Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant",** and collectively, the "**Applicants")**

RESPONDING BRIEF OF AUTHORITIES OF U.S. CLASS COUNSEL

(MOTION RETURNABLE AUGUST 17, 2022)

August 13 , 2022

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TO: **THE SERVICE LIST**

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant",** and collectively, the "**Applicants")**

I N D E X

Tab	*Document*
1.	*Nortel Networks Corp, Re*, 2009 CanLII 39492 (Ont. Sup. Ct., Commercial List)
2.	*Harte Gold Corp. (Re)*, 2022 ONSC 653 (Commercial List)
3.	*Mecachrome Canada Inc., Re*, 2009 QCCS 6355

4.	*Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828
5.	*Quest University Canada (Re)*, 2020 BCSC 1883
6.	*Quest University Canada (Re)*, 2020 BCSC 1845
7.	*Boutique Euphoria inc., Re*, 2007 QCCS 7129
8.	*Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, 2014 BCSC 1855
9.	*American Iron v. 1340923 Ontario*, 2018 ONSC 2810 (Commercial List)
10.	Martin P. Rosenthal, "Sales Process Dynamics The Monitor's Perspective", in Janis P. Sarra and Barbara Romaine, eds, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013).
11.	*CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Commercial List)

TAB 1

See para. 49

COURT FILE NO.: 09-CL-7950
DATE: 20090723

2009 CanLII 39492 (ON SC)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

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

APPLICANTS

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

BEFORE: **MORAWETZ J.**

COUNSEL: **Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al**

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF

S. Philpott, for the Former Employees

K. Zych, for Noteholders

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited

A. Kauffman, for Export Development Canada

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM

2009 CanLII 39492 (ON SC)

HEARD & DECIDED: **JUNE 29, 2009**

ENDORSEMENT

INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

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

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

[4] The following are my reasons for granting these orders.

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

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

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

BACKGROUND

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

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

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

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

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

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

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

2009 CanLII 39492 (ON SC)

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

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

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

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

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

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

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

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

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

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

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

2009 CanLII 39492 (ON SC)

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

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

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

ISSUES AND DISCUSSION

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

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

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

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

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

[29] The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. ("ATB Financial").

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

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

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

2009 CanLII 39492 (ON SC)

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

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

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

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

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

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

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

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc*. (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co*. (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

2009 CanLII 39492 (ON SC)

Financial Services Ltd. v. Hardrock Paving Co. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

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

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

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

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

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

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

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the "old company" is not

2009 CanLII 39492 (ON SC)

> feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

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

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

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

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

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

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

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

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

2009 CanLII 39492 (ON SC)

Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"…Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged…

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the <u>means</u> contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary…

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

2009 CanLII 39492 (ON SC)

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

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

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

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

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

(d) is there a better viable alternative?

I accept this submission.

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

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

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

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

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

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

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

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

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

2009 CanLII 39492 (ON SC)

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

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

2009 CanLII 39492 (ON SC)

DISPOSITION

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

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

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

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

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

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

MORAWETZ J.

Heard and Decided: June 29, 2009

Reasons Released: July 23, 2009

2009 CanLII 39492 (ON SC)

TAB 2

See paras 20-21, 38.

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

2022 ONSC 653 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

[2] Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

2022 ONSC 653 (CanLII)

Background

[3] Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.

[4] Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.

[5] It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.

[6] Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated $7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

[7] At the time of its initial application to the court, Harte Gold's assets were valued at $163.8 million. Its liabilities were valued at $166.1 million. On a balance sheet basis, therefore, Heart Gold was insolvent.

[8] Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.

[9] This prefiling strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.

[10] In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.

[11] In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.

[12] The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.

[13] Only one competing bid was received – a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.

[14] This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that

2022 ONSC 653 (CanLII)

the $10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the prefiling cure costs; and, (c) the undertaking to pay an additional cash deposit of US$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

2022 ONSC 653 (CanLII)

[15] In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

- the cancellation of all Harte Gold shares and the issue of new shares to the purchaser

- payment by the purchaser of all secured debt

- payment by the purchaser of virtually all prefiling trade amounts (estimated at $7.5 million but with a $10 million cap) and postfiling trade amounts

- certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contacts and liabilities include a number of agreements involving ongoing or future services in respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction The emplyment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority

- retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and

- releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

[16] I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and postfiling trade amounts, interim financing and the like, totals well over $160 million.

Issues

[17] There are three principal issues:

(1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;

(2) Whether the stay should be extended; and,

(3) Whether the Monitor's mandate should be extended to included additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

[18] Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "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".

[19] Section 36(1) of the CCAA provides:

> 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.

[20] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

> (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.

[21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp,* 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the interests of all parties;
>
> (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:

2022 ONSC 653 (CanLII)

see *Target Canada Co. (Re),* 2015 ONSC 1487*,* at paras. 14-17.

[22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[23] In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:

(a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,

(b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

[24] The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re),* (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found "the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise."

[25] A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.

[26] More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.

[27] In *Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218* at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc,* 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc,* 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

2022 ONSC 653 (CanLII)

2022 ONSC 653 (CanLII)

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

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[28] In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that "the terms 'sell or otherwise dispose of assets outside the ordinary course of business' under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*": *Nemaska* QCCA at para 19.

[29] Similarly, in *Quest University Canada (Re),* 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court's authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on CCAA jurisdiction in *9354-9186 Québec Inc. v. Callidus Capital Corp.,* 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.

[30] In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.

