted.*

**Schedule"A" — Abitibi Petitioners**

1. *ABITIBI-CONSOLIDATED INC.*
2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*
3. *3224112 NOVA SCOTIA LIMITED*
4. *MARKETING DONOHUE INC.*
5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*
6. *3834328 CANADA INC.*
7. *6169678 CANADA INC.*
8. *4042140 CANADA INC.*
9. *DONOHUE RECYCLING INC.*
10. *1508756 ONTARIO INC.*

11. *3217925 NOVA SCOTIA COMPANY*

12. *LA TUQUE FOREST PRODUCTS INC.*

13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*

14. *SAGUENAY FOREST PRODUCTS INC.*

15. *TERRA NOVA EXPLORATIONS LTD.*

16. *THE JONQUIERE PULP COMPANY*

17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*

18. *SCRAMBLE MINING LTD.*

19. *9150-3383 QUÉBEC INC.*

20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

**Schedule"B" — Bowater Petitioners**

1. *BOWATER CANADIAN HOLDINGS INC.*

2. *BOWATER CANADA FINANCE CORPORATION*

3. *BOWATER CANADIAN LIMITED*

4. *3231378 NOVA SCOTIA COMPANY*

5. *ABITIBIBOWATER CANADA INC.*

6. *BOWATER CANADA TREASURY CORPORATION*

7. *BOWATER CANADIAN FOREST PRODUCTS INC.*

8. *BOWATER SHELBURNE CORPORATION*

9. *BOWATER LAHAVE CORPORATION*

10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*

11. *BOWATER TREATED WOOD INC.*

12. *CANEXEL HARDBOARD INC.*

13. *9068-9050 QUÉBEC INC.*

14. *ALLIANCE FOREST PRODUCTS (2001) INC.*

15. *BOWATER BELLEDUNE SAWMILL INC.*

16. *BOWATER MARITIMES INC.*

17. *BOWATER MITIS INC.*

18. *BOWATER GUÉRETTE INC.*

19. *BOWATER COUTURIER INC.*

**Schedule"C" — 18.6 CCAA Petitioners**

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING 1 CORP.*

3. *BOWATER VENTURES INC.*

4. *BOWATER INCORPORATED*

5. *BOWATER NUWAY INC.*

6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

**Schedule"D" — First Closing Monitor's Certificate**

*CANADA*

*PROVINCE OF QUEBEC DISTRICT OF MONTRÉL*

*No.: 500-11-036133-094*

*SUPERIOR COURT*

Commercial Division (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

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

*ABITIBIBOWATER INC., AND ABITIBI-CONSOLIDATED INC., AND BOWATER CANADIAN HOLDINGS INC., AND THE OTHER PETITIONERS LISTED HEREIN, PETITIONERS AND ERNST & YOUNG INC., MONITOR*

*CERTIFICATE OF THE MONITOR*

Recitals:

**WHEREAS** on April 17, 2009, the Superior Court of Quebec (the "*Court*") issued an order (as subsequently amended and restated, the "*Initial Order*") pursuant to the *Companies' Creditors Arrangement Act* (the "*CCAA*") in respect of (i) Abitibi-Consolidated Inc. ("*ACI*") and subsidiaries thereof (collectively, the "*Abitibi Petitioners*"),[29] (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "*Bowater Petitioners*")[30] and (iii) certain partnerships[31]. Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

**WHEREAS** pursuant to the terms of the Initial Order, Ernst & Young Inc. (the "*Monitor*") was named monitor of, *inter alia*, the Abitibi Petitioners; and

**WHEREAS** on •, 2010, the Court issued an Order (the "*Closed Mills Vesting Order*") thereby, *inter alia*, authorizing and approving the execution by Abitibi-Consolidated Company of Canada ("*ACCC*"), Bowater Maritimes Inc. ("*BMI*") and Bowater Canadian Forest Products Inc. ("*BCFPI*" and together with ACCC and BMI, the "*Vendors*") of an agreement entitled *Purchase and Sale Agreement* (the "*Purchase Agreement*") by and between ACCC, BMI and BCFPI, as Vendors, American Iron & Metal LP (the "*Purchaser*") through its general partner American Iron & Metal GP Inc., as Purchaser, American Iron & Metal Company Inc., as Guarantor, and to which ACI intervened, copy of which was filed and into all the transactions contemplated therein (the "*Sale Transactions*") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

**WHEREAS** the Purchase Agreement contemplates two distinct closing in order to complete the Sale Transactions, namely a First Closing in respect of the First Closing Purchased Assets and a Second Closing in respect of the Fort William Purchased Assets (all capitalized terms as defined in the Purchase Agreement).

The Monitor Certifies that it has been Advised by the Vendors and the Purchaser as to the Following:

(a) the Purchase Agreement has been executed and delivered;

(b) the portion of the First Closing Purchase Price payable upon the First Closing and all applicable taxes have been paid (all capitalized terms as defined in the Purchase Agreement);

(c) all conditions to the First Closing under the Purchase Agreement have been satisfied or waived by the parties thereto.

This Certificate was delivered by the Monitor at ____ *[TIME]* on ____________ *[DATE]*.

*Ernst & Young Inc.* in its capacity as the monitor for the restructuration proceedings under the *CCAA* undertaken by AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and the other Petitioners listed herein, and not in its personal capacity.

*Name:* __________

*Title:* __________

**Schedule"E" — Permitted First Closing Assets Encumbrances**

**1. Beaupré Mill**

a. Servitudes dated February 10, 1954 registered under numbers 34 173, 34 174, 34 175, 34 176, 34 177, 34 178, 34 179, 34 180 in the index of immovables with respect to lot 3 681 454 in the Registration Division of Montmorency, Cadastre of Québec;

b. Servitude dated April 4, 1964 registered under number 45 815 in the index of immovables with respect to lot 3 681 454 in the Registration Division of Montmorency, Cadastre of Québec;

c. Servitudes dated December 17, 1980 registered under numbers 83 049, 83 050, 83 051, 83 052 and 83 053 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

d. Servitudes dated December 18, 1980 registered under number 83 095, 83 096 and 83 097 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

e. Servitude dated December 23, 1980 registered under number 83 121 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

f. Servitudes dated December 24, 1980 registered under numbers 83 140, 83 141, 83 142, 83 143, 83 144, 83 145, 83 146 and 83 147 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

g. Servitude dated December 30, 1980 registered under number 83 182 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

h. Servitudes dated January 7, 1981 registered under numbers 83 196, 83 197, 83 198 and 83 199 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

i. Servitudes dated January 9, 1981 registered under numbers 83 215 and 83 216 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

j. Servitude dated March 20, 1981 registered under number 83 751 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

k. Servitude dated June 22, 1981 registered under number 84 426 in the index of immovables with respect to lot 3 682 466 in the Registration Division of Montmorency, Cadastre of Québec;

l. Servitude dated November 13, 1981 registered under number 85 429 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

m. Servitude dated December 4, 1981 registered under number 85 555 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

n. Servitude dated December 9, 1981 registered under number 85 567 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

o. Servitude dated December 14, 1981 registered under number 85 602 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

p. Servitude dated December 16, 1981 registered under number 85 617 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

q. Servitude dated December 7, 1982 registered under number 87 882 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

r. Servitude dated December 20, 1982 registered under number 88 007 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

s. Servitude dated March 23, 1983 registered under number 91 937 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

t. Servitude dated September 9, 1983 registered under number 90 365 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

u. Servitude dated April 25, 1985 registered under number 91 154 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

v. Servitude dated July 7, 1986 registered under number 98 833 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

w. Servitude dated September 8, 1986 registered under number 99 187 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

x. Servitude dated December 23, 1997 registered under number 91 937 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

y. Servitude dated December 23, 1997 registered under number 134 993 in the index of immovables with respect to lots 3 681 089 and 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec;

z. Servitude dated December 23, 1997 registered under number 134 994 in the index of immovables with respect to lot 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec; and

aa. Servitude dated July 25, 2000 registered under number 141 246 in the index of immovables with respect to lots 3 681 089 and 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec.

**2. Dalhousie Mill**

None

**3. Donnacona Mill**

a. Servitude dated November 12, 1920 registered under number 68 747 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

b. Servitude dated October 26, 1931 registered under number 80007 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

c. Servitude dated May 11, 1933 registered under number 87 789 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

d. Servitude dated April 10, 1946 registered under number 109891 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

e. Servitude dated October 6, 1951 registered under number 125685 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

f. Servitude dated February 16, 1961 registered under number 154 517 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

g. Servitude dated February 1, 1983 registered under number 272521 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

h. Servitude dated April 14, 1986 registered under number 293891 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

i. Servitudes dated March 25, 1987 registered under numbers 301930, 301931 and 302028 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

j. Servitude dated October 30, 1990 registered under number 333377 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

k. Servitude dated April 19, 1996 registered under number 476330 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

l. Servitude dated April 19, 1996 registered under number 476331 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec; and

m. Servitude dated May 20, 2003 registered under number 10 410 139 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec.

**Schedule"F" — Second Closing Monitor's Certificate**

*CANADA*

*PROVINCE OF QUEBEC DISTRICT OF MONTRÉL*

*No.: 500-11-036133-094*

*SUPERIOR COURT*

Commercial Division (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

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

*ABITIBIBOWATER INC., AND ABITIBI-CONSOLIDATED INC., AND BOWATER CANADIAN HOLDINGS INC., AND THE OTHER PETITIONERS LISTED HEREIN, PETITIONERS AND ERNST & YOUNG INC., MONITOR*

*CERTIFICATE OF THE MONITOR*

Recitals:

**WHEREAS** on April 17, 2009, the Superior Court of Quebec (the "*Court*") issued an order (as subsequently amended and restated, the "*Initial Order*") pursuant to the *Companies' Creditors Arrangement Act* (the "*CCAA*") in respect of (i) Abitibi-Consolidated Inc. ("*ACI*") and subsidiaries thereof (collectively, the "*Abitibi Petitioners*"),[32] (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "*Bowater Petitioners*")[33] and (iii) certain partnerships[34]. Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

**WHEREAS** pursuant to the terms of the Initial Order, Ernst & Young Inc. (the "*Monitor*") was named monitor of, *inter alia*, the Abitibi Petitioners; and

**WHEREAS** on •, 2010, the Court issued an Order (the "*Closed Mills Vesting Order*") thereby, *inter alia*, authorizing and approving the execution by Abitibi-Consolidated Company of Canada ("*ACCC*"), Bowater Maritimes Inc. ("*BMI*") and Bowater Canadian Forest Products Inc. ("*BCFPI*" and together with ACCC and BMI, the "*Vendors*") of an agreement entitled *Purchase and Sale Agreement* (the "*Purchase Agreement*") by and between ACCC, BMI and BCFPI, as Vendors, American Iron & Metal LP (the "*Purchaser*") through its general partner American Iron & Metal GP Inc., as Purchaser, American Iron & Metal Company Inc., as Guarantor, and to which ACI intervened, copy of which was filed and into all the transactions contemplated therein (the "*Sale Transactions*") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

**WHEREAS** the Purchase Agreement contemplates two distinct closing in order to complete the Sale Transactions, namely a First Closing in respect of the First Closing Purchased Assets and a Second Closing in respect of the Fort William Purchased Assets (all capitalized terms as defined in the Purchase Agreement).

The Monitor Certifies that it has been Advised by the Vendors and the Purchaser as to the Following:

(a) the Purchase Agreement has been executed and delivered;

(b) the portion of the Second Closing Purchase Price payable upon the Second Closing and all applicable taxes have been paid (all capitalized terms as defined in the Purchase Agreement);

(c) all conditions to the Second Closing under the Purchase Agreement have been satisfied or waived by the parties thereto.

This Certificate was delivered by the Monitor at ____ *[TIME]* on ____________ *[DATE]*.

*Ernst & Young Inc.* in its capacity as the monitor for the restructuration proceedings under the *CCAA* undertaken by AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and the other Petitioners listed herein, and not in its personal capacity.

*Name:* __________

*Title:* __________

**Schedule"G" — Permitted Fort William Assets Encumbrances**

Section 1 Permitted Fort William Land Titles Assets Encumbrances

1. Notification Agreement in favour of the City of Thunder Bay, registered on PIN 62261-0314, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres; PT Water LT in front of Indian Reserve No. 52 (Grand Trunk Pacific Railway Company) PT 1, 2, 3, 55R-10429; Thunder Bay, save and except Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 23 and 24, 55R-13027

2. Water Easement in favour of the City of Thunder Bay registered on Part of PIN 62261-0314, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres; PT Water LT in front of Indian Reserve No. 52 (Grand Trunk Pacific Railway Company) PT 1, 2,3, 55R-10429; Thunder Bay, save and except Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 23 and 24, 55R-13027, being Part 10, 55R-13027

Section 2 Permitted Fort William Registry Assets Encumbrances

3. Notification Agreement in favour of the City of Thunder Bay, Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 11, 12, 13, 14, 15, 16 and 25, 55R-13027

4. Telephone Easement in favour of the City of Thunder Bay registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Part 20, 55R-13027

5. Water Easement in favour of the City of Thunder Bay, registered on Part of PIN 62261-0533, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 12 and 15, 55R-13027

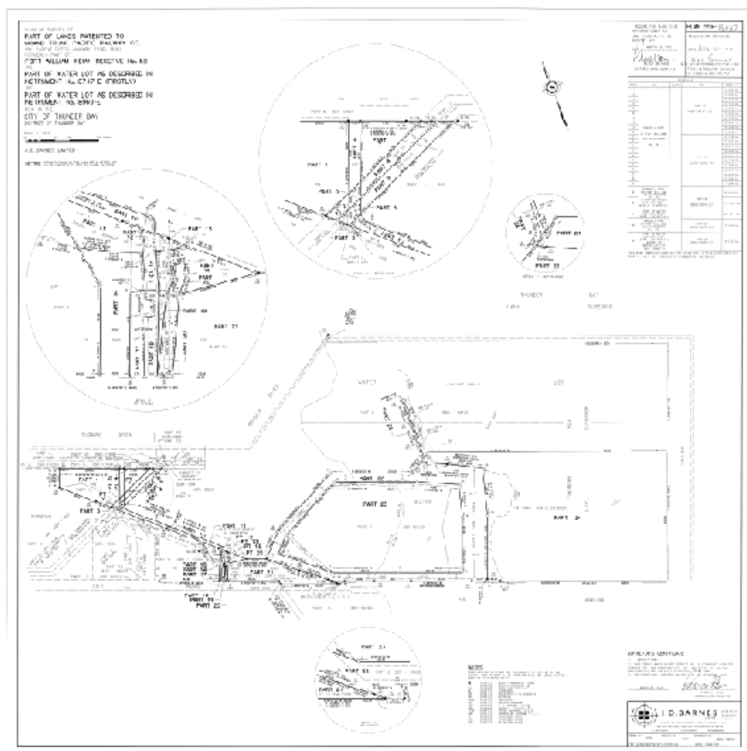
6. Easement in favour of Union Gas, registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 20 and 25, 55R-13027

7. Agreement registered as Instrument #403730 on July 14, 1999

8. Easement registered as Instrument #403729 on July 14, 1999

The said registered reference plan 55R13027 is attached as Annex A to this Schedule G (the "*Reference Plan")*.

**AnnexA**



**Graphic 1**

**Schedule"H" — Dalhousie Assets**

Municipal address:

451 William St., Dalhousie, New Brunswick, Canada, E8C 2X9

Legal description (Property Identifier No.):

50173616, 50172030, 50173715, 50172667, 50172634, 50173574, 50173582, 50173590, 50172626, 50173640, 50173624, 50173632, 50173657, 50173681, 50173673, 50173665, 50173749, 50173756, 50173764, 50105394, 50251354, 50172774, 50173566, 50173707

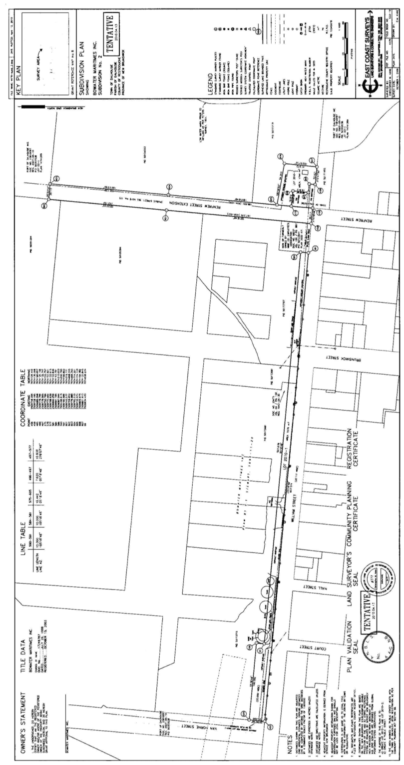
**Save and Except for**

The surveyed land bounded by the bolded line in the plan attached in Annex A to this Schedule H (the "*Dalhousie Plan*").

For greater certainty, the following property is not included in the sale:

Legal description (Property Identifier No.): 50191857, 50191865, 50191881, 50191873, 50191899, 50191915, 50191931, 50192384, 50192400, 50068832, 50193002, 50192996, 50192988, 50192970, 50192418, 50260538, 50260520, 50260512, 50072131, 50340959, 50340942, 50340934, 50340926, 50340918, 50340900, 50340892, 50340884, 50340645, 50340637, 50340629, 50340611, 50339779, 50192392, 50191949, 50191923, 50191907, 50172949, 50172931, 50172907, 50056506, 50241611, 50172899, 50172881, 50172873, 50172865, 50172857, 50172840, 50172832, 50172824, 50172444, 50171966, 50171958, 50173699, 50104553, 50173731, 50172923, 50172915.

**AnnexA — Dalhousie Plan**



**Graphic 2**

**Schedule"I" — Fort William Assets**

Municipal address:

1735 City Road, Thunder Bay, Ontario, Canada, P7B 6T7

Legal description:

**Section 1 Fort William Land Titles Assets**

PIN 62261-0314, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres; PT Water LT in front of Indian Reserve No. 52 (Grand Trunk Pacific Railway Company) PT 1, 2 ,3, 55R-10429; Thunder Bay, save and except Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 23 and 24, 55R-13027

**Section 2 Fort William Registry Assets**

Part of PIN 62261-0533, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 11, 12, 13, 14, 15, 16 and 25, 55R-13027

Footnotes

1 Namely, a first Vesting Order in respect of the Beaupré, Dalhousie, Donnacona and Fort William closed mills assets (Exhibit R-3A) and a second Vesting Order in respect of the corresponding Fort William land swap (Exhibit R-4A).

2 Dated March 22, 2010 and included in Exhibit I-1.

3 Exhibits VB-1 and I-5.

4 *AbitibiBowater Inc., Re*, 2009 QCCS 6460 (C.S. Que.), at para. 36 and 37.

5 See, in this respect, *Rail Power Technologies Corp., Re*, 2009 QCCS 2885 (C.S. Que.), at para. 96 to 99; *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]), at para. 35; *Boutique Euphoria inc., Re*, 2007 QCCS 7128 (C.S. Que.), at para. 91 to 95; *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.), and *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.).

6 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at para. 16.

7 See, for instance, the decisions cited at Note 5 and *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), leave to appeal refused (2005), 19 C.B.R. (5th) 53 (Ont. C.A.); *PSINET Ltd., Re*, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]), at para. 6; and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt 3346 (Ont. S.C.J. [Commercial List]), at para. 47.

8 *Grant Forest Products Inc., Re*, 2010 ONSC 1846 (Ont. S.C.J. [Commercial List]), at para. 30-33.

9 See, on that point, *Consumers Packaging Inc., Re* (Ont. C.A.), at para. 8, and *Canwest Global Communications Corp., Re*, 2010 ONSC 1176 (Ont. S.C.J. [Commercial List]), at para. 42.

10 See Exhibit I-1 and general condition # 5 of the Arctic Beluga penultimate bid.

11 See Exhibits I-6, I-8 and I-9.

12 See Exhibit I-7.

13 See Exhibit I-2.

14 See Exhibit I-6.

15 See Exhibit I-9.

16 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at para. 30.

17 (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.)

18 (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.)

19 *Rail Power Technologies Corp., Re*, 2009 QCCS 2885 (C.S. Que.), at para. 96 to 99, and *Boutique Euphoria inc., Re*, 2007 QCCS 7128 (C.S. Que.), at para. 91 to 95.

20 Exhibits AIM-1 and AIM-2.

21 See, for instance, the judgments rendered in *Rail Power Technologies Corp., Re*, 2009 QCCS 2885 (C.S. Que.); *Boutique Euphoria inc., Re*, 2007 QCCS 7128 (C.S. Que.); and *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.).

22 *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467 (Ont. C.A.), affirming (Ont. S.C.J. [Commercial List]) ("Skyepharma").

23 *Id*, at para. 30. See also, *Consumers Packaging Inc., Re* (Ont. C.A.), at para. 7.

24 See *Consumers Packaging Inc., Re* (Ont. C.A.), at para. 7; *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 637 (Ont. C.A. [In Chambers]), at para. 20; *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 665 (Ont. C.A.), at para. 8.

25 *In the Matter of Nortel Networks Corporation*, 2010 ONSC 126, at para. 3.

26 Assigned to Law Debenture Trust Company of New York registered under number 09-0288002-0001.

27 Assigned to U.S. Bank National Association and Wells Fargo Bank, N.A. under number 10-0018318-0001.

28 *Ibid*.

29 The Abitibi Petitioners are Abitibi-Consolidated Inc., Abitibi-Consolidated Company of Canada, 3224112 Nova Scotia Limited, Marketing Donohue Inc., Abitibi-Consolidated Canadian Office Products Holdings Inc., 3834328 Canada Inc., 6169678 Canada Incorporated., 4042140 Canada Inc., Donohue Recycling Inc., 1508756 Ontario Inc., 3217925 Nova Scotia Company, La Tuque Forest Products Inc., Abitibi-Consolidated Nova Scotia Incorporated, Saguenay Forest Products Inc., Terra Nova Explorations Ltd., The Jonquière Pulp Company, The International Bridge and Terminal Company, Scramble Mining Ltd., 9150-3383 Québec Inc. and Abitibi-Consolidated (U.K.) Inc.

30 The Bowater Petitioners are Bowater Canadian Holdings Incorporated., Bowater Canada Finance Corporation, Bowater Canadian Limited, 3231378 Nova Scotia Company, AbitibiBowater Canada Inc., Bowater Canada Treasury Corporation, Bowater Canadian Forest Products Inc., Bowater Shelburne Corporation, Bowater LaHave Corporation, St. Maurice River Drive Company Limited, Bowater Treated Wood Inc., Canexel Hardboard Inc., 9068-9050 Québec Inc., Alliance Forest Products (2001) Inc., Bowater Belledune Sawmill Inc., Bowater Maritimes Inc., Bowater Mitis Inc., Bowater Guérette Inc. and Bowater Couturier Inc.

31 The partnerships are Bowater Canada Finance Limited Partnership, Bowater Pulp and Paper Canada Holdings Limited Partnership and Abitibi-Consolidated Finance LP.

32 The Abitibi Petitioners are Abitibi-Consolidated Inc., Abitibi-Consolidated Company of Canada, 3224112 Nova Scotia Limited, Marketing Donohue Inc., Abitibi-Consolidated Canadian Office Products Holdings Inc., 3834328 Canada Inc., 6169678 Canada Incorporated., 4042140 Canada Inc., Donohue Recycling Inc., 1508756 Ontario Inc., 3217925 Nova Scotia Company, La Tuque Forest Products Inc., Abitibi-Consolidated Nova Scotia Incorporated, Saguenay Forest Products Inc., Terra Nova Explorations Ltd., The Jonquière Pulp Company, The International Bridge and Terminal Company, Scramble Mining Ltd., 9150-3383 Québec Inc. and Abitibi-Consolidated (U.K.) Inc.

33 The Bowater Petitioners are Bowater Canadian Holdings Incorporated., Bowater Canada Finance Corporation, Bowater Canadian Limited, 3231378 Nova Scotia Company, AbitibiBowater Canada Inc., Bowater Canada Treasury Corporation, Bowater Canadian Forest Products Inc., Bowater Shelburne Corporation, Bowater LaHave Corporation, St. Maurice River Drive Company Limited, Bowater Treated Wood Inc., Canexel Hardboard Inc., 9068-9050 Québec Inc., Alliance Forest Products (2001) Inc., Bowater Belledune Sawmill Inc., Bowater Maritimes Inc., Bowater Mitis Inc., Bowater Guérette Inc. and Bowater Couturier Inc.

34 The partnerships are Bowater Canada Finance Limited Partnership, Bowater Pulp and Paper Canada Holdings Limited Partnership and Abitibi-Consolidated Finance LP.

# TAB 4

2010 ONSC 1846
Ontario Superior Court of Justice [Commercial List]

Grant Forest Products Inc., Re

2010 CarswellOnt 2445, 2010 ONSC 1846, 67 C.B.R. (5th) 258

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

C. Campbell J.

Heard: February 1, 8, 2010
Judgment: March 30, 2010
Docket: CV-09-8247-00CL

Counsel: Sean Dunphy, Kathy Mah for Monitor
Daniel Dowdall, Jane O'Dietrich for Applicants, Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant U.S. Holdings GP
Kevin McElcheran for Toronto-Dominion Bank, Agent for First Lien Lenders
Fred Myers, Joe Pasquariello for Bank of New York Mellon, Agent for SLL
Sheryl Seigel for Georgia-Pacific LLC
Richard Swan for Peter Grant Sr.
Aubrey Kauffman for Independent Directors of Grant Forest Products Inc.

**Related Abridgment Classifications**
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

**Headnote**
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Applicants, being GFP Inc., its parent company, its Canadian subsidiaries, G U.S., and its related entities, obtained protection under Companies' Creditors Arrangement Act (CCAA) — Applicants had two levels of primary secured debt owed to FLL and SLL — GFP Inc. and G U.S. were in default under FLL agreement, and G U.S. was in default under SLL agreement — Applicants engaged financial advisor to advise on options to address debt position and locate investors or sell business, and marketing process was created — Bid of GP LLC, purchaser, was accepted and purchase and sale agreement was finalized — GFP Inc. et al. brought application to seek approval of sale and vesting order to complete transfer of control to purchaser — SLL opposed approval of transaction — Application granted — Once process put in place by Court Order for sale of assets of failing business, process should be honoured excepting extraordinary circumstances — Numerous parties participated over number of months in complex process designed to achieve not only maximum value of assets of business, but to ensure its survival

as going concern for benefit of many stakeholders — To permit invitation to reopen process not only would have destroyed integrity of process, but likely would have doomed transaction that had been achieved.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Applicants, being GFP Inc., its parent company, its Canadian subsidiaries, and G U.S. and its related entities, obtained protection under Companies' Creditors Arrangement Act (CCAA) when stay of proceedings was granted — Applicants had two levels of primary secured debt owed to FLL and SLL — GFP Inc. and G U.S. were in default under FLL agreement, and G U.S. was in default under SLL agreement — Applicants engaged financial advisor to advise on options to address debt position and locate investors or sell business, marketing process was created — Bid of GP LLC was accepted and purchase and sale agreement was finalized — Transaction required that security granted in favour of FLL and SLL be released and discharged upon closing of transaction — FLL's position was that only way transaction could be accomplished at proposed price was by creating tax benefits arising from proposed structure that would include transfer of G U.S. interests as partnership interests, rather than direct transfer of assets of G U.S. — FLL brought motion to add additional applicants — Motion granted — SLL opposed motion to add applicants and approve sale on basis that such relief would have had effect of mandatory order against U.S. parties which would extinguish U.S. security over U.S. realty and personalty — Issues raised by SLL were inextricably linked to restructuring of applicants and completion of transaction and as such were appropriate for consideration by Court — Transaction would not have been possible without tax advantages that were available as result of transaction form — Submissions that entire transaction was flawed because it resulted in transfer of some assets in U.S. without sale process envisaged in U.S. Bankruptcy Code, would have been triumph of form over substance — Relief sought was not merely device to sell U.S. assets from Canada, it was unified transaction, each element of which was necessary and integral to its success, it was Canadian process.

**Table of Authorities**

**Cases considered by *C. Campbell J.*:**

*Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

*Metcalfe & Mansfield Alternative Investments, Re* (January 5, 2010), Doc. 09-16709 (U.S. Bankr. S.D. N.Y.) — considered

*Morguard Investments Ltd. v. De Savoye* (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — followed

*Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — considered

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

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

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

*Bankruptcy Code*, 11 U.S.C.

Generally — referred to

Chapter 11 — referred to

Chapter 15 — considered

s. 363 — referred to

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

Generally — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Generally — referred to

***C. Campbell J.*:**

**Reasons for Decision**

1 This Application seeks approval of the Sale transaction and a Vesting Order to complete the transfer of the control of the business of Grant Forest Products Inc. to the purchaser Georgia-Pacific. The transaction is the culmination of the marketing process under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended ("CCAA"), authorized by an order of this Court dated June 25, 2009.

2 Approval of the transaction is opposed by the Second Lien Lenders ("SLL") [1] under an Inter-Creditor Agreement (the "ICA") of which Grant Forest is a party, on the basis that this Court does not have jurisdiction to, in effect, convey real property assets located in the United States.

3 An adjournment of the approval motion sought by the largest shareholder of Grant Forest, seeking time for improvement of expressions of interest by others into bids, was not granted. Consideration of the issues raised on this motion requires analysis of the many similarities and few differences between the restructuring and insolvency processes in Canada and the United States in cross-border transactions.

4 For reasons that follow, I am satisfied that this Court does have jurisdiction and it is appropriate to approve this complicated transaction. In order to deal with the objections raised, it is necessary to outline the transaction in some detail, the particulars of which are summarized in the Sixth Report of the Monitor.

5 Grant Forest Products Inc. ("GFP"), an Ontario company, and certain of its subsidiaries are privately owned corporations carrying on an Oriented Strand Board manufacturing business from facilities located in Canada and the United States. The most common uses of the companies' products are sheathing in the walls, floors and roofs in the construction of buildings and residential housing.

6 Two GFP mills are located in Ontario, one in Alberta (50% with Footner Forest Products) and two in the counties of Allendale and Clarendon in South Carolina.

7 The U.S. mills are owned indirectly through one of the Applicants, being the Grant Partnership registered in the state of Delaware. At present, due to decreased demand, only one Ontario mill and the Allendale mill in South Carolina are operating.

8 The Applicants, being the parent GFP, its Canadian subsidiaries Grant Alberta Inc. and Grant Forest Product Sales Inc., together with Grant U.S. holdings GP ("Grant U.S. Partnership") and its related entities, obtained protection under the CCAA on June 25, 2009, when a stay of proceedings was granted and Ernst and Young Inc. ("E&Y") was appointed Monitor. The Order also approved the continuation of the engagement of a chief restructuring advisor.

9 The Applicants have two levels of primary secured debt. The total debt obligations are comprised of the following facilities:

***First Lien Creditor Agreement***

10 As at May 31, 2009, the First Lien Lenders ("FLL") [2] were owed the principal amount of $399 million plus accrued interest of approximately $5.3 million pursuant to a credit agreement dated October 26, 2005 and amended March 21, 2007. An additional $8.7 million was owed to one or more of the FLL pursuant to interest rate swap agreements the liability of which was secured to the FLL Agent.

***Second Lien Creditor Agreement***

11 The bank of New York Mellon ("BNY") as successor is the Agent for the SLL, to whom as of May 31, 2009 was owed the principal amount of approximately $150 million plus accrued interest of approximately $42 million pursuant to a credit agreement dated as of March 21, 2007 as amended as of April 30, 2009. GFP and the Grant U.S. Partnership are the borrowers under the FLL Agreement with all related entities as guarantors of the FLL indebtedness. The Grant U.S. Partnership is the borrower under the SLL Agreement with all related entities as guarantors of the SLL debt.

12 GFP and the Grant U.S. Partnership are in default under the FLL Agreement and the Grant U.S. Partnership is in default under the SLL Agreement. Both the FLL and SLL Agents hold various security in Canada over each of their respective property and assets.

***Inter-Creditor Agreement***

13 The Applicants together with the entities related to the Grant U.S. Partnership, the FLL and SLL are parties to an Agreement dated March 21, 2007, which among other things deals with the relationship between the FLL security and the SLL security. Both the FLL and the SLL rely on this Agreement in respect of the issue as between them, which affects priority over assets.

***The Marketing Process***

14 Prior to the filing that gave rise to the initial order, the Applicants had engaged a financial advisor and an investment banking firm to advise on capital and strategic options to address the Applicants' debt position and liquidity needs and to locate investors or sell the business. While this process did not result in a transaction that could be implemented, the Applicants were of the view that the business could be sold as a going concern or they could sponsor a plan of arrangement to be consummated in CCAA proceedings. The Initial Order, which has not been objected to since being granted on June 25, 2009, contained a six page elaborate "Investment Offering Protocol" to provide interested parties with the opportunity to offer to purchase the business and operations in whole or in part as a going concern or to offer to sponsor a plan of arrangement of the Applicants or any of them.

15 The three phases of the marketing process are described in detail in paragraphs 35 to 47 of the Sixth Report of the Monitor. The process, which commenced in July 2009, involved contact with 91 potentially interested parties, narrowed to 13 who responded with expressions of interest, with eight parties invited to phase Two to conduct further due diligence.

16 At this phase, the interested parties were provided access to the Applicants' facilities, advised of the bid process and had until August 30, 2009 to submit revised proposals. This was subsequently extended to September 11, 2009 in order to accommodate due diligence requirements, plant tour schedules and management meetings with the eight interested parties who were to submit revised proposals on or before September 11, 2009.

17 As reported by the Monitor, two of the bids were inferior by their terms or consideration and three were within a similar range. As a result of due diligence items and closing conditions which risked the completion of the transaction, revised bids were extended to October 2, 2009 for the three interested parties.

18 As of October 16, 2009, 66 2/3% of the FLL debt and the Independent Directors Committee voted in favour of the selection of the Georgia-Pacific bid, one of the world's leading manufacturers and marketers of tissue, packaging, paper pulp and building products, to proceed to Phase Three.

19 As reported in the Fifth Report of the Monitor dated November 26, 2009, SLL who were prepared to agree to certain confidentiality provisions were apprised on October 15 of the status of the marketing process.

20 An exclusivity agreement was reached with Georgia-Pacific on October 20, 2009, which required the Applicants to refrain from seeking bids, responding to or negotiating with any party other than Georgia-Pacific with respect to the items included in the bid of Georgia-Pacific during a period of exclusivity which extended through a series of extensions to January 8, 2010, when the parties finalized a purchase and sale agreement that is in the material filed with the Court.

21 I accept the conclusion of the Monitor as set out in paragraph 56 of the Sixth Report:

> 56. It is the Monitor's view that the Marketing Process included a structured, fair, wide and effective canvassing of the market as demonstrated by the following:
>
> > a. contact by the Investment Offering Advisor of 91 interested parties comprising both financial and strategic parties located in North America, South America, Europe and Asia;

b. the execution of 32 NDAs by interested parties who were then granted access to review the Data Room and the subsequent submission of 13 EOIs at the end of *Phase 1*;

c. the EOIs of eight interested parties that were invited to participate in *Phase II* provided a value range which was market derived and tested, and as such, supported the conclusion that the consideration included in Georgia Pacific's bid reflected fair value;

d. of the eight interested parties that were invited to *Phase II*, five submitted improved bids in respect of consideration and/or closing conditions at the close of *Phase II* and of the three interested parties that were invited through to *Phase IIb*, each party again improved its bid in terms of consideration and/or closing conditions at the end of *Phase IIb*.

e. the selection of Georgia Pacific to negotiate a PSA was based on a thorough analysis of all of the financial and commercial terms presented in all of the bids, was recommended by the Monitor and the CRA and was approved by the First Lien Lenders Steering Committee and the Independent Directors Committee; and

f. the Second Lien Lenders were consulted, and their views and questions were taken into account in the final selection of Georgia Pacific.

22 This approval motion was originally returnable on February 1, 2010; it was adjourned to allow the parties to respond to two additional motions. The first, brought on behalf of the FLL, seeks to add as "Additional Applicants" the U.S. entities directly related to the Grant U.S. Partnership, "Grant NewCo LLC" and various Georgia-Pacific Canadian and U.S. entities.

23 The second motion, on behalf of the SLL, was to adjourn or dismiss the Approval Vesting motion on the basis that this Court did not have jurisdiction to deal with the assets in the United States that are the subject of the transaction and such assets would have to be dealt with under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

24 On February 1 and on the adjourned date of February 8, counsel for Peter Grant Senior sought a further adjournment to enable consideration of a recently received "offer." In its Seventh Report the Monitor reported on receipt of a letter which expressed interest in the Applicants' assets by a new "bidder." In its Report, the Monitor advised that in its opinion, the expression of interest could be considered as no more than that and reported that it did not comply with the Investment Offering Protocol.

25 Counsel for the SLL sought and was granted access to the correspondence but Mr. Grant was not, due to his involvement in a bid as per the terms of the Investment Offering Protocol.

26 On February 5, with knowledge of the position taken by the SLL and the specifics of the Georgia-Pacific agreement, another expression of interest was received by the Monitor and brought to the attention of the Court. This expression of interest from a previous "bidder" whose bid was rejected, sought to amend its previous position to accommodate the concern that the SLL had with respect to the Georgia-Pacific agreement.

27 The Court ruled that both of these expressions were no more than invitations to negotiate. In neither case by their terms were they intended to create binding obligations until definitive agreements were reached.

28 The Applicants and those parties supporting the Georgia-Pacific agreement urged that the integrity of the process would be compromised if further consideration were given to nothing more than expressions of interest.

29 It is now well established in insolvency law in Canada that once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances.

30 In *Tiger Brand Knitting Co., Re*, [2005] O.J. No. 1259 (Ont. S.C.J.), I noted at para. 31 that integrity of "process is integral to the administration of statutes such as the BIA and CCAA."

31 The leading case in Ontario, which confirms the importance of integrity of process, is *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), a decision of the Court of Appeal for Ontario. At issue was the power of the Court to review a decision of a receiver to approve one offer over another for the sale of an airline as a going concern. In reinforcing the importance of integrity of process, the Court quoted from Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at p. 92 adopted the following:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

32 In this case, numerous parties participated over a number of months in a complex process designed to achieve not only maximum value of the assets of the business, but to ensure its survival as a going concern for the benefit of many of the stakeholders.

33 I am satisfied that to permit an "invitation" to reopen that process not only would destroy the integrity of the process, but would likely doom the transaction that has been achieved.

***Motion to Add Applicants***

34 The motion brought by the FLL Agent to add additional applicants was supported by the original Applicants, the purchasers and the Monitor, and opposed by the SLL as part of the objection to jurisdiction of this Court. The purpose of adding Additional Applicants was said to be necessary to make the transaction effective.

35 The transaction with Georgia-Pacific contemplates the transfer of certain assets that are on terms as set out in the Agreement between GFP and related Canadian entities, and to the Canadian purchaser (a Georgia-Pacific subsidiary) with the claims of any person against such transferred assets attaching to the net proceeds received from the sale of such transferred assets.

36 Additionally, the transaction contemplates that the partnership interests in Grant U.S. Partnership will be surrendered and cancelled. Grant U.S. Partnership will issue new partnership interests to the Georgia-Pacific U.S. purchaser vehicle and the additional purchaser.

37 The aggregate consideration being paid by the Canadian purchaser for the transferred assets and the U.S. purchasers for the Grant U.S. Partnership interests is $403 million, subject to adjustment.

38 Through the U.S. purchasers' acquisition of the purchasers' partnership interests, the U.S. purchasers will acquire Grant U.S. Partnership, Southeast, Clarendon, Allendale, U.S. Sales, Newco. It is urged that through this structure the Applicants will maximize the value of their assets.

39 The agreement and transaction require that the security previously granted by the applicable U.S. applicants (the "Additional Applicants") in favour of the FLL and SLL and the indebtedness and liability of the applicable Additional Applicants to them and the Lenders under the FLL Agreement and the SLL Agreement be released and discharged upon closing of the transaction.

40 The position of the FLL, supported by the Applicants and the Monitor, is that the only way in which the transaction can be accomplished with the price that the FLL and the Applicants are prepared to accept is with the proposed structure that would include a transfer of the Grant U.S. Partnership interests as partnership interests, rather than a direct transfer of the assets of Grant U.S. Partnership.

41 The FLL, the Applicant and the Purchasers urge that without the tax benefit that arises from the proposed structure, the Agreement of Purchase and Sale with Georgia-Pacific would not have been completed.

***Position of SLL***

42 The position of the SLL, both in opposing the motion to add Additional Applicants and opposing Approval of the Sale, is that the relief sought is overly broad, inappropriate and would have the effect of mandatory orders against U.S. parties which would extinguish U.S. security over U.S. realty and personalty. The effect of the extinguishment is to absolve FLL of all forms of liability when it is neither a CCAA debtor nor an officer of this Court.

43 It is urged that there is no jurisdiction on which the FLL can seek an unlimited judicial release. The FLL cannot add the SLL as a party for any purpose that is to seek avoiding prior scrutiny in the U.S. courts of the merits of its actions and of the U.S. affiliates of the Original Applicants and the SLL. [3]

44 The SLL Agent asserts that the effect of the Application is to ask this Court, in the guise of a motion in a CCAA proceeding concerning Canadian debtors, to allow it on behalf of U.S. FLL to sue U.S. defendants for a final declaration of right and a mandatory injunction under the Inter-Creditor Agreement that is governed by U.S. law and U.S. choice of forum.

45 This is said to occur without delivering any originating process or meeting tests for the exercise of jurisdiction of this Court over U.S. parties concerning U.S. property. SLL submits that the FLL failed to provide any of the legal and procedural safeguards required by the Rules of Civil Procedure to any foreign or proposed defendant.

46 It is further urged that the ICA specifically provides the FLL with rights only upon the sale of assets under section 363 of the U.S. bankruptcy code. Therefore, it is submitted, a motion in a CCAA proceeding by the Original Applicants is not an appropriate forum for the resolution of the interpretation of a contract between the U.S. non-parties that is to be decided under U.S. law.

47 The SLL also complain that engaging the term "center of main interest" with respect to the U.S. affiliates is not a relevant question for this Court. Rather, it is a transparent attempt to pre-empt a U.S. court from making a determination required under the U.S. Bankruptcy Code, which may affect the standard of review afforded by the U.S. court upon any recognition proceedings that the original Applicants may choose to bring before the U.S. court in the future.