[31] Fitzpatrick J. relied on *Callidus* to the effect that:

- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence". On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only

by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances"

- the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company"

- Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context

- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence

- Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. The supervising judge is best positioned to undertake this inquiry.

[32] The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[33] Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.

[34] The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not "meritorious", also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. "reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings": *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

2022 ONSC 653 (CanLII)

[35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

2022 ONSC 653 (CanLII)

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

[40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

[41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

[42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

[43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

[44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

[45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

2022 ONSC 653 (CanLII)

2022 ONSC 653 (CanLII)

<u>Comparison with Sale in Bankruptcy</u>

[46] The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.

[47] The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.

[48] In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.

[49] Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

<u>Consultation with Creditors</u>

[50] Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately $28 million in respect of its hedge agreements. Silver Lake has claims of approximately $95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.

[51] BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.

[52] While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

[53] The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.

[54] I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

<u>The Effect of the Proposed Sale on Creditors and Other Interested Parties</u>

[55] The proposed transaction affords the following benefits to the creditors and to stakeholders generally:

(a) the retention and payment in full of the claims of almost all creditors of Harte Gold;

(b) continued employment for all except four of the Harte Gold's employees;

(c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and

(d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.

[56] The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.

[57] Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional "compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.

[58] The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).

[59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

2022 ONSC 653 (CanLII)

[60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

[61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

[62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

[63] Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.

[64] Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: *Stelco Inc. (Re),* 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.

[65] Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

2022 ONSC 653 (CanLII)

Fairness of Consideration

[66] Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable.[1]

[67] A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational – both payments being made to bring about the acquisition of the Mine as a going concern.

[68] It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the prefiling strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

[69] The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

[70] As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

[71] The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would

[1] The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

2022 ONSC 653 (CanLII)

have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

[72] It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

[73] The position of the purchaser is, not unreasonably, that it will not both continue to fund ongoing operations and the CCAA process and undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

[74] The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

[75] In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

[76] For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

[77] In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's

2022 ONSC 653 (CanLII)

assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

2022 ONSC 653 (CanLII)

Release

[78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

[79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

[80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

[81] Whether the claims to be released are rationally connected to the purpose of the restructuring: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

[82] Whether the releasees contributed to the restructuring: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

[83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

[84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

[85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

[86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

[87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

[88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

2022 ONSC 653 (CanLII)

[89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

[90] For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

[91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

[92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

[93] I approve the grant of the requested powers to the Monitor.

Conclusion

[94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Penny J.

Date: 2022-02-04

2022 ONSC 653 (CanLII)

TAB 3

See paras. 33, 63, 64

Mecachrome Canada Inc. (In the matter of the plan of compromise or arrangement of) c. Ernst & Young Inc. **2009 QCCS 6355**

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-11-035041-082

DATE : **JULY 16, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:
MECACHROME CANADA INC.
and
MECACHROME MONTRÉAL-NORD INC.
and
MECACHROME TECHNOLOGIES INC.
and
MIRABEL-MECACHROME INC.
Petitioners
and
ERNST & YOUNG INC.
and
SAMSON BÉLAIR DELOITTE & TOUCHE INC.
Co-Monitors

REASONS FOR JUDGMENT
ON MOTION TO APPROVE A PLAN FUNDING AGREEMENT (#59)

THE MOTION AT ISSUE

[1] The Court renders judgment on a Motion to Approve a Plan Funding Agreement. The reasons are delivered in the English language as the Motion, the Exhibits, the Monitor's Report and the Contestation involved are all drafted in that language.

[2] While the Court was ready to render judgment on July 15th, at the request of the parties' Counsel, the delivery of these reasons was postponed for 24 hours in view of their ongoing discussions.

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2009 QCCS 6355 (CanLII)

[3] By their Motion dated July 7, 2009, Mecachrome International Inc. (MII), Mecachrome Canada Inc., Mecachrome Montréal-Nord Inc., Mecachrome Technologies Inc. and Mirabel Mecachrome Inc. (collectively, the Canadian Debtors), ask the Court to issue an order approving a Plan Funding Agreement (the PFA) entered into between MII and FCPR Aerofund, FCPR Aerofund II, the Fonds de solidarité des travailleurs du Québec FTQ (together, the DIP Lenders) and Mecadev SAS, a newly formed entity to remain under the control of the DIP Lenders.

2009 QCCS 6355 (CanLII)

[4] The original PFA at issue, dated July 4, 2009[1], was amended during the second phase of oral arguments, namely on July 14, 2009, and replaced by another one, this time dated July 13, 2009[2].

[5] The Motion is filed pursuant to a restructuring process initiated on December 12, 2008, whereby the Canadian Debtors applied to the Court for the issuance of an initial order under Sections 4, 5 and 11 of the *CCAA*[3].

[6] The goal was to enable the restructuring of their affairs by preparing, negotiating and implementing a plan of arrangement with their creditors. The Canadian Debtors were then - and are still - operating at a deficit and facing serious liquidity problems.

[7] On that same day, the subsidiaries of MII incorporated in France, that is, Mecachrome France SAS and Mecachrome SAS (the French Debtors), also applied for the commencement of a parallel safeguard procedure in France.

THE PFA

[8] The PFA referred to in the Motion sets out the terms and conditions on which the DIP Lenders propose to fund a plan of compromise or arrangement (the Proposed Plan), to be implemented pursuant to the *CCAA* in respect of the Canadian Debtors and their creditors.

[9] In short, the PFA as amended provides for:

a) the execution and implementation of the restructuring transactions agreed upon in the Proposed Plan attached as Schedule A to the PFA;

b) the DIP Lenders to act as sponsors for the funding;

c) MII agreeing to undertake, upon request by the DIP Lenders, a corporate reorganization of the business, operations and assets of the company and its subsidiaries, but only after the vote of the creditors on the Proposed Plan and the sanction order of the Court;

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[1] Exhibit R-1.
[2] Exhibit R-1A.
[3] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

d) the possibility for MII to consider, negotiate and ultimately accept a proposal which is a Superior Proposal, from a financial point of view, to the one provided in the PFA. In such a case, the DIP Lenders have the right to offer to amend the terms of the PFA to match the Superior Proposal within a five-day period. If they elect not to match such Superior Proposal, MII has the right to terminate the PFA, but will be required to pay a break fee;

e) other events giving rise to the right to receive a break fee, including breach of specified covenants and failure of the Board of Directors of MII to recommend approval of the Proposed Plan;

f) MII's obligation to pay to the DIP Lenders all fees and expenses incurred in connection with the DIP loan agreement and the transaction contemplated by the PFA and all transactions related thereto if the Proposed Plan is not approved by the creditors;

g) a number of conditions precedent to closing, including obtaining the required creditors' support and Canadian Court approval, all required appropriate regulatory approvals, consents from certain third parties under the company's contracts, renegotiation of certain agreements, and absence of material adverse change.

2009 QCCS 6355 (CanLII)

[10] Under the PFA and the Proposed Plan, the DIP Lenders will acquire all the shares of MII. In consideration, they undertake to pay to MII, through Mecadev, approximately Euros 55,000,000, of which some Euros 30,000,000 will serve for distribution purposes to the unsecured creditors of the Canadian Debtors. The other Euros 25,000,000 will essentially be used to repay the DIP loan advances, the Bank Syndicate's secured loan, the claims of a specific creditor and the fees and disbursements of the transaction.

[11] For the DIP Lenders, the PFA is equivalent to an acquisition proposal of the business of MII, as the Monitor points out at paragraph 30 of his Fifth Report.

[12] For the unsecured creditors of the Canadian Debtors, the Proposed Plan arising there from would entail a recovery of about 12% of their claims.

THE CONTESTATION

[13] The record shows that MII issued Euros 200,000,000 of senior subordinated notes (the Notes) in May 2006, guaranteed by the Canadian Debtors and the French Debtors.

[14] An Ad Hoc Committee of Holders of the Notes is actively involved in the restructuring process. It represents by far the largest group of unsecured creditors in the *CCAA* proceedings. The members of the Ad Hoc Committee hold approximately 70% of the Notes. The Noteholders are the unsecured creditors who will most significantly have to bear the losses arising from this *CCAA* restructuring.

2009 QCCS 6355 (CanLII)

[15] The Ad Hoc Committee contests the Motion at issue. In a nutshell, they consider that the DIP Lenders:

a) have unilaterally put forward a pre-emptive PFA under which they propose to take ownership of 100% of MII;

b) have sought to do so in the absence of a Court-approved marketing process being conducted to confirm the fairness of the consideration they are offering;

c) rather than inviting negotiations and a fair process, seek to prevent MII from truly negotiating further any other reasonable arrangement;

d) seek a break fee and expense reimbursement despite the absence of a fair process and knowing that their Proposed Plan, as currently drafted, does not have the support of key stakeholders, that is, the Noteholders they represent.

[16] While, so they say, open to achieve a consensual restructuring solution for the Canadian Debtors, the Ad Hoc Committee argues that the DIP Lenders have chosen to unilaterally put forward a PFA and Proposed Plan which do not have their support as key stakeholders and which are premised upon an untested offer.

[17] Their clear and unambiguous intention, reiterated during oral argument, is to veto the Proposed Plan arising from the PFA.

[18] The Canadian Debtors reply that under the special circumstances of this case:

a) time is of the essence and they need to proceed forthwith to a vote by the unsecured creditors on the Proposed Plan;

b) to that end, the PFA remains the best and, indeed, the only available funding arrangement received so far for the presentation of any kind of plan of arrangement to the unsecured creditors;

c) the matter should be put to a vote of the unsecured creditors, in the interest of all stakeholders involved;

d) the Monitor supports the PFA, even more so in its amended format.

[19] Of course, the Monitor and the DIP Lenders support the argument of the Canadian Debtors.

ANALYSIS AND DISCUSSION

[20] For a restructuring process that has started barely six months ago, it is quite unfortunate to see that key stakeholders, such as the DIP Lenders and the Ad Hoc Committee of Noteholders, have chosen to crystallize their respective position and not to pursue more constructive dialogue together.

[21] They both appear to have lost sight of the fact that neither one will be able to achieve any reasonable and acceptable solution to this restructuring without the cooperation of the other.

[22] In his wisdom, the Monitor had warned both of these parties along these lines at paragraph 41 of his Fourth Report of June 26, 2009, apparently to no avail, or at the very least, with not much success. Neither the DIP Lenders nor the Ad Hoc Committee appear to have paid attention to his remarks.

[23] On the one hand, the DIP Lenders' approach of presenting the initial PFA and the Proposed Plan as a "take it or leave it" proposal, not open to discussion or negotiation, certainly appears questionable. Even more so when one now realizes that, faced with the articulated contestation of the Ad Hoc Committee and their line of questions to the Monitor, the DIP Lenders have finally decided to amend their PFA during the second phase of oral arguments, so as to tone down what was said to be irrevocable.

[24] No doubt such change of heart would have been far more beneficial to the whole process if done earlier rather than at the very last minute. Very precious days, if not weeks, have been lost as a result. This does not enhance the credibility of the process adopted towards the conclusion of the PFA.