48 Finally, it is suggested that what the FLL Agent seeks is contrary to the principles of comity and the common law principle that a court should decide only matters properly before it and necessary to its own decision.

49 The evidence before the Court is that on completion of the transaction, there will be a shortfall to the FLL on their debt and likely no recovery by the SLL on their debt. The SLL suggest that a separate auction sale of the U.S. mills might achieve a better price for these assets. There is no evidence before the Court to back up this assertion.

***Inter-Creditor Agreement***

50 The ICA, which was entered into as of March 21, 2007, binds the GFP group of companies, including Grant U.S. Partnership as well as the FLL and the SLL. The FLL and the SLL rely on the Agreement in support of their respective positions.

51 The stated purpose of the Agreement was to induce the FLL to consent to GFP incurring the second lien obligations and to induce the FLL to extend credit for the benefit of GFP.

52 By its terms and the definition of "bankruptcy code" in the ICA, the parties recognized that the Canadian statutes, being the CCAA and the BIA, as well as the U.S. Bankruptcy Code, might apply.

53 Counsel for the SLL relies on clause 9.10 of the ICA definition of "Applicable Law," which provides: "this agreement and the rights and obligations of the parties hereunder shall be governed by, and shall be construed and enforced in accordance with, the laws of the state of New York."

54 Accordingly, it is argued on behalf of the SLL that this Court should not have regard to any issues as between the FLL and SLL, but rather leave those to be litigated as between those parties in the State of New York.

55 The position of the FLL is that a Court having jurisdiction over insolvency of a Canadian entity might well be required to have regard to the ICA in dealing with legitimate and appropriate insolvency remedies in Canada. In this regard, counsel notes that clause 9.7 of the ICA identifies New York as a "non-exclusive" venue for disputes involving the Agreement.

56 The position of the Applicants and those supporting the ICA is that this Court is being asked to consider and approve a restructuring transaction in a process that has been overseen by this Court, and which includes, *inter alia*, a comprehensive marketing process involving an Ontario Court-appointed officer. This process has always expressly included the Applicants and their subsidiaries and the business that the integrated corporate group operated in North America from headquarters situated in Ontario.

57 The Applicants submit it is appropriate for this Court to deal with issues raised under the ICA between the FLL and SLL, where that is incidental to approval of this Canadian restructuring transaction.

58 I am satisfied that the issues raised by the SLL are inextricably linked to the restructuring of the Applicants and the completion of the transaction and as such are appropriate for consideration by this Court.

59 I am satisfied that, by operation of the Credit Agreement and ICA, the FLL are entitled to exercise their remedies, which they propose to do in this motion by adding the Additional Applicants as CCAA Applicants. They may then release their security over the assets to be transferred in connection with the exercise of their remedies and by doing so, the security of the SLL over the Transferred Assets is automatically and simultaneously released.

60 I am satisfied that the transaction, whereby Canadian assets are transferred to a Canadian Georgia-Pacific subsidiary and the assets of the essentially GFP-owned partnership interests in Grant U.S. Partnership are transferred to a newly created U.S. partnership by Georgia-Pacific, would not have been possible without the tax advantages that are available as a result of the form of this transaction.

61 To suggest, as does the submission of the SLL, that the entire transaction is flawed because the effect is a transfer of some assets in the United States without the sale process envisaged in section 363 of the U.S. Bankruptcy Code, would be a triumph of form over substance.

62 I accept that the effect of the transaction may indirectly be a transfer of U.S. real property assets and the release of a security over them of the SLL. The effect of the transaction is such that the claims of local creditors of the business of the U.S. mills remain unaffected. The Court was not apprised of any ordinary creditor other than the SLL that would be so affected.

*Comity and U.S. Chapter 15*

63 Counsel for the SLL Agent objected to the use by the Applicants of the term COMI (being Center Of Main Interest) in respect of this CCAA Application.

64 I accept that the term COMI has only been formally recognized in amendments to the CCAA, which came into effect in September 2009 after the filing of this Application. The term has gained recognition in the last few years as cross-border insolvencies have increased, particularly with the use of flexibility of the CCAA.

65 Comity, as expressed by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* [4], is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Comity balances "international duty and convenience" with "the rights of (a nation's) own citizens... who are under the protection of its laws." [5]

66 Without in any way intending to intrude on the law of another jurisdiction, it is appropriate to have a look at the plain wording of the ICA.

67 It is to be noted that there is no evidence put forward by the SLL Agent to suggest that the position of the FLL in respect of the ICA is incorrect. The only response from the SLL Agent is that the matter is not for this Court.

68 The suggestion by the SLL is that the effect of the Order sought is to vest title in U.S. assets. The FLL assert that all that is being done is the enforcement of their secured creditor remedies and release of their security, which under the ICA has the effect of releasing the security of the SLL.

69 The FLL submit that Section 3.1 of the ICA recognizes the broad remedies available to the FLL to enforce their security, using all the remedies of a secured creditor under the Bankruptcy Laws of the U.S. including the CCAA, without consultation with the SLL. The submission is further that the SLL are bound by any determination made by the FLL to release its security. The SLL is to provide written confirmation on the FLL becomes the agent of the SLL for that purpose.

70 The relevant sections of the ICA are set out in Appendix A hereto. As noted above, the position of the FLL is that they are exercising contractual remedies under the ICA.

71 For the SLL, the argument is that this Court should not interfere with the obligation of the FLL to commence proceedings in the appropriate jurisdiction (New York) to enforce its obligations against the SLL. Neither the SLL nor the FLL has commenced New York actions.

72 I am satisfied that this Court does have jurisdiction to provide the relief requested, which is the product of the marketing process that was not only approved by this Court, but not objected to by any party when it was initiated. [6]

73 I do not accept the submission on behalf of the SLL that "the proposed CCAA proceedings for the U.S. Affiliates are not proper CCAA proceedings at all, but are merely proposed as a mechanism for Canadian vesting of U.S. assets."

74 The relief sought is not merely a device to sell U.S. assets from Canada. This is a unified transaction, each element of which is necessary and integral to its success. It is properly a Canadian process.

75 There are many instances in which Canadian courts have granted vesting orders in relation to assets situated in the United States. Some of the orders are referred to in the factum of the FLL, including *Re Maax Corporation et al.*, [7] *Re Madill Equipment Canada*, [8] *Re ROL Manufacturing (Canada) Ltd*., [9] *Re Biltrite Rubber Inc.* [10] and *Re Pope and Talbot, Inc. et. al.* [11]

76 Decisions on both sides of the border have recognized that the United States and Canada have a special relationship that allows bankruptcy and insolvency matters to proceed with relative ease when assets lie in both territories. As the U.S. Bankruptcy Court for the Southern District of New York acknowledged in ABCP's *Metcalfe & Mansfield Alternative Investments, Re* [, Doc. 09-16709 (U.S. Bankr. S.D. N.Y. January 5, 2010)] [12] both systems are rooted in the common law and share similar principles and procedures. Bankruptcy proceedings in the United States acknowledge international proceedings and work alongside, rather than over, foreign matters. Chapter 15 of the U.S. Bankruptcy Code exemplifies this in its foreign bankruptcy proceedings: "the court should be guided by principles of comity and cooperation with foreign courts." [13]

77 In the cross-border case of *Muscletech Research & Development Inc., Re*, [14] COMI was found to be in Canada despite factors indicating the U.S. would also be a suitable jurisdiction. Particularly, most of the creditors were located in the U.S., as was the revenue stream. Most of the major decisions regarding the company were made in Canada, its directors and officers

were located in Ontario, banking was done in Ontario, etc. Justice Farley noted the positive relationship between Canada and the U.S. and credited this relationship to the adherence to comity and common principles. Judge Rakoff, presiding over the Chapter 15 proceedings, agreed with Farley J.'s endorsement, specifically noting that the factors outlined in the Canadian endorsement persuaded him over the factors in favour of U.S. COMI. Farley J. noted at paragraph 4 of his endorsement, and Judge Rankoff implicitly agreed, that "the courts of Canada and the U.S. have long enjoyed a firm and ongoing relationship based on comity and commonalities of principles as to, *inter alia*, bankruptcy and insolvency."

78 As noted by counsel for the SLL at paragraph 44 of their factum:

> Courts routinely enforce Canadian judgments in banluptcy, respecting our similar common law traditions including our respect for comity and restraint. In enforcing the decision of this Honourable Court in Metcalfe & Mansfield Alternative Investments et al., ("ABCP") the US Bankruptcy Court for the Southern District of New York, wrote:
>
> > The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportnity to be heard in a manner consistent with standards of U.S. due process. u.s. federal courts have repeatedly granted comity to Canadian proceedings. United Feature Syndicate, *Inc. v. Miler Features Syndicate*, Inc., 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) ("There is no question that bankruptcy proceedings in Canada-a sister common law jurisdiction with procedures akin to our own-are entitled to comity under appropriate circumstances.") (internal quotation marks and citations omitted); Tradewell, *Inc. v. American Sensors Elecs*., Inc., No. 96 Civ. 2474(DAB), 1997 WL 423075, at *l n.3 (S.D.N.Y. 1997) ("It is well-settled in actions commenced in New York that judgments of the Canadian courts are to be given effect under principles of comity.") (internal quotation marks and citation omitted); Cornjeldv. Investors Overseas Servs., Ltd., 47*l* F. Supp. 1255, l259 (S.D.N.V. 1979) ("The fact that the foreign country involved is Canada is significant. It is wellsettled in New York that the judgments of the Canadian courts are to be given effect under principles of comity. Trustees in bankruptcy appointed by Canadian courts have been recognized in actions commenced in the United States. More importantly, Canada is a sister common law jurisdiction with procedures akin to our own, and thus there need be no concern over the adequacy of the procedural safeguards of Canadian proceedings.") (internal quotation marks and citations omitted) [15]

79 *MAAX Corporation* (*MAAX*) provides some assistance on the U.S. treatment to CCAA proceedings in asset sales. The salient elements in *MAAX* included the fact that the sale was conducted prior to entering CCAA protection, only the Canadian entity ultimately sought protection under the Act and no concurrent U.S. proceedings were initiated at first. The MAAX companies operated extensively in the U.S. and internationally, and were eventually brought into the U.S. via Chapter 15. The Canadian court approved the move into the U.S. and granted the sale. While there were some operating companies based almost solely in the U.S. (opening bank accounts to qualify under the CCAA, as was done in the present case), the U.S. Bankruptcy Court looked at the entity as a whole and granted the petition. [16] The American court approved of a flexible approach to the U.S. asset sale, allowing it to go forward without a competitive bidding process, stalking horse or auction.

80 One of the essential features of the orders sought is the requirement that recognition be sought and obtained in the U.S. Bankruptcy Court, pursuant to Chapter 15 of that Code, of the Orders sought in this Court, including the adding of Additional Applicants.

81 I am satisfied that if there is a valid objection by the SLL, it is appropriately made in the U.S. Bankruptcy Court at a hearing to recognize this Order. I do not accept the proposition that this Court, by making the Order sought, would usurp a determinative review by the U.S. Court should it be found necessary.

82 Given the purpose and flexibility of the CCAA process, it is consistent with the jurisdiction of this Court to add the Additional Applicants for the appropriate purpose of facilitating and implementing the entire transaction, which is approved.

*Conclusion*

83 For the foregoing reasons, I am satisfied:

1. That it is not appropriate to re-open the Marketing Process;

2. That this Court does have jurisdiction to consider a sale transaction that incidentally does affect assets of a Canadian company in the United States;

3. That in all the circumstances it is appropriate to approve the proposed transaction.

**Appendix A**

**Applicable Provisions of the Inter-Creditor Agreement**

***Section 3.1***

Until the Discharge of First Lien Obligations has occurred, whether or not any Insolvency or Liquidation Proceeding has been commenced by or against the Company or any other Grantor, subject to Section 3.1(a)(1), the First Lien Collateral Agent and the other First Lien Claimholders shall have the right to enforce rights, exercise remedies (including set-off and the right to credit bid their debt) and make determinations regarding the release, disposition, or restrictions with respect to the Collateral without any consultation with or the consent of the Second Lien Collateral Agent or any other Second Lien Claimholder...

***Section 5.1 (a)***

If in connection with the exercise of the First Lien Collateral Agent's remedies in respect of the Collateral provided for in Section 3.1, the First Lien Collateral Agent, for itself or on behalf of any of the other First Lien Claimholders, releases any of its Liens on any part of the Collateral or releases any Grantor from its obligations under its guaranty of the First Lien Obligations in connection with the sale of the stock, or substantially all the assets, of such Grantor, then the Liens, if any, of the Second Lien Collateral Agent, for itself or for the benefit of the Second Lien Claimholders, on such Collateral, and the obligations of such Grantor under its guaranty of the Second Lien Obligations, shall be automatically, unconditionally and simultaneously released...

...The Second Lien Collateral Agent, for itself or on behalf of any such Second Lien Claimholders, promptly shall execute and deliver to the First Lien Collateral Agent or such Grantor such termination statements, releases and other documents as the First Lien Collateral Agent or such Grantor may request to effectively confirm such release.

***Section 5.1 (c)***

Until the Discharge of First Lien Obligations occurs, the Second Lien Collateral Agent, for itself and on behalf of the Second Lien Claimholders, hereby irrevocably constitutes and appoints the First Lien Collateral Agent and any officer or agent of the First Lien Collateral Agent, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Second Lien Collateral Agent or such holder or in the First Lien Collateral Agent's own name, from time to time in the First Lien Collateral Agent's discretion, for the purpose of carrying out the terms of this Section 5.1, to take any and all appropriate action and to execute any and all documents and instruments which may be necessary to accomplish the purposes of this Section 5.1 , including any endorsements or other instruments of transfer or release.

*Order accordingly.*

Footnotes

1 The appearing party on this motion is the Agent for the Second Lien Lenders, also referred to in the materials as Second Lien Creditors, hereinafter SLL.

2 Like the Second Lien Lenders, the First Lien Lenders appeared formally by their Agent, were sometimes referred to as the First Lien Creditors and will be hereinafter referred to as the FLL.

3 It is to be noted that there is no existing U.S. action of which the Court was made aware by either the SLL or the FLL.

4 [1990] 3 S.C.R. 1077 (S.C.C.) at 1096

5 Ibid.

6 Supplemental Initial Order, at paragraphs 8 and 24, Motion Record of the First Lien Lenders' Agent, at pages 10 and 18

7 *Re Maax Corporation*, unreported, Orders of the Superior Court of Quebec, TD Supplementary Brief of Authorities, Tabs 1a-c; Order by the US Bankruptcy Court for the District of Delaware Granting Recognition and Related Relief, TD Supplementary Brief of Authorities, Tab 1d.

8 *Re Madill Equipment Canada*, Case No. 08-41426, Distribution and Vesting Orders of the Supreme Court of British Columbia; Order of the US Bankruptcy Court (Western District of Washington at Tacoma) Granting Motion Authorizing Sale of Assets, TD Supplementary Brief of Authorities, Tab 2.

9 *Re. ROL Manufacturing (Canada) Ltd., et al.*, unreported, Order of the Quebec Superior Court (Commercial Division) Approving the Sale of the PSH Division, TD Supplementary Brief of Authorities, Tab 3a; Order of the US Bankruptcy Court, Southwestern District of Ohio, Authorizing and Approving Sale of PSH Division, TD Supplemental Brief of Authorities, Tab 3c.

10 *Re Biltrite Rubber Inc.*, Case No. 09-31423 (MAW), Sale Approval and Vesting Order and Distribution Order of the Ontario Superior Court of Justice, TD Supplemental Brief of Authorities, Tabs 4a-b; Order of the US Bankruptcy Court for the Northern District of Ohio Western Division Enforcing the Orders of the Ontario Court, TD Supplementary Brief of Authorities, Tab 4c.

11 *Re. Pope and Talbot, Inc. et al*., Case No. 08-11933 (CSS), Orders of the US Bankruptcy Court for the District of Delaware, TD Supplementary Brief of Authorities, Tab 5.

12 United States Bankruptcy Court, Case No. 09-16709, January 5, 2010, Martin Glenn J.

13 *Metcalfe* at 18

14 (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) (*Muscletech*), titled *Re RSM Richter Inc. v. Aguilar*, 2006 U.S. Dist. LEXIS 57595 (S.D.N.Y.) (*Re RSM Richter*)

15 See footnote 12, *supra*.

16 *In re MAAX Corp., et al.*, No. 08-11443 (Bankr. D. Del. Aug. 6, 2008)

# TAB 5

2014 SCC 53, 2014 CSC 53
Supreme Court of Canada

Creston Moly Corp. v. Sattva Capital Corp.

2014 CarswellBC 2267, 2014 CarswellBC 2268, 2014 SCC 53, 2014 CSC 53, [2014] 2 S.C.R. 633, [2014] 9 W.W.R. 427, [2014] B.C.W.L.D. 5218, [2014] B.C.W.L.D. 5219, [2014] B.C.W.L.D. 5230, [2014] B.C.W.L.D. 5255, [2014] S.C.J. No. 53, 242 A.C.W.S. (3d) 266, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 373 D.L.R. (4th) 393, 461 N.R. 335, 59 B.C.L.R. (5th) 1, 614 W.A.C. 1

# Sattva Capital Corporation (formerly Sattva Capital Inc.), Appellant and Creston Moly Corporation (formerly Georgia Ventures Inc.), Respondent and Attorney General of British Columbia and BCICAC Foundation, Interveners

McLachlin C.J.C., LeBel, Abella, Rothstein, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 12, 2013
Judgment: August 1, 2014
Docket: 35026

Proceedings: reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 554 W.A.C. 114, 326 B.C.A.C. 114, 2 B.L.R. (5th) 1, 36 B.C.L.R. (5th) 71, 2012 BCCA 329, 2012 CarswellBC 2327, Bennett J.A., Kirkpatrick J.A., Neilson J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2011), 2011 CarswellBC 1124, 2011 BCSC 597, 84 B.L.R. (4th) 102, Armstrong J. (B.C. S.C.); and reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 319 D.L.R. (4th) 219, 2010 BCCA 239, 2010 CarswellBC 1210, 7 B.C.L.R. (5th) 227, Levine J.A., Low J.A., Newbury J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2009), 2009 BCSC 1079, 2009 CarswellBC 2096, Greyell J. (B.C. S.C.)

Counsel: Michael A. Feder, Tammy Shoranick, for Appellant
Darrell W. Roberts, Q.C., David Mitchell, for Respondent
Jonathan Eades, Micah Weintraub, for Intervener, Attorney General of British Columbia
David Wotherspoon, Gavin R. Cameron, for Intervener, BCICAC Foundation

**Related Abridgment Classifications**
Alternative dispute resolution
IX Appeal from arbitration awards
  IX.2 Question of law
Alternative dispute resolution
IX Appeal from arbitration awards
  IX.5 Leave to appeal
    IX.5.b Miscellaneous
Business associations
IV Powers, rights and liabilities
  IV.9 Contracts by corporations
    IV.9.e Miscellaneous
Contracts
VII Construction and interpretation
  VII.4 Resolving ambiguities
    VII.4.c Reasonableness

**Headnote**
Alternative dispute resolution --- Appeal from arbitration awards — Question of law

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator concluded that stock exchange would have probably valued finder's fee at $0.15 per share under terms of agreement and that SC lost opportunity to sell shares at that value — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Alternative dispute resolution --- Appeal from arbitration awards — Leave to appeal — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but on question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of Agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Unless Court places restrictions in order granting leave, order granting leave is "at large" — Appellants may raise issues on appeal that were not set out in leave application — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Business associations --- Powers, rights and liabilities — Contracts by corporations — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Contracts --- Construction and interpretation — Resolving ambiguities — Reasonableness

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Question de droit

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu que la bourse aurait probablement évalué les honoraires d'intermédiation à 15 cents l'unité en vertu des termes de l'entente et que SC avait perdu l'occasion de vendre les actions à ce prix — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Demande d'autorisation d'appel — Divers

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale » — Appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Associations d'affaires --- Pouvoirs, droits et responsabilités — Contrats signés par la société — Questions diverses

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million $US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

Contrats --- Interprétation — Résolution des ambiguïtés — Caractère raisonnable

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million $US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens

des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.
The dispute concerned which date should be used to determine the price of shares and thus the number of shares to which SC was entitled. The arbitrator ruled in favour of SC, and CM sought leave to appeal from the Supreme Court Leave Court, which dismissed the application on the grounds that it did not involve a question of law, but rather mixed fact and law. The Court of Appeal granted CM leave to appeal, holding that it was a question of law. The Supreme Court dismissed the appeal, but the Court of Appeal reversed this decision and found in favour of CM. SC appealed both this decision and the decision of the Court of Appeal Leave Court to the Supreme Court of Canada.
**Held:** The appeals were allowed.
Per Rothstein J. (McLachlin C.J.C., LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring): The issue of whether the Court of Appeal Leave Court erred in finding a question of law for the purposes of granting leave to appeal was properly before the Court. While the subject of the appeal was important to the parties, the question was not a question of law within the meaning of s. 31 of the Arbitration Act. Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law. Canadian courts, however, have moved away from this historical approach. The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding". Questions of law "questions about what the correct legal test is". Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. The fact that the legal system leaves broad scope to tribunals of first instance to resolve issues of limited application supports treating contractual interpretation as a question of mixed fact and law.
The issue whether the proposed appeal was on a question of law was expressly argued before the Leave Courts of both the Supreme Court and Court of Appeal. There was no reason why SC should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to the Supreme Court of Canada. Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) of the Arbitration Act are met and where the leave court does not exercise its residual discretion to nonetheless deny leave. Even if the Court of Appeal Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the Supreme Court Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion. The Court of Appeal Court erred in holding that the Leave Court's comments on the merits of the appeal were binding on it and on the Supreme Court Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case. A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful. This is true even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal. The fact that the Court of Appeal provided its own reasoning as to why it came to the same conclusion as the Leave Court did not vitiate the error.
The arbitrator's decision that the shares should be priced according to the market price definition gave effect to both the market price definition and the "maximum amount" proviso. The arbitrator's interpretation of the agreement, as reconciled the market price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.
Le litige portait sur la date devant servir à déterminer le prix des actions et, ainsi, le nombre d'actions auxquelles SC avait droit. L'arbitre a tranché en faveur de SC, et CM a déposé une demande d'autorisation d'appel auprès de la Cour suprême, laquelle a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit. CM a obtenu l'autorisation d'appeler de la Cour d'appel, laquelle a estimé qu'il s'agissait d'une question de droit. La Cour suprême a rejeté l'appel, mais la Cour d'appel a infirmé cette décision et a tranché en faveur de CM. SC a formé un pourvoi à l'encontre de cette décision et de la décision de la formation de la Cour d'appel saisie de la demande d'autorisation d'appel auprès de la Cour suprême du Canada.
**Arrêt:** Les pourvois ont été accueillis.

Rothstein, J. (McLachlin, J.C.C., LeBel, Abella, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : C'était à bon droit que la Cour était saisie de la question de savoir si la formation de la Cour d'appel a commis une erreur en concluant à la présence d'une question de droit dans le cadre de la demande d'autorisation d'appel. Bien que la question faisant l'objet du pourvoi était importante, il ne s'agissait pas d'une question de droit au sens de l'art. 31 de l'Arbitration Act. Historiquement, la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit. Les tribunaux canadiens, toutefois, ont abandonné cette approche historique. L'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente ». Les questions de droit « concernent la détermination du critère juridique applicable ». Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties. En établissant une distinction entre les questions de droit et les questions mixtes de fait et de droit, on vise principalement à restreindre l'intervention de la juridiction d'appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère au tribunal administratif siégeant en première instance étaye la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

La question de savoir si l'appel proposé soulevait une question de droit a été expressément débattue devant les formations de la Cour suprême et de la Cour d'appel saisies de la demande d'autorisation. Rien n'empêchait SC de soulever cette question en appel, même si elle ne l'a pas mentionnée dans la demande d'autorisation d'appel qu'elle a présentée à la Cour suprême du Canada. L'appel d'une sentence arbitrale n'est donc entendu que si les critères de l'art. 31(2) de l'Arbitration Act sont remplis et que le tribunal saisi de la demande d'autorisation ne refuse pas néanmoins l'autorisation en vertu de son pouvoir discrétionnaire résiduel. Même si la formation de la Cour d'appel saisie de la demande d'autorisation avait défini une question de droit et qu'il avait été satisfait au critère du risque d'erreur judiciaire, elle aurait dû confirmer la décision de la formation de la Cour suprême saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour.

La Cour d'appel saisie de l'appel a commis une erreur en concluant que les commentaires sur le bien-fondé de l'appel formulés par la formation de la Cour d'appel saisie de la demande d'autorisation la liaient et liaient également la formation de la Cour suprême saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond; il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli. Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs. Le fait que la Cour d'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur.

La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donnait effet à cette dernière et à la stipulation relative au « plafond ». L'interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

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*C.J.A., Local 579 v. Bradco Construction Ltd.* (1993), 12 Admin. L.R. (2d) 165, [1993] 2 S.C.R. 316, 106 Nfld. & P.E.I.R. 140, 334 A.P.R. 140, 93 C.L.L.C. 14,033, 153 N.R. 81, 102 D.L.R. (4th) 402, 1993 CarswellNfld 114, 1993 CarswellNfld 132 (S.C.C.) — referred to

*Canada (Director of Investigation & Research) v. Southam Inc.* (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — considered

*Canadian Western Bank v. Alberta* (2007), [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — referred to

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*Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257, 62 D.L.R. (4th) 530, [1990] 2 W.W.R. 242, 1989 CarswellBC 163 (B.C. C.A.) — considered

*Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.* (2010), 483 W.A.C. 112, 25 Alta. L.R. (5th) 221, 2010 CarswellAlta 746, 2010 ABCA 126, 477 A.R. 112 (Alta. C.A.) — referred to

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**Words and phrases considered:**

**Contractual interpretation**

Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

**fee paid in shares**

There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both [the respondent and the appellant] would have been aware of this as sophisticated business parties.

**surrounding circumstances**

While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement . . . . The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract . . . . While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.

The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract . . . , that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" . . . . Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

**Termes et locutions cités:**

**circonstances**

Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (...). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (...). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (...).

La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (...), c'est-à-dire, les renseignements qui appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci. Compte tenu de ces exigences et de la règle d'exclusion de la preuve extrinsèque que nous verrons, on entend par « circonstances, pour reprendre les propos du lord Hoffmann [TRADUCTION] « tout ce qui aurait eu une incidence sur la manière dont une personne raisonnable aurait compris les termes du document » (...). La question de savoir si quelque chose appartenait ou aurait dû raisonnablement appartenir aux connaissances communes des parties au moment de la signature du contrat est une question de fait.

**honoraires sous forme d'actions**

Le versement des honoraires sous forme d'actions présente un risque inhérent, qui ne se pose pas dans le cas du versement en argent. Les honoraires payés en argent ont une valeur prédéterminée. Par contre, quand les honoraires sont versés en actions, le cours de l'action (ou le mécanisme permettant de le déterminer) est fixé à l'avance. Cependant, le cours de l'action fluctue avec le temps. La personne qui reçoit des honoraires payés en actions espère une augmentation du cours, de sorte que ses actions auront une valeur marchande supérieure à celle qui est établie selon le cours prédéterminé. En revanche, si le cours chute, cette personne reçoit des actions dont la valeur est inférieure à celle des actions selon le cours prédéterminé. Ce risque est bien connu de ceux qui évoluent dans ce milieu, et [l'intimée et l'appelante], des parties avisées, en auraient eu connaissance.

**interprétation contractuelle**

L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

***Rothstein J.*** **(McLachlin C.J.C. and LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring):**

1 When is contractual interpretation to be treated as a question of mixed fact and law and when should it be treated as a question of law? How is the balance between reviewability and finality of commercial arbitration awards under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*, hereinafter the "*AA*"), to be determined? Can findings made by a court granting leave to appeal with respect to the merits of an appeal bind the court that ultimately decides the appeal? These are three of the issues that arise in this appeal.

**I. Facts**

2 The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital Corporation (formerly Sattva Capital Inc.). The parties agree that Sattva is entitled to a finder's fee of US$1.5 million and is entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagree on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled.

3 Mr. Hai Van Le, a principal of Sattva, introduced Creston to the opportunity to acquire a molybdenum mining property in Mexico. On January 12, 2007, the parties entered into an agreement (the "Agreement") that required Creston to pay Sattva a finder's fee in relation to the acquisition of this property. The relevant provisions of the Agreement are set out in Appendix I.

4 On January 30, 2007, Creston entered into an agreement to purchase the property for US$30 million. On January 31, 2007, at the request of Creston, trading of Creston's shares on the TSX Venture Exchange ("TSXV") was halted to prevent speculation while Creston completed due diligence in relation to the purchase. On March 26, 2007, Creston announced it intended to complete the purchase and trading resumed the following day.

5 The Agreement provides that Sattva was to be paid a finder's fee equal to the maximum amount that could be paid pursuant to s. 3.3 of Policy 5.1 in the TSXV Policy Manual. Section 3.3 of Policy 5.1 is incorporated by reference into the Agreement at s. 3.1 and is set out in Appendix II of these reasons. The maximum amount pursuant to s. 3.3 of Policy 5.1 in this case is US$1.5 million.

6 According to the Agreement, by default, the fee would be paid in Creston shares. The fee would only be paid in cash or a combination of shares and cash if Sattva made such an election. Sattva made no such election and was therefore entitled to be paid the fee in shares. The finder's fee was to be paid no later than five working days after the closing of the transaction purchasing the molybdenum mining property.

7 The dispute between the parties concerns which date should be used to determine the price of Creston shares and thus the number of shares to which Sattva is entitled. Sattva argues that the share price is dictated by the Market Price definition at s. 2 of the Agreement, i.e. the price of the shares "as calculated on close of business day before the issuance of the press release announcing the Acquisition". The press release announcing the acquisition was released on March 26, 2007. Prior to the halt in trading on January 31, 2007, the last closing price of Creston shares was $0.15. On this interpretation, Sattva would receive approximately 11,460,000 shares (based on the finder's fee of US$1.5 million).

8 Creston claims that the Agreement's "maximum amount" proviso means that Sattva cannot receive cash or shares valued at more than US$1.5 million on the date the fee is payable. The shares were payable no later than five days after May 17, 2007, the closing date of the transaction. At that time, the shares were priced at $0.70 per share. This valuation is based on the price an investment banking firm valued Creston at as part of underwriting a private placement of shares on April 17, 2007. On this interpretation, Sattva would receive approximately 2,454,000 shares, some 9 million fewer shares than if the shares were priced at $0.15 per share.

9 The parties entered into arbitration pursuant to the *AA*. The arbitrator found in favour of Sattva. Creston sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *AA*. Leave was denied by the British Columbia Supreme Court (2009 BCSC 1079 (B.C. S.C.) (CanLII) ("SC Leave Court")). Creston successfully appealed this decision and was granted leave to appeal the arbitrator's decision by the British Columbia Court of Appeal (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (B.C. C.A.) ("CA Leave Court")).

10 The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC 597, 84 B.L.R. (4th) 102 (B.C. S.C.) ("SC Appeal Court")) upheld the arbitrator's award. Creston appealed that decision to the British Columbia Court of Appeal (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (B.C. C.A.) ("CA Appeal Court")). That court overturned the SC Appeal Court and found in favour of Creston. Sattva appeals the decisions of the CA Leave Court and CA Appeal Court to this Court.

**II. Arbitral Award**

11 The arbitrator, Leon Getz, Q.C., found in favour of Sattva, holding that it was entitled to receive its US$1.5 million finder's fee in shares priced at $0.15 per share.

12 The arbitrator based his decision on the Market Price definition in the Agreement:

> What, then, was the "Market Price" within the meaning of the Agreement? The relevant press release is that issued on March 26 .... Although there was no closing price on March 25 (the shares being on that date halted), the "last closing price" within the meaning of the definition was the $0.15 at which the [Creston] shares closed on January 30, the day before trading was halted "pending news" .... This conclusion requires no stretching of the words of the contractual definition; on the contrary, it falls literally within those words. [para. 22]

13 Both the Agreement and the finder's fee had to be approved by the TSXV. Creston was responsible for securing this approval. The arbitrator found that it was either an implied or an express term of the Agreement that Creston would use its best efforts to secure the TSXV's approval and that Creston did not apply its best efforts to this end.

14 As previously noted, by default, the finder's fee would be paid in shares unless Sattva made an election otherwise. The arbitrator found that Sattva never made such an election. Despite this, Creston represented to the TSXV that the finder's fee was to be paid in cash. The TSXV conditionally approved a finder's fee of US$1.5 million to be paid in cash. Sattva first learned that the fee had been approved as a cash payment in early June 2007. When Sattva raised this matter with Creston, Creston responded by saying that Sattva had the choice of taking the finder's fee in cash or in shares priced at $0.70.

15 Sattva maintained that it was entitled to have the finder's fee paid in shares priced at $0.15. Creston asked its lawyer to contact the TSXV to clarify the minimum share price it would approve for payment of the finder's fee. The TSXV confirmed on June 7, 2007 over the phone and August 9, 2007 via email that the minimum share price that could be used to pay the finder's fee was $0.70 per share. The arbitrator found that Creston "consistently misrepresented or at the very least failed to disclose fully the nature of the obligation it had undertaken to Sattva" (para. 56(k)) and "that in the absence of an election otherwise, Sattva is entitled under that Agreement to have that fee paid in shares at $0.15" (para. 56(g)). The arbitrator found that the first time Sattva's position was squarely put before the TSXV was in a letter from Sattva's solicitor on October 9, 2007.

16 The arbitrator found that had Creston used its best efforts, the TSXV could have approved the payment of the finder's fee in shares priced at $0.15 and such a decision would have been consistent with its policies. He determined that there was "a substantial probability that [TSXV] approval would have been given" (para. 81). He assessed that probability at 85 percent.

17 The arbitrator found that Sattva could have sold its Creston shares after a four-month holding period at between $0.40 and $0.44 per share, netting proceeds of between $4,583,914 and $5,156,934. The arbitrator took the average of those two amounts, which came to $4,870,424, and then assessed damages at 85 percent of that number, which came to $4,139,860, and rounded it to $4,140,000 plus costs.

18 After this award was made, Creston made a cash payment of US$1.5 million (or the equivalent in Canadian dollars) to Sattva. The balance of the damages awarded by the arbitrator was placed in the trust account of Sattva's solicitors.

**III. Judicial History**

***A. British Columbia Supreme Court — Leave to Appeal Decision, 2009 BCSC 1079 (B.C. S.C.)***

19 The SC Leave Court denied leave to appeal because it found the question on appeal was not a question of law as required under s. 31 of the *AA*. In the judge's view, the issue was one of mixed fact and law because the arbitrator relied on the "factual matrix" in coming to his conclusion. Specifically, determining how the finder's fee was to be paid involved examining "the TSX's policies concerning the maximum amount of the finder's fee payable, as well as the discretionary powers granted to the Exchange in determining that amount" (para. 35).

20 The judge found that even had he found a question of law was at issue he would have exercised his discretion against granting leave because of Creston's conduct in misrepresenting the status of the finder's fee to the TSXV and Sattva, and "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41).

***B. British Columbia Court of Appeal — Leave to Appeal Decision, 2010 BCCA 239 (B.C. C.A.)***

21 The CA Leave Court reversed the SC Leave Court and granted Creston's application for leave to appeal the arbitral award. It found the SC Leave Court "err[ed] in failing to find that the arbitrator's failure to address the meaning of s. 3.1 of the Agreement (and in particular the 'maximum amount' provision) raised a question of law" (para. 23). The CA Leave Court decided that the construction of s. 3.1 of the Agreement, and in particular the "maximum amount" proviso, was a question of law because it did not involve reference to the facts of what the TSXV was told or what it decided.

22 The CA Leave Court acknowledged that Creston was "less than forthcoming in its dealings with Mr. Le and the [TSXV]" but said that "these facts are not directly relevant to the question of law it advances on the appeal" (para. 27). With respect to the SC leave judge's reference to the preservation of the integrity of the arbitration system, the CA Leave Court said that the parties would have known when they chose to enter arbitration under the *AA* that an appeal on a question of law was possible. Additionally, while the finality of arbitration is an important factor in exercising discretion, when "a question of law arises on a matter of importance and a miscarriage of justice might be perpetrated if an appeal were not available, the integrity of the process requires, at least in the circumstances of this case, that the right of appeal granted by the legislation also be respected" (para. 29).

***C. British Columbia Supreme Court — Appeal Decision, 2011 BCSC 597 (B.C. S.C.)***

23 Armstrong J. reviewed the arbitrator's decision on a correctness standard. He dismissed the appeal, holding the arbitrator's interpretation of the Agreement was correct.

24 Armstrong J. found that the plain and ordinary meaning of the Agreement required that the US$1.5 million fee be paid in shares priced at $0.15. He did not find the meaning to be absurd simply because the price of the shares at the date the fee became payable had increased in relation to the price determined according to the Market Price definition. He was of the view that changes in the price of shares over time are inevitable, and that the parties, as sophisticated business persons, would have reasonably understood a fluctuation in share price to be a reality when providing for a fee payable in shares. According to Armstrong J., it is indeed because of market fluctuations that it is necessary to choose a specific date to price the shares in advance of payment. He found that this was done by defining "Market Price" in the Agreement, and that the fee remained US $1.5 million in $0.15 shares as determined by the Market Price definition regardless of the price of the shares at the date that the fee was payable.

25 According to Armstrong J., that the price of the shares may be more than the Market Price definition price when they became payable was foreseeable as a "natural consequence of the fee agreement" (para. 62). He was of the view that the risk was borne by Sattva, since the price of the shares could increase, but it could also decrease such that Sattva would have received shares valued at less than the agreed upon fee of US$1.5 million.

26 Armstrong J. held that the arbitrator's interpretation which gave effect to both the Market Price definition and the "maximum amount" proviso should be preferred to Creston's interpretation of the agreement which ignored the Market Price definition.

27 In response to Creston's argument that the arbitrator did not consider s. 3.1 of the Agreement which contains the "maximum amount" proviso, Armstrong J. noted that the arbitrator explicitly addressed the "maximum amount" proviso at para. 23 of his decision.

***D. British Columbia Court of Appeal — Appeal Decision, 2012 BCCA 329 (B.C. C.A.)***

28 The CA Appeal Court allowed Creston's appeal, ordering that the payment of US$1.5 million that had been made by Creston to Sattva on account of the arbitrator's award constituted payment in full of the finder's fee. The court reviewed the arbitrator's decision on a standard of correctness.

29 The CA Appeal Court found that both it and the SC Appeal Court were bound by the findings made by the CA Leave Court. There were two findings that were binding: (1) it would be anomalous if the Agreement allowed Sattva to receive US $1.5 million if it received its fee in cash, but shares valued at approximately $8 million if Sattva took its fee in shares; and (2) the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement.

30 The Court of Appeal found that it was an absurd result to find that Sattva is entitled to an $8 million finder's fee in light of the fact that the "maximum amount" proviso in the Agreement limits the finder's fee to US$1.5 million. The court was of the view that the proviso limiting the fee to US$1.5 million "when paid" should be given paramount effect (para. 47). In its opinion, giving effect to the Market Price definition could not have been the intention of the parties, nor could it have been in accordance with good business sense.

**IV. Issues**

31 The following issues arise in this appeal:

(a) Is the issue of whether the CA Leave Court erred in granting leave under s. 31(2) of the *AA* properly before this Court?

(b) Did the CA Leave Court err in granting leave under s. 31(2) of the *AA*?

(c) If leave was properly granted, what is the appropriate standard of review to be applied to commercial arbitral decisions made under the *AA*?

(d) Did the arbitrator reasonably construe the Agreement as a whole?

(e) Did the CA Appeal Court err in holding that it was bound by comments regarding the merits of the appeal made by the CA Leave Court?

**V. Analysis**

***A. The Leave Issue Is Properly Before This Court***

32 Sattva argues, in part, that the CA Leave Court erred in granting leave to appeal from the arbitrator's decision. In Sattva's view, the CA Leave Court did not identify a question of law, a requirement to obtain leave pursuant to s. 31(2) of the *AA*. Creston argues that this issue is not properly before this Court. Creston makes two arguments in support of this point.

33 First, Creston argues that this issue was not advanced in Sattva's application for leave to appeal to this Court. This argument must fail. Unless this Court places restrictions in the order granting leave, the order granting leave is "at large". Accordingly, appellants may raise issues on appeal that were not set out in the leave application. However, the Court may exercise its discretion to refuse to deal with issues that were not addressed in the courts below, if there is prejudice to the respondent, or if for any other reason the Court considers it appropriate not to deal with a question.

34 Here, this Court's order granting leave to appeal from both the CA Leave Court decision and the CA Appeal Court decision contained no restrictions (2013 CanLII 11315). The issue — whether the proposed appeal was on a question of law — was expressly argued before, and was dealt with in the judgments of, the SC Leave Court and the CA Leave Court. There is no reason Sattva should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to this Court.

35 Second, Creston argues that the issue of whether the CA Leave Court identified a question of law is not properly before this Court because Sattva did not contest this decision before all of the lower courts. Specifically, Creston states that Sattva did not argue that the question on appeal was one of mixed fact and law before the SC Appeal Court and that it conceded the issue on appeal was a question of law before the CA Appeal Court. This argument must also fail. At the SC Appeal Court, it was not open to Sattva to reargue the question of whether leave should have been granted. The SC Appeal Court was bound

by the CA Leave Court's finding that leave should have been granted, including the determination that a question of law had been identified. Accordingly, Sattva could hardly be expected to reargue before the SC Appeal Court a question that had been determined by the CA Leave Court. There is nothing in the *AA* to indicate that Sattva could have appealed the leave decision made by a panel of the Court of Appeal to another panel of the same court. The fact that Sattva did not reargue the issue before the SC Appeal Court or CA Appeal Court does not prevent it from raising the issue before this Court, particularly since Sattva was also granted leave to appeal the CA Leave Court decision by this Court.

36 While this Court may decline to grant leave where an issue sought to be argued before it was not argued in the courts appealed from, that is not this case. Here, whether leave from the arbitrator's decision had been sought by Creston on a question of law or a question of mixed fact and law had been argued in the lower leave courts.

37 Accordingly, the issue of whether the CA Leave Court erred in finding a question of law for the purposes of granting leave to appeal is properly before this Court.