[25] On the other hand, the Ad Hoc Committee's Contestation seems to forget the high risks involved with their position. They consider that the PFA, even as amended, remains unacceptable. Yet, their Contestation may end up in an absence of any reasonable arrangement and thus, in a liquidation of the Canadian Debtors and an even smaller recovery for the Noteholders compared to the one contemplated in the PFA and the Proposed Plan.

[26] The Ad Hoc Committee does raise legitimate objections, but they do not appear to bring much to the table in terms of concrete or reasonable solution at this stage.

[27] Be that as it may, the parties and their learned Counsel and financial advisors have elected to rely on this Court's judgment to sort out what, in all due respect, they should have solved together through reasonable concessions and compromises.

[28] In so doing, through their respective Motion and Contestation, they ask the Court to decide which of the two (2) conflicting positions should prevail. There is no in-between. Either the Motion is well founded or the Contestation is. The Court cannot change the terms of the PFA at the centre of this debate. This negotiation belongs to the parties, not to the Court.

[29] To rule upon this issue, the Court must exercise the powers given in this respect by the relevant provisions of the *CCAA*. This includes notably the exercise of its judicial discretion and inherent jurisdiction, the whole in furtherance of the objectives of the Act.

2009 QCCS 6355 (CanLII)

[30] As this Court already stated before, the fundamental goal of the *CCAA* is found in its very title, that is an Act to facilitate compromises and arrangements between companies and their creditors. It is aimed at enabling a debtor company, with the support of its creditors, to weather its financial difficulties and continue to operate in the interest of all interveners and society in general.

[31] The manner in which the *CCAA* favours this objective is through the conclusion of a plan of arrangement approved by minimum levels of majority of creditors, in number and in value. Of course, this objective must be reached at the best cost and on the best possible conditions for the creditors who inevitably suffer the consequences.

[32] In the Court's assessment of the situation as it stands today, the probabilities of achieving this fundamental goal of the *CCAA* appears to be better served by refusing to approve the PFA presented rather than by tying the hands of the Canadian Debtors in the manner entailed by such PFA.

[33] In a situation like this one, where the Court is asked to approve and give its blessing to a PFA leading to a Proposed Plan pursuant to which the DIP Lenders will end up acquiring MII, a *CCAA* restructuring requires the Canadian Debtors and the Monitor to satisfy the Court that they have proceeded in a manner where the transparency, integrity, credibility and fairness of the process is beyond reproach.

[34] Notwithstanding the clear efforts of the Canadian Debtors and the Monitor, the Court considers that this not the case here. Too many factors militate against granting the Motion as sought and approving the PFA as it stands, even in its amended format.

[35] In the Court's opinion, the cumulative effect of a) the absence of any legitimate and open process in order to obtain funding proposals beyond those of the DIP Lenders or the Ad Hoc Committee after May 15, 2009, b) the narrow definition of what constitutes a Superior Proposal under the PFA and the lack of flexibility, if any, given to the Board of Directors of MII in qualifying a proposal as a Superior Proposal or in considering or recommending such, and, c) the chilling effect of the rather high break fee contemplated in the PFA, forces the conclusion that the arguments of the Ad Hoc Committee's Contestation must prevail.

[36] To rule otherwise would pay scant respect to the need for a sufficient, transparent and open process before a Court sanctions the potential acquisition of the whole business in the context of a *CCAA* restructuring.

[37] As well, to allow the process contemplated by the PFA to move forward with no additional amendments will somehow usurp the key exercise of the right to vote belonging to the creditors under the *CCAA*. The Court is of the view that, as it stands now, the PFA unnecessarily ties up the hands of the Canadian Debtors with respect to the consideration of potentially available alternate solutions that, in the end, could benefit the affected creditors.

2009 QCCS 6355 (CanLII)

2009 QCCS 6355 (CanLII)

[38] This is wrong and should not be condoned lightly. Some explanations are called for.

[39] First, the Court agrees that the evidence does not establish that a proper maximizing value process has been undertaken so as to justify approving the PFA as it stands now.

[40] In fact, short of the DIP Lenders and the Ad Hoc Committee, neither the Canadian Debtors, nor the Monitor or anyone else have apparently interested any other entity in funding an arrangement.

[41] The lack of any steps taken towards that end appears to be linked to the short time frame allegedly available and the exclusivity clause of the DIP financing agreement that was extended to May 15, 2009. In the context of what is equivalent to an acquisition proposal of the business, this is hardly acceptable.

[42] The evidence indicates that as recently as last December 2008, prior to agreeing to a DIP financing arrangement under very difficult circumstances, the Canadian Debtors still canvassed no less 23 potential parties before making a final choice.

[43] While the interest shown then remained very sketchy, as only two (2) proposals were received, the following key changes however took place since that time:

a) a well-organized data room pertaining to the business and its financial information has been set up, after what appears to have been a lot of work by many;

b) there is a new CEO and a new CFO now in charge of the business;

c) significant downsizing of the business has taken place since the beginning of the *CCAA* process;

d) a new business plan has been prepared by MII in May 2009.

[44] In view of this, it is hard to understand why no steps were taken in order to interest any other parties in funding a potential arrangement. The impression given by the evidence offered is that the focus was limited solely to the DIP Lenders and the Ad Hoc Committee, and nothing else. The Monitor's Fifth Report seems to confirm that, apparently, it would have been unworkable to proceed otherwise.