***B. The CA Leave Court Erred in Granting Leave Under Section 31(2) of the AA***

*(1) Considerations Relevant to Granting or Denying Leave to Appeal Under the AA*

38 Appeals from commercial arbitration decisions are narrowly circumscribed under the *AA*. Under s. 31(1), appeals are limited to either questions of law where the parties consent to the appeal or to questions of law where the parties do not consent but where leave to appeal is granted. Section 31(2) of the *AA*, reproduced in its entirety in Appendix III, sets out the requirements for leave:

> (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
>
> > (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
> >
> > (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
> >
> > (c) the point of law is of general or public importance.

39 The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* give the courts judicial discretion to deny leave even where the statutory requirements have been met (*Student Assn. of the British Columbia Institute of Technology v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (B.C. C.A.) ("*BCIT*"), at paras. 25-26). Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) are met and where the leave court does not exercise its residual discretion to nonetheless deny leave.

40 Although Creston's application to the SC Leave Court sought leave pursuant to s. 31(2)(a), (b) and (c), it appears the arguments before that court and throughout focused on s. 31(2)(a). The SC Leave Court's decision quotes a lengthy passage from *BCIT* that focuses on the requirements of s. 31(2)(a). The SC Leave Court judge noted that both parties conceded the first requirement of s. 31(2)(a): that the issue be of importance to the parties. The CA Leave Court decision expressed concern that denying leave might give rise to a miscarriage of justice — a criterion only found in s. 31(2)(a). Finally, neither the lower courts' leave decisions nor the arguments before this Court reflected arguments about the question of law being important to some class or body of persons of which the applicant is a member (s. 31(2)(b)) or being a point of law of general or public importance (s. 31(2)(c)). Accordingly, the following analysis will focus on s. 31(2)(a).

*(2) The Result Is Important to the Parties*

41 In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be

"sufficiently important", in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

*(3) The Question Under Appeal Is Not a Question of Law*

**(a) When Is Contractual Interpretation a Question of Law?**

42 Under s. 31 of the *AA*, the issue upon which leave is sought must be a question of law. For the purpose of identifying the appropriate standard of review or, as is the case here, determining whether the requirements for leave to appeal are met, reviewing courts are regularly required to determine whether an issue decided at first instance is a question of law, fact, or mixed fact and law.

43 Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law (*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63 (Man. C.A.), at para. 20, *per* Steel J.A.; K. Lewison, *The Interpretation of Contracts* (5th ed. 2011 & Supp. 2013), at pp. 173-76; and G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 125-26). This rule originated in England at a time when there were frequent civil jury trials and widespread illiteracy. Under those circumstances, the interpretation of written documents had to be considered questions of law because only the judge could be assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

44 This historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law (*Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945 (U.K. H.L.), at paras. 58 and 82-83; and Lewison, at pp. 173-77). They do this despite the fact that U.K. courts consider the surrounding circumstances, a concept addressed further below, when interpreting a written contract (*Prenn v. Simmonds*, [1971] 3 All E.R. 237 (U.K. H.L.); and *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (U.K. H.L.)).

45 In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (Alta. C.A.) (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84 (Man. C.A.), at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221 (Alta. C.A.), at paras. 11-12; and *Costco Wholesale Canada Ltd. v. R.*, 2012 FCA 160, 431 N.R. 78 (F.C.A.), at para. 34. However, some Canadian courts have abandoned the historical approach and now treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. See for example *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1 (P.E.I. C.A.), at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98 (B.C. C.A.), at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230 (B.C. C.A.), at para. 44; *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81 (Ont. C.A.), at paras. 22-23 (majority reasons, *per* Blair J.A.) and paras. 133-35 (*per* Gillese J.A. in dissent, but not on this point); and *King*, at paras. 20-23.

46 The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 26 and 31-36.

47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1

S.C.R. 744 (S.C.C.), at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

49 As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam Inc*. Questions of law "are questions about what the correct legal test is" (*Southam Inc.*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam Inc.*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

50 With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

51 The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam Inc.* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

52 Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

53 Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

54 However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" .... [para. 36]

55 Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

**(b) The Role and Nature of the "Surrounding Circumstances"**

56 I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way

in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

**(c) Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule**

59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at pp. 341-42, *per* Sopinka J.).

60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

61 Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (Ont. C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

**(d) Application to the Present Case**

62 In this case, the CA Leave Court granted leave on the following issue: "Whether the Arbitrator erred in law in failing to construe the whole of the Finder's Fee Agreement ..." (A.R., vol. 1, at p. 62).

63 As will be explained below, while the requirement to construe a contract as a whole is a question of law that could — if extricable — satisfy the threshold requirement under s. 31 of the *AA*, I do not think this question was properly extricated in this case.

64 I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15). If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

65 However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed, the CA Leave Court acknowledges that the arbitrator had considered that proviso, since it notes that he turned his mind to the US$1.5 million maximum amount, an amount that can only be calculated by referring to the TSXV policy referenced in the "maximum amount" proviso in s. 3.1 of the Agreement. As I read its reasons, rather than being concerned with whether the arbitrator ignored the maximum amount proviso, which is what Creston alleges in this Court, the CA Leave Court decision focused on how the arbitrator construed s. 3.1 of the Agreement, which included the maximum amount proviso (paras. 25-26). For example, the CA Leave Court expressed concern that the arbitrator did not address the "incongruity" in the fact that the value of the fee would vary "hugely" depending on whether it was taken in cash or shares (para. 25).

66 With respect, the CA Leave Court erred in finding that the construction of s. 3.1 of the Agreement constituted a question of law. As explained by Justice Armstrong in the SC Appeal Court decision, construing s. 3.1 and taking account of the proviso

required relying on the relevant surrounding circumstances, including the sophistication of the parties, the fluctuation in share prices, and the nature of the risk a party assumes when deciding to accept a fee in shares as opposed to cash. Such an exercise raises a question of mixed fact and law. There being no question of law extricable from the mixed fact and law question of how s. 3.1 and the proviso should be interpreted, the CA Leave Court erred in granting leave to appeal.

67 The conclusion that Creston's application for leave to appeal raised no question of law would be sufficient to dispose of this appeal. However, as this Court rarely has the opportunity to address appeals of arbitral awards, it is, in my view, useful to explain that, even had the CA Leave Court been correct in finding that construction of s. 3.1 of the Agreement constituted a question of law, it should have nonetheless denied leave to appeal as the application also failed the miscarriage of justice and residual discretion stages of the leave analysis set out in s. 31(2)(a) of the *AA*.

*(4) May Prevent a Miscarriage of Justice*

**(a) Miscarriage of Justice for the Purposes of Section 31(2)(a) of the AA**

68 Once a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal "may prevent a miscarriage of justice" in order for it to grant leave to appeal pursuant to s. 31(2)(a) of the *AA*. The first step in this analysis is defining miscarriage of justice for the purposes of s. 31(2)(a).

69 In *BCIT*, Justice Saunders discussed the miscarriage of justice requirement under s. 31(2)(a). She affirmed the definition set out in *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (B.C. C.A.), which required the error of law in question to be a material issue that, if decided differently, would lead to a different result: "... if the point of law were decided differently, the arbitrator would have been led to a different result. In other words, was the alleged error of law material to the decision; does it go to its heart?" (*BCIT*, at para. 28). See also *Cusson v. Quan*, 2009 SCC 62, [2009] 3 S.C.R. 712 (S.C.C.), which discusses the test of whether "some substantial wrong or miscarriage of justice has occurred" in the context of a civil jury trial (para. 43).

70 Having regard to *BCIT* and *Quan*, I am of the opinion that in order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a) of the *AA*, an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case.

71 According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

72 At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case.

73 *BCIT* sets the threshold for this preliminary assessment of the appeal as "more than an arguable point" (para. 30). With respect, once an arguable point has been made out, it is not apparent what more is required to meet the "more than an arguable point" standard. Presumably, the leave judge would have to delve more deeply into the arguments around the question of law on appeal than would be appropriate at the leave stage to find *more* than an arguable point. Requiring this closer examination of the point of law, in my respectful view, blurs the line between the function of the court considering the leave application and the court hearing the appeal.

74 In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262 (Man. C.A.), at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (Alta. C.A.) (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease Inc.*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (Man. C.A.) (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21,

289 Nfld. & P.E.I.R. 174 (P.E.I. C.A.), at para. 11); and "credible argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270 (Sask. C.A. [In Chambers]), at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

75 Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the applicable standard of review. As I will later explain, reasonableness will almost always apply to commercial arbitrations conducted pursuant to the *AA*, except in the rare circumstances where the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise. Therefore, the leave inquiry will ordinarily ask whether there is any arguable merit to the position that the arbitrator's decision on the question at issue is unreasonable, keeping in mind that the decision-maker is not required to refer to all the arguments, provisions or jurisprudence or to make specific findings on each constituent element, for the decision to be reasonable (*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 16). Of course, the leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal. As such, this should not be taken as an invitation to engage in extensive arguments or analysis about the standard of review at the leave stage.

76 In *BCIT*, Saunders J.A. considered the stage of s. 31(2)(a) of the *AA* at which an examination of the merits of the appeal should occur. At the behest of one of the parties, she considered examining the merits under the miscarriage of justice criterion. However, she decided that a consideration of the merits was best done at the residual discretion stage. Her reasons indicate that this decision was motivated by the desire to take a consistent approach across s. 31(2)(a), (b) and (c):

> Where, then, if anywhere, does consideration of the merits of the the appeal belong? Mr. Roberts for the Student Association contends that any consideration of the merits of the appeal belongs in the determination of whether a miscarriage of justice may occur; that is, under the second criterion. I do not agree. In my view, the apparent merit or lack of merit of an appeal is part of the exercise of the residual discretion, and applies equally to all three subsections, (*a*) through (*c*). Just as an appeal woefully lacking in merit should not attract leave under (*b*) (of importance to a class of people including the applicant) or (*c*) (of general or public importance), so too it should not attract leave under (*a*). Consideration of the merits, for consistency in the section as a whole, should be made as part of the exercise of residual discretion. [para. 29]

77 I acknowledge the consistency rationale. However, in my respectful opinion, the desire for a consistent approach to s. 31(2)(a), (b) and (c) cannot override the text of the legislation. Unlike s. 31(2)(b) and (c), s. 31(2)(a) requires an assessment to determine whether allowing leave to appeal "may prevent a miscarriage of justice". It is my opinion that a preliminary assessment of the question of law is an implicit component in a determination of whether allowing leave "may prevent a miscarriage of justice".

78 However, in an application for leave to appeal pursuant to s. 31(2)(b) or (c), neither of which contain a miscarriage of justice requirement, I agree with Justice Saunders in *BCIT* that a preliminary examination of the merits of the question of law should be assessed at the residual discretion stage of the analysis as considering the merits of the proposed appeal will always be relevant when deciding whether to grant leave to appeal under s. 31.

79 In sum, in order to establish that "the intervention of the court and the determination of the point of law may prevent a miscarriage of justice" for the purposes of s. 31(2)(a) of the *AA*, an applicant must demonstrate that the point of law on appeal is material to the final result and has arguable merit.

**(b) Application to the Present Case**

80 The CA Leave Court found that the arbitrator may have erred in law by not interpreting the Agreement as a whole, specifically in ignoring the "maximum amount" proviso. Accepting that this is a question of law for these purposes only, a

determination of the question would be material because it could change the ultimate result arrived at by the arbitrator. The arbitrator awarded $4.14 million in damages on the basis that there was an 85 percent chance the TSXV would approve a finder's fee paid in $0.15 shares. If Creston's argument is correct and the $0.15 share price is foreclosed by the "maximum amount" proviso, damages would be reduced to US$1.5 million, a significant reduction from the arbitrator's award of damages.

81 As s. 31(2)(a) of the *AA* is the relevant provision in this case, a preliminary assessment of the question of law will be conducted in order to determine if a miscarriage of justice could have occurred had Creston been denied leave to appeal. Creston argues that the fact that the arbitrator's conclusion results in Sattva receiving shares valued at considerably more than the US$1.5 million maximum dictated by the "maximum amount" proviso is evidence of the arbitrator's failure to consider that proviso.

82 However, the arbitrator did refer to s. 3.1, the "maximum amount" proviso, at two points in his decision: paras. 18 and 23(a). For example, at para. 23 he stated:

> In summary, then, as of March 27, 2007 it was clear and beyond argument that under the Agreement:
>
> > (a) <u>Sattva was entitled to a fee equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange — section 3.1. It is common ground that the quantum of this fee is US$1,500,000.</u>
> >
> > (b) The fee was payable in shares based on the Market Price, as defined in the Agreement, unless Sattva elected to take it in cash or a combination of cash and shares.
> >
> > (c) The Market Price, as defined in the Agreement, was $0.15.
>
> [Emphasis added.]

83 Although the arbitrator provided no express indication that he considered how the "maximum amount" proviso interacted with the Market Price definition, such consideration is implicit in his decision. The only place in the contract that specifies that the amount of the fee is calculated as US$1.5 million is the "maximum amount" proviso's reference to s. 3.3 of the TSXV Policy 5.1. The arbitrator acknowledged that the quantum of the fee is US$1.5 million and awarded Sattva US$1.5 million in shares priced at $0.15. Contrary to Creston's argument that the arbitrator failed to consider the proviso in construing the Agreement, it is apparent on a preliminary examination of the question that the arbitrator did in fact consider the "maximum amount" proviso.

84 Accordingly, even had the CA Leave Court properly identified a question of law, leave to appeal should have been denied. The requirement that there be arguable merit that the arbitrator's decision was unreasonable is not met and the miscarriage of justice threshold was not satisfied.

*(5) Residual Discretion to Deny Leave*

**(a) Considerations in Exercising Residual Discretion in a Section 31(2)(a) Leave Application**

85 The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met (*BCIT*, at paras. 9 and 26). In *BCIT*, Saunders J.A. sets out a non-exhaustive list of considerations that would be applicable to the exercise of discretion (para. 31):

> 1. "the apparent merits of the appeal";
>
> 2. "the degree of significance of the issue to the parties, to third parties and to the community at large";
>
> 3. "the circumstances surrounding the dispute and adjudication including the urgency of a final answer";
>
> 4. "other temporal considerations including the opportunity for either party to address the result through other avenues";
>
> 5. "the conduct of the parties";

6. "the stage of the process at which the appealed decision was made";

7. "respect for the forum of arbitration, chosen by the parties as their means of resolving disputes"; and

8. "recognition that arbitration is often intended to provide a speedy and final dispute mechanism, tailor-made for the issues which may face the parties to the arbitration agreement".

86 I agree with Justice Saunders that it is not appropriate to create what she refers to as an "immutable checklist" of factors to consider in exercising discretion under s. 31(2) (*BCIT*, at para. 32). However, I am unable to agree that all the listed considerations are applicable at this stage of the analysis.

87 In exercising its statutorily conferred discretion to deny leave to appeal pursuant to s. 31(2)(a), a court should have regard to the traditional bases for refusing discretionary relief: the parties' conduct, the existence of alternative remedies, and any undue delay (*Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 S.C.R. 326 (S.C.C.), at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (*MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.), at para. 52). This would include the urgent need for a final answer.

88 With respect to the other listed considerations and addressed in turn below, it is my opinion that they have already been considered elsewhere in the s. 31(2)(a) analysis or are more appropriately considered elsewhere under s. 31(2). Once considered, these matters should not be assessed again under the court's residual discretion.

89 As discussed above, in s. 31(2)(a), a preliminary assessment of the merits of the question of law at issue in the leave application is to be considered in determining the miscarriage of justice question. The degree of significance of the issue to the parties is covered by the "importance of the result of the arbitration to the parties" criterion in s. 31(2)(a). The degree of significance of the issue to third parties and to the community at large should not be considered under s. 31(2)(a) as the *AA* sets these out as separate grounds for granting leave to appeal under s. 31(2)(b) and (c). Furthermore, respect for the forum of arbitration chosen by the parties is a consideration that animates the legislation itself and can be seen in the high threshold to obtain leave under s. 31(2)(a). Recognition that arbitration is often chosen as a means to obtain a fast and final resolution tailor-made for the issues is already reflected in the urgent need for a final answer.

90 As for the stage of the process at which the decision sought to be appealed was made, it is not a consideration relevant to the exercise of the court's residual discretion to deny leave under s. 31(2)(a). This factor seeks to address the concern that granting leave to appeal an interlocutory decision may be premature and result in unnecessary fragmentation and delay of the legal process (D. J. M. Brown and J. M. Evans, with the assistance of C. E. Deacon, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 3-67 to 3-76). However, any such concern will have been previously addressed by the leave court in its analysis of whether a miscarriage of justice may arise; more specifically, whether the interlocutory issue has the potential to affect the final result. As such, the above-mentioned concerns should not be considered anew.

91 In sum, a non-exhaustive list of discretionary factors to consider in a leave application under s. 31(2)(a) of the *AA* would include:

- conduct of the parties;
- existence of alternative remedies;
- undue delay; and
- the urgent need for a final answer.

92 These considerations could, where applicable, be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria of s. 31(2)(a) have been met. However, courts should exercise such discretion with caution. Having found

an error of law and, at least with respect to s. 31(2)(a), a potential miscarriage of justice, these discretionary factors must be weighed carefully before an otherwise eligible appeal is rejected on discretionary grounds.

**(b) Application to the Present Case**

93 The SC Leave Court judge denied leave on the basis that there was no question of law. Even had he found a question of law, the SC Leave Court judge stated that he would have exercised his residual discretion to deny leave for two reasons: first, because of Creston's conduct in misrepresenting the status of the finder's fee issue to the TSXV and Sattva; and second, "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41). The CA Leave Court overruled the SC Leave Court on both of these discretionary grounds.

94 For the reasons discussed above, fostering and preserving the integrity of the arbitral system should not be a discrete discretionary consideration under s. 31(2)(a). While the scheme of s. 31(2) recognizes this objective, the exercise of discretion must pertain to the facts and circumstances of a particular case. This general objective is not a discretionary matter for the purposes of denying leave.

95 However, conduct of the parties is a valid consideration in the exercise of the court's residual discretion under s. 31(2)(a). A discretionary decision to deny leave is to be reviewed with deference by an appellate court. A discretionary decision should not be interfered with merely because an appellate court would have exercised the discretion differently (*R. c. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509 (S.C.C.), at paras. 18 and 30). An appellate court is only justified in interfering with a lower court judge's exercise of discretion if that judge misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651 (S.C.C.), at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 (S.C.C.), at para. 117).

96 Here, the SC Leave Court relied upon a well-accepted consideration in deciding to deny discretionary relief: the misconduct of Creston. The CA Leave Court overturned this decision on the grounds that Creston's conduct was "not directly relevant to the question of law" advanced on appeal (at para. 27).

97 The CA Leave Court did not explain why misconduct need be directly relevant to a question of law for the purpose of denying leave. I see nothing in s. 31(2) of the *AA* that would limit a leave judge's exercise of discretion in the manner suggested by the CA Leave Court. My reading of the jurisprudence does not support the view that misconduct must be directly relevant to the question to be decided by the court.

98 In *Homex Realty & Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011 (S.C.C.), at pp. 1037-38, misconduct by a party not directly relevant to the question at issue before the court resulted in denial of a remedy. The litigation in *Homex* arose out of a disagreement regarding whether the purchaser of lots in a subdivision, Homex, had assumed the obligations of the vendor under a subdivision agreement to provide "all the requirements, financial and otherwise" for the installation of municipal services on a parcel of land that had been subdivided (pp. 1015-16). This Court determined that Homex had not been accorded procedural fairness when the municipality passed a by-law related to the dispute (p. 1032). Nevertheless, discretionary relief to quash the by-law was denied because, among other things, Homex had sought "throughout all these proceedings to avoid the burden associated with the subdivision of the lands" that it owned (p. 1037), even though the Court held that Homex knew this obligation was its responsibility (pp. 1017-19). This conduct was related to the dispute that gave rise to the litigation, but not to the question of whether the by-law was enacted in a procedurally fair manner. Accordingly, I read *Homex* as authority for the proposition that misconduct related to the dispute that gave rise to the proceedings may justify the exercise of discretion to refuse the relief sought, in this case refusing to grant leave to appeal.

99 Here, the arbitrator found as a fact that Creston misled the TSXV and Sattva regarding "the nature of the obligation it had undertaken to Sattva by representing that the finder's fee was payable in cash" (para. 56(k)). While this conduct is not tied to the question of law found by the CA Leave Court, it is tied to the arbitration proceeding convened to determine which share price should be used to pay Sattva's finder's fee. The SC Leave Court was entitled to rely upon such conduct as a basis for denying leave pursuant to its residual discretion.

100 In the result, in my respectful opinion, even if the CA Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the SC Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion.

101 Although the CA Leave Court erred in granting leave, these protracted proceedings have nonetheless now reached this Court. In light of the fact that the true concern between the parties is the merits of the appeal — that is how much the Agreement requires Creston to pay Sattva — and that the courts below differed significantly in their interpretation of the Agreement, it would be unsatisfactory not to address the very dispute that has given rise to these proceedings. I will therefore proceed to consider the three remaining questions on appeal as if leave to appeal had been properly granted.

***C. Standard of Review Under the AA***

102 I now turn to consideration of the decisions of the appeal courts. It is first necessary to determine the standard of review of the arbitrator's decision in respect of the question on which the CA Leave Court granted leave: whether the arbitrator construed the finder's fee provision in light of the Agreement as a whole, particularly, whether the finder's fee provision was interpreted having regard for the "maximum amount" proviso.

103 At the outset, it is important to note that the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which sets out standards of review of the decisions of many statutory tribunals in British Columbia (see ss. 58 and 59), does not apply in the case of arbitrations under the *AA*.

104 Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), and the cases that followed it is not entirely applicable to the commercial arbitration context. For example, the *AA* forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the *Dunsmuir* judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

105 Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

106 *Dunsmuir* and the post-*Dunsmuir* jurisprudence confirm that it will often be possible to determine the standard of review by focusing on the nature of the question at issue (see for example *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at para. 44). In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*A.T.A.*, at para. 30). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.

***D. The Arbitrator Reasonably Construed the Agreement as a Whole***

107 For largely the reasons outlined by Justice Armstrong in paras. 57-75 of the SC Appeal Court decision, in my respectful opinion, in determining that Sattva is entitled to be paid its finder's fee in shares priced at $0.15 per share, the arbitrator

reasonably construed the Agreement as a whole. Although Justice Armstrong conducted a correctness review of the arbitrator's decision, his reasons amply demonstrate the reasonableness of that decision. The following analysis is largely based upon his reasoning.

108 The question that the arbitrator had to decide was which date should be used to determine the price of the shares used to pay the finder's fee: the date specified in the Market Price definition in the Agreement or the date the finder's fee was to be paid?

109 The arbitrator concluded that the price determined by the Market Price definition prevailed, i.e. $0.15 per share. In his view, this conclusion followed from the words of the Agreement and was "clear and beyond argument" (para. 23). Apparently, because he considered this issue clear, he did not offer extensive reasons in support of his conclusion.

110 In *N.L.N.U.*, Abella J. cites Professor David Dyzenhaus to explain that, when conducting a reasonableness review, it is permissible for reviewing courts to supplement the reasons of the original decision-maker as part of the reasonableness analysis:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, <u>the court must first seek to supplement them before it seeks to subvert them</u>. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added by Abella J.; para. 12.]
>
> (Quotation from D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304.)

Accordingly, Justice Armstrong's explanation of the interaction between the Market Price definition and the "maximum amount" proviso can be considered a supplement to the arbitrator's reasons.

111 The two provisions at issue here are the Market Price definition and the "maximum amount" proviso:

> **2. DEFINITIONS**
>
> **"Market Price"** for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

And:

> **3. FINDER'S FEE**
>
> 3.1 ... the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. <u>Such finder's fee is to be paid in shares of the Company based on Market Price</u> or, at the option of the Finder, any combination of shares and cash, <u>provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations</u>.
>
> [Emphasis added.]

112 Section 3.1 entitles Sattva to be paid a finder's fee in shares based on the "Market Price". Section 2 of the Agreement states that Market Price for companies listed on the TSXV should be "calculated on close of business day before the issuance of the press release announcing the Acquisition". In this case, shares priced on the basis of the Market Price definition would be $0.15 per share. The words "provided the amount does not exceed the maximum amount as set out in the Exchange Policy

5.1, Section 3.3 Finder's Fee Limitations" in s. 3.1 of the Agreement constitute the "maximum amount" proviso. This proviso limits the amount of the finder's fee. The maximum finder's fee in this case is US$1.5 million (see s. 3.3 of the TSXV Policy 5.1 in Appendix II).

113 While the "maximum amount" proviso limits the amount of the finder's fee, it does not affect the Market Price definition. As Justice Armstrong explained, the Market Price definition acts to fix the date at which one medium of payment (US$) is transferred into another (shares):

> The medium for payment of the finder's fee is clearly established by the fee agreement. The market value of those shares at the time that the parties entered into the fee agreement was unknown. The respondent analogizes between payment of the $1.5 million US finder's fee in shares and a hypothetical agreement permitting payment of $1.5 million US in Canadian dollars. Both agreements would contemplate a fee paid in different currencies. The exchange rate of the US and Canadian dollar would be fixed to a particulate date, as is the value of the shares by way of the Market Price in the fee agreement. That exchange rate would determine the number of Canadian dollars paid in order to satisfy the $1.5 million US fee, as the Market Price does for the number of shares paid in relation to the fee. The Canadian dollar is the form of the fee payment, as are the shares. Whether the Canadian dollar increased or decreased in value after the date on which the exchange rate is based is irrelevant. The amount of the fee paid remains $1.5 million US, payable in the number of Canadian dollars (or shares) equal to the amount of the fee based on the value of that currency on the date that the value is determined.
>
> (SC Appeal Court decision, at para. 71)

114 Justice Armstrong explained that Creston's position requires the Market Price definition to be ignored and for the shares to be priced based on the valuation done in anticipation of a private placement.

115 However, nothing in the Agreement expresses or implies that compliance with the "maximum amount" proviso should be reassessed at a date closer to the payment of the finder's fee. Nor is the basis for the new valuation, in this case a private placement, mentioned or implied in the Agreement. To accept Creston's interpretation would be to ignore the words of the Agreement which provide that the "finder's fee is to be paid in shares of the Company based on Market Price".

116 The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both the Market Price definition and the "maximum amount" proviso. The arbitrator's interpretation of the Agreement, as explained by Justice Armstrong, achieves this goal by reconciling the Market Price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

117 As Justice Armstrong explained, setting the share price in advance creates a risk that makes selecting payment in shares qualitatively different from choosing payment in cash. There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.

118 By accepting payment in shares, Sattva was accepting that it was subject to the volatility of the market. If Creston's share price had fallen, Sattva would still have been bound by the share price determined according to the Market Price definition resulting in it receiving a fee paid in shares with a market value of less than the maximum amount of US$1.5 million. It would make little sense to accept the risk of the share price decreasing without the possibility of benefitting from the share price increasing. As Justice Armstrong stated:

> It would be inconsistent with sound commercial principles to insulate the appellant from a rise in share prices that benefitted the respondent at the date that the fee became payable, when such a rise was foreseeable and ought to have been addressed by the appellant, just as it would be inconsistent with sound commercial principles, and the terms of the fee agreement, to

increase the number of shares allocated to the respondent had their value decreased relative to the Market Price by the date that the fee became payable. Both parties accepted the possibility of a change in the value of the shares after the Market Price was determined when entering into the fee agreement.

(SC Appeal Court decision, at para. 70)

119 For these reasons, the arbitrator did not ignore the "maximum amount" proviso. The arbitrator's reasoning, as explained by Justice Armstrong, meets the reasonableness threshold of justifiability, transparency and intelligibility (*Dunsmuir*, at para. 47).

***E. Appeal Courts Are Not Bound by Comments on the Merits of the Appeal Made by Leave Courts***

120 The CA Appeal Court held that it and the SC Appeal Court were bound by the findings made by the CA Leave Court regarding not simply the decision to grant leave to appeal, but also the merits of the appeal. In other words, it found that the SC Appeal Court erred in law by ignoring the findings of the CA Leave Court regarding the merits of the appeal.

121 The CA Appeal Court noted two specific findings regarding the merits of the appeal that it held were binding on it and the SC Appeal Court: (1) it would be anomalous if the Agreement allowed Sattva to receive US$1.5 million if it received its fee in cash, but allowed it to receive shares valued at approximately $8 million if Sattva received its fee in shares; and (2) that the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement:

> The [SC Appeal Court] judge found the arbitrator had expressly addressed the maximum amount payable under paragraph 3.1 of the Agreement and that he was correct.
>
> This finding is contrary to the remarks of Madam Justice Newbury in the earlier appeal that, if Sattva took its fee in shares valued at $0.15, it would receive a fee having a value at the time the fee became payable of over $8 million. If the fee were taken in cash, the amount payable would be $1.5 million US. Newbury J.A. specifically held that the arbitrator did not note this anomaly and did not address the meaning of paragraph 3.1 of the Agreement.
>
> The [SC Appeal Court] judge was bound to accept those findings. Similarly, absent a five-judge division in this appeal, we must also accept those findings. [paras. 42-44]

122 With respect, the CA Appeal Court erred in holding that the CA Leave Court's comments on the merits of the appeal were binding on it and on the SC Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at para. 88). A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful (*Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310 (B.C. C.A.), at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii (note) (S.C.C.)). This is true even where the determination of whether to grant leave involves, as in this case, a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal (*Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (Ont. C.A.), at para. 32).

123 Creston concedes this point but argues that the CA Appeal Court's finding that it was bound by the CA Leave Court was inconsequential because the CA Appeal Court came to the same conclusion on the merits as the CA Leave Court based on separate and independent reasoning.

124 The fact that the CA Appeal Court provided its own reasoning as to why it came to the same conclusion as the CA Leave Court does not vitiate the error. Once the CA Appeal Court treated the CA Leave Court's reasons on the merits as binding, it could hardly have come to any other decision. As counsel for Sattva pointed out, treating the leave decision as binding would render an appeal futile.

**VI. Conclusion**

125 The CA Leave Court erred in granting leave to appeal in this case. In any event, the arbitrator's decision was reasonable. The appeal from the judgments of the Court of Appeal for British Columbia dated May 14, 2010 and August 7, 2012 is allowed with costs throughout and the arbitrator's award is reinstated.

*Appeals allowed.*

*Pourvois accueillis.*

**AppendixI**

*Relevant Provisions of the Sattva-Creston Finder's Fee Agreement*

(a) "Market Price" definition:

**2. DEFINITIONS**

**"Market Price"** for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

(b) Finder's fee provision (which contains the "maximum amount" proviso):

**3. FINDER'S FEE**

3.1 ... the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

**AppendixII**

*Section 3.3 of TSX Venture Exchange Policy 5.1: Loans, Bonuses, Finder's Fees and Commissions*

**3.3 Finder's Fee Limitations**

The finder's fee limitations apply if the benefit to the Issuer is an asset purchase or sale, joint venture agreement, or if the benefit to the Issuer is not a specific financing. The consideration should be stated both in dollars and as a percentage of the value of the benefit received. Unless there are unusual circumstances, the finder's fee should not exceed the following percentages:

| **Benefit** | **Finder's Fee** |
|---|---|
| On the first $300,000 | Up to 10% |
| From $300,000 to $1,000,000 | Up to 7.5% |
| From $1,000,000 and over | Up to 5% |

As the dollar value of the benefit increases, the fee or commission, as a percentage of that dollar value should generally decrease.

**AppendixIII**

*Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as it read on January 12, 2007) (now the Arbitration Act)*

**Appeal to the court**

**31**

(1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

(a) all of the parties to the arbitration consent, or

(b) the court grants leave to appeal.

(2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

(3) If the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.

(4) On an appeal to the court, the court may

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

# TAB 6

2021 ABQB 263
Alberta Court of Queen's Bench

Harco Enterprises Ltd. v. Knelsen Sand and Gravel Ltd.

2021 CarswellAlta 815, 2021 ABQB 263, [2021] A.W.L.D. 2842, [2021] A.W.L.D. 2843, [2021] A.W.L.D. 2844, [2021] A.W.L.D. 2945, 18 B.L.R. (6th) 12, 333 A.C.W.S. (3d) 546, 69 C.P.C. (8th) 352

# Harco Enterprises Ltd., also known as Harco Oilfield Services Ltd. (Plaintiff / Defendant by counterclaim) and Knelsen Sand and Gravel Ltd. (Defendant / Plaintiff by counterclaim)

Tamara L. Friesen J.

Heard: September 8-11, 14-18, 2020
Judgment: April 7, 2021
Docket: Edmonton 1203-07693

Counsel: Danielle Bourgeois, Connor Malone, for Plaintiff
Roberto Noce, Q.C., Michael Gibson, for Defendant

**Related Abridgment Classifications**
Contracts
III Formation of contract
III.1 Consensus ad idem
III.1.g Oral contracts
Contracts
IX Performance or breach
IX.8 Breach
IX.8.d Miscellaneous
Contracts
XIV Remedies for breach
XIV.5 Damages
XIV.5.e Sale of goods
Remedies
I Damages
I.11 Damages in contract
I.11.e Sale of goods

**Headnote**
Contracts --- Formation of contract — Consensus ad idem — Oral contracts
Parties entered into business agreement that allowed defendant to set up gravel crushing operations in two gravel pits where plaintiff held quarry leases in exchange for royalties — Contract consisted of both written and oral terms and at least one collateral oral agreement — Defendant discovered that plaintiff had accessed and sold gravel products to third-party from stockpile in one of gravel pits without notifying defendant, which resulted in defendant ceasing to pay royalties — Plaintiff brought action for damages for breach of contract — Action allowed — Written and oral terms constituted one contract and had to be considered and interpreted together in determining issues between parties — Aggregate agreement was binding but it did not stand alone — Collateral oral agreement also existed that from time-to-time defendant would provide or crush aggregate products for plaintiff, and in return, plaintiff would pay defendant reasonable crushing fee — Parties' intent at time of entering into contract was to enter into agreement in which defendant would be entitled to long-term exclusive access to good source of

gravel while plaintiff would have benefit of consistent stream of royalty income — There was no question that consideration flowed from defendant to plaintiff and that contract benefited both parties.

Contracts --- Performance or breach — Breach — Miscellaneous

Parties entered into business agreement that allowed defendant to set up gravel crushing operations in two gravel pits where plaintiff held quarry leases in exchange for royalties — Contract consisted of both written and oral terms and at least one collateral oral agreement — Defendant discovered that plaintiff had accessed and sold gravel products to third-party from stockpile in one of gravel pits without notifying defendant, which resulted in defendant ceasing to pay royalties — Defendant brought counterclaim for damages for breach of contract — Counterclaim dismissed — Plaintiff's removal of product without permission was clear breach of parties' collateral agreement with respect to how they would deal with crushing and processing for plaintiff but was not breach that warranted termination of contract — It was well-established that if plaintiff wanted gravel from gravel pits it had to ask defendant, and it was also well-established that defendant had designated certain stockpiles and certain products for certain uses and that if plaintiff wanted to remove product from there, it needed permission to do so — Agreement between parties did not contain terms addressing consequences for non-terminable breaches that occurred during course of agreement, and term allowing defendant to withhold payment or entitlement to remedy of set-off could not be implied — Nothing in negotiations that led up to agreement or during course of agreement supported defendant's chosen course of action for dealing with breach — Defendant also did not have entitlement to set-off in law as it failed to actually determine its damages or losses or to issue any specific demand for repayment — Defendant could have calculated its damages and sent demand for repayment at any time following discovery of breach, but chose not to do so and rejected offer to replace gravel.

Contracts --- Remedies for breach — Damages — Sale of goods

Parties entered into business agreement that allowed defendant to set up gravel crushing operations in two gravel pits where plaintiff held quarry leases in exchange for royalties — Contract consisted of both written and oral terms and at least one collateral oral agreement — Defendant discovered that plaintiff had accessed and sold gravel products to third-party from stockpile in one of gravel pits without notifying defendant, which resulted in defendant ceasing to pay royalties — Plaintiff brought action for damages for breach of contract — Action allowed — Plaintiff was entitled to payment for unpaid aggregate invoices in total amount of $406,229.89 and to compensation for additional outstanding invoices in amount of $212,142.68 — Only benefit that plaintiff received from core contract was payment of royalties and therefore, to deprive plaintiff of royalty payments would have been to deprive it of substantially whole benefit of contract — Defendant was not merely late in paying plaintiff, it had deliberately withheld payments indefinitely as way to apply pressure to plaintiff with respect to its non-terminable breach of contract as negotiating tactic — As result, defendant's refusal to pay plaintiff was breach that warranted termination of contract.

Remedies --- Damages — Damages in contract — Sale of goods

Parties entered into business agreement that allowed defendant to set up gravel crushing operations in two gravel pits where plaintiff held quarry leases in exchange for royalties — Contract consisted of both written and oral terms and at least one collateral oral agreement — Defendant discovered that plaintiff had accessed and sold gravel products to third-party from stockpile in one of gravel pits without notifying defendant, which resulted in defendant ceasing to pay royalties — Defendant brought counterclaim for damages for breach of contract — Counterclaim dismissed — Plaintiff conceded that defendant was entitled to $8,000 for crushing fee with respect to gravel removed by plaintiff, and was entitled to $11,900 for concrete rock removed from different pit — Defendant did not prove that plaintiff was responsible for removing any other aggregate from pit — Fact that plaintiff had removed material on two prior occasions was not sufficient evidence to prove it was responsible for all material that was alleged to be missing — Defendant was not entitled to any compensation beyond what plaintiff had conceded it was owed and had not proved its counterclaim.

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*Bank of Montreal v. Dynex Petroleum Ltd.* (1999), 1999 CarswellAlta 1271, 74 Alta. L.R. (3d) 219, [2000] 2 W.W.R. 693, 182 D.L.R. (4th) 640, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 179, (sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 255 A.R. 116, (sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 220 W.A.C. 116, 1999 ABCA 363, 2 B.L.R. (3d) 59 (Alta. C.A.) — referred to

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*Saskatoon Sand & Gravel Ltd. v. Steve* (1973), 40 D.L.R. (3d) 248, 1973 CarswellSask 175 (Sask. Q.B.) — referred to

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*Turner v. Bell Mobility Inc.* (2014), 2014 ABQB 36, 2014 CarswellAlta 127, 581 A.R. 1 (Alta. Q.B.) — referred to

*Unique Broadband Systems Inc., Re* (2014), 2014 ONCA 538, 2014 CarswellOnt 9327, 13 C.B.R. (6th) 278, 121 O.R. (3d) 81, 322 O.A.C. 122 (Ont. C.A.) — considered

*Van Camp v. Laurentian Bank of Canada* (2015), 2015 ABCA 83, 2015 CarswellAlta 299, 381 D.L.R. (4th) 721, 38 B.L.R. (5th) 1, (sub nom. *Van Camp v. Chrome Horse Motorcycle Inc.)* 599 A.R. 201, (sub nom. *Van Camp v. Chrome Horse Motorcycle Inc.)* 643 W.A.C. 201, 12 Alta. L.R. (6th) 41 (Alta. C.A.) — considered

*a.k.a. Cartoon Inc. v. Natterjack Animation Co.* (2002), 2002 BCSC 1763, 2002 CarswellBC 3036, 31 B.L.R. (3d) 52 (B.C. S.C.) — considered

**Statutes considered:**

*Judicature Act*, R.S.A. 2000, c. J-2

s. 12 — referred to

*Limitations Act*, R.S.A. 2000, c. L-12

Generally — referred to

*Mines and Minerals Act*, R.S.A. 2000, c. M-17

Generally — referred to

*Provincial Lands Act*, R.S.S. 1978, c. P-31

Generally — referred to

*Provincial Lands Act, 2016*, S.S. 2016, c. P-31.1

Generally — referred to

*Public Lands Act*, R.S.A. 2000, c. P-40

Generally — referred to

**Rules considered:**

*Alberta Rules of Court*, Alta. Reg. 124/2010

R. 11.25(3) — referred to

**Regulations considered:**

*Provincial Lands Act*, R.S.S. 1978, c. P-31

*Provincial Lands Regulations*, Sask. Reg. 145/68

Pt. III.1 [en. Sask. Reg. 54/93] — referred to

s. 25 — referred to

*Provincial Lands Act, 2016*, S.S. 2016, c. P-31.1

*Crown Resource Land Regulations, 2019*, R.R.S., c. P-31.1, Reg. 3

Generally — referred to

***Tamara L. Friesen J.*:**

**Introduction:**

1 In 2009, Harco Enterprises Ltd. (Harco) and Knelsen Sand and Gravel Ltd. (Knelsen) entered into a mutually beneficial business agreement. The agreement allowed Knelsen to set up gravel crushing operations in two gravel pits located near the Alberta/Saskatchewan border for which Harco held quarry leases from the Government of Saskatchewan ("GOS"): the Border Pit and the Rawlakes Pit (the "Gravel Pits"). For a period of 5 years, Knelsen would access, process and acquire gravel and sand products from the Gravel Pits, and pay royalties to Harco in return.

2 The business relationship soured in the summer of 2011 when Knelsen discovered that Harco had accessed and sold processed gravel products to a third party from a stockpile in one of the Gravel Pits, without notifying Knelsen. This discovery set off a chain of events leading to the dramatic demise of the relationship between the parties, and ultimately, to this trial.

3 Offended by Harco's actions, and suspicious that additional products had been removed from the Gravel Pits without their consent, Knelsen stopped paying royalties to Harco; however, they continued to access and acquire gravel products from the Gravel Pits for the next three to four months. Knelsen did not advise Harco of the reason for withholding payment until January 3, 2012. Harco responded on February 9, 2012 by terminating the contract and eventually evicting Knelsen from the Gravel Pits and other Harco properties.

4 On May 22, 2012, Harco filed a Statement of Claim against Knelsen for unpaid royalty debts, and additional claims that were resolved prior to trial. Knelsen filed its Statement of Defence on June 28, 2012, and on August 8, 2012 counterclaimed for breach of contract and associated damages incurred as a result of alleged improper eviction from the properties.

5 The contract in issue consisted of a combination of both written and oral terms, as well as at least one collateral oral agreement. Many important terms were left uncertain. Other important terms were ignored, or unanticipated by the parties. Some agreed upon terms apparently shifted or evolved over time. The parties did not establish an appropriate method for dispute resolution to deal with disagreements or breaches. They put no thought or effort into determining what should happen to stockpiled materials if the contract was not renewed, or if it was terminated due to default by one of the parties.

6 A good contract makes for a good business relationship. As a result of the major deficiencies in this contract, what started out as a mutually beneficial and lucrative business relationship ended in distrust, blame, anger, hurt feelings, family discord, and a very expensive and extensive litigation process.

7 For the reasons that follow, I find that Harco's claim for unpaid invoices succeeds, and Knelsen's counterclaim fails.

***The parties' positions***

8 In its Statement of Claim, Harco asserted that Knelsen breached the agreement by failing or refusing to pay amounts owed to Harco for gravel products removed from the Gravel Pits between September and December, 2011. Harco claimed that pursuant to the unwritten terms of the agreement, established through course of conduct, Knelsen was required to prepare and pay Harco's invoices within a reasonable time frame (30 days) and had failed to do so. In addition to other remedies, Harco sought payment of the invoices in the amount of *$391,164.74*.

9 Knelsen did not take significant issue with the amounts claimed in the invoices, which were prepared based on records provided to Harco by Knelsen; rather, Knelsen argued it was not required to pay the invoices because Harco breached the agreement first by removing gravel from the Gravel Pits without Knelsen's consent, and without payment. Further, Knelsen disagreed with the assertion that any particular timeframe for payment of the invoices was agreed upon, and argued that the termination of contract was unjustified as Knelsen had delayed rather than refused payment of the invoices.

10 In its Counterclaim, Knelsen argued that the terms of the written agreement gave them "exclusive right" to access and acquire gravel and sand products from the Gravel Pits, and ownership of (or rights in equity to) stockpiled processed gravel products. An implied term of the agreement was that Harco would not remove, sell or otherwise make use of the processed gravel products in the Gravel Pits without Knelsen's prior approval or agreement.

11 Because Harco breached that term, Knelsen was entitled to respond by withholding payment for the invoices until the matter of improperly removed gravel products could be determined. Knelsen submitted it was a further breach of the contract for Harco to terminate the agreement and evict them prior to the agreed upon expiration date of May, 2014.

12 Knelsen sought compensation for: aggregate products improperly removed by Harco; crushing fees for the processed gravel product remaining in Harco's possession; costs incurred to relocate their asphalt plant; costs incurred to acquire additional processed gravel products for Knelsen's ongoing projects; and costs for the remobilization of their crushing plant. Knelsen sought damages to a total of: *$1,124,615.15*.

13 In its Statement of Defence to the Counterclaim, Harco submitted that they could not have breached the terms of the written agreement because it was not binding: it contained no consideration and was missing essential terms. At trial, Harco submitted they were entitled to take aggregate products from the stockpile because until royalties were paid, the processed gravel products stored in the Gravel Pits were still owned by them.

14 Harco further defended on the basis that they considered Knelsen's refusal to pay the invoices to be a breach of an essential term which constituted a repudiation of the business agreement. As a result, Harco was entitled to revoke permission for Knelsen to operate its gravel extraction, crushing and removal operations in the Gravel Pits.

15 Knelsen filed its Affidavit of Records on February 2, 2013. After reviewing those records, Harco made a further demand for payment of four additional invoices totalling *$15,065.15*. Harco filed an Amended Statement of Claim on March 20, 2014 which included the additional invoices.

16 In February of 2015, Harco demanded further payment of additional outstanding invoice amounts which had been calculated in relation to what the parties referred to as the "2011 Hotmix Totals" in the amount of *$174,498.70*; however, they did not amend their Statement of Claim to specifically include those totals.

17 At trial, Harco sought compensation for the unpaid invoices identified in their Statement of Claim, as well as for additional gravel products extracted, processed and removed by Knelsen which they became aware of following termination of the contract; specifically, the 2011 and 2012 Hotmix, Hotmix inventory and concrete sand ("Hotmix Totals"). Their final claim for unpaid invoices was *$406,229.89* for regular aggregate products, and *$374,194.84* for Hotmix Totals, bringing their total claim to *$780,424.73.*

18 Knelsen argued at trial that Harco's claim with respect to the Hotmix Totals was never properly pleaded, and was therefore barred by the Limitations Act, RSA 2000 c L-12 and also as a matter of trial fairness, by application of the *audi alteram partem* rule.

***Preliminary issue: laws from another jurisdiction***

19 Given that the Gravel Pits are located in Saskatchewan and Harco is a Saskatchewan company, Harco might have filed its claim in Saskatchewan. It chose to file in the Court of Queen's Bench of Alberta. This was a reasonable decision given that Harco's center of operations is in Cold Lake, Alberta; Knelsen is an Alberta company; and the agreement in issue was entered into and took place primarily in Alberta. The dispute clearly has a "real and substantial connection" to Alberta: see Rule 11.25(3) of the Alberta Rules of Court, Alta Reg 124/2010 and Bansal v Ferrara Pan Candy Co Inc 2014 ABQB 384 at para 29.

20 Further, Knelsen implicitly consented to the jurisdiction of the Alberta Court of Queen's Bench by defending and counterclaiming in the same action, and by proceeding with the trial in this Court: see Norex Petroleum Limited v Chubb Insurance Company of Canada 2008 ABQB 442 at para 54 [Norex].

21 In closing argument, Harco argued that Part III.1 of the Provincial Lands Regulations, Sask Regs 145/68 (the "Gravel Regs"), specifically s 25, prevented it from legally bargain away its ownership interest in the processed aggregate to Knelsen even if that is what the parties may have intended (an assertion Harco denies). [1] Section 25 indicates that "No sand and gravel disposition may be assigned or transferred except with the prior written consent of the Minister." No such consent was sought or given in this case.

22 This argument was made for the first time in closing argument, taking Knelsen by surprise. As a result, the Court allowed the parties to provide additional written submissions. In its submissions, Knelsen asserted that this Court, having properly taken jurisdiction over the dispute, should not rely on Saskatchewan statutes dealing with regulation of Crown resources, and gravel in particular, in determining the issues at trial, as to do so would amount to improper reliance on the laws of a foreign jurisdiction.

23 Section 12 of the Judicature Act, RSA 2000, c J–2 provides a complete answer to this argument:

> When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

24 In taking judicial cognizance of Saskatchewan legislation, Alberta rules of construction apply. In Turner v Bell Mobility Inc 2014 ABQB 36 at para 38 Lee J adopted the following observation from *Norex*: "this Court is routinely called upon to apply foreign laws and does so with the aid of experts as needed". He concluded: "Alberta courts are capable of applying Saskatchewan laws as they relate to contractual rights and obligations existing between [the parties]" and found that in that case, there would be no disadvantage to the parties for the Court to do so (para 39).

25 There is an ample body of jurisprudence and statutory authority dealing with disputes over, and regulation of, Gravel Pits and quarries in Alberta and Saskatchewan, as well as in many other Canadian jurisdictions. Further, Alberta's legislation includes laws very similar to the Saskatchewan legislation relied on by Harco; in particular, the Metallic and Industrial Minerals Exploration Regulation, Alta Reg 213/1998 which is enabled by the Mines and Minerals Act, RSA 2000, c M–17 and the Public Lands Act, RSA 2000, c P–40.

26 Therefore, insofar as legislation and authorities from other provincial jurisdictions, and Saskatchewan in particular, may assist this Court in determining the issues, this Court will rely on them. I do not require the assistance of an expert in order to do so.

**Issues:**

27 The issues before the Court were as follows:

1. What were the terms of the contract between the parties?
2. Did Harco breach a term of the agreement by taking processed aggregate product without permission?
3. If so, what action was Knelsen entitled to take as a result of the breach?
4. Did Knelsen breach a term of the agreement by withholding payment of invoices?
5. If so, what action was Harco entitled to take as a result of the breach?
6. What damages, if any, should flow to Harco?
7. Does Knelsen have a valid counterclaim against Harco based in contract or equity?
8. What damages, if any, should flow to Knelsen?

**Facts:**

***The evidence***

28 At trial, Harco called two witnesses: Mr. Zane Harrison in his personal capacity and as corporate representative of Harco, and Harco's accountant, Mr. Keith Puetz. Knelsen called four witnesses: Mr. Darryl Quist in his personal capacity and as Knelsen's corporate representative; Mr. Terry Harrison, brother of Mr. Zane Harrison and former General Manager of Harco; Mr. Jake Wiebe, a key Knelsen employee directly involved with the issue at trial; and Mr. Ryan Becker, a Knelsen employee in relation to Knelsen accounting and corporate matters.

29 In addition to oral evidence, the evidence at trial included a significant quantity of business and other records entered as exhibits, most by agreement, as well as lengthy portions of transcripts from the questioning of Mr. Quist and Mr. Wiebe which were read into the record.

30 I found each of the witnesses who testified before me to be credible and reliable on certain points, and not on others. It was clear to me that Mr. Zane Harrison, Mr. Quist, and Mr. Wiebe, in particular, were deeply entrenched in their view of events, and committed to delivering to the Court whatever information best supported their party's particular interests, depending on how they interpreted the questions being put to them. This was not surprising given that the litigation process was well into its eighth year when the matter came before me.

31 Fortunately, there were few areas of significant factual disagreement. In general, where there was a contradiction between testimony a witness gave at questioning, and their testimony at trial, I preferred the evidence given at questioning, as it was much closer in time to the events in issue. Where I was able to understand and rely on documentary evidence to support a factual finding without resorting to relying on a particular witness's subjective interpretation, I did so.

32 Many of the facts as set out below were taken from the parties' closing oral and written submissions. Where the parties disagreed, the fact set out below should be considered my finding based on full consideration of the evidence at trial.

***The parties:***

***Harco Enterprises Ltd.***

33 The Plaintiff, Harco Enterprises Ltd., operating in Alberta as Harco Oilfield Services Ltd. (Harco), is a Saskatchewan corporation, extra-provincially registered in Alberta. It started as a construction company run by members of the extended Harrison family in 1978. It was purchased by Mr. George Harrison and his four sons — Terry, Craig, Darryl and Zane — in the 1990s. Currently, it is in the business of selling concrete and aggregate, in addition to other pursuits in leasing. For efficiency and clarity, I will refer to the Harrisons by their first names throughout the remainder of this judgment. No disrespect is intended.

34 George is the largest shareholder of Harco. Initially, Zane and his three brothers were also shareholders. The family members held various positions within the company over the years. Over time, the other three brothers left the company.

35 At the time the agreement at issue in the case was formed, Terry was acting as general manager, a position he had taken over from George in 2007. Terry and George had a falling out in 2010 which ended in Terry being removed as general manager and director, and eventually, ceasing to be a shareholder. At that time, George returned to his position as general manager and Zane stepped in to act as assistant manager.

36 Harco's offices are in Cold Lake, Alberta. Harco's shop is in Pierceland Yard which consists of 29 acres of undeveloped residential land. The Yard contains a cement plant, an area where various aggregate products and byproducts are stored in stockpiles, and storage for various pieces of equipment and machinery.

37 Harco also owns other parcels of land near Cold Lake, including an 11.9 acre lot at the corner of Highway 55 and Highway 28 (the "Alberta Property").

38 Harco leases two parcels of land near Cold Lake from the Government of Saskatchewan: the Rawlakes Pit located in Saskatchewan, and the Border Pit which runs along the Saskatchewan/Alberta Border. The leases are renewed every 5 years and Harco has held them continually since the mid 1980s.

39 During the applicable time period, Harco's rights and obligations pursuant to the leases included, but were not limited to: possession of the land; exclusive right to exploration, recovery and disposition of sand and gravel located on the land; land stripping; provision of annual production returns; royalty payment to the GOS; record keeping for royalty payment purposes; reclamation/remediation; and removal authorization.

40 Harco is required to pay royalties to the GOS at the end of the year based on preparation of an annual production return and to pay disturbed acreage charges and royalties "in accordance with the Regulations." At the applicable time, the rate was 20 cents per cubic meter.

***Harco's business model***

41 As explained by Zane, the process for gravel extraction, and Harco's business model with respect to the gravel quarry leases they hold is as follows:

- Harco applies to the GOS for "removal acres".
- Harco moves in machines and removes whatever is above the soil. Harco then removes the layers of top soil until aggregate level is reached.
- Harco hires a crushing company, generally determined based on an agreed upon price for the product.
- The crushing company brings in crushing equipment and sets it up. The crushing company then removes the aggregate and loads it into its crushing machine.
- The crushing machine processes aggregate into various sizes of "crush" or "base rock" which is placed into stockpiles depending on what is required. Some examples of aggregate product include: $^3/_4$ inch straight rock, roll gravel, base, $^1/_2$ inch straight rock, 2 inch, 1.5 inch etc. Different types of aggregate have different uses, and therefore different values.
- As the machine crushes the rock into the required aggregate product, it rejects or separates out byproducts such as natural fines, asphalt sand or natural sand. These materials, considered to be commodities, are also stored in piles. Sometimes they are combined with other aggregate products to produce asphalt mix — also known as Hotmix.

- The amount of aggregate product produced and placed into stockpiles is measured using a platform scale in the pit. A hauling truck drives onto the scales, the weight of the truck is subtracted, and other necessary adjustments made in order to determine the tonnage. Then the product is dumped into a stockpile or removed.

- When product is removed from the stockpiles, the amount removed is measured in the same way. That amount is recorded on a haul ticket which is then reported to Harco.

- Harco prepares and issues an invoice back to the crushing company with respect to royalties payable to Harco for the removed product. Royalties are (usually) only payable on amounts once they are removed.

- Harco then reports back to the GOS at the end of each year by providing an annual production return. Harco pays royalties to the GOS according to that return.

- The crushing company moves out of the pit at the end of contract.

- When the pit is no longer producing, Harco is responsible to the GOS for reclamation of the area.

42 This business model, which enables Harco to sever raw aggregate from property belonging to the GOS, crush it, and dispose of it for a profit, is legally described as a *profit à prendre*: "the right of taking."

***Knelsen Sand and Gravel Ltd.***

43 The Defendant, Knelsen Sand and Gravel Ltd. (Knelsen) is an Alberta corporation, carrying on business as a sand and gravel supplier. Knelsen started as a small aggregate supply company based in La Crete. It has since grown into a large general contracting company. In 2004, Knelsen started bidding on major highway construction projects, and has expanded and grown in size as it established itself in the commercial paving business.

44 Mr. Darryl Quist, a professional engineer, was hired by Knelsen in 1998 to help expand the company's business from supply into general contracting. He has held various roles in the company, and was acting as the Construction Manager for Knelsen in 2008 when Knelsen became involved with Harco.

45 Mr. Jake Wiebe has worked for Knelsen for over 26 years. He has also held various roles in the company. In 2007, he took the position of "Aggregate Manager" which he continued to hold as of the date of trial.

46 Knelsen owns and operates most of the equipment it requires to fulfill its contractual duties to its customers, including trucks, a mobile aggregate crusher, and asphalt plant. While its center of operations is located in La Crete, Knelsen also operates a concrete plant in Cold Lake, referred to as the Cold Lake Yard.

***The Agreement***

47 In 2008, Mr. Quist purchased some gravel from Harco for a paving job Knelsen was doing on Highway 55 south of Cold Lake. He was interested in securing a supply of aggregates for projects in North-eastern Alberta and began discussing with Terry the possibility of entering into a long-term agreement. They continued their discussions over the winter of 2008/2009. Knelsen was considering bidding on various projects in the area, including a Government of Alberta contract to take on the Cold Lake Highway Twinning Project.

48 Mr. Quist assessed the two Harco Gravel Pits and determined that the Border Pit would be conducive to processing gravel with a lot of sand in it, or what is known as "base gravel" — or $^3/_4$ inch road crush while the Rawlakes Pit would be a good source for other aggregate products.

49 The Border Pit has a large footprint and Mr. Quist and Terry discussed the possibility of storing inventory in the Border Pit for project bids. They agreed Knelsen would produce and process a 50 thousand tonne stockpile of $^{3}/_{4}$ inch aggregate for that purpose, which Knelsen did in the summer of 2008 (although this may have occurred as late as the spring of 2009).

50 Around the same time, Terry asked Knelsen to crush a pile for Harco's use. Another stockpile was created at the Border Pit that was around 20 thousand tonnes (although at different points in the litigation and at trial, this was also described as a 5000 tonne pile). Harco paid Knelsen a crushing fee of $7 per tonne for the gravel in that pile.

51 In order to further secure their gravel supply, and to keep competitors out of the Harco Gravel Pits, Knelsen sought a more formal arrangement with Harco. There is no question that Terry and Mr. Quist had the necessary authority to enter into binding business agreements on behalf of their respective companies during the relevant time period.

52 Urlacher Construction (Urlacher) was also operating in the Border Pit at that time. The parties agreed that as Urlacher only dealt with sand products, they were not in competition with Knelsen and could remain.

53 George often stopped by the Gravel Pits and took part in at least some of the discussions leading up to formalization of the agreement. Zane was not in a management position at that time and was not involved in any of these preliminary conversations or negotiations.

54 On May 25, 2009, Mr. Quist and Terry agreed to terms, and signed a one-page Aggregate Agreement (the "Agreement") on behalf of their respective companies.

55 Mr. Quist drafted the document, which he described as a "foundational, farmer to farmer" type agreement, without the assistance of legal counsel. It contained the following provisions:

i. The term of the agreement was for 5 years from May 15, 2009 to May 15, 2014.

ii. During the term of the agreement, Knelsen had "exclusive right to access and acquire gravel and sand products" from the two leased Gravel Pit sites.

iii. Pricing for the processed gravel products would be established on a project-by-project basis.

iv. No other entity would be entitled to access and process materials at the Gravel Pit sites unless they had the permission of both Knelsen and Harco to do so.

v. Knelsen was permitted to set up an asphalt processing plant on Harco's Alberta Property.

vi. The Agreement could be extended for another 5 years if both parties agreed to do so.

vii. The Agreement could not be cancelled by Harco unless Knelsen defaulted on it.

56 Mr. Quist testified that Harco "threw in . . . for *gratis*" the offer to allow Knelsen to set up its asphalt plant operations on the Alberta Property for the duration of the Agreement. Terry testified that "if we didn't throw in the property it wouldn't have happened." Regardless: the Agreement did not require Knelsen to pay any rent to Harco in relation to any of the properties.

57 Knelsen won the Twinning Project contract about a month after signing the Agreement. Approximately 2 months after signing the Agreement, the parties agreed on a written Royalty Schedule (the "Schedule") that specified amounts payable for the gravel products. Mr. Quist testified that the Schedule reflected pricing that the parties had been using already "for some time." The price for $^{3}/_{4}$ inch crush "general use" was $7.00 per tonne.

58 Mr. Quist indicated that in order to "bid with confidence" on the Twinning Project, he had approached George and Terry and asked them for "an aggressive price." He used a price of $3.50 per tonne for $^{3}/_{4}$ inch crush (20 mm crush) in the bid. He

further testified that materials for the Twinning Project were billed differently than other projects and that billing was based on the project the materials were used for, not which stockpile the products came from.

59 Mr. Quist's claim that the special, aggressive price of $3.50 was to be used for all Twinning Project materials regardless of what stockpile the materials were drawn from was contradicted by documentary and other evidence at trial, most obviously the Schedule itself. The Schedule clearly lists $3.50 per tonne as the price for "20 mm crushed gravel — Cold Lake Twinning (separately stockpiled)" and $7.00 per tonne as the price for "20mm crushed gravel — (separately stockpiled)."

60 The parties further agreed — verbally, or through established course of conduct — on the following additional contractual terms:

- Urlacher could continue to operate in the Border Pit.
- Harco could continue to sell materials from the Gravel Pits to customers with whom they had an established customer base.
- Knelsen controlled the quantities and types of raw aggregate it processed at the Gravel Pits.
- Knelsen purchased the processed aggregate from Harco upon hauling quantities of processed aggregates away from the Gravel Pits or at the "point of sale".
- Knelsen had no obligation to pay Harco royalties on the materials in the stockpiles prior to selling or using them.
- Knelsen kept records of the quantities and types of processed aggregate materials it extracted and processed (the "Crushing Records") as well as the materials it hauled away from the Gravel Pits (the "Haul Cards"). At the end of each month, Knelsen prepared a summary based on the Haul Cards which stated the quantity and type of processed aggregate hauled from the Gravel Pits (the "Summaries").
- Harco invoiced Knelsen for the purchased product by preparing monthly invoices based on the Summaries Knelsen provided to Harco.
- Once they were prepared and received, Knelsen paid the invoices within a reasonable amount of time by mailing a cheque to Harco for the outstanding amounts.
- The prices paid by Knelsen to Harco for the various types of processed aggregate were contained in the Schedule.

61 In addition to the terms of the main contract, the parties also agreed that from time to time, if Harco required aggregate product for itself or for one of its existing customers, it could remove it from Knelsen's stockpiles, or request Knelsen to process it into a separate stockpile designated for Harco's use. Knelsen would do so, prepare an invoice, and Harco would remit an agreed upon crushing fee to Knelsen.

62 As indicated earlier, some important terms were ambiguous, undefined, or not addressed or included in any of the written, oral or collateral agreements, specifically:

1. What did the term "exclusive right to access" mean in the Aggregate Agreement?
2. Who owned the unused aggregate materials stockpiled in the Gravel Pits?
3. What constituted a "reasonable time" for Knelsen to pay Harco's invoices?
4. Were "Hotmix" materials supposed to be billed monthly or annually?
5. Who was considered an existing Harco customer, or a Knelsen competitor and how would that be determined?
6. What crushing fee would Harco pay to Knelsen for crushing services?

7. What constituted a "default" by Knelsen warranting termination of the agreement by Harco?

8. What actions were the parties entitled to take against one another for non-terminable breaches occurring during the course of the agreement?

9. What rights or obligations did the parties have on termination of the agreement, whether due to one party's default, or as of the anticipated expiration date?

10. What specific rights or obligations did the parties have with respect to processed aggregate materials that had not been purchased by Knelsen prior to the termination of the agreement (i.e. stockpiles left behind)?

63 The issue of Hotmix billing was not particularly controversial. Mr. Quist initially indicated that the Hotmix Totals were calculated on an annual basis, although in cross-examination he said " . . . it was the way it ended up happening... nothing prevented us from doing it monthly." In questioning he indicated that in 2010, the year-end calculation of Hotmix Totals was an "oversight" and there was no agreement that the Hotmix materials were to be billed differently than other aggregate materials. I accept his evidence from questioning.

64 The bulk of the ambiguous, or missing terms listed above were contested by the parties. The following facts are relevant to the Court's determination of issues related to those terms, which will be dealt with in the context of the "Decision" section below.

65 Mr. Quist testified that the parties did not specifically discuss whether Harco could access stockpiles in the Gravel Pits other than piles created specifically for their use. Zane testified that he would not take material from stockpiles designated for Knelsen's use unless he notified someone from Knelsen he was doing so, and afterwards, provided a record of how much was taken. Terry said the agreement was: "Knelsen's stockpiles are Knelsen's and Harco's are Harco's."

66 The parties did not discuss whether Harco would have been able to bring its own crusher to the Gravel Pits. Mr. Quist asserted the Agreement would not have allowed that to happen.

67 Mr. Quist admitted Knelsen did not actually have "exclusive right of access" to the Gravel Pits because Harco maintained operational management and was entitled to access the Gravel Pits and to sell product to its customers. Additionally, Urlacher continued to operate in and out of the Border Pit.

68 Upon entering into the agreement, Knelsen did not undertake to purchase a minimum quantity of aggregate. Nothing in the Agreement required Knelsen to keep buying aggregate and other materials from Harco if its circumstances changed, for example, if its future contracts in the area fell through and it had no need for local aggregate products.

69 Mr. Quist testified that the parties "did not spend a lot of time" discussing the issue of termination of the agreement, or what might constitute a breach of the agreement. The only term relating to default is contained in the Aggregate Agreement. Mr. Quist offered his subjective opinion that a deliberate breach of a term would likely invite termination by the other party.

70 Mr. Quist indicated that the idea of set-off or withholding payment was not brought up with Terry, nor was the issue of payment at the end of the relationship.

71 With respect to invoicing, Terry testified that "the deal was, when it was trucked out they had 30 days to pay for it"; however, the invoices did not indicate that there were to be paid in 30 days. Terry further testified that "every 30 days they sent haul tickets or weigh tickets, and I sent [the invoice] to La Crete and they sent me a cheque." Once the invoices were sent "7 days later, [we would] get paid every time."

72 Knelsen reviewed its invoices prior to May 2009, and noted they were paid within a few days of the 25$^{th}$ of each month. Most of the invoices entered as exhibits were paid within 30 days.

73 Prior to signing the Agreement, the only circumstance contemplated that would permit Knelsen to delay payment of invoices to Harco "within a reasonable time" was a construction delay where Knelsen was waiting for payment from a customer.

74 Knelsen had a side agreement with Urlacher for the purchase of concrete sand. Urlacher would invoice Knelsen and pay royalties to Harco accordingly.

***Carrying out the Agreement***

75 After the Agreement was signed, Knelsen's operations and relationship with Harco, primarily via Terry, ran smoothly. In 2010, work in the Gravel Pits increased, and large quantities of gravel product were produced and removed, mostly in relation to the Twinning Project.

76 From 2008 to September 2011, Harco received numerous Summaries and Haul Cards which purported to accurately record quantities and types of processed aggregate Knelsen hauled from the Gravel Pits. Harco provided invoices to Knelsen accordingly, which Knelsen paid.

77 Mr. Wiebe testified that Knelsen mobilized in the Border Pit twice in 2009. In the spring of 2009 they produced the 50 thousand tonne pile of $^3/_4$ inch road crush, as well as the 5000 tonne pile for Harco (although this may have occurred as early as the summer of 2008). In the late summer of 2009, they produced a larger pile of 140 — 150 thousand tonnes of $^3/_4$ inch road crush dedicated to the Twinning Project.

78 Mr. Wiebe further testified that Knelsen mobilized in the Rawlakes Pit three times. In the summer of 2009, they produced a 12,000 tonne pile of $^3/_4$ inch crush (asphalt material). In the fall of 2009, Mr. Wiebe estimated they produced 63 thousand tonnes of asphalt material for the Twinning Project. In late fall 2010, Knelsen processes 24,000 tonnes of $^3/_4$ and $^1/_2$ inch rock.

79 Knelsen left a loader at the Border Pit for the duration of the relationship. They did not leave a loader at the Rawlakes Pit.

80 After the material was crushed at the various yards, some of it was taken and stored at the Alberta Property, and some at Harco's Pierceland Yard. Knelsen was responsible for hauling materials from the Border Pit. A scale was set up in the pit to measure the amount of material after it was removed from the stockpiles.

81 Harco hauled all of the concrete out of the Rawlakes Pit into Pierceland Yard. Knelsen picked it up at Pierceland Yard and hauled it to their concrete plant at the Cold Lake Yard. Knelsen hauled the asphalt materials out of the Rawlakes Pit. Some material hauled from the Pierceland Yard and the Rawlakes Pit would be measured using a scale at the Alberta Property. Some material would be measured upon arrival at the Cold Lake Yard.

***The reprocessing incident***

82 According to both Zane and Mr. Wiebe, in December 2010, Knelsen re-processed a portion of the $^3/_4$ inch material in the 12,000 tonne stockpile into 2000 tonnes of $^1/_2$ inch material.

83 When already processed aggregate material is "reprocessed," wastage and loss occur. Mr. Wiebe in his questioning indicated that the loss might be up to 1/3$^{rd}$ to 50% of the rock put in. If that is the case, then 2000 of $^3/_4$ inch product might result in the creation of as little as 1000 tonnes of $^1/_2$ inch. Similarly, in order to create 2000 tonnes of $^1/_2$ inch, 3000 — 4000 tonnes of $^3/_4$ inch rock would need to be removed from the pile.

84 At trial, when asked how it was possible to create 2000 tonnes of $^1/_2$ inch from 2000 tonnes of $^3/_4$ inch, Mr. Wiebe recalled that they had removed 2000 tonnes of $^3/_4$ inch from the existing stockpile, and added "pit run" materials to account for

the wastage, thus enabling them to produce almost *exactly* 2000 tonnes of $^1/_2$ inch material from almost *exactly* 2000 tonnes of $^3/_4$ inch material.

85 I do not accept this explanation. It is not believable that Knelsen would reprocess more valuable $^3/_4$ aggregate into less valuable $^1/_2$ inch aggregate by combining it with "pit run" materials. It would have made much more sense to leave the more valuable product as it was, and produce new $^1/_2$ inch material from "pit run" materials. It is therefore far more likely that 3000 — 4000 tonnes of $^3/_4$ inch material was removed from the pile in order to create 2000 tonnes of $^1/_2$ inch rock.

86 Zane, when asked about the re-crushing incident, testified that he thought Knelsen had re-crushed the $^3/_4$ inch rock to "make us look like we stole it." I also do not accept that explanation. Knelsen's decision to re-process $^3/_4$ inch rock into $^1/_2$ inch rock was a baffling and inefficient use of resources even to a gravel neophyte, but I have no evidence to indicate it was done deliberately in an effort to "disguise" or "hide" gravel for nefarious purposes.

87 Knelsen mobilized the crusher and moved it out of the Rawlakes Pit at the end of 2010, following the "reprocessing" incident. Mr. Quist testified that he anticipated Knelsen would need to remobilize the crusher to bring it back to the Gravel Pits prior to the expiration of the 5-year contract with Harco.

***The relationship falters***

88 It became obvious through the course of the trial that Zane and George were unhappy with the terms Terry had agreed to. In particular, they believed Harco was entitled to more beneficial royalty payments than were set out in the Royalty Schedule.

89 In the fall of 2010, they removed Terry as General Manager of Harco, and together, took over management of Harco. This caused tension and unhappiness within the Harrison family, and from my interpretation of the events that followed, this tension and unhappiness spilled over into the relationship between Harco and Knelsen.

90 Following his removal, Terry remained friends with some of the Knelsen staff and management, in particular, with Mr. Wiebe. It is also clear to me that their continued friendship contributed to George and Zane's feeling that Knelsen was or had been somehow taking advantage of them, and that they were not getting the best out of the bargain Terry had entered into on Harco's behalf.

91 I found Zane's testimony with respect to the timing and content of various meetings and incidents occurring in 2010 and 2011 somewhat confusing.

92 At some point after Terry left, he and George met with Mr. Quist and Mr. Wiebe to discuss royalty prices. He recalled telling them they would need to negotiate with Harco on a project by project basis moving forward. That did not occur, and the Schedule pricing was not amended. The subject of rent for the Alberta Property was also raised, to no avail. Zane recalled that at this meeting, Mr. Quist and Mr. Wiebe indicated they were experiencing difficulty selling off the 50 tonne pile because of the higher royalty price of $7 per tonne. Harco offered to sell it for them, again to no avail.

93 In 2009, when Terry was still in charge, Knelsen had crushed gravel for Harco's use, and the use of Harco customers, on several occasions, charging a crushing fee which allowed for some profit but which was between 4 and 6 dollars per tonne. At some point in 2010, Zane Harrison asked for additional materials to be crushed for Harco's use. Knelsen invoices from 2010 indicates that some crushing was done for Harco that year, after Zane took over.

94 Zane testified at some length about another incident during the same time period in which he asked Mr. Wiebe to create piles of crush for Harco, and was refused. Apparently, this occurred just prior to the "recrushing" incident. Zane watched as Knelsen re-crushed already crushed aggregate materials, and then moved out the crusher without performing the crushing requested by Harco.

95 Mr. Wiebe recalled meeting with the Harrisons at Humpty's at some point in 2011. Harco was seeking additional aggregate products to sell to third party. On that occasion, Mr. Wiebe refused the request as in his opinion, the third party in that case was a competitor and not an "existing customer" in his opinion.

96 Clearly, in Zane Harrison's view, Knelsen did not deal with his requests for crushing promptly or respectfully, and should not have refused to crush for him in 2010 and 2011.

97 Mr. Quist did not remember participating in any of these conversations.

***August 2011 removal incident and September meetings***

98 Mr. Quist testified that the start of 2011 was "business as usual." Things changed abruptly in August 2011 when he was notified gravel was being removed from the 50 thousand tonne stockpile in the Border Pit. The product was not being removed with the Knelsen loader or loaded onto Knelsen trucks. No one from Knelsen knew about it and Knelsen was not hauling out of the Border Pit at that time.

99 The source of that information was Terry, who testified as follows: "I don't know if it was me or not — if it was me so what? If you saw someone getting hurt you would call it in too. I saw my friend getting hurt."

100 The material was being removed by Carillion Canada (Carillion) and loaded into their trucks. Mr. Quist said he called a supervisor at Carillion and told him the gravel was designated for Knelsen's use. He was informed by Les Kwiatkowski of Carillion that 2383 tonnes had been removed under Harco's authorization.

101 Zane testified through reference to an invoice that he sold 2117 tonnes of $^{3}/_{4}$ inch gravel crush to Carillion at that time. Zane further testified that Carillion was one of Harco's existing customers. Mr. Quist did not disagree. He said the issue was not that Harco was prohibited from selling gravel product to Carillion; rather, that Harco was not entitled to remove product from "that specific pile" which was the 50 thousand tonne general use pile.

102 George and Zane met with Mr. Wiebe and Mr. Quist in a conference room at the Ramada in Cold Lake on September 7, 2011 to try to resolve the issue. Mr. Quist insisted that the pile was designated for Knelsen projects and the material had been taken from it without authorization. He said he wanted to "figure out a path forward."

103 As confirmed by Mr. Quist, the Harrisons took the position that they owned the gravel in the Gravel Pits, and it was theirs to sell however they chose to do so, as long as they paid the crushing fee, regardless of what stockpile it came from. If Knelsen refused to crush for Harco, then Harco was entitled to take what it needed. Mr. Quist indicated this was the first time he had heard anyone from Harco taking that position. He admitted to being "excitable" at the meeting and that he had raised his voice. The Harrisons admitted to allowing Carillion to remove product from the 50 tonne stockpile at the Border Pit. George said no other product had been removed. The meeting did not end well.

104 Prior to the meeting on September 7, 2011, Mr. Wiebe had visited the Rawlakes Gravel Pits. The inventory he expected to see there was almost gone. He said he had a suspicion rock had been taken by Harco because he saw a "different truck leaving and the machine was warm." He did not elaborate on these observations. Mr. Wiebe then "walked off the pile," in order to measure it, and estimated 5000 tonnes to be missing.

105 Mr. Wiebe testified in questioning that he would go back "every couple of months" to check on the various stockpiles in the Gravel Pits. Knelsen's site manager would also go out to the Gravel Pits to check on them. Mr. Wiebe could not say when he or the site manager had last checked on the status of the stockpiles prior to September 7, 2011.

106 The parties agreed to meet at the Rawlakes Pit on September 8, 2011. Mr. Quist and Mr. Wiebe arrived first. Mr. Quist said he was "astounded" to see that the material in the pile was "half gone" although he also could not say when he had last checked on the stockpiles. He said he and Mr. Wiebe have become very good at estimating the size of stockpiles over the years,

and he also estimated 5000 tonnes was missing from the pile. Mr. Quist indicated 5000 tonnes would equate to approximately 180 truckloads.

107 Zane arrived to the Rawlakes meeting alone. When asked about the missing gravel he admitted to removing some of it. At that time, he estimated it was about 1100 tonnes. In his testimony, based on his billing records, he indicated it was 685 tonnes. Mr. Quist and Mr. Wiebe insisted that it was 5000 tonnes — a position they maintained at trial.

108 Zane testified that he offered to bring in a crusher to crush new gravel to replenish the pile. Mr. Quist did not deny this offer "could have" been made. If it had been made, his response would have been "no" because "we crush our own rock." Mr. Wiebe testified that at some point, Zane offered to return the rock that had been removed, but he did not know if it was at that time. His offer was not accepted. The meeting ended quickly, and the parties drove away.

109 Zane explained that he had not told Knelsen about the additional amounts he had removed during the meeting the day before because things had become so heated, and essentially, he was too flustered and upset to do so.

110 Following the meeting, Knelsen did no further investigation into the issue. They did not get GPS measurements of the Rawlakes stockpile, or the aggregate stored in various places, nor did they perform an accounting of the amount they had actually crushed versus the amount they had actually hauled and billed. The crushing records they could have relied on to prove the various amounts were eventually lost when Mr. Wiebe's computer crashed sometime in 2013.

111 As a result, following the September meetings, Knelsen had only a general idea of how much aggregate product they suspected had been removed by Harco or Harco customers without Knelsen's permission: 7000 tonnes (5,000 tonne estimate from the Rawlakes Pit, plus the approximately 2,000 tonnes removed by Carillion from Border Pit).

***Invoicing issue***

112 Mr. Quist testified that following the September meetings he did not know how to resolve the issue. He indicated to Mr. Wiebe that "the relationship was probably over"; however, he explained that Knelsen continued to operate in the Gravel Pits into 2012 because "they had huge commitments to the City of Cold Lake" and had to continue to use the material they had processed and committed to that job.

113 Knelsen continued to remove quantities of processed aggregates, and continued to send invoices to Harco for the materials removed, with the exception of "Hotmix Totals" which had been, through "oversight", billed on a yearly basis, rather than a monthly basis in 2010 and 2011. Harco continued to issue monthly invoices back to Knelsen accordingly.

114 On October 28, 2011, Harco issued Invoice No. 4739 in the amount of *$112,074.38.* On November 30, 2011 Harco issued Invoice No. 4742 in the amount of *$241,605.95*. On December 10, 2011 Harco issued Invoice No. 4744 in the amount of *$25,176.69*. On December 31, 2011 Harco issued Invoice No. 4746 in the amount of *$12,307.72.*

115 The Outstanding Invoices totalling *$391,164.74* accurately reflected the quantities of aggregate hauled by Knelsen from the Gravel Pits, as detailed in the Summaries and/or Haul Cards provided by Knelsen. The Outstanding Invoices also accurately reflected the prices outlined in the Royalty Schedule (although one calculation was challenged by Knelsen). The four invoices were prepared and sent to Knelsen in the established manner. They were received by Knelsen, but they were not paid.

116 The "Hotmix Totals" for 2011 were apparently prepared as a batch in November 2011 but were not forwarded to Harco at that time. Harco received those totals as part of document production in these proceedings at a much later date. Retroactively determined: the total payment owed by Harco for Hotmix at the end of 2011 was *$174, 498.70.*

117 Knelsen had ceased operations in the Rawlakes Pit prior to September. The 2011 construction season wound up at the end of October. By that time, Knelsen had removed most of the remaining concrete materials from the Gravel Pits, and taken it to the Asphalt Plant or into Cold Lake to the Pierceland Yard, leaving only manufactured sands. They hauled 3/4 inch gravel base out of the Border Pit until it was depleted.

118 When questioned in 2013, Mr. Quist indicated that the decision to stop paying Harco's invoices was made shortly after the September meeting, possibly in September or early October. In his 2015 questioning, this date changed to "close to the time the [January 2012] letter was written." In his testimony in chief he again contradicted his earlier testimony and indicated the decision to stop paying was made "over the Christmas break." I find that the decision was made sometime in October.

119 According to the exhibits, Knelsen continued to pay Harco for invoices received in August and September of 2011, although these payments were delayed by two to three months. The last payment to Harco was made in December of 2011.

120 Mr. Quist further testified that he had not considered at that time, because he did not "know for sure," what the value was of the crushing costs associated with the missing materials he suspected Harco removed without permission.

121 As already indicated, at the time the decision was made to withhold payment of invoices, Knelsen would have known that the amount alleged to be missing was just over 7,000 tonnes. If a crushing fee of $5 per tonne was owed on that amount, Harco would have owed Knelsen *$35,000.00*. Even if a much higher crushing fee of $20 per tonne was charged, Harco would have owed Knelsen *$140,000.00*.

***Demise of the relationship***

***Knelsen Letter***

122 On January 3, 2011, Mr. Quist sent a letter to Harco on behalf of Knelsen. The letter summarized the terms of the "foundational" Aggregate Agreement and stated that it "places the relationship between Harco and Knelsen as that of landlord and tenant with specific operational management in the responsibility of Knelsen."

123 With respect to the Border Pit materials, the letter indicated that the stockpiles were depleted at the end of the 2011 construction season and that they would now be performing a "summary review" of the quantities removed from the stockpiles.

124 Mr. Quist summarized the events of August and September 2011 from Knelsen's perspective, concluding that " . . . Harco has, without our knowledge and without our authorization, removed products that have been allocated specifically for Knelsen's purpose" and that "Harco has depleted inventory of material that Knelsen requires."

125 The letter also stated that "Knelsen is holding Harco responsible for all of the missing and unaccounted for aggregate. The actions and positions that Harco has taken in the above-noted action demonstrate a contravention of the Aggregate Agreement. We cannot proceed forward with the current method of operations."

126 He indicated Knelsen was holding the invoices "without payment until such time as:

1. Knelsen is satisfied that adequate remedy is in place for the missing materials

2. For moving forward, there is firm understanding of procedures for administrative and operational management of the sources.

127 Mr. Quist indicated in his testimony that the purpose of the letter was to "wake up" the relationship to see if "something could be salvaged." He claimed that at that time, he still wanted to continue the relationship because the Border and Rawlakes Gravel Pits were good sources of product, in a good location. He insisted the letter did not represent a refusal to pay; rather, it was "a pause, not an end . . . pausing is withholding temporarily."

128 In questioning, Mr. Quist had similarly indicated that Knelsen considered Harco's actions to constitute a breach, but not a default of the agreement.

***Harco Letter***

129 Harco replied on February 8, 2012, via letter from their legal counsel, and terminated the agreement with Knelsen.

130 Harco took the position that the Agreement was not a binding contract as it did not include essential terms. In the alternative, if the Agreement was binding, then Knelsen had defaulted by failing to pay Harco for the aggregate sold and invoiced in the last three months of 2011. Payments were due within 30 days and had not been remitted to Harco.

131 Harco gave Knelsen until March 14, 2012 (approximately one month from the date of the letter) to remove their vehicles and equipment from the Rawlakes and Border Gravel Pits. They also gave Knelsen the option of removing "any aggregate, sand or other stockpiled commodities" from the Gravel Pits after receiving written authorization from George or Zane Harrison.

132 With respect to the Alberta Property, Harco indicated that there was no tenancy agreement in place as no rent had ever been agreed upon or paid. Knelsen was again given one month to remove their vehicles and equipment. In addition, Harco sought an accounting of the "Hotmix Totals" for 2011 so that Harco could prepare an invoice. The information was to be provided "prior to Knelsen being allowed to remove any aggregate, sand or stockpiled commodities from the Alberta Property."

133 With respect to the Pierceland Yard, Harco stated that "Knelsen is not to remove any aggregate, sand or other stockpiled commodities from Harco's property in Pierceland, unless and until full payment for the outstanding amount is received."

134 Harco went on to set out a revised Schedule of material pricing for 2012 in which it more than doubled the amounts set out for most of the items listed in the previously agreed upon Schedule.