[45] As stated, albeit in a different but still similar context, by the Ontario Court of Appeal in *Soundair*[4], by the Ontario Superior Court of Justice in *Tiger Brand Knitting*[5], by the Alberta Court of Queen's Bench in *Calpine*[6], and by this Court in *Boutiques*

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

5 *Tiger Brand Knitting Co., Re,* (2005), 9 C.B.R. (5th), 315 (Ont. S.C.J. [Commercial List]), leave to appeal refused (2005), 19 C.B.R. (5th) 53 (Ont. C.A.).

6 *Calpine Canada Energy Limited (Companies' Creditors Arrangements Act)*, 2007 ABQB 49.

Euphoria[7], in a process such as this one, there has to be some demonstration by the Canadian Debtors that reasonable attempts have been made to properly canvass the market before approving a PFA that is, in essence, presented to the affected creditors as the best available deal under the circumstances.

[46] To that end, the PFA, which is aimed at acquiring all the shares of MII with a right to match any competing offer and a break fee should a Superior Proposal be accepted, closely resembles a stalking horse bid process with no real canvassing of the market at any point in time, be it prior to its finalization or after its approval.

[47] The inclusion of an exclusivity clause of limited duration in the DIP financing agreement may have given a head start to the DIP Lenders in any acquisition proposal scenario. However, in the Court's opinion, it did not, and could not, have the impact of relieving the Canadian Debtors and the Monitor of their duty and obligations towards all the other stakeholders.

[48] A *CCAA* process does insulate a debtor company from the attacks of its creditors. However, at the same time, the Act places the process under the Court's supervision. This has meaning and consequences. The benefits that the Act gives to a debtor company do not exist without corresponding obligations, particularly in terms of fairness, transparency and openness towards all stakeholders.

[49] The mere fact that, here, these obligations must be met and the results achieved, and rightly so, within a very tight time frame does not entail that these duties could or should be ignored.

[50] From that standpoint, even though the DIP Lenders have finally decided, at the last hour, to withdraw their exclusivity clause requirements, it remains that the narrow definition of what constitutes a Superior Proposal seriously limits the possibility of even seeing other bidders involved once the PFA is approved. In other words, because of the content of the PFA as it stands now, once it is approved as sought, it appears unlikely that any kind of transparent and open process will follow.

[51] The situation would no doubt have been worse with the exclusivity clause initially included in the PFA. The clause has now been removed. Yet, under the PFA, the conditions precedent to a Superior Proposal being qualified as such and the lack of flexibility of the Board of Directors of MII towards any proposal other than the PFA render quite unlikely the remote possibility of the Canadian Debtors seeing any other proposal once the PFA at issue is approved.

[52] From that perspective, if the PFA is truly the best available funding arrangement under the circumstances, it is difficult to understand why the definition of Superior Proposal had to be so narrowly construed and why the MII Board of Directors' powers of

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[7] *Boutique Euphoria (In the Matter of the Compromise or Arrangement of)*, S.C. Montréal, nº 500-11-030746-073, 2007-07-19, Gascon J.

2009 QCCS 6355 (CanLII)

recommendation so precisely limited, mostly when one sees that the DIP Lenders have the opportunity to match any Superior Proposal within five days.

[53] At present, the terms of the PFA discourage rather than invite the coming forward of other potential bidders.

[54] Contrary to what the Canadian Debtors argued, the issue is not whether the MII Board of Directors will likely consider or not a Superior Proposal received, even though their flexibility is very limited in that regard. The issue is rather whether or not the PFA as drafted does indeed favour any Superior Proposal coming forward because of its narrow and convoluted definition.

[55] Second, while no doubt serious, the alleged urgency and need to proceed quickly to a vote of the unsecured creditors on the Proposed Plan on the basis of the PFA appears to be somewhat qualified. While no less than a few days ago, the PFA was being presented to the Court as a "take it or leave it" proposal, no terms of which could be modified, time has rather shown that even that initial PFA was not yet a fully matured and final proposal.

[56] Faced with strong opposition by the Ad Hoc Committee of the Noteholders, the DIP Lenders first renounced to the rather unrealistic tight time frame they were insisting upon in their initial PFA. Then, they finally withdrew the gist of the exclusivity requirements that the Monitor himself had considered inappropriate for some time, to the knowledge of the DIP Lenders.

[57] Furthermore, faced with the criticism regarding its level, they slightly reduced the amount of their break fee. Finally, they clarified the ambiguities concerning the pre-acquisition proposal clauses and the application of the break fee and fee and expenses clauses.

[58] Considering the position voiced initially by the DIP Lenders, it appears obvious that none of this would have taken place without the benefit of the Contestation of the Ad Hoc Committee. That Contestation was triggered by the Canadian Debtors' Motion and the corresponding need to satisfy the Court as to the reasonability of the PFA conditions, including the integrity and transparency of the process leading to it.

[59] In this respect, the additional delays caused so far by the Contestation have enhanced rather than hurt the process by allowing at the very least some problematic clauses of the PFA to be withdrawn or qualified.

[60] Third, turning to the break fee, the Court agrees with the Ad Hoc Committee's submission that the amount proposed appears disproportionate to the amount that the DIP Lenders are putting on the table for the Canadian Debtors' plan of arrangement.

2009 QCCS 6355 (CanLII)

[61] Under the PFA, the DIP Lenders undertake to pay through Mecadev Euros 55,000,000 to MII. The proposed break fee, as reduced, is Euros 2,500,000, which is about 4.5% of the Euros 55,000,000 offered.