***Knelsen vacates the properties***

135 While they were no longer operating in the Gravel Pits when they received this letter, Knelsen had continued to haul product from the Pierceland Yard into Cold Lake until roughly February 9, 2012. Once they received Harco's letter, their operations ceased. No additional aggregate products were removed.

136 Mr. Quist testified that as of January, 2012 Knelsen did not have any "extraordinary projects" on the horizon, similar to the Twinning Project.

137 Knelsen did not take Harco up on its offer to seek permission or authorization from Zane or George to access the properties to remove aggregate, sand and other commodities. Instead, they took the position they had been "locked out." From that point onward, Knelsen purchased any aggregate materials needed to meet their commitments from other sources.

138 On February 22, 2012, Knelsen used aerial photos and GPS data to determine quantities of aggregate product left at the Pierceland yard and the Alberta Property. No measurements were taken of the Rawlakes Pit. Mr. Quist testified there were 2110 tonnes of $^{3}/_{4}$ inch, 4165 tonnes of $^{1}/_{2}$ inch and 20,034 thousand tonnes of manufactured fines left at Pierceland Yard. 5000 tonnes of $^{1}/_{2}$ inch, 3,288 tonnes of manufactured fines and 1233 tonnes of natural sand remained at the Alberta Property.

139 Zane testified that at the time Knelsen vacated the properties there was 7000 tonnes of $^{1}/_{2}$ inch and 2000 tonnes of $^{3}/_{4}$ inch at Pierceland yard. The only thing left at Rawlakes Pit was a pile of manufactured fines. He indicated some additional piles of material were left at the Alberta property but did not give an estimate.

140 Following the termination of the contract, as part of disclosure related to the lawsuit, Knelsen disclosed "Agg tracker" records which enabled Harco to reconstruct the amount of aggregate removed by Knelsen in 2012. Invoices were issued accordingly: Invoice No. 5 for *$4,879.96*; Invoice No. 6 for *$970.09*; Invoice No. 7 for *$6,813.16*, Invoice No. 8 for *$2,401.54*, for a total of: *$15,065.15.* Those invoices were not paid.

141 Similarly, as part of its Affidavit of Records, Knelsen disclosed a document that accounted for the 2011 Hotmix Totals. Invoices were prepared by Harco and disclosed to Knelsen in their subsequent Supplemental Affidavit of Records in February of 2014. In February of 2015, counsel for Harco made a formal demand for payment of the Hotmix Totals via letter for a total amount of: *$174, 498.00.* The Hotmix invoices were also not paid.

**Applicable Law:**

142 To make out a claim in contract, a plaintiff — whether by claim or counterclaim — must prove: the existence of a contract, breach of contract, and damages flowing from the breach. The test is on a balance of probabilities.

***Contract formation***

143 A contract is not legally enforceable unless there is clear agreement that the parties intend to be bound by the essential terms offered and accepted: see Jin v Ren,2015 ABQB 115 at para 59 [Jin]; and Ron Ghitter Property Consultants Ltd v Beaver Lumber Company Limited 2003 ABCA 221 at para 9.

144 The question of whether the parties have agreed to be bound is assessed objectively using the "reasonable bystander" standard: Berthin v Berthin 2016 BCCA 104 at para 46. The Court may therefore rely on the parties' statements, oral agreements, and actions in determining an intention to be bound: *Jin* at para 61; R & B Plumbing & Heating Ltd v Gilmour 2018 BCSC 1295 at para 38 [R & B Plumbing]. The parties' subjective intentions are irrelevant. The same principles apply whether the contract in question is oral, written or a combination of the two: *R & B Plumbing* at para 39.

145 Consideration forms the heart of every enforceable contract: each party must receive something of value from the other: Balfour v Tarasenko 2016 BCCA 438 at paras 44—45 [Balfour].

146 Enforceable contracts may be in the form of written agreements, oral agreements or agreements comprised of both written and oral components: John D McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) [McCamus]; and *Balfour* at para 46.

147 Generally speaking, most written contracts represent the exclusive record of the parties' agreement: written contracts are meant to speak for themselves. When interpreting the terms of a written contract, the "parol evidence" rule precludes consideration of extrinsic evidence " . . . that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing": Sattva Capital Corp v Creston Moly Corp 2014 SCC 53 at para 59 [Sattva], citing King v Operating Engineers Training Institute of Manitoba Inc 2011 MBCA 80 at para 35 [King].

148 The court's ultimate goal has always been " . . . to determine the intent of the parties at the time of the execution of the contract": *King* at para 60, citing Manulife Bank of Canada v Conlin [1996] 3 SCR 415, 139 DLR (4th) 426 at para 79; Consolidated-Bathurst v Mutual Boiler [1980] 1 SCR 888, 112 DLR (3d) 49 at para 26 [Consolidated–Bathurst].

149 In keeping with this approach, the Court may consider " . . . extrinsic evidence to determine if the written agreement was intended to be the whole agreement or whether a collateral contract exists": McRoberts v Whissell 2006 ABCA 388 at para 19 [McRoberts]; and see *King* at paras 38 — 41; see also *Sambrook v Altamira Management Ltd*, [2001] OJ No 2769, 106 ACWS (3d) 653 (ONSC), aff'd [2002] 19 CCEL (3d) 184, 117 ACWS (3d) 92 (ONCA).

150 If the Court determines that a contract is partly oral and partly written, "the oral and written parts of the contract must then be considered together and interpreted as one inclusive contract" (*King* at para 39). This is sometimes referred to as a "whole agreement" exception to the parol evidence rule: AGP, Inc v Chinook Grain Co,1999 ABQB 857 at paras 75—78 [AGP].

151 Collateral oral contracts are rare and must be proven strictly: *Balfour* at para 46; Gainers Inc v Pocklington Holdings Inc 2000 ABCA 151 at para 19 [Gainers]. In order for a Court to recognize the existence of a collateral oral agreement, the evidence must demonstrate the parties clearly intended to enter into a separate and legally binding agreement that "stands alone as a distinct contract": Carman Construction Ltd v Canadian Pacific Railway Co [1982] 1 SCR 958 at paras 19—20, SCJ No 49; *Gainers* at para 19; *AGP* at paras 69 — 71. Further, the terms of the collateral agreement cannot contradict the terms of the master (usually written) agreement: *Balfour* at para 46; *AGP* at para 73.

***Contractual interpretation***

152 The primary goal of contractual interpretation is to determine "the intent of the parties and the scope of their understanding": *Sattva* at paras 47. In order to do so, courts are encouraged to be practical, and to consider context beyond the four corners of the written contract: *Sattva* at paras 47 - 49; IFP Technologies (Canada) Inc v EnCana Midstream and Marketing 2017 ABCA 157 [IFP] at para 79.

153 Words are to be given meaning based on their "ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para 47; Alberta Union of Provincial Employees v Alberta Health Services 2020 ABCA 4 [AUPE] at para 23.

> Surrounding circumstances are background facts which would likely be uncontroversial to the parties, be known to both parties at the relevant time, and be capable of affecting how a reasonable person would understand the language of the document. In other words, objective background facts relevant to the interpretive exercise (AUPE at para 25 [emphasis in original]).

154 Objective evidence must be contextual, and should not be used "to overwhelm the contractual language": *Sattva* paras 57, 59; *AUPE* at paras 28 — 29; *IFP* at para 81. Furthermore, evidence of "the parties' subjective intentions about the meaning of contractual language" is irrelevant and always inadmissible: *AUPE* at paras 27, 29; *IFP* at paras 58, 79 — 87.

155 In *IFP* Alberta Court of Appeal gave several examples of relevant background facts including:

> . . . (1) the genesis, aim or purpose of the contract; (2) the nature of the relationship created by the contract; and (3) the nature or custom of the market or industry in which the contract was executed: ***Sattva*** ... at paras 47-48 [citations omitted]. Ultimately, the surrounding circumstances can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": ***Sattva*** ... at para 58 [citations omitted] (para 83).

156 To this end, evidence of pre-contractual negotiations may be relevant "insofar as that evidence shows the factual matrix, for example by helping to explain the genesis and aim of the contract [citations omitted]": *IFP* at para 85 [emphasis in original].

157 Furthermore, "[i]t is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole": BG Checo International Ltd v British Columbia Hydro &Power Authority [1993] 1 SCR 12 at para 9, 99 DLR (4th) 577; see also *IFP* at para 79. Each term in the contract must be interpreted in an appropriate way, harmonious with other terms in the agreement: McCamus at 820.

158 Commercial contracts " . . . should be interpreted in accordance with sound commercial principles and good business sense": McCamus at 763 — 766. As stated by the Supreme Court in *Consolidated-Bathurst*, at para 26: "Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties."

159 Furthermore, "in the absence of evidence of a bad bargain, courts should not interpret a contract in a way that yields an unrealistic or absurd result": *IFP* at para 88; In the Matter of a Plan of Compromise or Arrangement of Unique Broadband Systems, Inc,2014 ONCA 538 at para 88 [Unique]. Similarly, whenever possible, courts should avoid an interpretation that renders an agreement invalid or unlawful: see McCamus at 831, citing *Detomac Mines Ltd v Reliance Fluorspar Mining Syndicate Ltd*, [1952] OR 423 (Ont Sup Ct) at 430, aff'd [1952] OR 783 (CA); see also *Unique* at para 87.

160 As aptly summarized by the Court of Appeal:

> In the end, contractual interpretation is not an exercise in second guessing what could have been included in a contract while discounting or dismissing relevant terms of a contract and uncontradicted contextual information. It is instead an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context (***IFP*** at para 89).

161 In my view, this interpretive approach should be taken irrespective of whether the contract in question is written, oral or, as is the case here, a combination of the two.

***Implied terms***

162 It is common practice for courts to imply contractual terms when there are gaps or omissions because the parties agreed only to the essential terms of the agreement or because the parties did not foresee and provide for a conflict or contingency that arises in their contractual relationship: McCamus at 832 — 833; Bhasin v Hrynew 2014 SCC 71 at para 44 [Bhasin].

163 The ability to imply terms is not an invitation for the Courts to construct or "rewrite" a new agreement for the parties after the fact. The legal presumption is against implication of terms, and courts ought to imply terms sparingly and cautiously: McCamus at 833; Benfield Corporate Risk Canada Ltd v Beaufort International Insurance Inc 2013 ABCA 200 at paras 108, 110—112 [Benfield].

164 Implied terms must be reasonable, and capable of clear expression: McCamus at 842, citing Marinangeli v Marinangeli [2003] 228 DLR (4th) 376 at para 65, 66 OR (3d) 40 (CA)[*Marinangeli*]. They must not contradict any express provisions of the written contract: *Marinangeli* at para 65; *Benfield* at para 115; *Gainers* at para 18. Furthermore, they must be lawful and not contrary to public policy: McCamus at 842; Pacific National Investments Ltd v Victoria (City) 2000 SCC 64 at paras 30—32.

165 Terms may be implied based on "custom in a certain trade or industry," if the Court has been provided with a proper evidentiary basis on which to base its implication: *Benfield* at para 105; Canadian Pacific Hotels Ltd v Bank of Montreal [1987] 1 SCR 711 at para 51, 40 DLR (4th) 385 [CP Hotels].

166 Terms may be implied in fact "where the term suggested is so obvious that it is not worth mentioning expressly" (an "officious bystander" would obviously assume the parties' intended the term) or "where it is needed to give "business efficacy" to the intended contract (it is necessary because without it, the contract would fail)*:* McCamus at 833, 842; *Benfield* at paras 106 — 107; and *CP Hotels* at para 54.

167 Terms may be implied in law if such terms are necessary "to ensure that the agreement between the parties is, in the court's view, a fair and reasonable one" (McCamus at 834, 850; Machtinger v HOJ Industries Ltd [1992] 1 SCR 986, 91 DLR (4th) 491 at paras 50 — 54 [Machtinger]*; CP Hotelss* at para 53. Terms implied in law are not based on the presumed intentions of the parties and therefore, may not necessarily be consistent with those intentions (McCamus at 834). For example, they may be implied for reasons of public policy, in the context of a particular type of contract: *London Drugs Ltd v Kuehne & Nagel International Ltd,*, [1992] 3 SCR 299, 97 DLR (4th) 26 at 282.

***Breach of contract***

168 The usual remedy for breach of contract is damages. Following discovery of the breach, the contract continues with the "obligations of both parties yet unperformed" pursuant to the terms of the contract remaining in place: Hunter Engineering Co v Syncrude Canada Ltd [1989] 1 SCR 426 at para 148, 57 DLR (4th) 321 [Hunter Engineering].

169 The "exceptional remedy" of terminating the contract is only available where the breach amounts to a failure of performance by one party which deprives the other party of "substantially the whole benefit" of the contract: *Hunter Engineering* at para 148; Guarantee Co of North America v Gordon Capital Corp,[1999] 3 SCR 423 at paras 40—44, 178 DLR (4th) 1 [Guarantee]*;* Booster Juice Inc v West Edmonton Mall Property Incc 2019 ABCA 58 at para 13 [Booster Juice]. The breaching party has, through their actions, repudiated the contract.

170 It then falls to the innocent party to determine whether to accept the repudiation and terminate the agreement, or continue the contract and deal with the breach in some other way: Van Camp v Laurentian Bank of Canada 2015 ABCA 83 at para 32 [Van Camp]*;* Brown v Belleville (City)) 2013 ONCA 148 at para 45 [Brown]*; Booster Juicee* at para 19. The innocent party must clearly and unequivocally communicate their decision to disaffirm the contract to the party within a reasonable time.

Communication of the choice to disaffirm may be done " . . . directly by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case": *Brown* at para 45; *Van Camp* at para 32.

171 The term "fundamental breach" is often used to describe this calibre of breach, *albeit* in the context of exclusionary clauses in the employment context: Potter v New Brunswick Legal Aid Services Commission,2015 SCC 10 at para 35 [Potter]; see Graesser J's discussion in Gaw v Yellowhead (County),2018 ABQB 271 at paras 68—79. Whether categorized as a substantial, fundamental, material or serious breach, the "standard nevertheless remains unchanged": to constitute repudiation, the conduct in question must "evince an intention to no longer be bound by the contract": *Potter* at para 35.

172 Professor Waddams has suggested there is really only a need to identify two classes of breaches: "breaches that justify termination, and breaches that do not.": S M Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at para 597 [Waddams]. I agree.

173 The right to terminate a contract for a breach exists independently from the contract itself. If a party fundamentally or substantially breaches a contract, the conditions or requirements for termination as stipulated in the contract no longer apply: John Barlot Architect v 413481 Alberta Ltd 2013 ABQB 388 at para 42, citing Norwood Construction Ltd v Post 83 Co–operative Housing Association, [1988] 30 CLR 231 at paras 19, 26 — 27, CLD 1649 (BC CA) [*Norwood*].

174 The choice to terminate the agreement is not rescission in the true legal sense of the word, being *void ab initio* by a vitiating element; rather, the parties are discharged from future obligations, but remain bound by rights and obligations that have accrued through partial performance: *Guarantee* at paras 40 — 41, see also Ascent One Properties Ltd v Liao 2020 BCCA 247 at paras 88—89.

175 In other words: the contract has ended, but it remains binding in terms of past acts and defaults: Chomedy Aluminum Co v Belcourt Construction (Ottawa) Ltd [1979] 24 OR (2d) 1, at para 15, 97 DLR (3d) 170 (CA). Lawful termination of a contract does not deprive the breaching party of accrued contractual rights: *Norwood* at para 36.

***Breach of a payment term***

176 The requirement to "pay within a reasonable time" is a commonly implied term, but it is not often considered a fundamental or essential term, breach of which justifies termination of the contract: see Hughes v Moncton (City) 2006 NBCA 83 at para 6 [Hughes], and Muller v O'Flynn 2019 BCSC 1674 at para 46 [Muller].

177 What constitutes a "reasonable time" is based on the expectations of the parties at the time they made their agreement, and the circumstances of the case: *Muller* at para 58. It can also depend on a number of other factors, such as: (1) "the course of dealing between the parties leading up to the formation of the contract"; (2) the nature of the obligations under the contract; (3) the financial position of the relevant party; (4) the value of what is at issue; and (5) the state of the market: *Muller* at paras 46,58; Illidge v Sona Resources Corporation 2017 BCSC 1326 at para 171 [Illidge].

178 Without an express contractual term to the contrary, time is *not* presumed to be "of the essence": *Illidge* at para 172. When a party does not fulfill of term of the contract within a reasonable time, the other party to the contract may issue a notice to comply. At this point, time may become "of the essence", and if the party fails to comply upon receiving reasonable notice, "the party seeking performance can choose to treat the contract as having been repudiated": *Muller* at para 60.

179 In a.k.a Cartoon v Natterjack Animation 2002 BCSC 1763 [Natterjack] the parties entered into an agreement under which Natterjack would provide animation services to a.k.a. Part way through production, a.k.a. stopped paying Natterjack, and in response, Natterjack stopped working on the project. The issue before the Court was whether non-payment by a.k.a. was a fundamental breach of the contract constituting repudiation (*Natterjack* at para 2). Natterjack treated it as such, accepted the repudiation, and terminated the contract (para 13).

180 The Court found that a.k.a.'s suspension of payments caused Natterjack to be deprived of the substantial benefit that it contracted for under the agreement (para 50). Natterjack did not know when it would be paid, the suspended payments were

substantial and the suspension of payments was indefinite (para 50). The Court found that in some circumstances, when payment is not received, "the default may amount to a fundamental breach even where no damages have yet been suffered" (*Natterjack* at para 52).

181 In *R & B Plumbing & Heating Ltd. v. Gilmour*, 2018 BCSC 1295 the Court found that breach of the terms of an agreed upon payment method, established through course of conduct, was a fundamental breach warranting termination (at paras 44 — 47).

***Set-off and self-help***

182 Self-help remedies taken in response to breaches or perceived breaches of contract are subject to the same analysis as any other implied term would be. Courts cannot rewrite agreements by inserting terms into them after the fact unless those terms are firmly grounded on the presumed intentions of the parties — nor can the parties.

183 A claim to "set-off" is one type of remedy that is commonly resorted to in contractual disputes between parties who have corresponding duties of payment.

184 In Compton Petroleum Corp v Alberta Power Ltd 1999 ABQB 42 [Compton] Paperny J (as she then was) held that Alberta's unequivocal refusal to pay an invoice that was due and payable represented a clear repudiation of the agreement entitling Compton to "consider its obligations at an end" (paras 46 — 47).

185 The *Compton* case was, at its core, a case about self-help and set-off. Alberta had claimed a right to set-off its debt to Compton against money Compton's affiliate Nesi owed to Alberta's affiliate Atco, as a justification for withholding payment to Compton.

186 Paperny J explained that there are three possible ways to assert a set-off (at para 24):

1. *Set-off by agreement*: This occurs where the parties agree to set-off debts or obligations (para 25).

2. *Set-off by law*: A party may be entitled to legal set-off where the claims between the two parties are for liquidated debts (specified cash amounts) and the cross-claims are mutual (between the same parties and in the same right) (paras 27 — 28).

3. *Set-off in equity*: Where the strict requirements of legal set-off would create an injustice, the party may rely on the law of equity on proof of five elements (para 31, citing Royal Bank v Wilton, [1995] 28 Alta LR (3d) 1 at 13, 123 DLR (4th) 266 (CA):

> i. The party relying on the set-off must show some equitable ground for being protected against his adversary's demands . . .
>
> ii. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed . . .
>
> iii. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim . . .
>
> iv. The plaintiff's claim and the cross-claim need not arise out of the same contract . . .
>
> v. Unliquidated claims are on the same footing as liquidated claims . . .

187 In *Compton*, none of the justifications for set-off were found to have been established.

***Unjust enrichment***

188 Unjust enrichment is an independent cause of action: *Jin* at para 52. As such, in theory it may be possible for even a repudiating or breaching party to seek a remedy based on unjust enrichment following termination of a contract.

189 Of course, the ability to bring an unjust enrichment claim in a breach of contract case would depend on the absence of a term in the agreement requiring forfeiture in the event of a breach: McCamus at 1143; John D McCamus & Peter D Maddaugh, *The Law of Restitution*, 2nd ed (Aurora: Canada Law Book Inc, 2004) at 600.

190 A claim of unjust enrichment depends on proof of the following three elements:

1. An enrichment of the defendant;

2. A corresponding deprivation of the plaintiff; and,

3. An absence of juristic reason for the enrichment.

Garland v Consumers' Gas Co, 2004 SCC 25 at para 30 [Garland] ; citing *Pettkus v Becker*, , [1980] 2 SCR 834 at p. 848

191 What constitutes an "enrichment" or "corresponding deprivation" is seldom controversial, especially where money and goods are involved. The question is generally a straight-forward economic assessment as to whether a "tangible benefit" (positive or negative) has been conferred on the defendant: *Garland* at para. 31.

192 Determining whether there is a "juristic reason" justifying the enrichment is more complicated. In *Garland*, the Court described a two-step analysis summarized as follows:

> First: the plaintiff must show that there is "no juristic reason from an established category" which could be relied upon to deny recover. Those categories include: contract, disposition of law, donative intent or "any other valid common law, equitable or statutory obligation."
>
> Second: if no such reason from an established category exists, then the defendant may attempt to prove another reason to deny recovery, "having regard to two factors: the reasonable expectations of the parties, and public policy considerations." (at paras 44 — 46; ***Jin*** at para 58).

193 In *Natterjack*, the Court posited that restitution for the defaulting party "should be openly recognized and integrated with the rights of the innocent party" (at para 62):

> Recognition that principles of restitution are at stake is itself an important step forward, for restitution invites an inquiry into the injustice of any enrichment and suggests the conclusion that substantial breach of contract can lead, unless the Court intervenes to avoid it, to an unjust enrichment of either the party not in breach or of the contract breaker. . . . . A mature system of law should surely be sufficiently flexible to avoid an unjust enrichment in both cases without jeopardizing the benefits to be secured to society by the enforceability of contracts.
>
> See also: Waddams, 2017 at paras 606 and 611.

194 In keeping with general principles of contractual interpretation, "where commercial parties have freely bargained in a manner which, on the occurrence of specific events, results in a windfall for one or the other of them, the Court will not interfere": *Natterjack* at para 65. If the parties have not, however, considered a particular situation in the contractual regime, " . . . it cannot be said that there is a 'juridical reason' justifying an enrichment.": *Natterjack* at para 66.

195 In contrast, in the context of a *quantum meruit* claim for part performance of a construction contract, the Court in *D & M Steel Limited v 51 Construction Ltd*, 2018 ONSC 2171 concluded: "It follows as a matter of straight-forward contract law, that the breaching party to a contract is not entitled to be paid under the contract nor is it entitled to advance a claim for *quantum meruit*" (at para 88). Similarly, in *Jin*, the Court concluded that "in making out a claim of unjust enrichment here, there must have been no contract in place" (at para 58).

**Decision:**

***What were the terms of the contract?***

196 The parties agreed that they had entered into an enforceable contract of mutual benefit to both parties. They did not agree on the nature of that contract.

197 Knelsen argued that the written Aggregate Agreement was a binding contract, and asked the Court to imply a number of other verbal terms where necessary to "breath life" into it. Harco argued that the Aggregate Agreement was not a binding contract because no consideration flowed to Harco, and it lacked other essential terms such as quantities, prices and payment terms. Harco asked the Court to determine the terms of the contract by relying on the parties' verbal promises and course of conduct.

198 Mr. Quist and Terry both testified that the written Aggregate Agreement was never intended to represent the entirety of the contractual terms between the parties. Essential terms which were not contained in that Agreement were to be agreed upon at a later time; most significantly, pricing. Approximately two months after the Agreement was signed, the Royalty Schedule was set. It remained in place until Harco terminated the contract in February of 2012.

199 Additional oral terms were agreed to by the parties verbally and through course of conduct; for instance, terms dealing with invoicing and payment. The agreed upon written and oral terms are set out in the "Facts" section above.

200 Together, the written and oral terms constituted one contract [the Contract] and must be considered and interpreted together in determining the issues between the parties. The question of whether or not the Aggregate Agreement is a stand-alone binding contract does not need to be determined. The Agreement is binding, but it does not stand-alone: the oral and written terms must be considered together and interpreted as one contract.

201 In addition, I find that a collateral oral agreement existed which was related to, but not essential to the core contract. The parties agreed that from time to time, Knelsen would either provide, or crush aggregate products for Harco or "existing, non-competing" Harco customers, and in return, Harco would pay Knelsen a reasonable crushing fee. Additional terms of this collateral agreement were: first, that Knelsen would not delay or deny a reasonable request by Harco for crushing or access to gravel products in the Gravel Pits and second, that Harco would only sell to existing customers, and would not sell to Knelsen's competitors. That agreement was a distinct contract that was ancillary to the main contract.

202 The parties' intent at the time of entering into the Contract, objectively discerned, was to enter into agreement in which Knelsen would be entitled to long-term, "exclusive" access to a good source of gravel, while Harco would have the benefit of a consistent stream of royalty income. The nature of the relationship was not one of landlord and tenant, as was stated by Mr. Quist in the Knelsen letter of February, 2012; rather, it was always one of customer and vendor. Knelsen was the customer, Harco was the vendor. This is abundantly clear in the preamble to the Aggregate Agreement which indicates: whereas Knelsen "desires to access and acquire gravel and sand products from Harco" and Harco "desires to provide and sell gravel and sand products to Knelsen."

203 There is no question that consideration flowed from Knelsen to Harco and that the contract benefitted both parties. Harco held the *profit-a-prendre* for the land via the lease from the GOS, but did not have to put any effort into actually producing the gravel. Knelsen controlled production of their own quality aggregate product, stored it in stockpiles for their future use, and set up an asphalt plant on the Alberta Property, without having to pay any rent in order to do so. The fact that the contract seems to have been more lucrative of beneficial for Knelsen than for Harco does not impact on its enforceability.

***Did Harco breach a term of the agreement by taking processed aggregate product without permission?***

204 The parties were unable to present any objective or extrinsic evidence that at the time the contract was entered into, the parties agreed on, or even applied their minds to who actually owned the aggregate product after it was processed by Knelsen, but before it was removed from the Gravel Pits or more accurately before the "point of sale." The failure to include any contractual terms addressing the issue of ownership or legal status of the stockpiles during or upon termination of the contract proved to be a major oversight.

205 Knelsen believed that it owned the stockpiles because the parties had agreed that Knelsen would have "exclusive right to access and acquire gravel and sand products" from the two leased Gravel Pit sites. Furthermore, Knelsen had put effort and skill into extracting and crushing the gravel, and had designated it for use in certain projects.

206 Harco believed that it owned the stockpiles, as it held the lease to the Gravel Pits and the quarrying rights, and had not been paid any rent, or any royalty for the gravel stockpiles stored on its property. Royalties were not paid until the gravel was hauled offsite (at point of sale) and Knelsen had no obligation to buy all of the gravel it crushed if it had no use for it.

207 Harco's belief that they owned the stockpiles led to their decision to take product from the stockpiles without notifying Knelsen, or obtaining their consent. Knelsen's belief that they owned the stockpiles led to their decision to withhold payment for invoices as a way to set-off losses for product it believed had been improperly removed.

208 As previously indicated, Harco argued at trial that its lease agreement with the GOS was governed by Saskatchewan legislation which did not allow it to transfer its ownership interest in the gravel, prior to the point of sale, without the consent of the Crown. Consent was not obtained in this case, and therefore, it would have been illegal for Harco to agree to assign their ownership interest to Harco, even if it intended to do so.

209 In *Saskatchewan Minerals v Keyes*, [1972] SCR 703 the Supreme Court of Canada concluded that third parties cannot acquire rights from a holder of a Crown leasehold interest without the consent of the Crown where the governing legislation so provides, even if that result is contrary to the parties' intentions (at 704). Applying the Supreme Court's reasoning to Harco's rights and responsibilities as described in the GOS lease and the *Gravel Regs*, I was concerned that this argument did not really serve Harco's best interests, as it implied that some essential terms of the Contract might be illegal, making the Contract itself void *ab initio*. Both parties vehemently objected to that interpretation at trial and in their written submissions.

210 The Court must do its utmost to uphold the intentions of contracting parties, and when presented with two reasonable, but divergent interpretive paths, the Court should avoid the path renders an intended contract unlawful. Therefore, in this case I accept that Harco could not legally bargain away its leasehold interests, that Harco's contract with Knelsen was separate and apart from those leasehold interests, and that as a result, the Contract did not violate the Gravel Regs.

211 That does not solve the question of stockpile ownership. A *profit à prendre* is a form of real property interest held by the owner of a mineral lease, acquired by the party that severs raw aggregate from that property. Here, GOS owns the property, Harco owns the mineral lease, and Knelsen has subcontracted the *profit à prendre* from Harco.

212 Harco was unable to provide the Court with any caselaw dealing with stockpile ownership in a similar circumstance. The cases which were provided deal with stockpile ownership in the context of private land ownership, and most land squarely on the side of ownership vesting in the party that actually removes the aggregate from the ground, and crushes it into the stockpile: see Rural Municipality of Last Mountain Valley No 250 v Ter Keurs Bros Inc 2020 SKQB 37 at para 32; Bussey Seed Farms Ltd v DBC Contractors Ltd 2016 ABQB 577 at paras 6–12; *Saskatoon Sand & Gravel Ltd v Steve*, (1973), 40 DLR, (3d) 248 (QL)(Sask QB); *BC Rail Ltd v Biro et al*, 2001 BCSC 264 (CanLII); Amoco Canada Resources Ltd v Potash Corp of Saskatchewan Inc, 1991 CanLII 7951 (SKCA); Atlantic Concrete Ltd v Levatte Construction Co Ltd, 1975 CanLII 1162 (NSCA).

213 In my view, Knelsen had a contractually limited ownership interest in the stockpiled materials. The use of the terms "exclusive" in the Aggregate Agreement referred only to Knelsen's ability to access, extract and crush aggregate gravel products free of competition and did not deprive Harco of its ownership rights. Furthermore, the GOS also had an ownership interest in the stockpiled materials, as owner of the land and holder of the royalty: see Bank of Montreal v Enchant Resources Ltd,1999 ABCA 363 at paras 30, 40 and Bank of Montreal v Dynex Petroleum Ltd,2002 SCC 7 at para 9.

214 Fortunately, in my view, when it comes to interpreting the terms of the Contract itself, the issue of legal ownership of the stockpiles is not determinative. Harco cannot hide behind an assertion of ownership or an ownership interest to defend

against the allegation that it was a breach of the Contract for Harco to remove gravel product from the stockpiles without first seeking direction and permission from Knelsen.

215 It was well-established by August of 2011 that if Harco wanted gravel from the Gravel Pits, it had to ask Knelsen for it. Knelsen would either crush the gravel requested, or sell to Harco from one of the existing piles. The only proviso was that Harco could not sell to Knelsen's competitors.

216 It was also well-established that Knelsen had designated certain stockpiles and certain products for certain uses, and that if Harco wanted to remove product from one of those stockpiles, it needed to have Harco's permission to do so.

217 I accept that Knelsen, specifically Mr. Wiebe, was more cooperative in dealing with crushing and access requests when Terry was in charge, then he was once George and Zane took over. Zane's evidence on this point was not contradicted by Mr. Wiebe or Mr. Quist. Mr. Wiebe admitted to refusing Harco's request to crush for a third party in 2011, for example.

218 Whether or not Mr. Wiebe was justified in his refusal is not a question I need to determine. Zane was frustrated by what he perceived to be unreasonable and obstructive behaviour on the part of Knelsen and in response to that behaviour, he convinced himself he was justified in taking, or allowing his customers to take from Knelsen's designated stockpiled material. He defended his actions by asserting that since Harco legally owned the materials until Knelsen actually paid for them, no notification or permission was required. When pressed on the issue by Mr. Quist and Mr. Wiebe he offered to replace what he had taken. In my view, he made that offer not simply to placate them, but because he knew what he had done was wrong.

219 Based on the established course of conduct between the parties, which had developed over the preceding three years, this was a clear breach of the parties' collateral agreement with respect to how the parties would deal with crushing and processing for Harco and Harco customers.

***Was Knelsen entitled to withhold payment of invoices as a result of the breach?***

220 At no point in this action did Knelsen assert that Harco's breach constituted a serious or substantial breach constituting repudiation. I agree that while it obviously resulted in hard feelings and mistrust between the parties, it was not the kind of breach that warranted termination of the primary Contract.

221 Having specified no method for dispute resolution or remedy for breach of contract, the only remedy available as a result of Harco's breach in this case was damages. However, prior to filing its counterclaim, Knelsen did not ask Knelsen for any specific damages. At the time the breach was discovered, Zane offered to bring a crusher in to replace the missing materials, and to pay for the amounts he said he had removed. His offers to help rectify or remedy the breach were not accepted.

222 Following discovery of the breach, Knelsen made no effort to determine how much was actually missing, other than guessing at 5000 tonnes by "stepping off" what was left in the Raw Lakes pile. They did not try to figure out, at that time, precisely how much product should have been there. That amount would have been easy to determine simply by cross-referencing the amount remaining in the pile with their crushing records, which were apparently diligently kept and stored initially on paper, and eventually on computer, by Mr. Wiebe, until they were irrevocably lost as a result of computer error sometime in 2013 after the commencement of litigation.

223 Even if they had based a demand on their estimate, then they could have, for example, asserted Harco owed them for 5000 tonnes x $12.00 per tonne which was the price for concrete rock, for a total of $60,000.00. Knelsen could have added that to the amount of $^3/_4$ inch base material Mr. Quist thought had been removed by Carillion from the Border Pit: 2383 tonnes at approximately $5 per tonne for a total of $11,930.00. Knelsen could have demanded reimbursement from Harco for the amounts "unaccounted for" in a specific amount of approximately $72,000.00. Instead, Knelsen decided on a general self-help remedy of unlimited set-off and began withholding payments from Harco for gravel products it continued to remove from the Gravel Pits.

224 The agreement between the parties did not contain any terms addressing the consequences for non-terminable breaches occurring during the course of the agreement. I do not find that a term allowing Knelsen to withhold payment, or entitlement to a remedy of set-off can be implied in this case.

225 None of the accepted categories or rationale for implication of contractual terms apply here. Procedures for dealing with non-terminable breaches had not been considered, or discussed at the time the contract was entered into and the parties' intentions are therefore not discernable. No evidence was brought to indicate this was an industry custom, or even that it was an established practice for dealing with disputes as between the parties themselves. It is not a term that a reasonable bystander would consider so obvious it did not need to be explicitly written in to the contract, nor is it necessary to imply such a term in order to promote business efficacy, or ensure fairness as between the parties or in general terms.

226 Nothing in the negotiations leading up to the agreement, or during the course of the agreement supports Knelsen's chosen course of action for dealing with the breach. I will not write the ability to claim set-off into this Contract.

227 Even if I was willing to do so, the set-off in this case was almost comically disparate: approximately $72,000 (or more generously calculated: $100,000.00) for suspected "missing" or "impermissibly removed" aggregate set off against over $300,000.00 — later determined to be more like $700, 000.00 — in payable invoices.

228 Knelsen clearly did not have an entitlement to set-off by agreement. Knelsen also had no entitlement to set-off in law, as they had failed to actually determine their damages or losses, or to issue any specific demand for repayment.

229 Furthermore, Knelsen's letter of January 2012 stated that they were holding Harco "responsible for all of the missing and unaccounted for aggregate" and that they would not pay their invoices until an "adequate remedy" was in place. That language denotes a reason for withholding payment that goes well beyond legal set-off: Knelsen wanted to use the withheld payments as leverage so that they could renegotiate or clarify the existing contractual terms. This interpretation is supported by Mr. Quist's reply in questioning, when he was asked why Knelsen had not put its mind to the value of the crushing cost for the missing quantities of aggregate, that "the withholding of payment was then not based on strictly a monetary value . . . "

230 Finally, Knelsen had no basis for making a claim to set-off in equity, because no injustice had been done to them. Knelsen could have calculated their damages and sent a demand for repayment at any time following discovery of the breach, but they chose not to do so. Furthermore, they rejected Zane's offer to replace the gravel, they did not notify Knelsen of their decision to address the breach by withholding payments until several months after that decision had been made, and the amount they withheld greatly exceeded even their most generously calculated estimated losses.

231 Knelsen was not entitled to withhold payments of Harco invoices as a result of Harco's breach, and doing so was a breach of the contract.

***Did Knelsen breach the contract and if so, was Harco entitled to terminate the contract as a result of that breach?***

232 The only benefit Harco received from the core contract was payment of royalties. Knelsen's obligation to pay royalty fees to Harco was therefore an essential term of their agreement because it formed the substance of the consideration. To deprive Harco of royalty payments would be to deprive them of substantially the whole benefit of the contract they had entered into.

233 Knelsen argued that they were not refusing to pay the royalty payments, they were merely delaying payment until the matter of Harco's breach could be addressed. In other words, the payments were merely late when Harco made the decision to terminate the agreement.

234 It is true that not all breaches of due dates for payment will constitute terminable breaches. In this case, the parties agreed that payment would be made within a "reasonable time." Based on the expectations of the parties at the time they made their agreement, and the circumstances of the case, I find that meant approximately 30 days.

235 Knelsen had in the past, delayed payment to Harco beyond 30 days from receipt of invoice as a result of receiving late payment themselves from one of their customers, or for other business reasons. I agree that in this case, if Knelsen was simply 3 months late in paying Harco, it is questionable whether that on its own would constitute a breach warranting termination.

236 Knelsen was not merely late in paying Harco. The letter of January 2012 clearly indicates that Knelsen was deliberately withholding payments indefinitely as a way to apply pressure to Harco with respect to Harco's non-terminable breach of contract — as a negotiating tactic. As I have already indicated, the letter makes it very clear that Knelsen was concerned with more than financial set-off. Knelsen wanted both an "adequate remedy" for the breach, and to obtain a "firm understanding of procured for administrative and operational management of the source."

237 Knelsen's refusal to pay Harco for the outstanding invoices was therefore not simply a delayed or late payment: it was a breach warranting termination. It was a serious breach of an essential term of the contract, depriving Harco of essentially the only benefit it received from the agreement either indefinitely, or by implication, until it agreed to Knelsen's further demands for a "firm understanding" between the parties. Additionally, the statement "We cannot proceed forward with the current method of operations" objectively constituted an explicit repudiation of the contract, regardless of Mr. Quist's testimony as to what he may have subjectively intended.

238 Harco was entitled to terminate the agreement upon receipt of the January 2012 letter. They clearly communicated acceptance of Knelsen's repudiation of the agreement in their letter of February 2012. Once the contract was terminated, Harco was entitled to ask Knelsen to remove their equipment from Harco properties. I find that they were given sufficient time to do so, and Knelsen did not argue otherwise.

***What damages, if any should flow to Harco?***

239 Rights accrued by the parties at time of termination survive the end of the contract. Therefore, Harco is entitled to payment for the unpaid aggregate invoices in the amount proven at trial as follows:

Invoice No. 4739 in the amount of **$112,074.38**

Invoice No. 4742 in the amount of **$241,605.95**

Invoice No. 4744 in the amount of **$25,176.69**

Invoice No. 4746 in the amount of **$12,307.72**

Invoice No. 5 in the amount of **$4,879.96**

Invoice No. 6 in the amount of **$970.09**

Invoice No. 7 in the amount of **$6,813.16**

Invoice No. 8 in the amount of **$2,401.54**

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**TOTAL: $406,229.89**

240 Knelsen argued that Invoice No. 4742 should be reduced as the $^3/_4$ inch aggregate material reflected in that invoice was used for the Twinning Project. As I indicated in the "Fact" section above, the Schedule is not unclear or ambiguous with respect to pricing per stockpile versus pricing per job, and the parties' subjective intentions in that regard are irrelevant. The aggregate in question was taken from the 50,000 tonne stockpile, therefore the unit price is $7.00/tonne. There will be no reduction with respect to Invoice No. 4742.

***Hotmix Totals***

241 Knelsen contended that Harco's claim for the 2011 and 2012 Hotmix Totals should be dismissed because, in contrast to the other aggregate invoices described in the Amended Statement of Claim, it was never specifically pleaded or itemized by Harco. It is therefore barred by operation of the Limitations Act, RSA 2000, c L–12, and if not statute barred, violates the doctrine of *audi alteram partem*: in other words, it would be unfair.

242 Harco submitted that the claim for Hotmix Totals did not need to be specifically pleaded nor did its pleadings need to be amended in order for the Court to accept that portion of its overall claim. Appropriate notice had been given to Knelsen that payment of the Hotmix Totals would be sought at trial, and the *Limitations Act* did not apply.

243 The doctrine of *audi alteram partem* ensures that parties have "a fair opportunity of answering the case against them". On factual matters, parties must be given the " . . . opportunity ... for correcting or contradicting any relevant statement prejudicial to their view". On matters of law, parties have the right to state their case adequately and "to answer contrary arguments": IWA v Consolidated Bathurst Packaging Ltd [1990] 1 SCR 282 at para 50, 68 DLR (4th) 524.

244 Proper pleadings are therefore an essential aspect of trial fairness: "It is well-established that a trial or chambers judge should not decide a case on a matter not pleaded, and specifically should not grant remedies beyond the pleadings": Mazepa v Embree 2014 ABCA 438 at para 8.

245 In Lahnalampi v Canada (Attorney General) 2014 FC 1136 [Lahnalampi] at paras 71 — 74, the Federal Court of Appeal observed that while parties "are entitled to have their dispute adjudicated on the basis of the issued joins in the pleadings . . . this does not mean that a trial judge can never decide a case on a basis other than that set out in the pleadings." The more important consideration is whether the other party has been surprised or prejudiced:

> A trial judge must decide a case according to the facts and the law as he or she finds them to be. Accordingly, there is no procedural unfairness where a trial judge, on his or her own initiative or at the initiative of one of the parties, raises and decides an issue in a proceeding that does not squarely fit within the pleadings, as long as, of course, all the parties have been informed of that issue and have been given a fair opportunity to respond to it . . . [citations deleted].
>
> ***Lahnalampi*** at para 74.

246 Where a part includes a prayer for "such further and other relief as this Honourable Court deems just" the respondents are given notice that the Court "is not confined to the precise remedies sought by the petitioners.": Haida Nation v British Columbia (Minister of Forests) 2002 BCCA 462 at para 38.

247 I do not accept that Harco's claim for the Hotmix Totals came as a surprise to Knelsen, or that they were ambushed by it on the date of trial. Knelsen was given ample evidence and notice that Harco would be seeking damages for the unpaid Hotmix Totals.

248 Although Harco did not specify the Hotmix Totals in its Amended Statement of Claim filed in March 2014, Knelsen was well aware of the outstanding invoices for the Hotmix Totals at that time. In the termination letter sent in February of 2012, Harco made its first demand for the Hotmix records from Knelsen. On February 21, 2013, Knelsen provided the Hotmix totals to Harco via document 76 of their Affidavit of Records. In July of 2013, Mr. Quist was questioned on that document specifically referencing the Hotmix totals. Harco created and included invoices for the Hotmix totals in its First Supplemental Affidavit of Records, sworn May of 2014. Harco made a specific demand for the amounts owing for the Hotmix totals via letter from Harco's counsel on February 13, 2015.

249 In its Amended Statement of Claim, Harco addressed the damages it suffered due to Knelsen's failure to remit records to Harco, including records of the Hotmix Totals, while seeking the Court's determination of the amount at trial. Relief sought with respect to the Hotmix Totals falls within the general relief sought by Harco because the damages caused by Knelsen's failure to

remit the records is closely related to the relief sought by Harco for the amounts owing under the Invoices. Harco also sought "such further and other relief as the nature of the case may require and this Honourable Court may deem just to grant."

250 Inclusion at trial of a specific claim for unpaid Hotmix Totals could not have come as a surprise to Knelsen. Harco had raised the issue with them many times previously. As such, Knelsen was not freshly prejudiced and was given a fair opportunity to respond to Harco's demand for payment of the Hotmix Totals. Indeed, Knelsen was prepared and ready to respond to the claim at trial, and did so.

251 It is well within the Court's discretion in this case to award Harco compensation for the 2011 Hotmix Totals. It is not always easy to predict precisely how the evidence will come at out trial, and it would be unjust to restrict Harco to claiming damages for only those invoices which were specifically identified and set out in their Amended Statement of Claim.

252 Harco is therefore entitled to compensation for the 2011 Hotmix Totals in the amount of *$212.142.68*, which, while it was not the amount reflected in the initial documents, was the total amount of the loss actually proven at trial through reliance on Knelsen's records.

253 With respect to the 2012 Hotmix Totals and Concrete Sand, I find that Knelsen was caught off guard at trial by these claims, and did not have sufficient notice of them to be able to marshal appropriate evidence in reply. In any event, I am unable to conclude that the evidence at trial clearly proved those amounts, or some of them, were owing to Harco. In particular, Knelsen witnesses very clearly indicated that they purchased concrete sand from Urlacher, not Harco, and that it was Urlacher who recorded it and paid for it.

254 Harco is not entitled to compensation for the 2012 Hotmix Totals or Concrete Sand.

***Does Knelsen have a valid counterclaim against Harco based in contract or equity?***

255 Knelsen is entitled to compensation for payment of crushing fees in relation to amount of aggregate improperly removed from the Gravel Pits by Harco or Harco's customers.

256 Harco conceded that it owes Knelsen a crushing fee with respect to the 685 tonnes removed by Zane from the Rawlakes Pit. Given Zane's admission under cross-examination with respect to appropriate crushing fees in the circumstances, the rate will be set at $12/ tonne for a total of *$8000.00.*

257 Harco also conceded that amounts were also payable for concrete rock removed by Carillion from the Border Pit. The rate for that will be set at $5 per tonne, for a total of *$11,900.00*.

258 On a balance of probabilities, Knelsen has not proven that Harco is responsible for removing any other aggregate from the Rawlakes Pit, for the following reasons:

- The evidence at trial was insufficient to prove 5000 tonnes was ever missing from the pile. During cross-examination of Mr. Wiebe, with reference to the relevant documents, as well as in her closing argument, counsel for Harco made a very credible case for asserting that in fact, no material was missing.

- Mr. Wiebe may have been off by several thousand tonnes in his estimate of quantities of aggregate remaining in the pile after the "recrushing incident."

- Knelsen's evidence was reconstructed after the fact based on estimates and hauling records. The actual crushing records indicating precisely how much material was in the stockpiles to begin with, were lost by Knelsen, but not until 2013. Those records, which would have assisted in calculating how much material should have been in the pile and more specifically, how much gravel remained in the pile after the "recrushing" incident, were still in existence when the alleged loss was discovered. Knelsen was on notice to preserve all records related to these proceedings prior to 2013 and did not do so. As a result of these factors, I have drawn an adverse inference against Knelsen in relation to the applicable calculations.

• Zane admitted to giving Carillion permission to enter the Gravel Pits to remove gravel, and to removing 685 tonnes himself, but he did not admit to removing any other quantities.

• Harco had the opportunity to remove the gravel, but not exclusive opportunity. Various parties other than Knelsen and Harco were able to go in and out of the Gravel Pits, including Carillion and Urlacher.

259 The fact Harco had removed or allowed material to be removed on two prior occasions is not sufficient evidence to prove it was responsible for all the material alleged to be missing. It was not Harco's onus to prove it *did not* remove 5000 tonnes of materials from the Gravel Pits without Knelsen's authority, in breach of the contract: the onus was Knelsen's to prove that it did. They did not prove on a balance of probabilities how much material was actually missing, or that Harco was responsible. Knelsen is not entitled to compensation beyond what has been set out above.

260 Knelsen is also not entitled to compensation for expenses it incurred related to its eviction from the premises, post-termination. As the eviction occurred as a result of Knelsen's breach, Knelsen is the author of its own misfortune. Even if those expenses were compensable, they would have been incurred at the termination of the contract, or earlier in any event, therefore, Knelsen did not prove any actual loss.

261 Similarly, the fact that Knelsen had to obtain materials at a higher cost from another aggregate supplier as result of being evicted by Harco does not entitle them to compensation for those amounts. If they had not breached the agreement, they would not have been evicted.

262 That leaves the issue of the materials in the remaining stockpiles. Should Knelsen be compensated for crushing fees in relation to any of the aggregate materials they left behind?

***What damages, if any, should flow to Knelsen?***

263 The parties are in agreement that they did not consider what would happen to any stockpiled material remaining at any of the properties at the end of their relationship, regardless of whether that relationship ran its 5 year course or was terminated earlier than 5 years as a result of a terminable breach.

264 Having failed to even contemplate that issue, there is no reasonable basis on which this Court can imply any intention with respect to what would happen to the stockpiles at the end of the contract. This is not a situation in which it would be proper for the Court to imply a term based on business practice or industry custom (no evidence was provided on that point) or in fact (it is not necessary to fulfill the goals of the contract, or obvious in any way) or in law (no legal or policy consideration come into play). Equity is therefore the only basis on which Knelsen might claim for recovery.

265 Knelsen argued that Harco should have to compensate them for their crushing fees for the aggregate products left behind at Pierceland Yard and the Alberta Property because Harco received or could receive a benefit from that material through future use or sale, proving an enrichment. The crushing process obviously improved the aggregate, and that improvement occurred at Knelsen's expense, proving a deprivation.

266 I agree with both of those conclusions, but I disagree with the assertion that there is no juristic reason for Harco's resulting enrichment in this case.

267 As a matter of contract law, I believe it would suffice to find that the juridical reason for the enrichment in this case is breach of contract: Knelsen, as the breaching party, is simply not entitled to advance a claim for *quantum meruit* in the circumstances.

268 That said, I agree that equitable principles may be applied to ground restitution to a breaching party depending on the situation, as was described by the Court in *Natterjack*. This is especially important where one party stands to gain a significant windfall, as is the case here.

269 The reasonable expectations of the parties as discerned from the definable terms and context of their business relationship should therefore also be considered. That context includes the following:

- As was stated many times during the course of the trial, Knelsen controlled the quantities and types of raw aggregate it processed at the Gravel Pits.

- When the contract was formed, Knelsen made no commitment to Harco to crush or to buy any set or minimum amount of gravel.

- Knelsen could have left the site at any point in time, or simply stopped crushing gravel in the Gravel Pits, and Knelsen would not have been able to bring in another crusher until the 5 year contractual period elapsed.

- Knelsen did not have to pay Harco for the gravel until "the point of sale." Mr. Quist was very clear that the "point of sale" was not extraction and processing; rather, it was the point at which Knelsen was able to profit from the product. As Terry explained it, Knelsen did not "pay for stockpiles . . . the gravel was not the money."

- Although the materials had been transported out of the Gravel Pits, Knelsen had not yet paid Harco any royalties with respect to the stockpiled materials when they were evicted.

- The aggregate products left behind were *not* crushed at Harco's request. In fact, the last time Harco asked Knelsen to crush for them, Knelsen had refused to do so.

270 Ultimately, the potential of Knelsen "over-crushing" aggregate products that Knelsen could not use or sell prior to the end of the 5 year contractual term was a business risk. Because Knelsen paid royalties at point of sale and not at extraction, had that risk had materialized, Knelsen's only real losses would have been the cost of machinery, time and labour it took to crush. What the crushing process actually cost Knelsen is an expense that Knelsen refused to disclose to the court, but it was obviously less, not more than what Knelsen charged Harco and its other customers. The risk of losing its sunk costs at the end of the agreement was apparently a risk worth taking.

271 In Rene Rey Swiss Chocolates Ltd v Society Des Produits Marnier–Lapostolle SA, 1993 CanLII 1458 (BCSC), following termination of a contract, the Court denied a somewhat similar claim for compensation for stockpiled inventory in the form of packaging:

> In the business world a perpetual licence is highly improbable. In so stockpiling, the plaintiff, at its peril, ignored the facts of business life that commercial contracts contain expressly or by implication a termination clause. It took the risk that its stock piling might turn out to be excessive.

272 Similarly, had the contract in this case run its course Knelsen would have had no basis on which to make any demand for Harco to pay crushing fees for the stockpiled materials left behind.

273 The contract did not run its course. It was terminated due to Knelsen's actions. As a result of that termination, Knelsen was evicted from the properties and any ownership interest it might have previously claimed in relation to the stockpiled material evaporated. Knelsen should not be able to claim a greater entitlement where the loss materialized as a result of its own breach, than it would have been able to claim if the contract had run its course. Furthermore, it is not fair or logical to demand that Harco pay crushing fees for a product it did not ask for, at a rate of compensation that is greater than the actual pecuniary loss Knelsen incurred in the first place.

274 Additionally, given the many significant advantages in the contract which were to Knelsen's benefit, including no rent, no commitment to minimum or any production, and payment of royalties at "point of sale" rather than at the point of extraction, there is no general unfairness resulting from Harco's potential ability to benefit from the processed aggregate and other commodities that remained on their properties after termination and eviction.

275 Given that Harco arbitrarily and significantly increased the royalty prices for aggregate materials after the termination notice, I agree that the stockpiled materials at issue were not "voluntarily abandoned" as was asserted by Harco. That submission would have provided an additional basis on which to deny recovery only if the pricing had remained the same during the one month notice period Harco gave Knelsen to vacate the properties. The implication in that case would have been that Knelsen failed to mitigate its losses by paying the agreed upon royalties to Harco, and moving the material in question to a different location. No such implication can be made in these circumstances.

276 Equitable remedies are discretionary. On these facts, I would not exercise my discretion to make the award sought by Knelsen. According to Knelsen's calculations, the damages owed to them as crushing fees would meet or exceed Harco's damages resulting from Knelsen's terminable breach of contract. This would be a grossly unfair result in the circumstances.

277 If I am wrong, and Knelsen is entitled to an equitable remedy with respect to the stockpiled materials left behind, in my view, quantification of damages would have been limited to their sunk costs. That calculation would have in turn, depended on Knelsen disclosing those costs to the court. As I indicated earlier, they were unwilling to do so.

**Conclusion:**

278 Harco has proven their claim and are entitled to damages in the amount of $406.229.89 + $212,142.68 = *$618,372.57*.

279 Knelsen has not proven their counterclaim.

280 If the parties are unable to agree on costs within 60 days of issuance of this decision, they may contact me for advice with respect to seeking my further ruling on that issue.

*Action allowed; counterclaim dismissed.*

Footnotes

1 The Provincial Lands Act, RSS 1978, c P–31 which was the enabling statute for the *Gravel Regs*, was repealed or spent effective March 13, 2017. *The* Provincial Lands Act, 2016, SS 2016, c P–31.1 is currently the enabling statute for *The* Crown Resource Land Regulations, 2019, RRS c P–31.1 Reg 3 (Regulations). The *Gravel Regs* were applicable during the time that the Agreement was created and during the span of the agreement set out by the parties: approximately 2008 — 2014. The Regulations include wording similar to that formerly contained in the *Gravel Regs*.

# TAB 7

2021 ABCA 115
Alberta Court of Appeal

Canlanka Ventures Ltd v. Capital Direct Lending Corp

2021 CarswellAlta 747, 2021 ABCA 115, [2021] 7 W.W.R. 460, [2021] A.W.L.D. 1428, [2021] A.W.L.D. 1654, [2021] A.W.L.D. 1670, 20 Alta. L.R. (7th) 252, 329 A.C.W.S. (3d) 460, 458 D.L.R. (4th) 59

# Canlanka Ventures Ltd (Respondent / Cross-Appellant / Plaintiff) and Capital Direct Lending Corp (Appellant / Cross-Respondent / Defendant)

Myra Bielby, Ritu Khullar, Dawn Pentelechuk JJ.A.

Heard: March 11, 2021
Judgment: March 25, 2021
Docket: Calgary Appeal 1901-0356AC

Proceedings: affirming *Canlanka Ventures Ltd. v. Capital Direct Lending Corp.* (2019), 2019 ABQB 797, 2019 CarswellAlta 2189, R.J. Hall J. (Alta. Q.B.); additional reasons at *Canlanka Ventures Ltd v. Capital Direct Lending Corp* (2020), 2020 CarswellAlta 217, 2020 ABQB 96, R.J. Hall J. (Alta. Q.B.)

Counsel: Mr. Rajakaruna, for Respondent / Cross-Appellant
J.M. Larter, for Appellant / Cross-Respondent

**Related Abridgment Classifications**
Professions and occupations
IX Mortgage brokers
IX.2 Negligence
Remedies
I Damages
I.3 General damages
I.3.a Future pecuniary loss
I.3.a.i Future loss of income or earning capacity
I.3.a.i.E Loss of opportunity

**Headnote**
Professions and occupations --- Mortgage brokers — Negligence
Respondent mortgagee bought number of second mortgages, B, C, M and Be mortgages, from appellant mortgage broker and entered into agreement with mortgage broker for mortgage broker to administer those mortgages — After it lost money on second mortgages, it commenced action against mortgage broker for damages for negligence, negligence misrepresentation, breach of contract and breach of fiduciary duty — Trial judge found that mortgage broker made deliberate misrepresentations with respect to B mortgage, which precluded mortgagee from making informed decision as to whether to foreclose or take other steps, but that mortgagee would have suffered loss in any event, and he therefore awarded damages for loss of opportunity in amount of $25,000 — With respect to C mortgage, trial judge found that initial appraisal of property was not negligently done and that mortgage broker had not misrepresented value of property secured by C mortgage to mortgagee — With respect to other two mortgages, trial judge found that mortgagee was sole cause of extra legal feels in relation to M mortgage and that while mortgagee was not paid last monthly payment on Be mortgage, it had been discharged as result of violation of trust conditions by lawyer, not breach of duty owned by mortgage broker — Mortgage broker appealed and mortgagee cross appealed — Appeal and cross-appeal dismissed — Trial judge did not err in finding that mortgage broker was in breach of its duty of honesty in contractual performance toward mortgagee in relation to B mortgage — There was no evidence of anything that should have made mortgagee suspicious of what he was being told in relation to B mortgage — Evidence demonstrated that

mortgagee understood that foreclosure proceedings had been taken on B mortgage and mortgage broker did nothing to clear up misleading statement that B mortgage was in foreclosure — Mortgage broker's misrepresentations were active, intentional and went well beyond innocent non-disclosure — Interpreting indemnity clause in administration agreement as indemnifying mortgage broker from mortgagee's claims would deprive mortgagee of ability to enforce agreement, which was absurd as it did not reflect reasonable assumptions of party to contract — Mortgagee's disagreement with trial judge's findings with respect to claims regarding other three mortgages was not sufficient to conclude that trial judge had engaged in palpable and overriding error.

Remedies --- Damages — General damages — Future pecuniary loss — Future loss of income or earning capacity — Loss of opportunity

Respondent mortgagee bought number of second mortgages, B, C, M and Be mortgages, from appellant mortgage broker and entered into agreement with mortgage broker for mortgage broker to administer those mortgages — After it lost money on second mortgages, it commenced action against mortgage broker for damages for negligence, negligence misrepresentation, breach of contract and breach of fiduciary duty — Trial judge found that mortgage broker made deliberate misrepresentations with respect to B mortgage, which precluded mortgagee from making informed decision as to whether to foreclose or take other steps, but that mortgagee would have suffered loss in any event, and he therefore awarded damages for loss of opportunity in amount of $25,000 — Mortgage broker appealed and mortgagee cross appealed — Appeal and cross-appeal dismissed — Trial judge made no error in concluding that mortgagee had established that, but for mortgage broker's misconduct, it had opportunity to avoid loss and that opportunity rose above mere speculation and had some practical value — Mortgagee's inability to quantify damages arising from loss did not preclude recovery — In valuing loss of opportunity suffered by mortgagee, trial judge considered that mortgagee would likely not have recovered full amount of its investment had it been given opportunity — Trial judge's award of $25,000 was not unreasonable.

**Table of Authorities**

**Cases considered:**

*Bhasin v. Hrynew* (2014), 2014 SCC 71, 2014 CSC 71, 2014 CarswellAlta 2046, 2014 CarswellAlta 2047, [2014] 11 W.W.R. 641, 27 B.L.R. (5th) 1, 464 N.R. 254, 379 D.L.R. (4th) 385, 20 C.C.E.L. (4th) 1, [2014] 3 S.C.R. 494, 584 A.R. 6, 623 W.A.C. 6, 4 Alta. L.R. (6th) 219 (S.C.C.) — considered

*C.M. Callow Inc. v. Zollinger* (2020), 2020 SCC 45, 2020 CSC 45, 2020 CarswellOnt 18468, 2020 CarswellOnt 18469, 452 D.L.R. (4th) 44, 10 B.L.R. (6th) 1 (S.C.C.) — considered

*Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, 32 N.R. 488, [1980] I.L.R. 1-1176, 1979 CarswellQue 157, 1979 CarswellQue 157F, 29 O.R. (2d) 720 (S.C.C.) — considered

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

*Housen v. Nikolaisen* (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — followed

*IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing* (2017), 2017 ABCA 157, 2017 CarswellAlta 1133, 53 Alta. L.R. (6th) 96, [2017] 12 W.W.R. 261, 70 B.L.R. (5th) 173 (Alta. C.A.) — considered

*Strategic Acquisition Corp v. Starke Capital Corp* (2017), 2017 ABCA 250, 2017 CarswellAlta 1356, 82 R.P.R. (5th) 198, 59 Alta. L.R. (6th) 16, 416 D.L.R. (4th) 435 (Alta. C.A.) — considered

*Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)* (2010), 2010 SCC 4, 2010 CarswellBC 296, 2010 CarswellBC 297, 100 B.C.L.R. (4th) 201, [2010] 3 W.W.R. 387, 86 C.L.R. (3d) 163, 65 B.L.R. (4th) 1, 397 N.R. 331, 315 D.L.R. (4th) 385, 281 B.C.A.C. 245, 475 W.A.C. 245, [2010] 1 S.C.R. 69 (S.C.C.) — considered

*Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* (2021), 2021 SCC 7, 2021 CSC 7, 2021 CarswellBC 265, 2021 CarswellBC 266, [2021] 2 W.W.R. 193, 9 M.P.L.R. (6th) 1, 44 B.C.L.R. (6th) 215, 454 D.L.R. (4th) 1 (S.C.C.) — followed

**Statutes considered:**

*Judgment Interest Act*, R.S.A. 2000, c. J-1

Generally — referred to

**Rules considered:**

*Alberta Rules of Court*, Alta. Reg. 124/2010

R. 2.23 — referred to

R. 14.5 — referred to

R. 14.5(1)(g) — referred to

***Per curiam*:**

**Overview of Appeal**

1 The respondent/cross-appellant, Canlanka Ventures Ltd (the "respondent"), bought a number of second mortgages from the appellant/cross-respondent mortgage broker, Capital Direct Lending Corp (the "appellant"), and ultimately sued the appellant in relation to losses suffered from four of those mortgages. The trial judge dismissed three of the four claims, but granted judgment for damages in the sum of $25,000 plus prejudgment interest in relation to the fourth mortgage (the "Bastien mortgage"): Canlanka Ventures Ltd v Capital Direct Lending Corporation 2019 ABQB 797 (the "Decision"). The appellant appeals from that portion of the Decision. The respondent cross-appeals, seeking to increase that $25,000 award, in addition to an award of damages in relation each of the other three mortgages, punitive damages in the amount of "several times more" than the $40,000 claimed in its Amended Statement of Claim, and costs on a full indemnity basis.

2 The trial judge found that the appellant, hired to administer the respondent's mortgages after purchase, made two intentional misrepresentations to the respondent after the respondent advised that it had stopped receiving payments from the Bastien mortgage (the "misrepresentations"). The appellant told the respondent that the Bastien mortgage had been placed into foreclosure and did nothing to correct that misinformation when its representative, Mr. Tripp, learned that foreclosure was in relation to only the first mortgage, owned by a third party. It also advised the respondent that another party intended to buy out the second mortgage which was not correct and which did not occur. The trial judge concluded that as a result of the misrepresentations, the respondent was precluded from making an informed decision as to whether to foreclose on the Bastien mortgage, whether to seek to obtain its own appraisals and whether to offer to buy out the first mortgagee.

3 The Bastien mortgage was removed from title during the foreclosure of the first mortgage, with the result that the respondent lost this investment in its entirety. In particular, the respondent lost the opportunity to protect the second mortgage by taking steps, such as the purchase and redemption of the first mortgage, which would have been available to it had the appellant not made the misrepresentations.

4 The trial judge found however, that the respondent would have suffered a loss even if it had taken steps to redeem the first mortgage, because the market value of the secured property was insufficient to pay out the entirety of the sums secured by the first and second mortgages. Accordingly, he awarded damages for loss of opportunity rather than for the amount the respondent paid to purchase the second mortgage or the amount secured by that mortgage.

5 Five months prior to purchasing the Bastien mortgage, in November 2010, the respondent purchased another second mortgage (the "Couper mortgage") from the appellant for $37,000 after being provided with an appraisal on the underlying property, valuing it at $153,000. A first mortgage of $84,000 was already registered on that property. By the fall of 2011, the mortgagor had defaulted on making the required payments with the result that both the first mortgagee and respondent commenced foreclosure proceedings. The first mortgagee then obtained an appraisal of $104,000 on the value of the underlying property from the same appraiser who had prepared the initial appraisal.

6 The respondent was concerned that, some 14 months after the date of the $153,000 appraisal, the secured property was valued at only $104,000 although the condition of the property and improvements to the underlying property had not changed. It then had the property appraised on its own, obtaining an appraisal for $135,000. As a result, it decided to protect its second mortgage by buying out the first mortgage, at a cost of $102,899.70, bringing its total investment to $140,000 in both mortgages.

After completing foreclosure, it sold the property for $123,000 after realtor fees and sued the appellant for the resulting loss arguing that it had misrepresented the value of the property.

7 The trial judge, however, was unwilling to infer or conclude that the initial $153,000 appraisal of the underlying property was negligently done in the absence of direct or expert evidence, and dismissed the respondent's claim. He concluded that the appellant had not misrepresented the value of the property secured by the Couper mortgage to the respondent, whom he found to be a sophisticated investor well aware of the risks in buying second mortgages and who was properly informed.

8 In relation to the remaining two mortgages, the trial judge determined that the appellant was the sole cause of any extra legal fees incurred in relation to the McDonald mortgage, as a result of finding its principal, Mr. Gaston Rajakaruna, was stubborn and had acted unreasonably in refusing to discharge the mortgage after payment of it in full. He further found that while the respondent was not paid the last monthly payment on the Bell mortgage, it had been discharged as a result of a violation of trust conditions by an Ontario lawyer, rather than any breach of duty owed by the appellant.

9 This Court granted Mr. Rajakaruna leave to represent the respondent in the argument of this appeal although he is not a lawyer, pursuant to r 2.23(4) of the Alberta Rules of Court, Alta Reg 124/2010. He is one of the two shareholders in, and the controlling mind of the respondent. This decision further turned on Mr. Rajakaruna's representation that the respondent could not afford to retain counsel, the Court's determination that his representation would be of assistance to it, as opposed to having no submissions made on behalf of the respondent, and because the amounts at issue on appeal are not substantially larger than the $25,000 cut-off imposed by r 14.5(1)(g) at which point leave is required to appeal. This rule reflects the Court's concern about husbanding resources where the jeopardy faced by the parties to an appeal comes close to matching the legal costs of advancing or defending the appeal in any event of the result.

10 For the reasons that follow, both the appeal and cross-appeal are dismissed.

**Issues**

1) Did the appellant breach its contractual duty of good faith toward the respondent in relation to the Bastien mortgage?

2) Did the indemnity clause in the contract insulate the appellant from liability in relation to the Bastien mortgage?

3) Did the trial judge err in relation to damages?

4) Did the trial judge err in concluding that the respondent had not proven its claim in relation to the remaining three mortgages?

**Standard of Review**

11 Findings of fact are reviewable for palpable and overriding error: Housen v Nikolaisen 2002 SCC 33 at para 25, [2002] 2 SCR 235 [Housen]. Matters of contractual interpretation are typically questions of mixed law and fact reviewed for palpable and overriding error. Errors of law, however, are reviewed on the standard of correctness: Sattva Capital Corp v Creston Moly Corp 2014 SCC 53 at para 50–53, [2014] 2 SCR 633. A failure to identify and apply the correct test for awarding damages for loss of opportunity is reviewed on the standard of correctness: *Housen* at para 36.

**Analysis**

***Did the appellant breach its contractual duty of good faith toward the respondent in relation to the Bastien mortgage?***

12 The trial judge found that the parties entered into a contract (the "administration agreement") dated March 12, 2009, in which the appellant agreed to perform certain services in relation to the mortgages the respondent purchased from it, for a

fee. The appellant concedes that it drafted this agreement, and that every party purchasing mortgages from it was required to sign an agreement on the same terms.

13 The following term is found on page 2 of the administration agreement:

> The Administrator [the appellant] agrees to act in good faith and to the best of its ability in the best interest of the Mortgage Holder [the respondent].

14 The administration agreement went on to provide the following apparent limitation on that duty:

> Due to the nature of the mortgage business and the surrounding environment of notices and information from a variety of sources, the Administrator [the appellant] will strive to attend to all aspects of the Mortgage Holder's [the respondent's] mortgage interests, but cannot therefore be held liable for any oversight, errors or omissions related to the mortgage interests included under this agreement [the "exclusion clause"].

15 The trial judge found that the appellant, hired to administer the Bastien mortgage for the respondent, deliberately misrepresented to the respondent that it was the Bastien mortgage that was in foreclosure, rather than the first mortgage on the same properties: Decision at paras 78-80. He also found that the appellant advised the respondent that the mortgagors intended to buy out the Bastien second mortgage which they ultimately did not do. The trial judge found that the appellant had done nothing to protect the respondent's interest in the Bastien mortgage, either by hiring a lawyer to commence foreclosure on it, or even by accurately advising the respondent about the situation. He did not find that the appellant's actions constituted merely a failure to disclose or were negligent; rather, he found the appellant's actions were deliberate: Decision at para 83.

16 In oral argument, counsel for the appellant argued these findings amounted to palpable and overriding error because the respondent should have known, based on his other dealings with Capital Direct or otherwise, that the email sent to Mr. Rajakaruna by a Capital Direct employee providing an updated loan payment schedule for the Bastien mortgage and stating " . . . the aforementioned mortgage is in foreclosure", in fact did not refer to the Bastien mortgage but rather to the first mortgage on the same property. The trial judge found however, that Mr. Rajakaruna took it to mean the Bastien mortgage was in foreclosure, and that there was no other rational reading of the phrase "aforementioned mortgage": Decision at para 47.

17 We reject the argument that the respondent should have inferred the true state of affairs from this email. We have not been pointed to any evidence that demonstrates any event that did or should have made Mr. Rajakaruna suspicious of what he was being told. Rather, as observed at paras 54 and 56 of the Decision, his email request of the appellant on July 18, 2012 asking about foreclosure on his mortgage, shows he was continuing under the understanding that foreclosure proceedings had been taken on his mortgage. And on September 12, 2012, he emailed the appellant indicating he was confused and asking where the respondent stood. The appellant took no steps to clear up or remedy the misleading statement that the Bastien mortgage was in foreclosure, either directly or through legal counsel.

18 The trial judge found that by intentionally making the misrepresentations, the appellant breached its contractual obligation "to act in good faith and to the best of its ability in the best interest of the" respondent. He also concluded that the exclusion clause operated only to exclude liability for negligence rather than for intentional acts; as a result, it did not insulate the appellant from its misrepresentations given his finding that they were deliberate.

19 The duty of good faith in contractual performance does not depend on the "good faith" clause described in para 13 above. It exists in every contract, whether or not an express term to that effect is included in the contract. In Bhasin v Hrynew 2014 SCC 71 at para 73, [2014] 3 SCR 494 [Bhasin], the Supreme Court of Canada described the duty of honesty in contractual performance as follows:

> . . . there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance . . .

20 At paras 63 and 74 of *Bhasin*, the Supreme Court notes that this new duty is not an implied term of the contract but arises out of a general organizing principle of good faith that operates irrespective of the intentions of the parties and which is analogous to equitable doctrines that impose limits on freedom of contract, such as the doctrine of unconscionability.

21 Mr. Justice Kasirer of the Supreme Court of Canada recently illustrated this principle, writing for the majority in CM Callow Inc v Zollinger 2020 SCC 45 [Callow], where he stated at para 3:

> . . . the duty of honesty applies to all contracts as a matter of contractual doctrine, and means "simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract".

And further, at para 53:

> Good faith is thus not relied upon here to provide, by implication, a new contractual term or a guide to interpretation of language that was somehow an unclear statement of parties' intent. Instead, the duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right because the duty, irrespective of the intention of the parties, applies to the performance of all contracts and, by extension, to all contractual obligations and rights. This means, simply, that instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest.

22 The appellant argues that the trial judge made a reviewable error in concluding that it breached its obligation to act in good faith toward the respondent in making the misrepresentations because, while deliberate, it was not done for personal gain. It submits that these statements were made after Mr. Tripp reasonably concluded, although without advising the respondent or seeking its permission, that no action should be taken because of the respondent's limited equity in the secured property and because the costs of foreclosure and sale would make a recovery action uneconomic. We observe that this was not simply a failure to advise of general or third-party information, but active misrepresentation, perhaps from paternalistic motivation, that deprived the respondent of the right to make its own decisions in relation to taking action to protect its investment.

23 The appellant nonetheless argues that the misrepresentations amounted to no more than a failure to disclose, which the Supreme Court of Canada stated was not included in a duty of good faith in *Bhasin.* However, at para 86 the Court described the duty as follows:

> The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests.

And at para 87:

> . . . there is no unilateral duty to disclose information relevant to termination. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract.

24 The misrepresentations made here amounted to more than protecting the appellant's advantages arising from the administration agreement or failing to disclose so as to subordinate the appellant's interests to those of the respondent. The trial judge found, and the appellant does not argue otherwise, that the misrepresentations were intentional. They actively misled the respondent, regarding the proceedings in relation to the Bastien mortgage, and therefore amounted to a breach of the duty of honesty in contractual performance. Nothing in *Bhasin* makes a finding of a breach of the duty of honesty in contractual performance turn on the fact the underlying misrepresentation was made for personal gain. The misrepresentations in this case were active, intentional and went well beyond innocent non-disclosure.

25 This conclusion is supported by analogy to the type of conduct that the Supreme Court agreed constituted a breach of the duty of honesty in contractual performance in *Callow*, outlined in the concurring decision of Brown J at para 134 as follows:

> . . . Based on Baycrest's conduct and express statements, the trial judge found that Baycrest had represented that the winter service agreement was not in danger of termination (paras. 65 and 76). Further, the trial judge found that Baycrest knew that its representations were misleading and nonetheless expressed its intention of keeping Callow in the dark (paras. 48 and 69). These findings are sufficient to support the conclusion that Baycrest breached the duty of honest performance . . .

If that is the case for conduct where the misrepresentations arose in part from silence, it must equally be the case for misrepresentations that the trial judge expressly found were intentionally conveyed.

26 This was also not a situation where the misrepresentations arose simply from an exercise of discretion afforded to the appellant by the contract, such that it is not necessary, or relevant, to conduct the type of analysis described in the recent decision of Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District 2021 SCC 7.

27 We note that at para 75 of *Bhasin*, the Supreme Court declared that the duty of honesty in contractual performance is a doctrine that the parties are not free to exclude. It was therefore not, in any event, open for the trial judge to interpret the exclusion clause in a way that would excuse the breach of the appellant's duty of honesty toward the respondent. And he did not purport to do so. Rather, the trial judge found: "This contractual obligation of good faith . . . is not excluded by the exclusion clauses in the contract": Decision at para 83.

28 We therefore conclude that the trial judge did not err in finding that the appellant was in breach of its duty of honesty in contractual performance toward the respondent in relation to the Bastien mortgage.

*Did the indemnity clause in the contract insulate the appellant from liability?*

29 The administration agreement also provided:

> The [respondent] shall indemnify and hold [the appellant] harmless from any and all loss, injury, damage and/or liability resulting or claimed to have resulted by any person or entity from any breach of the [appellant's] promises, representations or warranties under this Agreement or otherwise arising from or relating to any acts or omissions, whether willful, negligent or otherwise, of [the appellant] or its employees or agents in connection with any loan under this agreement [the "indemnity clause"].

30 The trial judge concluded that the indemnity clause did not protect the appellant from a finding of liability because it indemnified it against claims made by third parties only, and not from the respondent's claim. We observe that if it were otherwise, the indemnity clause would indemnify the appellant from any claim, proper or otherwise, made by the other party to the contract in which it was found. This interpretation would deprive the respondent of an ability to enforce the administration agreement, even if the appellant failed to make any attempt to administer the mortgages as promised within it. It would oblige the respondent to pay the appellant for services it did not receive.

31 The appellant's interpretation of the indemnity clause is arguably absurd because it would not reflect the reasonable assumptions of a party to a contract. There is a principle of contractual interpretation which holds that "[i]n choosing among possible constructions of an agreement, courts will avoid an interpretation that produces a commercial result that is considered unreasonable": see John D. McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 822. The author suggests at 822-3, that "absurdity" in the contractual context is largely synonymous with "commercially unreasonable".

32 Estey J in Consolidated-Bathurst v Mutual Boiler [1980] 1 SCR 888 at 901, 112 DLR (3d) 49, described the principle as follows: " . . . an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result."

33 The appellant argues that the indemnity clause nonetheless protects it from liability because it survives an analysis based on the three-part test for determining whether a party may rely on an indemnity clause to exempt themselves from liability for a particular contractual breach, as articulated by the Supreme Court of Canada in Tercon Contractors Ltd v British Columbia

(Transportation and Highways) 2010 SCC 4, [2010] 1 SCR 69 [Tercon]. That test requires the court to examine 1) whether, as a matter of contractual interpretation, the clause applies to the circumstances of the case; 2) whether the clause is invalid because it was unconscionable at the time the contract was made (as might arise from unequal bargaining power between the parties); and, 3) if the clause applies and is otherwise valid, whether overriding public policy reasons nevertheless favour refusing to enforce the contractual bargain agreed to by the parties.

34 It is unnecessary to consider this argument because, even if the indemnity clause were to survive a *Tercon* analysis, *Tercon* must now be applied subject to the duty of honesty in contractual performance recognized in *Bhasin. Bhasin*, decided by the Supreme Court of Canada four years after *Tercon*, does not create an exemption from the duty of contractual honesty for indemnity clauses any more than it does for exclusion clauses. Rather in Bhasinat para 74, the Court described the new duty as a general doctrine of contract law that applies to all contracts.

35 Here, as with regard to the exclusion clause, the existence of the indemnity clause cannot protect the appellant from a breach of its duty of contractual honesty.

***Did the trial judge err in relation to damages?***

36 The trial judge found that as a result of the appellant's contractual breach, the respondent was precluded from making an informed decision about whether to foreclose on the Bastien mortgage, whether to seek its own appraisals of the land it secured and whether to offer to buy out the first mortgage. The respondent thus suffered a loss. The trial judge went on to conclude however, that the loss could not be measured by the value of the second mortgage because "even if Capital Direct had accurately and properly informed Canlanka, Canlanka was going to suffer a loss". He went on to conclude that as the actual pecuniary damages arising from the appellant's breach of contract could not be calculated mathematically, he would assess them as the value of a lost opportunity in the amount of $25,000 plus prejudgment interest.

37 The appellant argues that the trial judge made a palpable and overriding error in concluding that the respondent suffered this loss of opportunity because even if it had accurately advised the respondent of the situation, the respondent would not likely have attempted to ameliorate its potential losses. While pointing to no evidence to support these submissions, it argues this is the only possible inference available because, as it turned out, the first mortgagee suffered a $29,955.15 loss after foreclosure and subsequent sale of the property, such that the respondent's lost chance had no value. It points out that pursuing any avenue of amelioration would have resulted in the respondent incurring legal and/or appraisal fees. It also submits that Mr. Rajakaruna testified that the respondent did not have the funds available to pay out the first mortgage at the relevant time.

38 However, the respondent had, in the same time frame, chosen to pay out a first mortgage with the result it saved part of the value of the Couper second mortgage, which evidences the respondent's understanding of this avenue of recourse. Further, the first mortgagee's loss on the eventual sale of the property secured by the Bastien mortgage does not compel the conclusion that the respondent would have suffered a loss as well. It ignores the fact that the respondent could have chosen pay out the first mortgage as it had with the Couper situation, and then hold the secured property to a point where it could be sold at a price that would allow recovery in part or in full.

39 Mr. Rajakaruna's testimony regarding available funding was that while he did not have the money on hand to pay out the first mortgage, he never investigated whether the bank would loan the respondent the money because of the appellant's representation that the second mortgage was going to be bought out. And by the time the appellant found out otherwise, foreclosure had been completed on the first mortgage.

40 While the trial judge did not expressly refer to this Court's decision in Strategic Acquisition Corp v Starke Capital Corp,2017 ABCA 250, 416 DLR (4th) 435 [Strategic], he nonetheless proceeded through the analysis for loss of opportunity damages discussed therein. He found that the respondent established that, but for the appellant's misconduct, it had an opportunity to avoid a loss and that opportunity rose above mere speculation and had some practical value.

41 A party's inability to quantify damages arising from a loss will not preclude recovery where it is not possible to lead evidence to accurately value that loss, as with the value of an opportunity not taken. In that circumstance, the Court will make

the best estimate of damages: *Strategic* at para 78; IFP Technologies (Canada) Inc v EnCana Midstream and Marketing2017 ABCA 157 at para 208, 12 WWR 261.

42 As for the size of the award, $25,000, the appellant submits that sum fails to take into consideration the full total of the projected expenses that would have been incurred had the respondent sought to redeem the first mortgage. In particular, the trial judge failed to account for the $20,426.10 in total costs that the respondent would have incurred had it redeemed the first mortgage. It argues that the damage award should be reduced by this sum to approximately $4574.

43 That argument would have been relevant had the trial judge set damages based on a mathematical calculation rather than on the basis of loss of opportunity. That was not the case here. In valuing the lost opportunity suffered by the respondent, the trial judge did however consider that it would not likely have recovered the full amount of its investment had it been given the opportunity to pursue an avenue of amelioration.

44 Absent any reason to conclude the $25,000 figure was otherwise unreasonable, we decline to interfere with the exercise of the trial judge's discretion in awarding these damages, plus interest under the Judgment Interest Act, RSA 2000, c J–1 applicable to non-pecuniary damages, onward from April 5, 2012.

45 While the trial judge gave no express reasons for failing to award the punitive damages sought by the respondent or for failing to award it solicitor-client costs, we observe that the respondent was unsuccessful in relation to three of its four claims. This supports the inference that the trial judge concluded that the appellant's misconduct, although intentional, was not sufficiently serious to attract damages over and above those awarded for lost opportunity. As such, this was also not a situation which attracted full indemnity costs.

***Did the trial judge err in concluding that the respondent had not proven its claim in relation to the remaining three mortgages?***

46 The respondent has also not persuaded us that the trial judge engaged in palpable and overriding error in relation to his findings underpinning the dismissal of its claims regarding the other three mortgages. Simple disagreement with various of those findings is insufficient. It has not convinced us that the appellant owed it a fiduciary duty.

47 In relation to the Couper mortgage, in particular, we observe that the respondent retained its own lawyer to foreclose on it. The trial judge found the respondent to be a sophisticated investor, aware of the risks involved with owning second mortgages. The respondent led no evidence to establish that the appraisal provided to it at the time it purchased this mortgage, was inflated or inaccurate. The fact that the property value subsequently decreased over a relatively short period of time does not drive the conclusion that the appraisal was not reasonable at the time it was prepared, or that it was negligently prepared and provided.

**Conclusion**

48 The appeal and cross-appeal are hereby dismissed.

*Appeal and cross-appeal dismissed.*

# TAB 8

2008 ONCA 587
Ontario Court of Appeal

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240 O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008

Judgment: August 18, 2008 *

Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

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John B. Laskin for National Bank Financial Inc., National Bank of Canada
Thomas McRae, Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
Howard Shapray, Q.C., Stephen Fitterman for Ivanhoe Mines Ltd.
Kevin P. McElcheran, Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia, T.D. Bank
Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada, as Indenture Trustees
Usman Sheikh for Coventree Capital Inc.
Allan Sternberg, Sam R. Sasso for Brookfield Asset Management and Partners Ltd., Hy Bloom Inc., Cardacian Mortgage Services Inc.
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James A. Woods, Sebastien Richemont, Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Jazz Air LP
Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

**Related Abridgment Classifications**

Bankruptcy and insolvency
XVII Practice and procedure in courts
- XVII.7 Appeals
  - XVII.7.b To Court of Appeal
    - XVII.7.b.ii Availability
      - XVII.7.b.ii.D Miscellaneous cases

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
- XIX.3 Arrangements
  - XIX.3.b Approval by court
    - XIX.3.b.iv Miscellaneous

**Headnote**

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Releases — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — CCAA permits inclusion of third party releases in plan of compromise or arrangement to be sanctioned by court where those releases were reasonably connected to proposed restructuring — It is implicit in language of CCAA that court has authority to sanction plans incorporating third-party releases that are reasonably related to proposed restructuring — CCAA is supporting framework for resolution of corporate insolvencies in public interest — Parties are entitled to put anything in Plan that could lawfully be incorporated into any contract — Plan of compromise or arrangement may propose that creditors agree to compromise claims against debtor and to release third parties, just as any debtor and creditor might agree to such terms in contract between them — Once statutory mechanism regarding voter approval and court sanctioning has been complied with, plan becomes binding on all creditors.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Miscellaneous cases

Leave to appeal — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — Criteria for granting leave to appeal in CCAA proceedings was met — Proposed appeal raised issues of considerable importance to restructuring proceedings under CCAA Canada-wide — These were serious and arguable grounds of appeal and appeal would not unduly delay progress of proceedings.