[62] Based on the evidence presented to the Court, this appears excessive. In the chart of break fees attached to the Motion[8], the average break fee, in a merger and acquisition scenario, is about 2.9%. Also, no precedent involving similar break fees in the context of a restructuring process has been offered to the Court.

[63] Finally, according to the evidence, the amount of the break fee is at least twice the amount of real expenses incurred so far by the DIP Lenders under the PFA process. Accordingly, it does include some sort of a risk premium or effort premium of some magnitude.

[64] The burden of showing that the break fee is reasonable rests upon the Canadian Debtors. The evidence in support thereof is sketchy at best. This is not an issue that one should consider lightly in the context of a *CCAA* restructuring supervised by a Court, whereby the unsecured creditors, who are already suffering the consequences of the restructuring as here, end up in reality paying the cost of such break fee.

[65] Fourth, the Court considers that the other arguments that the Canadian Debtors insisted upon are not convincing under the circumstances.

[66] On the one hand, while the approval and support of the Monitor remains an important factor, it is not decisive in and of itself.

[67] Here, the Monitor is faced with nothing else and reasonably fears that the process may be going to a dead end without the PFA. Admittedly, this is not an easy situation. Yet, in the Court's view, it is no reason to close one's eyes towards a process that appears to be submitted as a "*fait accompli*" under the PFA.

[68] On the other hand, the argument voiced often by the Canadian Debtors and the Monitor, to the effect of letting the matter go to a vote on the Proposed Plan by the unsecured creditors, does not answer the problem truly at issue here.

[69] The Court is asked to approve and give its blessing to the PFA. Once the PFA is approved, there is no going back. The creditors will not be in a position to change its terms, if alone, with respect notably to the narrow definition of a Superior Proposal, the lack of flexibility given to the Board of Directors of MII in terms of recommendations, and the applicability of the break fee. Letting the matter go to a vote on the Proposed Plan will not deal with these issues at any point in time.

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[8] Exhibit R-2.

2009 QCCS 6355 (CanLII)

[70] In this regard, the *Stelco* decision[9] relied upon by the Canadian Debtors and the DIP Lenders is of no assistance. In that case, the decision to send the matter to a vote notwithstanding the opposition voiced was reached in a different context.

[71] The process involved had been going on for twenty some months. Prior plans had been presented and had failed. No one had any formal or decisive veto like here. The Court was of the view that the plan was not doomed to fail and that the break fee was reasonable. The process was neither at issue.

[72] In this case, this is not so.

[73] The position voiced by the Ad Hoc Committee suffers no ambiguity. It should not be discarded lightly. No one has suggested that they have any other ulterior motive than to try to obtain the best possible value for their claims within the best available process and through the best efforts.

[74] It is not with happiness that the Court concludes that it cannot approve the PFA as it stands today. No one knows if time or a more open process will lead to a better result. However, this uncertainty is insufficient to approve the process leading to the PFA and the PFA as it stands.

[75] To paraphrase the Ad Hoc Committee's submission, approval of the PFA on the terms proposed would limit the flexibility and optionality of the process at a time when, given that the DIP Lenders' PFA has not been tested and is not supported by key stakeholders, the process does require flexibility, optionality and credibility.

[76] All in all, the Court's assessment of the situation is that there is likely still margin to do better. The behaviour of the DIP Lenders and the amended PFA are silent testimony in support of that assertion.

FOR THESE REASONS GIVEN VERBALLY AND REGISTERED, THE COURT:

[77] **DISMISSES** the Motion;

[78] **COSTS TO FOLLOW**.

CLÉMENT GASCON, J.S.C.

2009 QCCS 6355 (CanLII)

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9 *Stelco Inc., Re,* 2005 CanLII 36272 (ON S.C.); *Stelco Inc., Re,* (2005), 15 C.B.R. (5th) 288, 2005 CanLII 40140 (ON C.A.).

2009 QCCS 6355 (CanLII)

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Dates of hearing: July 14 and July 16, 2009
Reasons transcribed and revised July 28, 2009

TAB 4

See paras. 96-97.

Arrangement relatif à Blackrock Metals Inc. **2022 QCCS 2828**

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-060598-212

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

BY THE HONOURABLE MARIE-ANNE PAQUETTE, Chief Justice

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

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

DELOITTE RESTRUCTURING INC.
Monitor
-and-

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

13482332 CANADA INC.
Shareholder Bidder
-and-

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

2022 QCCS 2828 (CanLII)

2022 QCCS 2828 (CanLII)

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

OVERVIEW 2
1. Procedural background (Court Orders)..4
2. Phases of the SISP..5
3. Tasks performed by the Monitor in accordance with the SISP 5
4. Canada Inc.'s LOI 6
5. Orders sought and conclusions of the Court..6
5.1 The Bid Extension Application 6
5.2 The RVO Application 7
ANALYSIS 7
6. Bid Extension Application 7
6.1 Facts relevant to the issue..7
6.2 Opposing arguments of the parties 8
6.3 Legal principles 10
6.4 Discussion 11
7. RVO Application 14
7.1 Legal Principles 14
7.2 Discussion on criteria to approve an RVO..21
7.3 Discussion on the releases..26
FOR THESE REASONS, THE COURT: 28

OVERVIEW

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

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

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

BlackRock, central to the green materials transition in North America. BlackRock's business plan contemplates a forty-one year project life generating strong returns, with a small-scale mining operation.

[3] As of now, BlackRock has been in the process of raising the necessary capital to start the construction and implementation of Project Volt, which is now being estimated to cost approximately US$1.02 billion. Considering the early stage of its development, no revenues have ever been generated by the project.

[4] BlackRock's only secured creditors are OMF Fund II H Ltd. (**Orion**) and Investissement Québec (**IQ**). On January 18, 2019, BlackRock signed a loan credit agreement with Orion and IQ to supply the necessary working capital required to continue Project Volt. This loan was due and payable on December 1, 2022 and, as of now, Orion and IQ's secured claim amounts to approximately $100M, which constitutes the best part of BlackRock's pre-filing obligations. Orion and IQ also own, respectively, 18% and 12% of BlackRock's shares.

[5] On December 22, BlackRock filed an Application for an Initial Order and other ancillary relief in the present *Companies' Creditors Arrangement Act* (**CCAA**)[2] restructuring proceedings.

[6] On January 7, 2022, the Court issued a two-part order in view of the sale of the assets of BlackRock. Firstly, the Court established the parameters of a sale and investment solicitation process (**SISP**) for the sale of such assets.

[7] Secondly, the Court approved the Agreement of Purchase and Sale signed by Orion and IQ as purchaser (**Stalking Horse Agreement**) and ordered that this agreement be considered as constituting the "Stalking Horse Bid" under the SISP. The agreed purchase price under the Stalking Horse Agreement is to be equal to the fair market value of BlackRock's secured debt towards Orion and IQ (approximately $100M).

[8] Pursuant to the January 7, 2022 orders, Phase 2 Bids under the SISP were to be submitted before May 11, 2022, as will be discussed below.

[9] Two Applications are before the Court in relation to the above:

9.1. Amended Application by the Shareholder Bidder, 13482332 Canada Inc. (**Canada Inc.**) to extend the Phase 2 Bid Deadline (**Bid Extension Application**); and

9.2. BlackRock' Application to approve a vesting order (**RVO application**)

[10] In the Bid Extension Application, Canada Inc. seeks to extend the deadlines provided for in the January 7, 2022 orders, with the view of continuing to canvass the

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

2022 QCCS 2828 (CanLII)

market for financial partners that would allow it to submit a Phase 2 Bid after the Phase 2 Bid deadline.

[11] In the RVO Application, BlackRock seeks an order approving the sale of its assets essentially along the terms of the IQ and Orion's Stalking Horse Agreement (**Proposed Transaction**).

[12] On May 31, 2022, due to time constraints, the Court rejected the Bid Extension Application and granted the RVO Application, with reasons to follow. The reasons are found below.

2022 QCCS 2828 (CanLII)

1. PROCEDURAL BACKGROUND (COURT ORDERS)

[13] On December 22, 2021, BlackRock filed an Application for an Initial Order and other ancillary relief.

[14] On December 23, 2021, the Court issued a First Day Initial Order pursuant to the CCAA and, *inter alia*, appointed Deloitte Restructuring Inc. as the monitor (**Monitor**).

[15] On January 7, 2022, the Court issued an *Amended and Restated Initial Order* and an *Order Approving a Sale and Investment Solicitation Process (SISP) and Approving a Stalking Horse Agreement of Purchase and Sale*.

[16] The January 7, 2022 orders (**Initial Orders**) provided that BlackRock was authorized to borrow from Orion and IQ, as interim lenders, such amounts from time to time as BlackRock may consider necessary or desirable, up to a maximum principal amount of $2M outstanding at any time, to fund the ongoing expenditures of BlackRock and to pay such other amounts as may be permitted (**Interim Facility**). The Court also authorized a corresponding Interim Charge, for a maximum amount of $2.4M, in favor or IQ and Orion.

[17] The Initial Orders also approved a SISP to be conducted in accordance with the approved procedures (**Bidding Procedures**);

17.1. authorized the Monitor and BlackRock to implement the SISP;

17.2. approved the Stalking Horse Agreement, solely for the purposes of:

(i) constituting the "stalking horse bid" under the SISP; and

(ii) approving the Expense Reimbursement (as defined in the Stalking Horse Agreement), and subject to further Order of this Court.

[18] Pursuant to the Initial Orders and at the request of the Intervenors (shareholders), the Court extended the SISP by an additional 30 days beyond what was originally contemplated.

2022 QCCS 2828 (CanLII)

[19] The Stay of proceedings was thereafter extended to June 30, 2022, in accordance with further requests made and in accordance with the debate arising from the two Motions identified above.

2. PHASES OF THE SISP

[20] The objective of the SISP was to solicit interest either (i) in one or more sales or partial sales of all, substantially all, or certain portions of the BlackRock's business; and/or (ii) for an investment in a restructuring, recapitalization, refinancing or other form of reorganization of BlackRock or its business.

[21] The Bidding Procedures provide that a party interested in participating in the SISP must sign and deliver to the Monitor a non-disclosure agreement (**NDA**) and upon doing so, is considered a "**Phase 1 Qualified Bidder**", following which the Monitor will provide to such party a confidential information memorandum (**CIM**) and access to the confidential virtual data room (**VDR**) set up by BlackRock and the Monitor.

[22] The Bidding Procedures further provide that if a Phase 1 Qualified Bidder wishes to submit a bid, it must deliver to the Monitor a non-binding letter of intent (**LOI**) which must conform to certain specified requirements (**Phase 1 Qualified Bid**) no later than 5:00 p.m. on March 9, 2022 (**Phase 1 Bid Deadline**).

[23] Following the Phase 1 Bid Deadline, BlackRock shall determine, in consultation with the Monitor, if an LOI qualifies as a "**Phase 1 Successful Bid**", in which case the bidder is thereafter deemed a "**Phase 2 Qualified Bidder**".