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

*Bell ExpressVu Ltd. Partnership v. Rex* (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

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

*Canadian Airlines Corp., Re* (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

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

*Cineplex Odeon Corp., Re* (2001), 2001 CarswellOnt 1258, 24 C.B.R. (4th) 201 (Ont. C.A.) — followed

*Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30, 2002 CarswellOnt 1038 (Ont. C.A. [In Chambers]) — followed

*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

*Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.* (1976), 1976 CarswellQue 32, [1978] 1 S.C.R. 230, 26 C.B.R. (N.S.) 84, 75 D.L.R. (3d) 63, (sub nom. *Employers' Liability Assurance Corp. v. Ideal Petroleum (1969) Ltd.)* 14 N.R. 503, 1976 CarswellQue 25 (S.C.C.) — referred to

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*Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

*Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 2001 BCSC 1721, 2001 CarswellBC 2943, 19 B.L.R. (3d) 286 (B.C. S.C.) — distinguished

*Quebec (Attorney General) v. Bélanger (Trustee of)* (1928), 1928 CarswellNat 47, [1928] A.C. 187, [1928] 1 W.W.R. 534, [1928] 1 D.L.R. 945, (sub nom. *Quebec (Attorney General) v. Larue)* 8 C.B.R. 579 (Canada P.C.) — referred to

*Ravelston Corp., Re* (2007), 2007 CarswellOnt 2114, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]) — referred to

*Reference re Companies' Creditors Arrangement Act (Canada)* (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — considered

*Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces* (1933), [1934] 1 D.L.R. 43, 1933 CarswellNat 47, [1933] S.C.R. 616 (S.C.C.) — referred to

*Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces* (1935), [1935] 1 W.W.R. 607, [1935] 2 D.L.R. 1, 1935 CarswellNat 2, [1935] A.C. 184 (Canada P.C.) — considered

*Rizzo & Rizzo Shoes Ltd., Re* (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — considered

*Royal Penfield Inc., Re* (2003), 44 C.B.R. (4th) 302, [2003] R.J.Q. 2157, 2003 CarswellQue 1711, [2003] G.S.T.C. 195 (C.S. Que.) — referred to

*Skydome Corp., Re* (1998), 1998 CarswellOnt 5914, 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]) — referred to

*Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 2000 CarswellOnt 4120, 20 C.B.R. (4th) 160, 50 O.R. (3d) 688, 137 O.A.C. 74 (Ont. C.A.) — referred to

*Steinberg Inc. c. Michaud* (1993), [1993] R.J.Q. 1684, 55 Q.A.C. 298, 1993 CarswellQue 229, 1993 CarswellQue 2055, 42 C.B.R. (5th) 1 (C.A. Que.) — referred to

*Stelco Inc., Re* (2005), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) — referred to

*Stelco Inc., Re* (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

*Stelco Inc., Re* (2006), 210 O.A.C. 129, 2006 CarswellOnt 3050, 21 C.B.R. (5th) 157 (Ont. C.A.) — referred to

*T&N Ltd., Re* (2006), [2007] Bus. L.R. 1411, [2007] 1 All E.R. 851, [2006] Lloyd's Rep. I.R. 817, [2007] 1 B.C.L.C. 563, [2006] B.P.I.R. 1283 (Eng. Ch. Div.) — considered

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

*Business Corporations Act*, R.S.O. 1990, c. B.16

s. 182 — referred to

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44

s. 192 — referred to

*Code civil du Québec*, L.Q. 1991, c. 64

en général — referred to

*Companies Act*, 1985, c. 6

s. 425 — referred to

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

Generally — referred to

s. 4 — considered

s. 5.1 [en. 1997, c. 12, s. 122] — considered

s. 6 — considered

*Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 21 — referred to

s. 92 — referred to

s. 92 ¶ 13 — referred to

**Words and phrases considered:**

**arrangement**

"Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor.

***R.A. Blair J.A.*:**

**A. Introduction**

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

***Leave to Appeal***

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

***Appeal***

6 For the reasons that follow, however, I would dismiss the appeal.

**B. Facts**

***The Parties***

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP — in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants — slightly over $1 billion — represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

***The ABCP Market***

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment — usually 30 to 90 days — typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

***The Liquidity Crisis***

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes — partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

*The Montreal Protocol*

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze — the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement — known as the Montréal Protocol — the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

***The Plan***

*a) Plan Overview*

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper — which has been frozen and therefore effectively worthless for many

months — into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

*b) The Releases*

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

> a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
>
> b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;
>
> c) The Canadian banks provide below-cost financing for the margin funding facility and,
>
> d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

*The CCAA Proceedings to Date*

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan — 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan — 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval — a majority of creditors representing two-thirds in value of the claims — required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" — an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

**C. Law and Analysis**

39 There are two principal questions for determination on this appeal:

> 1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
>
> 2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

***(1) Legal Authority for the Releases***

40 The standard of review on this first issue — whether, as a matter of law, a CCAA plan may contain third-party releases — is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;

b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;

c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;

d) the releases are invalid under Quebec rules of public order; and because

e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

*Interpretation, "Gap Filling" and Inherent Jurisdiction*

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters," [2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am

satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan*, *supra*, at pp. 306-307:

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest*. [Emphasis added.]

*Application of the Principles of Interpretation*

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore — as the application judge found — in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

**The Statutory Wording**

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

a) the skeletal nature of the CCAA;

b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in

c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

**Compromise or Arrangement**

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated

into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

64 *T&N Ltd., Re*, *supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement. [4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party*. [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

**The Binding Mechanism**

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

**The Required Nexus**

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;

c) The Plan cannot succeed without the releases;

d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

*The Jurisprudence*

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud*, *supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal Airlines Ltd.* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian — at a contractual level — may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank, Canada* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
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> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to

> immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank, Canada* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II")*. The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] — the classification case — the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... [*H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants — particularly those represented by Mr. Woods — rely heavily upon the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*, *supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 — English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
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> . . . . .
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
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> . . . . .
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature — they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company — rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases — as I have concluded it does — the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against

a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

*The 1997 Amendments*

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> **Exception**
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> > (a) relate to contractual rights of one or more creditors; or
> >
> > (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> **Powers of court**
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> **Resignation or removal of directors**
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted: [8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment

was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

*The Deprivation of Proprietary Rights*

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

*The Division of Powers and Paramountcy*

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act*, *1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

*Conclusion With Respect to Legal Authority*

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

***(2) The Plan is "Fair and Reasonable"***

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;

f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of *all* Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

**D. Disposition**

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

***J.I. Laskin J.A.*:**

I agree.

***E.A. Cronk J.A.*:**

I agree.

*Application granted; appeal dismissed.*

**ScheduleA — Conduits**

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

**ScheduleB — Applicants**

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

**ScheduleA — Counsel**

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee

2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.

3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.

5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Footnotes

* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp.319-320.

4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard)*, *supra*.

5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.

6 A majority in number representing two-thirds in value of the creditors (s. 6)

7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (C.A. Que.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (C.A. Que.)

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

# TAB 9

2013 ONSC 2519
Ontario Superior Court of Justice [Commercial List]

SkyLink Aviation Inc., Re

2013 CarswellOnt 7670, 2013 ONSC 2519, [2013] O.J. No. 2664, 229 A.C.W.S. (3d) 24, 3 C.B.R. (6th) 83

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

In the Matter of a Plan of Compromise and Arrangement of Skylink Aviation Inc. Applicant

Morawetz J.

Heard: April 23, 2013
Oral reasons: April 23, 2013
Docket: CV-13-1003300CL

Counsel: Robert J. Chadwick, Logan Willis for SkyLink Aviation Inc.
Harvey Chaiton for Arbib, Babrar and Sunbeam Helicopters
Emily Stock for Certain Former and Current Directors, for Insured Claims
S.R. Orzy, Sean Zweig for Noteholders
Shayne Kukulowicz for Certain Directors and Officers
M.P. Gottlieb, A. Winton for Monitor, Duff & Phelps

**Related Abridgment Classifications**
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iii Creditor approval
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

**Headnote**
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Debtor entered protection under Companies' Creditors Arrangement Act for purpose of recapitalization — Plan sought to refinance first lien debt, cancel secured notes in exchange for consideration including new common shares and new debt, and compromise of certain unsecured liabilities — Settlements were arranged with certain claimants, including releases regarding potential claims — Debtor brought application for extension of stay and sanctioning plan of arrangement and compromise — Application granted — Plan was not opposed and had strong support from creditors — Debtor complied with procedural requirements of Act, and orders including initial order — Debtor acted in good faith and with due diligence — Plan was fair and reasonable — Releases were necessary part of plan and had been negotiated amongst appropriate parties.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Creditor approval

Debtor entered protection under Companies' Creditors Arrangement Act for purpose of recapitalization — Plan sought to refinance first lien debt, cancel secured notes in exchange for consideration including new common shares and new debt, and compromise of certain unsecured liabilities — Settlements were arranged with certain claimants, including releases regarding potential claims — Debtor brought application for extension of stay and sanctioning plan of arrangement and compromise — Application granted — Plan was not opposed and had strong support from creditors — Debtor complied with procedural requirements of Act, and orders including initial order — Debtor acted in good faith and with due diligence — Plan was fair and reasonable — Releases were necessary part of plan and had been negotiated amongst appropriate parties.

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

Sealing confidential materials.

**Table of Authorities**

**Cases considered by *Morawetz J.*:**

*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]) — considered

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

*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 257 O.A.C. 400 (note), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 390 N.R. 393 (note) (S.C.C.) — referred to

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

*Canadian Airlines Corp., Re* (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

*Canadian Airlines Corp., Re* (2000), 88 Alta. L.R. (3d) 8, 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 4 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.) — referred to

*Canadian Airlines Corp., Re* (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

*Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — considered

*Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

*SkyLink Aviation Inc., Re* (2013), 2013 CarswellOnt 2785, 2013 ONSC 1500 (Ont. S.C.J. [Commercial List]) — referred to

**Statutes considered:**

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

Generally — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

s. 19(2) — referred to

***Morawetz J.*:**

1 SkyLink Aviation Inc. ("SkyLink Aviation", the "Company" or the "Applicant"), seeks an Order (the "Sanction Order"), among other things:

(a) sanctioning SkyLink Aviation's Plan of Compromise and Arrangement dated April 18, 2013 (as it may be amended in accordance with its terms, the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA");

(b) declaring that the New Shareholders Agreement is effective and binding on all holders of New Common Shares and any Persons entitled to receive New Common Shares pursuant to the Plan; and

(c) extending the Stay Period, as defined in the Initial Order of this Court granted March 8, 2013 [2013 CarswellOnt 2785 (Ont. S.C.J. [Commercial List])] (the "Initial Order").

2 No party opposed the requested relief.

3 Counsel to the Company submits that the Plan has strong support from the creditors and achieves the Company's goal of a going-concern recapitalization transaction (the "Recapitalization") that minimizes any impact on operations and maximizes value for the Company's stakeholders.

4 Counsel further submits that the Plan is fair and reasonable and offers a greater benefit to the Company's stakeholders than other restructuring or sale alternatives. The Plan has been approved by the Affected Creditors with 95.3% in number representing 93.6% in value of the Affected Unsecured Creditors Class and 97.1% in number representing 99.99% in value of the Secured Noteholders Class voting in favour of the Plan (inclusive of Voting Claims and Disputed Voting Claims).

5 The request for court approval is supported by the Initial Consenting Noteholders, the First Lien Lenders and the Monitor.

**The Facts**

6 SkyLink Aviation, together with the SkyLink Subsidiaries (as defined in the Affidavit of Jan Ottens sworn April 21, 2013) (collectively, "SkyLink"), is a leading provider of global aviation transportation and logistics services, primarily fixed-wing and rotary-wing air transport and related activities (the "SkyLink Business").

7 SkyLink is responsible for providing non-combat life-supporting functions to both its own personnel and those of its suppliers and clients in high-risk conflict zones.

8 SkyLink Aviation experienced financial challenges that necessitated a recapitalization of the Company under the CCAA. On March 8, 2013, the Company sought protection from its creditors under the CCAA and obtained the Initial Order which appointed Duff & Phelps Canada Restructuring Inc. as the monitor of the Applicant in this CCAA Proceeding (the "Monitor").

9 The primary purpose of the CCAA Proceeding is to expeditiously implement the Recapitalization. The Recapitalization involves: (i) the refinancing of the Company's first lien debt; (ii) the cancellation of the Secured Notes in exchange for the issuance by the Company of consideration that includes new common shares and new debt; and (iii) the compromise of certain unsecured liabilities, including the portion of the Noteholders' claim that is treated as unsecured under the Plan.

10 On March 8, 2013, I granted the Claims Procedure Order approving the Claims Procedure to ascertain all of the claims against the Company and its directors and officers. SkyLink Aviation, with the assistance of the Monitor, carried out the Claims Procedure in accordance with the terms of the Claims Procedure Order.

11 Pursuant to the Claims Procedure Order, the Secured Noteholders Allowed Claim, was determined by the Applicant, with the consent of the Monitor and the Majority Initial Consenting Noteholders, to be approximately $123.4 million.

12 The Secured Noteholders Allowed Claim was allowed for both voting and distribution purposes against the Applicant as follows:

(a) $28.5 million, as agreed among the Applicant, the Monitor and the Majority Initial Consenting Noteholders, was allowed as secured Claims against the Applicant (collectively the "Secured Noteholders Allowed Secured Claim"); and

(b) $94.9 million, the balance of the Secured Noteholders Allowed Claim, was allowed as an unsecured Claim against the Applicant (collectively the "Secured Noteholders Allowed Unsecured Claim").

13 The value of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range set out in the valuation dated March 7, 2013 (the "Valuation") prepared by Duff & Phelps Canada Limited.

14 The Claims Procedure resulted in $133.7 million in Affected Unsecured Claims, consisting of the Secured Noteholders Allowed Unsecured Claim of $94.9 million and other unsecured Claims of $38.8 million, being filed against the Company.

15 In addition, ten claims were filed against the Directors and Officers totalling approximately $21 million. Approximately $13 million of these claims were also filed against the Company.

16 Following the commencement of these proceedings, SkyLink Aviation entered into discussions with certain creditors in an effort to consensually resolve the Affected Unsecured Claims and Director/Officer Claims asserted by them. These negotiations, and the settlement agreements ultimately reached with these creditors, resulted in amendments to the original version of the Plan filed on March 8, 2013 (the "Original Plan").

**Purpose and Effect of the Plan**

17 In developing the Plan, counsel submits that the Company sought to, among other things: (i) ensure a going-concern result for the SkyLink Business; (ii) minimize any impact on operations; (iii) maximize value for the Company's stakeholders; and (iv) achieve a fair and reasonable balance among its Affected Creditors.

18 The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicant.

19 Unaffected Creditors will not be affected by the Plan (subject to recovery in respect of Insured Claims being limited to the proceeds of applicable Insurance Policies) and will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of the Plan).

20 Equity Claims and Equity Interests will be extinguished under the Plan and any Equity Claimants will not receive any consideration or distributions under the Plan.

21 The Plan provides for the release of a number of parties (the "Released Parties"), including SkyLink Aviation, the Released Directors/Officers, the Released Shareholders, the SkyLink Subsidiaries and the directors and officers of the SkyLink Subsidiaries in respect of Claims relating to SkyLink Aviation, Director/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA proceedings or other related matters. These releases were negotiated as part of the overall framework of compromises in the Plan, and such releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization.

22 The Plan does not release: (i) the right to enforce SkyLink Aviation's obligations under the Plan; (ii) any Released Party from fraud or wilful misconduct; (iii) SkyLink Aviation from any Claim that is not permitted to be released pursuant to Section 19(2) of the CCAA; or (iv) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA. Further, as noted above, the Plan does not release Director/Officer Wages Claims or Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the applicable Insurance Policies.

**Meetings of Creditors**

23 At the Meetings, the resolution to approve the Plan was passed by the required majorities in both classes of creditors. Specifically, the Affected Creditors approved the Plan by the following majorities:

(a) Affected Unsecured Creditors Class:

95.3% in number and 93.6% in value (inclusive of Voting Claims and Disputed Voting Claims);

97.4% in number and 99.9% in value (Voting Claims only); and

(b) Secured Noteholders Class:

97.1% in number and 99.99% in value.

24 Counsel to the Company submits that the results of the vote taken in the Affected Unsecured Creditors Class would not change materially based on the inclusion or exclusion of the Disputed Voting Claims as the required majorities for approval of the Plan under the CCAA would be achieved regardless of whether the Disputed Voting Claims are included in the voting results.

25 Counsel for the Company submits that the Plan provides that the shareholders agreement among the existing shareholders of SkyLink Aviation will be terminated on the Plan Implementation Date. A new shareholders agreement (the "New Shareholders' Agreement"), which is to apply in respect of the holders of the New Common Shares as of the Plan Implementation Date, has been negotiated between and among: (i) the Initial Consenting Noteholders (and each of their independent counsel), who will collectively hold more than 90% of the New Common Shares; and (ii) counsel to the Note Indenture Trustee, who acted as a representative for the interests of the post-Recapitalization minority shareholders.

**Requirements for Approval**

26 The general requirements for court approval of a CCAA plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.

*Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.)).

*Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.), at para 60, leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed (2000), 2001 ABCA 9 (Alta. C.A.), leave to appeal refused [2001] S.C.C.A. No. 60 (S.C.C.).

27 Since the commencement of the CCAA Proceeding, I am satisfied that SkyLink Aviation has complied with the procedural requirements of the CCAA, the Initial Order and all other Orders granted by the Court during the CCAA Proceeding.

28 With respect to the second part of the test I am satisfied that throughout the course of the CCAA Proceeding, SkyLink Aviation has acted in good faith and with due diligence and has complied with the requirements of the CCAA and the Orders of this Honourable Court.

29 Counsel to SkyLink submits that the Plan is fair and reasonable for a number of reasons including:

(a) the Plan represents a compromise among the Applicant and the Affected Creditors resulting from dialogue and negotiations among the Company and its creditors, with the support of the Monitor and its counsel;

(b) the classification of the Company's creditors into two Voting Classes, the Secured Noteholders Class and the Affected Unsecured Creditors Class, was approved by this Court pursuant to the Meetings Order. This classification was not opposed at the hearing to approve the Meetings Order or thereafter at the comeback hearing;

(c) the amount of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range provided for in the Valuation and is supported by the Monitor;

(d) the Affected Creditors voted to approve the Plan at the Meetings;

(e) the Plan is economically feasible;

(f) the Plan provides for the continued operation of the world-wide business of SkyLink with no disruption to customers and provides for an expedient recapitalization of the Company's balance sheet, thereby preserving the goingconcern value of the SkyLink Business;

I accept these submissions and conclude that the Plan is fair and reasonable.

30 In considering the appropriateness of the terms and scope of third party releases, the courts will take into account the particular circumstances of a case and the purpose of the CCAA:

> The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction the release of third parties where the factual circumstances are deemed appropriate for the success of a Plan.
>
> *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List]); affirmed 2008 ONCA 587 (Ont. C.A.) leave to appeal refused (2008), 257 O.A.C. 400 (note) (S.C.C.).

31 Counsel to the Company submits that the third party releases provided under the Plan protect the Released Parties from potential claims relating to the Applicant based on conduct taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan. The Plan does not release any Released Party for fraud or wilful misconduct.

32 Counsel to the Company submits the releases provided in the Plan were negotiated as part of the overall framework of compromises in the Plan, and these releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization and that there is a reasonable connection between the releases contemplated by the Plan and the restructuring to be achieved by the Plan to warrant inclusion of such releases in the Plan.

33 I am satisfied that the releases of the Released Directors/Officers and the Released Shareholders contained in the Plan are appropriate in the circumstances for a number of reasons including:

(a) the releases of the Released Directors/Officers and the Released Shareholders were negotiated as part of the overall framework of compromises in the Plan;

(b) the Released Directors/Officers consist of parties who, in the absence of the Plan releases, would have Claims for indemnification against SkyLink Aviation;

(c) the inclusion of certain parties among the Released Directors/Officers and the Released Shareholders was an essential component of the settlement of several Claims and Director/Officer Claims;

(d) full disclosure of the releases was made to creditors in the Initial Affidavit, the Plan, the Information Statement, the Monitor's Second Report and the Ottens' Affidavit;

(e) the Monitor considers the scope of the releases contained in the Plan to be reasonable in the circumstances.

34 I am satisfied that the Plan represents a compromise that balances the rights and interests of the Company's stakeholders and the releases provided for in the Plan are integral to the framework of compromises in the Plan.

**Sealing the Confidential Appendix**

35 The Applicant also requests that an order to seal the confidential appendix to the Monitor's Third Report (the "Confidential Appendix"), which outlines the Monitor's analysis and conclusions with respect to the amount of the Secured Noteholders Allowed Secured Claim.

36 The Confidential Appendix contains sensitive commercial information, the disclosure of which could be harmful to stakeholders. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.) (WL Can) at para. 53 has been met and the Confidential Appendix should be sealed.

**Extension of Stay Period**

37 The Applicant also requests an extension of the Stay Period until May 31, 2013.

38 I am satisfied that the Company has acted and, is acting, in good faith and with due diligence such that the extension request is justified and is granted.

*Application granted.*

# TAB 10

2020 ONSC 6837
Ontario Superior Court of Justice [Commercial List]

Re Green Relief Inc.

2020 CarswellOnt 19933, 2020 ONSC 6837, 331 A.C.W.S. (3d) 419, 88 C.B.R. (6th) 305

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN RELIEF INC. (the "Applicant")

Koehnen J.

Heard: November 2-3, 2020
Judgment: November 9, 2020
Docket: CV-20-00639217-00CL

Counsel: C. Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell, for Applicant
Peter Osborne, Christopher Yung, for Directors, Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel
Mark Abradjian, for Tony Battaglia in his capacity as shareholder and creditor
David Ward, for 2650064 Ontario Inc.
Alex Henderson, for Susan Basmaji
Gavin Finlayson, for Auxley Cannabis Group Inc. and Kolab Project Inc.
Anton Granic, for himself
Rory McGovern, for Steve LeBlanc
Alan Dick, Adrienne Boudreau, for Thomas Saunders
Steven Weisz, Amanda McInnis, for Lyn Mary Bravo
Brian Duxbury, for Warren Bravo
Robert Kennaley, Joshua W. Winter, for Henry Schilthuis and Mark Lloyd
Danny Nunes, for Monitor

**Related Abridgment Classifications**
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

**Headnote**
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Applicant was company, that had filed for bankruptcy — Company sought order approving transaction for sale of its assets, under Companies' Creditors Arrangement Act (CCAA) — Stakeholders challenged release that approval was to grant in favour of releasees, as condition precedent for sale — Company applied for above-noted relief — Application granted — Whether

release was condition precedent or not, was not barrier to court approval of release — Absence of relevant plan was similarly not barrier to release — Claim being released had little to no chance of success, so that deprivation of cause of action was not major issue — Released parties were necessary to restructuring — Claims released were rationally connected to purpose of plan — Releasees had contributed to efforts, so that company could apply for relief — Release benefitted debtor as well as creditors — Creditors had proper notice of release — All of these factors were in favour of approval of release and transaction — Application judge remained seized of all issues Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 36 (3).
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Applicant was company, that had filed for bankruptcy — Company sought order approving transaction for sale of its assets, under Companies' Creditors Arrangement Act (CCAA) — Stakeholders challenged release that approval was to grant in favour of releasees, as condition precedent for sale — Company applied for above-noted relief — Application granted — Relief was not extended to shareholder, who was not part of negotiation — It was not clear on evidence whether shareholder helped bring about transaction.

**Table of Authorities**

**Cases considered by *Koehnen J.*:**

*Arrangement relatif à Nemaska Lithium inc.* (2020), 2020 CarswellQue 10601, 2020 QCCS 3218 (Que. Bktcy.) — referred to

*BlueStar Battery Systems International Corp., Re* (2000), 2000 CarswellOnt 4837, [2001] G.S.T.C. 2, 10 B.L.R. (3d) 221, 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]) — referred to

*Lydian International Limited (Re)* (2020), 2020 ONSC 4006, 2020 CarswellOnt 9768, 81 C.B.R. (6th) 218 (Ont. S.C.J. [Commercial List]) — considered

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

*Target Canada Co., Re* (2016), 2016 ONSC 316, 2016 CarswellOnt 589, 32 C.B.R. (6th) 48 (Ont. S.C.J.) — referred to

**Statutes considered:**

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

Generally — referred to

s. 5.1(1) [en. 1997, c. 12, s. 122] — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

s. 11 — referred to

s. 36(3) — referred to

***Koehnen J.*:**

1 The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the*Companies'* Creditors Arrangement Act, R.S.C. 1985, c. C-36 , as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.

2 For the reasons set out below, I:

a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.

b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.

c. Decline to extend the benefit of the release to Susan Basmaji.

**I. The Sale Transaction**

3 Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.

4 265 Co. will pay $5,000,000 for the common shares. Approximately $1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will pay Residual Co. up to $7,000,000 as an earn out during the first two fiscal years following closing. The earn out is based on a payment of 25% of annual EBITDA above $5,000,000.

5 Section 36(3) of the CCAA provides that, when deciding whether to authorize a sale of assets, the court should consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the Monitor approved the process leading to the proposed sale;

(c) whether the Monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which creditors were consulted;

(e) the effects of the proposed sale or distribution on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

6 These factors are consistent with the principles set out inRoyal Bank v. Soundair Corp.1991 CanLII 2727(ON CA) at para. 16 for the approval of a sales transaction.

7 I am satisfied that the principles of *Soundair* and the factors set out in section 36 (3) of the CCAA have been met here.

8 The process leading to the Transaction was reasonable in the circumstances. While there was no formal sale and investor solicitation process, the transaction was the culmination of a seven-month long Notice of Intention and CCAA proceeding. The proceeding involved vigorously competing stakeholders and a competitive bidding process between interested purchasers. The competing stakeholder groups had ample opportunity to bring the business to the attention of potential purchasers. I am satisfied that there was ample information available and ample time for stakeholders to participate in the purchase process or bring the purchase to the attention of market players who may be interested in acquiring Green Relief. The Monitor approved the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

9 No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

**II. The Release**

10 The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.

11 There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.

12 The Objectors argue that I should reject the release because:

(i) It was improper to include it as a condition precedent to the Transaction.

(ii) I have no jurisdiction to approve the release.

(iii) The release fails to meet the test set out in case law concerning releases.

(iv) The release is too broad in scope.

***(i) Release as a Condition Precedent***

13 The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.

14 Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

15 That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.

***(ii) Jurisdiction to Grant Release***

16 The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.

17 The Objectors begin their analysis with section 5.1 (1) ofthe CCAA which provides:

> 5.1 (1) **A compromise or arrangement** made in respect of a debtor company **may include** in its terms provision for the **compromise of claims against directors** of the company **that arose before the commencement of proceedings under this Act** and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations (emphasis added).

18 The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to prefiling claims

19 The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.

20 The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.

21 Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put $3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.

22 Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

23 While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

24 The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In largepart I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

25 Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court undersection 11 of the CCAA to make any order that it considers appropriate in the circumstances.

26 At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.*, 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

***(iii) The Test for a Release***

27 In *Lydian International Limited (Re)*, 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

(a) Whether the claims to be released are rationally connected to the purpose of the plan;

(b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.

28 As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

29 In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian*, it warrants separate identification on the facts of the case before me.

30 The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

*The Quality of the Claims being Released*

31 As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.

32 On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.

33 This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.

34 This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

35 The Objectors' primary opposition to the release is based on their desire to bring an action against the current directors, the Company's legal advisors during the CCAA proceedings, the Monitor and its counsel for their conduct during the CCAA proceedings. The Objectors submit that the current Board, the Monitor and their legal counsel misled the court by suggesting that they had a transaction in the offing that would have injected $20,000,000 into Green Relief. The Objectors say that the releasees did insufficient due diligence to determine whether the proposed purchaser in fact had $20,000,000 available.

36 The Objectors submit that the Company has incurred needless professional fees because of the fruitless pursuit of the $20,000,000 transaction and that Green Relief suffered a loss of chance in that it was deprived of the ability to pursue alternative transactions.

37 If anything, the proposed action demonstrates the need for a release. In the overall circumstances of the case, the threat of litigation against the current board, the Company's counsel, the Monitor and its counsel is unfounded and disproportionate. To demonstrate this requires some context and background.

38 At the outset of the proceeding, 265 Co. proposed to extend a $5,000,000 operating loan to Green Relief. The loan provided no money for creditors. The board feared that accepting the loan would inevitably put Green Relief further into debt

and ultimately end up with 265 Co. having ownership of Green Relief without having provided anything for other stakeholders. Mr. Leblanc supported the 265 Co. proposal and urged that I adopt it.

39 The board urged me to allow them to pursue a proposal from another investor, Mr. Vercouteren. The Vercouteren proposal would have injected $20,000,000 into Green Relief. As it turns out, the Vercouteren proposal did not materialize. Initially the court was advised that the Vercouteren proposal was being delayed because of administrative holdups attributable to the Covid 19 pandemic. A few months later it was discovered that the delays were attributable to the fact that the Vercouteren proposal was contingent upon the completion of another transaction in Europe. The nature of that transaction, its status, closing date, likelihood of closing and reason for not closing to date were never revealed.

40 It is fair to say that when I discovered this, I expressed frustration to the Applicant for having failed to disclose the true status of the Vercouteren proposal from the outset. The Applicant assured me that they had done due diligence on Mr. Vercouteren and had been assured by his counsel, a reputable law firm, that he was a person of financial substance with the means to complete a transaction of the sort he had proposed.

41 With the benefit of hindsight one can debate whether the board acted perfectly, their conduct, however, ultimately led to the situation we find ourselves in now which is one that has 265 Co. offering more money to creditors and potentially other stakeholders than its initial proposal did. The proposal I am being asked to approve would see 265 Co. inject $5,000,000 of which $1,500,000 would be for operating purposes and $3,500,000 would be for distribution to creditors. In addition, the 265 Co. proposal contains an earn out of up to an additional $7,000,000 for distribution to creditors. While I agree that it does not offer $20,000,000, the reality is that $20,000,000 was not on the table.

42 Mr. McGovern, on behalf of Mr. Leblanc submits that the fact that the current offer of 265 Co. is superior to the prior offer does not end the analysis because the board and its advisors got that superior offer by engaging in questionable conduct. According to Mr. McGovern, this introduces moral hazard into the equation which is undesirable.

43 On that analysis, if anyone has been damaged by the alleged moral hazard, it is 265 Co. which has been led to improve its previous offers based on allegedly misleading information. However, 265 Co. does not complain. It wishes to close the Transaction.

44 Mr. Dick on behalf of Mr. Saunders and Mr. Kennaley on behalf of Messrs. Schilthuis and Lloyd submit that the Objectors should be able to pursue their loss of chance claim. They argue that there were no other bids for Green Relief because the size of the Vercouteren proposal inhibited others from bidding. While perhaps initially appealing as a basis to speculate about what other bids may have been available, I do not accept the submission for three reasons.

45 First, the Vercouteren proposal did not stop 265 Co. from making its $5,000,000 operating loan proposal. It also did not stop 265 Co. from making a significantly more superior offer later subject to an exit right based on what its due diligence revealed. Anyone who was seriously interested in the business could have made an offer with a due diligence exit right. There is nothing unusual in that type of proposal

46 Second, the founders supported 265 Co.'s initial inferior proposal. Had they truly believed Green Relief was worth $20,000,000, it is unlikely they would have done so. In addition, the founders were ideally placed to find other financial solutions preferable to the one on offer. They did not do so. Even when they learned that the current proposal was conditional on the release, the Objectors did not suggest that the company return to the drawing board to search for another transaction. The Objectors want me to approve the Transaction but with the release removed.

47 Third, no creditor objects to the Transaction. Any hope of a transaction that would offer more funds for creditors, let alone shareholders, than the Transaction does is illusory. At an earlier stage in this proceeding, Mr. Weisz stated that "Green Relief is hopelessly insolvent": see my endorsement of April 20, 2020 at para. 6. At the time, Green Relief was in default of leases, had tax arrears of over $100,000 and was over five months in arrears on a mortgage in favour of Rescom. Hopelessly insolvent companies do not have enough money to pay off creditors, let alone provide value to shareholders. This particular hopelessly insolvent company is a cannabis business. The entire cannabis industry is undergoing a fundamental shakeup. There

is no shortage ofCCAA proceedings involving players in the cannabis industry. The harsh business reality is that creditors, let alone shareholders, will come out short in these restructurings. If anyone stands to gain from a superior offer, it is creditors. Yet no creditor, apart from Ms. Bravo who asserts that she is a creditor, wants to pursue a claim against anyone for their conduct of the CCAA proceeding.

48 In those circumstances, I am satisfied that whatever right of action is being removed by the release is so insubstantial that the court need not be concerned about depriving anyone of a cause of action that has even a remote chance of success. At best, it is a cause of action that is entirely without legal merit but which might have some economic value if a defendant were prepared to settle on the basis of the claim's nuisance value. Permitting unmeritorious claims to proceed so that the founders can try to extract a nuisance value settlement arising from steps that were approved by the court at each stage would amount to legally authorized extortion which I am not inclined to permit.

49 In the circumstances described above, the quality of the claims released would incline me to approve the release.

*Application of the Lydian Factors*

50 *Releasees necessary and essential:* The released parties here were necessary and essential to the restructuring. A CCAA proceeding quite obviously cannot proceed without a Monitor, Monitor's counsel or company counsel. Similarly, a restructuring cannot proceed without the other releasees like directors, officers and employees.

51 *Rational connection between claims released and the purpose of the plan:* The claims released are rationally connected to the purpose of the plan. The object of the release is to diminish indemnity claims by the releasees against Residual Co. and the pool of cash that is being created in its hands to satisfy creditor claims. Given that one purpose of a CCAA proceeding is to maximize creditor recovery, a release which helps do that is rationally connected to the purpose of the plan.

52 *Whether the plan can succeed without the releases* is unknown. The directors have made the releases a condition precedent to the plan. The court should not accept the release simply because it is said to be a condition precedent. In the circumstances of this case, the condition precedent strikes me as more of a strong-arm tactic that courts should resist. I feel myself at liberty to call the directors' bluff and approve the Transaction without the release.

53 Success of the plan without releases should, however, also be assessed with regard to factors other than potential strong-arming by incumbent directors. Here, the pool of assets immediately available for distribution of creditors is approximately $3,500,000. As noted, the releasees may have a claim on those funds to satisfy any indemnity claims arising out of the litigation. Mr. McGovern's announced desire to sue the Monitor, its counsel, the directors and Green Relief's counsel for their conduct during the restructuring may give rise to indemnity claims of a size that would make a significant dent in the cash available for creditors. That diminution would make the plan significantly less successful and, depending on circumstances, could eliminate assets available for creditors.

54 *Did the releasees contribute to the plan:* While there is not yet a plan, the releasees have clearly contributed to get the Company to this stage. The Monitor, its counsel, the directors and Company counsel dedicated time and effort to the CCAA proceedings. Professional advisors contributed further by deferring billing and collection. Messrs. Jha and Battaglia contributed $1,500,000 of their personal funds to provide DIP financing at relatively modest interest rates. Mr. Battaglia contributed $220,000. Dr. Jha initially contributed $500,000 and then increased his contribution to $1,250,000 in June 2020.

55 *Does the release benefit the debtor as well as creditors:* The release benefits the debtor in that it helps facilitate a transaction that will make funds available to creditors. In the absence of the release, the funds available to creditors could be significantly diminished because of indemnity claims by the releasees. Those indemnity claims would include claims for advancement of defence costs. The advancement of defence costs would be claimed in relation to an action that questions the conduct of the releasees during a court supervised and court approved the process. As noted above, the nature of those claims is highly tenuous.

56 *Creditors knowledge of the nature and effect of the release:* All creditors on the service list were served with materials relating to this motion. Creditors were free to attend the hearing, several did. Those creditors who made submissions on the motion supported the release.

57 A consideration of the foregoing *Lydian* factors would also incline me to approve the release. If I balance the right to the Objectors to pursue the releasees for their conduct during the CCAA proceeding against the right of creditors to maximize recovery against the Green Relief estate, there is simply no contest. The creditors with proven claims have legitimate, verified demands against the corporate estate. The Objectors have tenuous claims based on objections to a court supervised process that would in effect amount to a collateral attack on court orders. In those circumstances I am satisfied that the release benefits the debtor and creditors generally.

**Scope of the Releases**

58 Although the scope of the releases is captured by the factor that Lydian describes as whether the releases are fair, reasonable and not overly broad, I consider the scope of the release here in a standalone section because of the prominence given to it during argument.

59 The release is found in paragraph 24 of the proposed order. Its material language provides:

> ...the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicant, legal counsel and advisors of the Applicant, and (ii) the Monitor and its legal counsel (collectively, the "Released Parties") shall be ... released ... from ...all ... claims ...of any nature or kind whatsoever ... based in whole or in part on any act or omission, ... taking place prior to the filing of the Monitor's Certificate and that relate in any manner whatsoever to the Applicant or any of its assets (current or historical), obligations, business or affairs or this CCAA Proceeding, ... provided that nothing in this paragraph shall ... release... any claim: (i) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, (ii) against the former directors and officers of the Applicant for breach of trust arising from acts or omissions occurring before the date of the Initial Order, (iii) that may be made against any applicable insurance policy of the Applicant prior to the date of the Initial Order, or (iv) that may be made against the current directors and officers that would be covered by the Directors' Charge granted pursuant to the Initial Order.

60 While the release appears broad at first blush, a closer reading narrows it scope considerably. The parties being released are by and large parties who provided services to the company during the CCAA process. Given that the incremental steps in the CCAA process were approved by the court and were subject to submission by a wide variety of parties, the release is not, prima facie, unreasonable. In addition, while current directors are also released, the longest-serving of those are Messrs. Jha and Battaglia who became directors on March 7, 2019, approximately one year before the Notice of Intention was filed. The time period for which they are being released outside of the court proceedings is therefore relatively limited. On the motion, no one advanced any basis for a claim against them for pre-Notice of Intention conduct.

61 The release then goes on to carve out certain types of claims that are not being released even as against the limited population of releasees. The carveouts include claims not permitted to be released under section 5.1 (2)of the CCAA and claims that may be made against any applicable insurance policy.

62 Section 5.1 (2) of the CCAA prohibits releases for, among other things, "wrongful or oppressive conduct by directors." Just what that means was the subject of much argument on the motion.

63 On behalf of Green Relief, Mr. Thornton submitted that the carveout for "wrongful or oppressive conduct" is broad and would include negligence claims. In other words, in the Company's view, negligence claims are not being released. Mr. Thornton submitted that the language ofsection 5.1 (2) of the CCAA effectively releases the directors from statutory liabilities for which they may be liable because the corporation failed to do something even though that failure is not attributable to any wrongdoing by directors. By way of example, directors' statutory liability for unpaid wages would fall into this category and would be captured by the release.

64 In BlueStar Battery Systems International Corp., Re2000 CanLII 22678 (ON SC) Farley J. said the following about the scope ofsection 5.1 (2) at para 14:

> "However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining "oppressive conduct". Similarly it would appear that "wrongful conduct" would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal."

65 This passage would appear to support Mr. Thornton's submission.

66 Mr. Osborne, on behalf of the current directors took a narrower view of the meaning of "wrongful or oppressive" conduct and described it as referring to "active but not "passive torts". In Mr. Osborne's submission, the release covers claims in respect of which the corporation can indemnify directors, including negligence, but does not include intentional conduct like fraud.

67 Given the difference of views, some counsel asked me to define specifically what was or was not excluded by section 5.1 (2) while others urged me not to define the scope of the section at this stage.

68 My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.

69 In that regard I would urge a heavy dose of restraint on all parties. There has been no shortage of animosity and litigation between the parties. Temperatures have run high throughout. Before continuing any existing litigation or commencing new litigation, I would urge all parties to consider whether they are proceeding out of anger and frustration, however justified it may be, or are they proceeding on a rational economic basis because there is a cogent basis for a claim that will lead to recovery considerably in excess of the costs of litigating. This is a situation where suing "out of principle" warrants considerable restraint.

70 The release also carves out claims "that may be made against any applicable insurance policy of the Applicant prior to the date of the initial order." I was advised during the motion that the directors were unable to obtain insurance after the Notice of Intention was filed in March 2020 but that the company purchased tail coverage that extended coverage for past conduct of directors. The tail coverage expires on November 26, 2020. That still provides plaintiffs with a period of time to commence an action for which there might be insurance coverage and to which the release might therefore not apply. The tail coverage may for example, cover current and former directors for conduct that arose before the Notice of Intention was filed.

71 To permit such claims to be filed, I am temporarily lifting the stay of proceedings against officers and directors of Green Relief solely for the purpose of initiating claims that would potentially obtain the benefit of the carveouts under the release.

72 Given my preference for interpreting the release in light of actual circumstances rather than in a vacuum and given my temporary lift of the stay of proceedings against officers and directors, there is considerable benefit to the parties and considerable judicial efficiency in having the release interpreted by the same judicial officer who approved it and who had oversight of the CCAA proceedings. I will therefore remain seized of this issue and order that any issue about whether the release applies (including the issue of insurance coverage) will be determined by me.

73 To be clear, if any actions are commenced because of the temporary lift stay, the parties will still have to agree that such actions are carved out of the release by virtue of insurance coverage or I will have to determine that issue. The actions will not proceed and need not be defended until such agreement is reached or until I have determined whether the release applies.

**Relief requested by Susan Basmaji**

74 Susan Basmaji is a shareholder who asks that I extend the coverage of the release to her. Ms. Basmaji says she motivated a large number of other shareholders to cooperate with the Monitor and the Company to support the Transaction. She says that as a result of those efforts, Mr. Leblanc has commenced a defamation action against her.

75 I am not inclined to extend the release to Ms. Basmaji. The release was the product of negotiations between various stakeholders. It is not for the court to rewrite the release and bring other parties into the negotiation. I have extremely limited knowledge of the dispute between Mr. Leblanc and Ms. Basmaji and have no basis for concluding whether Ms. Basmaji was essential to the success of the Transaction as Lydian suggests nor do I have enough information about the defamation action to determine whether Ms. Basmaji should benefit from a release. That that said, it strikes me that the litigation between Mr. Leblanc and Ms. Basmaji a dispute to which the exhortation in paragraph 69 above is particularly relevant.

**Disposition**

76 For the reasons set out above, I

a. approve the Transaction;

b. approve the release;

c. will remain seized of all issues concerning the interpretation of the release and the insurance coverage referred to in it;

d. lift the stay of proceedings solely to permit actions to be brought up to and including November 26, 2020 in order to capture the benefit of insurance coverage referred to in the release;

e. reimpose the stay of proceedings effective at 12:01 AM on November 27, 2020; and

f. decline to extend the benefit of the release to Susan Basmaji.

*Application granted.*

# TAB 11

2015 ONSC 5557
Ontario Superior Court of Justice [Commercial List]

Nelson Education Ltd., Re

2015 CarswellOnt 13576, 2015 ONSC 5557, 258 A.C.W.S. (3d) 465, 29 C.B.R. (6th) 140

# In the Matter of the Companies' Lenders Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Nelson Education Ltd. and Nelson Education Holdings Ltd., Applicants

Newbould J.

Heard: August 13, 27, 2015
Judgment: September 8, 2015
Docket: CV15-10961-00CL

Counsel: Benjamin Zarnett, Jessica Kimmel, Caroline Descours for Applicants
Robert W. Staley, Kevin J. Zych, Sean Zweig for First Lien Agent and the First Lien Steering Committee
John L. Finnigan, D.J. Miller, Kyla E.M. Mahar for Royal Bank of Canada
Orestes Pasparaskis for Monitor

**Related Abridgment Classifications**
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

**Headnote**
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Education publishing company obtained protection under Companies' Creditors Arrangement Act ("CCAA") — Bank was one of 22 first lien lenders, second lien lender and agent for second lien lenders — Credit bid for sale of substantially all assets to newly incorporated entity owned by first ranked secured lenders, if approved, would results in second lien lenders receiving nothing on outstanding loans — Company brought motion for approval of sale; bank brought motion for order that amounts owing to it and portion of consent fee be paid by company prior to sale — Company's motion granted; bank's motion dismissed — Normally, sale process is undertaken after court approves proposed sale methodology with monitor participating in process and reporting to court — While none of this occurred, sale or investment sales process ("SISP") and credit bid sale transaction met requirements of CCAA — SISP was typical and consistent with processes that had been approved by court in many CCAA proceedings — Results of SISP showed that no interested parties could offer price sufficient to repay amounts owing to first lien lenders — Intercreditor agreement governed, and led to conclusion that order in favour of bank as second lien agent was not appropriate as payment would reduce collateral subject to rights of first lien lenders in that collateral.

**Table of Authorities**

**Cases considered by *Newbould J.*:**

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

*Brainhunter Inc., Re* (2009), 2009 CarswellOnt 7627 (Ont. S.C.J. [Commercial List]) — referred to

*Cruden v. Bank of New York* (1992), 957 F.2d 961 (U.S. C.A. 2nd Cir.) — referred to

*Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

*Nortel Networks Corp., Re* (2014), 2014 ONSC 6973, 2014 CarswellOnt 17291, 20 C.B.R. (6th) 171, 17 C.C.P.B. (2nd) 10 (Ont. S.C.J. [Commercial List]) — referred to

*Rainbow v. Swisher* (1988), 72 N.Y.2d 106, 531 N.Y.S. 775, 527 N.E.2d 258 (U.S. N.Y. Ct. App.) — referred to

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

**Statutes considered:**

*Bankruptcy Code*, 11 U.S.C.

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 36(3) — considered

***Newbould J.*:**

1 The applicants Nelson Education Ltd. ("Nelson") and Nelson Education Holdings Ltd. sought and obtained protection under the CCAA on May 12, 2015. They now apply for approval of the sale of substantially all of the assets and business of Nelson to a newly incorporated entity to be owned indirectly by Nelson's first ranked secured lenders (the "first lien lenders") pursuant to a credit bid made by the first lien agent. Nelson also seeks ancillary orders relating to the sale. The effect of the credit bid, if approved, is that the second lien lenders will receive nothing for their outstanding loans.

2 RBC is one of 22 first lien lenders, a second lien lender and agent for the second lien lenders. At the time of its motion to replace the Monitor, RBC did not accept that the proposed sale should be approved. RBC now takes no position on the sale approval motion other than to oppose certain ancillary relief sought by the applicants. RBC also has moved for an order that certain amounts said to be owing to it and their portion of a consent fee should be paid by Nelson prior to the completion of the sale. The applicants and the first lien lenders oppose the relief sought by RBC.

**Nelson business**

3 Nelson is a Canadian education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country.

4 The business and assets of Nelson were acquired by an OMERS entity and certain other funds from the Thomson Corporation in 2007 together with U.S. assets of Thomson for U.S. $7.75 billion, of which US$550 million was attributed to the Canadian business. The purchase was financed with first lien debt of approximately US$311.5 million and second lien debt of approximately US$171.3 million.

5 The maturity date under the first lien credit agreement was July 3, 2014 and the maturity date under the second lien credit agreement was July 3, 2015. Nelson has not paid the principal balances owing under either loan. It paid interest on the first lien credit up to the filing of this CCAA application. It has paid no interest on the second lien credit since April 2014. As of the filing date, Nelson was indebted in the aggregate principal amounts of approximately US$269 million, plus accrued interest, costs and fees, under the first lien credit agreement and approximately US$153 million, plus accrued interest, costs and fees, under the second lien credit agreement.

6 Because these loans are denominated in U.S. dollars, the recent decline in the Canadian dollar against the United States dollar has significantly increased the Canadian dollar balance of the loans. Nelson generates substantially all of its revenue in Canadian dollars and is not hedged against currency fluctuations. Based on an exchange rate of CAD/USD of 1.313, as of August 10, 2015, the Canadian dollar principal balances of the first and second lien loans are $352,873,910 and $201,176,237.

7 According to Mr. Greg Nordal, the CEO of Nelson, the business of Nelson has been affected by a general decline in the education markets over the past few years. Notwithstanding the industry decline over the past few years, Nelson has maintained strong EBITDA over each of the last several years.

**Discussions leading to the sale to the first lien lenders**

8 In March 2013, Nelson engaged Alvarez & Marsal Canada Securities ULC ("A&M"), the Canadian corporate finance arm of Alvarez & Marsal to assist it in reviewing and considering potential strategic alternatives. RBC, the second lien agent also engaged a financial advisor in March 2013 and the first lien steering committee engaged a financial advisor in June 2013. RBC held approximately 85% of the second lien debt.

9 Commencing in April 2013, Nelson and its advisors entered into discussions with stakeholders including the RBC as second lien agent, the first lien steering committee and their advisors. Nelson sought to achieve as its primary objective a consensual transaction that would be supported by all of the first lien lenders and second lien lenders. These discussions took place until September 2014. No agreement with the first lien lenders and second lien lenders was reached.

10 In April 2014, Nelson and the second lien lenders agreed to two extensions of the cure period under the second lien credit agreement in respect of the second lien interest payment due on March 31, 2014, to May 30, 2014. In connection with these extensions, Nelson made a partial payment of US$350,000 in respect of the March interest payment and paid certain professional fees of the second lien lenders. Nelson requested a further extension of the second lien cure period beyond May 30, 2014, but the second lien lenders did not agree. Thereafter, Nelson defaulted under the second lien credit agreement and failed to make further interest payments to the second lien lenders.

11 The first lien credit agreement matured on July 3, 2014. On July 7, 2014, Nelson proposed an amendment and extension of that agreement and solicited consent from its first lien lenders. RBC, as one of the first lien lenders was prepared to consent to the Nelson proposal, being a consent and support agreement, but no agreement was reached with the other first lien lenders and it did not proceed.

12 In September, 2014, Nelson proposed in a term sheet to the first lien lenders a transaction framework for a sale or restructuring of the business on the terms set out in a term sheet dated September 10, 2014 and sought their support. In connection with the first lien term sheet, Nelson entered into a first lien support agreement with first lien lenders representing approximately 88% of the principal amounts outstanding under the first lien credit agreement. The consenting first lien lenders comprised 21 of the 22 first lien lenders, the only first lien lender not consenting being RBC. Consent fees of approximately US$12 million have been paid to the consenting first lien lenders.

13 The first lien term sheet provided that Nelson would conduct a comprehensive and open sale or investment sales process (SISP) to attempt to identify one or more potential purchasers of, or investors in, the Nelson business on terms that would provide for net sale or investment proceeds sufficient to pay in full all obligations under the first lien credit agreement or that was otherwise acceptable to first lien lenders holding at least 66 2/3% of the outstanding obligations under the first lien credit agreement. If such a superior offer was not identified pursuant to the SISP, the first lien lenders would become the purchaser and purchase substantially all of the assets of Nelson in exchange for the conversion by all of the first lien lenders of all of the debt owing to them under the first lien credit agreement into a new first lien term facility and for common shares of the purchaser.

14 In September 2014, the company engaged A&M to assist with the SISP. By that time, A&M had been advising the Company for over 17 months and had gained an understanding of the Nelson Business and the educational publishing industry. The SISP was structured as a two-phase process.

15 Phase 1 involved (i) contacting 168 potential purchasers, including both financial and strategic parties located in Canada, the United States and Europe, and 11 potential lenders to ascertain their potential interest in a transaction, (ii) initial due diligence and (iii) receipt by Nelson of non-binding letters of interest ("LOIs"). The SISP provided that interested parties could propose a purchase of the whole or parts of the business or an investment in Nelson.

16 Seven potential purchasers submitted LOIs under phase 1, six of which were offers to purchase substantially all of the Nelson business and one of which was an offer to acquire only the K-12 business. Nelson reviewed the LOIs with the assistance of its advisors, and following consultation with the first lien steering committee and its advisors, invited five of the parties that submitted LOIs to phase 2 of the SISP. Phase 2 of the SISP involved additional due diligence, data room access and management presentations aimed at completion of binding documentation for a superior offer.

17 Three participants submitted non-binding offers by the deadline of December 19, 2014, two of which were for the purchase of substantially all of the Nelson business and one of which was for the acquisition of the K-12 business. All three offers remained subject to further due diligence and reflected values that were significantly below the value of the obligations under the first lien credit agreement.

18 On December 19, 2014, one of the participants advised A&M that it required additional time to complete and submit its offer, which additional time was granted. An offer was subsequently submitted but not ultimately advanced by the bidder.

19 Nelson, with the assistance of its advisors, maintained communications throughout its restructuring efforts with Cengage Learnings, the company that has the U.S. business that was sold by Thomson and which is a key business partner of Nelson. Cengage submitted an expression of interest for the higher education business that, even in combination with the offer received for the K-12 business, was substantially lower than the amount of the first lien debt. In February 2015, Cengage and Nelson terminated discussions about a potential sale transaction.

20 Ultimately, phase 2 of the SISP did not result in a transaction that would generate proceeds sufficient to repay the obligations under the first lien credit agreement in full or would otherwise be supported by the first lien lenders. Accordingly, with the assistance of A&M and its legal advisors, and in consultation with the first lien steering committee, Nelson determined that it should proceed with the sale transaction pursuant to the first lien support agreement.

**Sale transaction**

21 The sale transaction is an asset purchase. It will enable the Nelson business to continue as a going concern. It includes:

(a) the transfer of substantially all of Nelson's assets to a newly incorporated entity to be owned indirectly by the first lien lenders;

(b) the assumption by the purchaser of substantially all of Nelson's trade payables, contractual obligations and employment obligations incurred in the ordinary course and as reflected in its balance sheet, excluding some obligations including the obligations under the second lien credit agreement and an intercompany promissory note of approximately $102.3 million owing by Nelson to Nelson Education Holdings Ltd.;

(c) an offer of employment by the purchaser to all of Nelson's employees; and

(d) a release by the first lien lenders of all of the indebtedness owing under the first lien credit agreement in exchange for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the purchaser, and (ii) the obligations under a new US$200 million first lien term facility to be entered into by the Purchaser.

22 The relief sought by the applicants apart from the approval of the sale transaction involves ancillary relief, including authorizing the distribution from Nelson's cash on hand to the first lien lenders of outstanding fees and interest, effecting mutual releases of parties associated with the sale transaction, and deeming a shareholders' rights agreement to bind all shareholders of the purchaser. This ancillary relief is opposed by RBC.

**Analysis**

***(i) Sale approval***

23 RBC says it takes no position on the sale, although it opposes some of the terms and seeks an order paying the second lien lenders their pre-filing interest and expense claims. Whether RBC is entitled to raise the issues that it has requires a consideration of the intercreditor agreement of July 5, 2007 made between the agents for the first lien lenders and the second lien lenders.

24 Section 6.1(a) of the intercreditor agreement provides that the second lien lenders shall not object to or oppose a sale and of the collateral and shall be deemed to have consented to it if the first lien claimholders have consented to it. It provides:

> The Second Lien Collateral Agent on behalf of the Second Lien Claimholders agrees that it will raise no objection or oppose a sale or other disposition of any Collateral free and clear of its Liens and other claims under Section 363 of the Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) if the First Lien Claimholders have consented to such sale or disposition of such assets and the Second Lien Collateral Agent and each other Second Lien Claimholder will be deemed to have consented under Section 363 of the Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) to any sale supported by the First Lien Claimholders and to have released their Liens in such assets.
>
> (underlining added)

25 Section 6.11 of the intercreditor agreement contained a similar provision. RBC raises the point that for these two sections to be applicable, the first lien claimholders must have consented to the sale, and that the definition of first lien claimholders means that all of the first lien lenders must have consented to the sale. In this case, only 88% of the first lien lenders consented to the sale, the lone holdout being RBC. The definition in the intercreditor agreement of first lien claimholder is as follows:

> "**First Lien Claimholders**" means, at any relevant time, the holders of First Lien Obligations at that time, including the First Lien Collateral Agent, the First Lien Lenders, any other "Secured Party" (as defined in the First Lien Credit Agreement) and the agents under the First Lien Loan Documents.

26 The intercreditor agreement is governed by the New York law and is to be construed and enforced in accordance with that law. The first lien agent filed an opinion of Allan L. Gropper, a former bankruptcy judge in the Southern District of New York and undoubtedly highly qualified to express proper expert opinions regarding the matters in issue. Mr. Gropper did not, however, discuss the principles of interpretation of a commercial contract under New York law, and in the absence of such evidence, I am to take the law of New York so far as contract interpretation is concerned as the same as our law. In any event, New York law regarding the interpretation of a contract would appear to be the same as our law. See *Cruden v. Bank of New York*, 957 F.2d 961 (U.S. C.A. 2nd Cir. 1992) and *Rainbow v. Swisher*, 72 N.Y.2d 106, 531 N.Y.S. 775, 527 N.E.2d 258 (U.S. N.Y. Ct. App. 1988). Mr. Gropper did opine that the sections in question are valid and enforceable in accordance with their terms. [1]

27 The intercreditor agreement, like a lot of complex commercial contracts, appears to have a hodgepodge of terms piled on, or added to, one another, with many definitions and exceptions to exceptions. That is what too often appears to happen when too many lawyers are involved in stirring the broth. It is clear that there are many definitions, including a reference to First Lien Lenders, which is defined to be the Lenders as defined in the First Lien Loan Documents, which is itself a defined term, meaning the First Lien Credit Agreement and the Loan Documents. The provisions of the first lien credit agreement make clear that the Lenders include all those who have lent under that agreement, including obviously RBC.

28 Under section 8.02(d) of the first lien credit agreement, more than 50% of the first lien lenders (the "Required Lenders") may direct the first lien agent to exercise on behalf of the first lien lenders all rights and remedies available to. In this case 88% of the first lien lenders, being all except RBC, directed the first lien agent to credit bid all of the first lien debt. This credit bid was thus made on behalf of all of the first lien lenders, including RBC.

29 While the definition of First Lien Claimholders is expansive and refers to both the First Lien Collateral Agent (the first lien agent) and the First Lien Lenders, suggesting a distinction between the two, once the Required Lenders have caused a credit bid to be made by the First Lien Collateral Agent, RBC in my view is taken to have supported the sale that is contemplated by the credit bid.

30 It follows that RBC is deemed under section 6.11 of the intercreditor agreement to have consented to the sale supported by the first lien claimholders. It is nevertheless required that I determine whether the sale and its terms should be approved. It is also important to note that no sale agreement has been signed and it awaits an order approving the form of Asset Purchase Agreement submitted by Nelson in its motion materials.

31 This is an unusual CCAA case. It involves the acquisition of the Nelson business by its senior secured creditors under a credit bid made after a SISP conducted before any CCAA process and without any prior court approval of the SISP terms. The result of the credit bid in this case will be the continuation of the Nelson business in the hands of the first lien lenders, a business that is generating a substantial EBITDA each year and which has been paying its unsecured creditors in the normal course, but with the extinguishment of the US $153 million plus interest owed to the second lien lenders.

32 Liquidating CCAA proceedings without a plan of arrangement are now a part of the insolvency landscape in Canada, but it is usual that the sale process be undertaken after a court has blessed the proposed sale methodology with a monitor fully participating in the sale process and reporting to the court with its views on the process that was carried out[2] . None of this has occurred in this case. One issue therefore is whether the SISP carried out before credit bid sale that has occurred involving an out of court process can be said to meet the *Soundair*[3] principles and that the credit bid sale meets the requirements of section 36(3) of the CCAA.

33 I have concluded that the SISP and the credit bid sale transaction in this case does meet those requirements, for the reasons that follow.

34 Alvarez & Marsal Canada Inc. was named the Monitor in the Initial Order over the objections of RBC, but shortly afterwards on the come-back motion by RBC, was replaced as Monitor by FTI Consulting Inc. The reasons for this change are contained in my endorsement of June 2, 2015. There was no suggestion of a lack of integrity or competence on the part of A&M or Alvarez & Marsal Canada Inc. In brief, the reason was that A&M had been retained by Nelson in 2013 as a financial advisor in connection with its debt situation, and in September 2014 had been retained to undertake the SISP process that has led to the sale transaction to the first lien lenders. I did not consider it right to put Alvarez & Marsal Canada Inc. in the position of providing independent advice to the Court on the SISP process that its affiliate had conducted, and that it would be fairer to all concerned that a different Monitor be appointed in light of the fact that the validity of the SISP process was going to be front and centre in the application of Nelson to have the sale agreement to the first lien lenders approved. Accordingly FTI was appointed to be the Monitor.

35 FTI did a thorough review of all relevant facts, including interviewing a large number of people involved. In its report to the Court the Monitor expressed the following views:

> (a) The design of the SISP was typical of such marketing processes and was consistent with processes that have been approved by the courts in many CCAA proceedings;
>
> (b) The SISP allowed interested parties adequate opportunity to conduct due diligence, both A&M and management appear to have been responsive to all requests from potentially interested parties and the timelines provided for in the SISP were reasonable in the circumstances;
>
> (c) The activities undertaken by A&M were consistent with the activities that any investment banker or sale advisor engaged to assist in the sale of a business would be expected to undertake;
>
> (d) The selection of A&M as investment banker would not have had a detrimental effect on the SISP or the value of offers;
>
> (e) Both key senior management and A&M were incentivised to achieve the best value available and there was no impediment to doing so;

(f) The SISP was undertaken in a thorough and professional manner;

(g) The results of the SISP clearly demonstrate that none of the interested parties would, or would be likely to, offer a price for the Nelson business that would be sufficient to repay the amounts owing to the first lien lenders under the first lien credit agreement

(h) The SISP was a thorough market test and can be relied on to establish that there is no value beyond the first lien debt.

36 The Monitor expressed the further view that:

(a) There is no realistic prospect that Nelson could obtain a new source of financing sufficient to repay the first lien debt;

(b) An alternative debt restructuring that might create value for the second lien lenders is not a viable alternative at this time;

(c) There is no reasonable prospect of a new sale process generating a transaction at a value in excess of the first lien debt;

(d) It does not appear that there are significant operational improvements reasonably available that would materially improve profitability in the short-term such that the value of the Nelson business would increase to the extent necessary to repay the first lien debt and, accordingly, there is no apparent benefit from delaying the sale of the business.

37 *Soundair* established factors to be considered in an application to approve a sale in a receivership. These factors have widely been considered in such applications in a CCAA proceeding. They are:

(a) whether sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently;

(b) whether the interests of all parties have been considered;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process.

38 These factors are now largely mirrored in section 36(3) of the CCAA that requires a court to consider a number of factors, among other things, in deciding to authorize a sale of a debtor's assets. It is necessary to deal briefly with them.

(a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances. In this case, despite the fact that there was no prior court approval to the SISP, I accept the Monitor's view that the process was reasonable.

(b) Whether the monitor approved the process leading to the proposed sale or disposition. In this case there was no monitor at the time of the SISP. This factor is thus not strictly applicable as it assumes a sale process undertaken in a CCAA proceeding. However, the report of FTI blessing the SISP that took place is an important factor to consider.

(c) Whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy. The Monitor did not make such a statement in its report. However, there is no reason to think that a sale or disposition under a bankruptcy would be more beneficial to the creditors. The creditors negatively affected could not expect to fare better in a bankruptcy.

(d) The extent to which the creditors were consulted. The first lien steering committee was obviously consulted. Before the SISP, RBC, the second lien lenders' agent, was consulted and actively participated in the reconstruction discussions. I take it from the evidence that RBC did not actively participate in the SISP, a decision of its choosing, but was provided some updates.

(e) The effects of the proposed sale or disposition on the creditors and other interested parties. The positive effect is that all ordinary course creditors, employees, suppliers and customers will be protected. The effect on the second lien lenders is to wipe out their security and any chance of their loans being repaid. However, apart from their being deemed to have consented to the sale, it is clear that the second lien lenders have no economic interest in the Nelson assets except as might be the case some years away if Nelson were able to improve its profitability to the point that the second lien lenders could be paid something towards the debt owed to them. RBC puts this time line as perhaps five years and it is clearly conjecture. The first lien lenders however are not obliged to wait in the hopes of some future result. As the senior secured creditor, they have priority over the interests of the second lien lenders.

There are some excluded liabilities and a small amount owing to former terminated employees that will not be paid. As to these the Monitor points out that there is no reasonable prospect of any alternative solution that would provide a recovery for those creditors, all of whom rank subordinate to the first lien lenders.

(f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. The Monitor is of the view that the results of the SISP indicate that the consideration is fair and reasonable in the circumstances and that the SISP can, and should, be relied on for the purposes of such a determination. There is no evidence to the contrary and I accept the view of the Monitor.

39 In the circumstances, taking into account the *Soundair* factors and the matters to be considered in section 36(3) of the CCAA, I am satisfied that the sale transaction should be approved. Whether the ancillary relief should be granted is a separate issue, to which I now turn.

***(ii) Ancillary claimed relief***

*(a) Vesting order*

40 The applicants seek a vesting order vesting all of Nelson's right, title and interest in and to the purchased assets in the purchaser, free and clear of all interests, liens, charges and encumbrances, other than the permitted encumbrances and assumed liabilities contemplated in the Asset Purchase Agreement. It is normal relief given in an asset sale under the CCAA and it is appropriate in this case.

*(b) Payment of amounts to first lien lenders*

41 As a condition to the completion of the transaction, Nelson is to pay all accrued and unpaid interest owing to the first lien lenders and all unpaid professional fees of the first lien agent and the first lien lenders outstanding under the first lien credit agreement. RBC does not oppose this relief.

42 If the cash is not paid out before the closing, it will be an asset of the purchaser as all cash on hand is being acquired by the purchaser. Thus the first lien lenders will have the cash. However, because the applicant is requesting a court ordered release by the first lien lenders of all obligations under the first lien credit agreement, the unpaid professional fees of the first lien agent and the first lien lenders that are outstanding under the first lien credit agreement would no longer be payable after the closing of the transaction. Presumably this is the reason for the payment of these prior to the closing.

43 These amounts are owed under the provisions of the first lien credit agreement and have priority over the interests of the second lien lenders under the intercreditor agreement. However, on June 2, 2015 it was ordered that pending further order, Nelson was prevented from paying any interest or other expenses to the first lien lenders unless the same payments owing to the second lien lenders. Nelson then chose not to make any payments to the first lien lenders. It is in effect now asking for

an order nunc pro tunc permitting the payments to be made. I have some reluctance to make such an order, but in light of no opposition to it and that fact that it is clear from the report of the Monitor that there is no value in the collateral for the second lien lenders, the payment is approved.

*(c) Releases*

44 The applicants request an order that would include a broad release of the parties to the Asset Purchase Agreement as well as well as other persons including the first lien lenders.

45 The Asset Purchase Agreement has not been executed. In accordance with the draft approval and vesting order sought by the applicants, it is to be entered into upon the entry of the approval and vesting order. The release contained in the draft Asset Purchase Agreement in section 5.12 provides that the parties release each other from claims in connection with Nelson, the Nelson business, the Asset Purchase Agreement, the transaction, these proceedings, the first lien support agreement, the supplemental support agreement, the payment and settlement agreement, the first lien credit agreement and the other loan documents or the transactions contemplated by them. Released parties are not released from their other obligations or from claims of fraud. The release also does not deal with the second lien credit agreement or the second lien lenders.

46 The first lien term sheet made a part of the support agreement contained terms and conditions, but it stated that they would not be effective until definitive agreements were made by the applicable parties and until they became effective. One of the terms was that there would be a release "usual and customary for transactions of this nature", including a release by the first lien lenders in connection with "all matters related to the Existing First Lien Credit Agreement, the other Loan Documents and the transactions contemplated herein". RBC was not a party to the support agreement or the first lien term sheet.

47 The release in the Asset Purchase Agreement at section 5.12 provides that "each of the Parties on behalf of itself and its Affiliates does hereby forever release...". "Affiliates" is defined to include "any other Person that directly or indirectly...controls...such Person". The party that is the purchaser is a New Brunswick numbered company that will be owned indirectly by the first lien lenders. What instructions will or have been given by the first lien lenders to the numbered company to sign the Asset Purchase Agreement are not in the record, but I will assume that the First Lien Agent has or will authorize it and that RBC as a first lien lenders has not and will not authorize it.

48 Releases are a feature of approved plans of compromise and arrangement under the CCAA. The conditions for such a release have been laid down in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) at paras. 43 and 70. Third party releases are authorized under the CCAA if there is a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan. In *Metcalfe*, Blair J.A. found compelling that the claims to be released were rationally related to the purpose of the plan and necessary for it and that the parties who were to have claims against them released were contributing in a tangible and realistic way to the plan [4] .

49 While there is no CCAA plan in this case, I see no reason not to consider the principles established in *Metcalfe* when considering a sale such as this under the CCAA, with any necessary modifications due to the fact that it is not a sale pursuant to a plan. The application of those principles dictates in my view that the requested release by the first lien lenders should not be ordered.

50 The beneficiaries of the release by the first lien lenders are providing nothing to the first lien lenders in return for the release. The substance of the support agreement was that Nelson agreed to try to fetch as much as it could through a SISP but that if it could not get enough to satisfy the first lien lenders, it agreed to a credit bid by the first lien lenders. Neither Nelson nor the first lien agent or supplemental first lien agent or any other party gave up anything in return for a release from the first lien lenders. So far as RBC releasing a claim that it may have as a first lien lender against the other first lien lenders, nothing has been provided to RBC by the other first lien lenders in return for such a release. RBC as a first lien lender would be required to give up any claim it might have against the other parties to the release for any matters arising prior to or after the support agreement while receiving nothing in return for its release.

In the circumstances, I decline to approve the release by the first lien lenders requested by the applicants to be included in the approval and vesting order.

*(d) Stockholders and Registration Rights Agreement*

51 The applicants seek to have a Stockholders and Registration Rights Agreement declared effective and binding on all persons entitled to receive common shares of Purchaser Holdco in connection with the transaction as though such persons were signatories to the Stockholders and Registration Rights Agreement.

52 The Stockholders and Registration Rights Agreement is a contract among the purchaser's parent company, Purchaser Holdco, and the holders of Purchaser Holdco's common shares. After implementation of the transaction, the first lien lenders will be the holders of 100% of the shares of Purchaser Holdco. The Stockholders and Registration Rights Agreement was negotiated and agreed to by Purchaser Holdco and the First Lien Steering Committee (all first lien lenders except RBC). The First Lien Steering Committee would like RBC to be bound by the agreement. The evidence of this is in the affidavit of Mr. Nordal, the President and CEO of Nelson, who says that based on discussions with Mr. Chadwick, the First Lien Steering Committee requires that all of the first lien lenders to be bound to the terms of the Stockholders and Registration Rights Agreement. This is of course double hearsay as Mr. Chadwick acts for Nelson and not the First Lien Steering Committee.

The effect of what is being requested is that RBC as a shareholder of Purchaser Holdco would be bound to some shareholder agreement amongst the shareholders of Purchaser Holdco. While the remaining 88% of the shareholders of Purchaser Holdco might want to bind RBC, I see nothing in the record that would justify such a confiscation of such shareholder rights. I agree with RBC that extending the Court's jurisdiction in these CCAA proceedings and exercising it to assist the purchaser's parent company with its corporate governance is not appropriate. The purchaser and its parent company either have the contractual right to bind all first lien lenders to terms as future shareholders, or they do not.

**RBC Motion**

***(a) Second lenders' pre-filing interest and second lien agent's fees***

53 RBC seeks an order that directing Nelson to pay to RBC in its capacity as the second lien agent the second lien interest outstanding at the filing date of CDN$1,316,181.73 and the second lien fees incurred prior to the filing date of US $15,365,998.83.

54 Mr. Zarnett in argument conceded that these amounts are owed under the second lien credit agreement. There are further issues, however, being (i) whether they continue to be owed due to the intercreditor agreement (ii) whether RBC is entitled under the intercreditor agreement to request the payment and (iii) whether RBC is entitled to be paid these under the intercreditor agreement before the first lien lenders are paid in full.

55 There is a distinction between a lien subordination agreement and a payment subordination agreement. Lien subordination is limited to dealings with the collateral over which both groups of lenders hold security. It gives the senior lender a head start with respect to any enforcement actions in respect of the collateral and ensures a priority waterfall from the proceeds of enforcement over collateral. It entitles second lien lenders to receive and retain payments of interest, principal and other amounts in respect of a second lien obligation unless the receipt results from an enforcement step in respect of the collateral. By contrast, payment subordination means that subordinate lenders have also subordinated in favour of the senior lender their right to payment and have agreed to turn over all money received, whether or not derived from the proceeds of the common collateral [5] . The intercreditor agreement is a lien subordination agreement, as stated in section 8.2.

56 Nelson and the first lien agent say that RBC has no right to ask the Court to order any payments to it from the cash on hand prior to the closing of the transaction. They rely on the language of section 3.1(a)(1) that provides that until the discharge of the first lien obligations, the second lien collateral agent will not exercise any rights or remedies with respect to any collateral, institute any action or proceeding with respect to such remedies including any enforcement step under the second lien documents. RBC says it is not asking to enforce its security rights but merely asking that it be paid what it is owed and is permitted to receive under the intercreditor agreement, which does not subordinate payments but only liens. It points to section 3.1(c) that provides that:

> (c) Notwithstanding the foregoing (i.e. section 3.1(a)(1)) the Second Lien Collateral Agent and any Second Lien Claimholder may (1)... and may take such other action as it deems in good faith to be necessary to protect its rights in an insolvency proceeding" and (4) may file any... motions... which assert rights... available to unsecured creditors...arising under any insolvency... proceeding.

57 My view of the intercreditor agreement language and what has occurred is that RBC has not taken enforcement steps with respect to collateral. It has asked that payments owing to it under the second lien credit agreement up to the date of filing be paid.

58 Payment of what the second lien lenders are entitled to under the second lien credit agreement is protected under the intercreditor agreement unless it is as the result of action taken by the second lien lenders to enforce their security. Section 3.1(f) of the intercreditor agreement provides as follows:

> (f) Except as set forth is section 3.1(a) and section 4 to the extent applicable, <u>nothing in this Agreement shall prohibit the receipt by the Second Lien Collateral Agent or any Second Lien Claimholders of the required payments of interest, principal and other amounts owed</u> in respect of the Second Lien Obligations or receipt of payments permitted under the First Lien Loan Documents, including without limitation, under section 7.09(a) of the First Lien Credit Agreement, <u>so long as such receipt is not the direct or indirect result of the exercise by the Second Lien Collateral Agent or any Second Lien Claimholders of rights or remedies as a secured creditor (including set off) or enforcement in contravention of this Agreement.</u> ... (underlining added).

59 Section 3.1(a) prohibits the second lien lenders from exercising any rights or remedies with respect to the collateral before the first liens have been discharged. Section 4 requires any collateral or proceeds thereof received by the first lien collateral agent from a sale of collateral to be first applied to the first lien obligations and requires any payments received by the second lien lenders from collateral in connection with the exercise of any right or remedy in contravention of the agreement must be paid over to the first lien collateral agent.

60 It do not agree with the first lien collateral agent that payment to RBC before the sale closes of amounts owing pre-filing under the second lien credit agreement would be in contravention of section 4.1. That section deals with cash from collateral being received by the first lien collateral agent in connection with a sale of collateral, and provides that it shall be applied to the first lien obligations until those obligations have been discharged. In this case, the cash on hand before any closing will not be received by the first lien collateral agent at all. It will be received after the closing by the purchaser.

61 The first lien collateral agent has made a credit bid on behalf of the first lien lenders. Pursuant to section 3.1(b), that credit bid is deemed to be an exercise of remedies with respect to the collateral held by the first lien lenders. Under the last paragraph of section 3.1(c), until the discharge of the first lien obligations has occurred, the sole right of the second lien collateral agent and the second lien claimholders with respect to the collateral is to hold a lien on the collateral pursuant to the second lien collateral documents and to receive a share of the proceeds thereof, if any, after the discharge of the first lien obligations has occurred. That provision is as follows:

> Without limiting the generality of the foregoing, unless and until the discharge of the First Lien Obligations has occurred, except as expressly provided in Sections 3.1(a), 6.3(b) and this Section 3.1(c), the sole right of the Second Lien Collateral Agent and the Second Lien Claimholders with respect to the Collateral is to hold a Lien of the Collateral pursuant to the

Second Lien Collateral Documents for the period and to the extend granted therein and to receive a share of the proceeds thereof, if any, after the Discharge of First Lien Obligations has occurred.

62 RBC points out that its rights under section 3.1(f) to receive payment of amounts owing to the second lien lenders is not subject to section 3.1(c) at all. It is not suggested by the first lien collateral agent that this is a drafting error, but it strikes me that it may be. The provision at the end of section 3.1(c) is inconsistent with section 3.1(f) as section 3.1(c) is not an exception to section 3.1(f).

63 Both the liens of the first lien lenders and the second lien lenders are over all of the assets of Nelson. Cash is one of those assets. Therefore if payment were now made to RBC from that cash, the cash would be paid to RBC from the collateral for amounts owing under the second lien credit agreement before the obligations to the first lien lenders were discharged. The obligations to the first lien lenders will be discharged when the sale to the purchaser takes place and the first lien obligations are cancelled.

64 There is yet another provision of the intercreditor agreement that must be considered. It appears to say that if a judgment is obtained in favour of a second lien lender after exercising rights as an unsecured creditor, the judgment is to be considered a judgment lien subject to the intercreditor agreement for all purposes. Section 3.1(e) provides:

> (e) Except as otherwise specifically set forth in Sections 3.1(a) and (d), the Second Lien Collateral Agent and the Second Lien Claimholders may exercise rights and remedies as unsecured creditors against the Company or any other Grantor that has guaranteed or granted Liens to secure the Second Lien Obligations in accordance with the terms of the Second Lien Loan Documents and applicable law; provided that in the event that any Second Lien Claimholder becomes a judgment creditor in respect of Collateral as a result of its enforcement of its rights as an unsecured creditor with respect to the Second Lien Obligations, **such judgment Lien** shall be subject to the terms of this Agreement for all purposes (including in relation to the First Lien Obligations) as the other Liens securing the Second Lien Obligations are subject to this Agreement. (Emphasis added).

65 What exactly is meant by a "judgment Lien" is not stated in the intercreditor agreement and is not a defined term. If an order is made in this CCAA proceeding that the pre-filing obligations to the second lien collateral agent are to be paid from the cash on hand that Nelson holds, is that a "judgment Lien" meaning that it cannot be exercised before the first lien obligations are discharged? In this case, as the first lien obligations will be discharged as part of the closing of the transaction, does that mean that once the order is made approving the sale and the transaction closes, the cash on hand will go to the purchaser and the judgment Lien will not be paid? It is not entirely clear. But the section gives some indication that a judgment held as a result of the second lien agent exercising rights as an unsecured creditor cannot be used to attach collateral contrary to the agreement if the first lien obligations have not been discharged.

66 I have been referred to a number of cases in which statements have been made as to the need for the priority of secured creditors to be recognized in CCAA proceedings, particularly when distributions have been ordered. While in this case we are not dealing with a distribution generally to creditors, the principles are well known and undisputed. However, in considering the priorities between the first and second lien holders in this case, the intercreditor agreement is what must govern, even with all of its warts.

67 In this case, the cash on hand held by Nelson is collateral, and subject to the rights of the first lien lenders in that collateral. An order made in favour of RBC as second lien agent would reduce that collateral. The overall tenor of the intercreditor agreement, including section 3.1(e), leads me to the conclusion that such an order in favour of RBC should not be made. I do say, however, that the issue is not at all free from doubt and that no credit should be given to those who drafted and settled the intercreditor agreement as it is far from a model of clarity. I decline to make the order sought by RBC.

68 I should note that RBC has made a claim that that Nelson and the first lien lenders who signed the First Lien Support Agreement acted in bad faith and disregarded the interests of the second lien lenders under the intercreditor agreement. RBC claims that the first lien lenders induced Nelson to breach the second lien credit agreement and that this breach resulted in

damages to the second lien agent in the amounts of US$15,365,998.83 on account of interest and CDN$1,316,181.73 on account of fees. RBC says that these wrongs should be taken into account in considering whether the credit bid should be accepted and that the powers under section 11 of the CCAA should be exercised to order these amounts to be paid to RBC as second lien agent.

69 I decline to do so. No decision on this record could be possibly be made as to whether these wrongs took place. The claim for inducing breach of contract surfaced in the RBC factum filed just two days before the hearing and it would be unfair to Nelson or the first lien lenders to have to respond without the chance to fully contest these issues. Moreover, even the release sought by the applicants would not prevent RBC or any second lien lender from bringing an action for wrongs committed. RBC is able to pursue relief for these alleged wrongs in a separate action.

***(b) Consent fee***

70 The first lien lenders who signed the First Lien Support Agreement were paid a consent fee. That agreement, and particularly the term sheet made a part of it, provided that those first lien lenders who signed the agreement would be paid a consent fee.

71 RBC contends that because the consent fee was calculated for each first lien lender that signed the First Lien Support Agreement on the amount of the loans that any consenting first lien lenders held under the first lien credit agreement, the consent fee was paid on account of the loans and thus because all first lien lenders were to be paid equally on their loans on a pro rata basis, RBC is entitled to be paid its share of the consent fees.

72 Section 2.14 of the first lien credit agreement provides in part, as follows:

> If, other than as expressly provided elsewhere herein, **any Lender shall obtain on account of the Loans made by it**, or the participations in L/C Obligations and Swing Line Loans held by it, **any payment** (whether voluntary, involuntary, through the exercise of any right of setoff, or otherwise) **in excess of its ratable share** (or other share contemplated hereunder) thereof, such Lender shall immediately (a) notify the Administrative Agent of such fact, and (b) purchase from the other Lenders such participations in the Loans made by them and/or such subparticipations in the participations in L/C Obligations or Swing Line Loans held by them, as the case may be, as shall be necessary to cause such purchasing Lender to share the excess payment in respect of such Loans or such participations, as the case may be, pro rata with each of them ... [emphasis added].

73 RBC says that while the section refers to a first lien lender obtaining a payment "on account" of its loan, U.S. authorities under the U.S. Bankruptcy Code have held that the words "on account of" do not mean "in exchange for" but rather mean "because of." As the consent payments are calculated on the amount of the loan of any first lien lender who signed the term sheet, RBC says that they were made because of their loan and thus RBC is entitled to its share of the consent fees that were paid by virtue of section 2.14 of the first lien credit agreement.

74 I do not accept that argument. The consent fees were paid because the consenting first lien lenders signed the First Lien Support Agreement. The fact that their calculation depended on the amount of the loan made by each consenting first lien lender does not mean they were made because of the loan. RBC declined to sign the First Lien Support Agreement and is not entitled to a consent fee.

**Conclusion**

75 An order is to go in accordance with these reasons. As there has been mixed success, there shall be no order as to costs.

*Company's motion granted; bank's motion dismissed.*

Footnotes

1 I do not think that Mr. Gropper's views on what particular sections of the agreement meant is the proper subject of expert opinion on foreign law. Such an expert should confine his evidence to a statement of what the law is and how it applies generally and not

express his opinion on the very facts in issue before the court. See my comments in *Nortel Networks Corp., Re* (2014), 20 C.B.R. (6th) 171 (Ont. S.C.J. [Commercial List]) para. 103.

2 See *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) at paras. 35-40 and *Brainhunter Inc., Re*, [2009] O.J. No. 5207 (Ont. S.C.J. [Commercial List]) at paras. 12-13.

3 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

4 This case does not involve a plan under the CCAA. One of the reasons for this may be that pursuant to section 6.9(b) of the intercreditor agreement, in the event the applicants commence any restructuring proceeding in Canada and put forward a plan, the applicants, the first lien lenders and the second lien lenders agreed that the first lien lenders and the second lien lenders should be classified together in one class. The second lien lenders agreed that they would only vote in favour of a plan if it satisfied one of two conditions, there was no contractual restriction on their ability to vote against a plan.

5 See 65 A.B.A. Bus Law. 809-883 (May 2010).