[24] Phase 2 Qualified Bidders shall thereafter submit their Phase 2 Qualified Bid no later than 5:00 p.m. on May 11, 2022, or such other date or time as may be agreed by the Monitor in consultation with BlackRock and with the authorization of Orion and IQ as Stalking Horse Bidders, acting reasonably (**Phase 2 Bid Deadline**).

[25] Also pursuant to the Bidding Procedures, the Stalking Horse Bidders are Phase 2 Qualified Bidders for all purposes under the SISP.

[26] Therefore, Canada Inc. had until May 11, 2022, 5:00 p.m. (Eastern Standard Time) to submit its Phase 2 Qualified Bid (**Phase 2 Bid Deadline**).

3. TASKS PERFORMED BY THE MONITOR IN ACCORDANCE WITH THE SISP

[27] Further to the Initial Orders, the Monitor undertook the following steps to conduct the solicitation process in accordance with the SISP:

a. the Monitor contacted 415 potentially interested parties;

b. 374 potentially interested parties received the Teaser according to email confirmations received by the Monitor;

2022 QCCS 2828 (CanLII)

c. 232 potentially interested parties were contacted directly by the Monitor, in addition to the general distribution that occurred on January 10, 2022;

d. 65 potentially interested parties participated in more serious discussions about the opportunity or confirmed that they were not interested;

e. 7 interested parties executed an NDA and were granted access to the VDR; and,

f. 1 interested party (Shareholder Bidder) submitted a non-binding Letter of Interest (LOI) prior to the Phase 1 Bid Deadline.[3]

4. CANADA INC.'S LOI

[28] Canada Inc. was incorporated on March 8, 2022, as a special purpose vehicle to participate in the SISP and submit a bid.

[29] Canada Inc.'s shares are owned by 3 individuals, Mr. Edward Yu, Mr. Solomon (Sam) Pillersdorf and Mr. Leslie A. Wittlin, who, directly or through corporate entities under their control, own approximately 50% of the outstanding shares of BlackRock. Mr. Yu, Mr. Pillersdorf and Mr. Wittlin also act as directors and officers of the company. Canada Inc.'s representatives submit that they have well established links into the mining industry and, based on same, have assembled a team of experienced advisory professionals in the field.

[30] The Monitor did not receive any other LOI on or before the Phase 1 Bid Deadline. Therefore, Canada Inc.'s non-binding LOI[4] of March 9, 2022 is the only Phase 1 Successful Bid.

[31] In its LOI, Canada Inc. proposes a purchase price for BlackRock's shares that shall be either the sum of $100M or such greater amount as would be required to exceed the minimum purchase price as defined in the Initial Order.

5. ORDERS SOUGHT AND CONCLUSIONS OF THE COURT

5.1 The Bid Extension Application

[32] Canada Inc. argues that its tremendous efforts to submit a bid to the Monitor are on the verge of bearing fruit, albeit slightly past the Bid Deadline. Canada Inc. therefore begs the Court to extend the Phase 2 Bid Deadline (which expired on May 11, 2021) for an extra thirty days after the present judgment.

[33] The Monitor, BlackRock and Orion and IQ object to such extension.

[3] Fifth Report, par. 27.
[4] Exhibits A-2, R-3.

2022 QCCS 2828 (CanLII)

[34] For the reasons below, the Court refused the extension sought.

5.2 The RVO Application

[35] The only pending bid therefore is the one made by Orion and IQ, the Stalking Horse Bidders. With the support of BlackRock and of the Monitor, they beg the Court to approve the drafted agreement.[5]

[36] The **Intervenors**, who own approximately 50% of the shares of BlackRock, object to the structure of the Proposed Transaction, as it would amount to an illegal appropriation of their shares, without their consent. They also object to the granting of a release to Orion and IQ, as contemplated under the Stalking Horse Agreement.

[37] For the reasons below, the Court dismissed the Intervenors' objection and approved the transaction in accordance with the RVO.

ANALYSIS

6. BID EXTENSION APPLICATION

6.1 Facts relevant to the issue

[38] As indicated above, Canada Inc.'s LOI[6] is the only Phase 1 Successful Bid. Therefore, only IQ and Orion (Stalking Horse Bidders) and Canada Inc. (Shareholder Bidder) were permitted to proceed to Phase 2 of the SISP.

[39] More particularly, on March 8-9, 2022, before the Phase 1 Bid Deadline, Canada Inc. was incorporated and delivered to the Monitor a non-binding LOI, which was confirmed as a Phase 1 Successful Bid. Canada Inc. therefore qualified for Phase 2 of the SISP.

[40] To assist in making such a decision, BlackRock and the Monitor requested and received clarifications, particularly with respect to the ability of Canada Inc.'s representatives to fund its bid from their own assets or from third-party financing (**Clarification Letter**)[7], which will be discussed below.[8]

[41] At a later meeting, held on May 9, 2022, Canada Inc. informed the Monitor and BlackRock that despite having initiated, with the help of its own financial advisors, a solicitation process to identify financial partners that would support its bid, it would not be in position to file a qualified bid by the Phase 2 Deadline.

[5] Exhibit R-2.
[6] Exhibits A-2, R-3.
[7] Exhibit R-5.
[8] See par. [68] and following of the present judgment.

2022 QCCS 2828 (CanLII)

[42] Canada Inc. therefore verbally requested that the Phase 2 Bid Deadline be extended for an additional 30 days in order to continue to canvass the market for financing.[9]

[43] The Monitor consulted with BlackRock and requested the position of Orion and IQ, as Stalking Horse Bidders, in accordance with paragraph 21 of the approved Bidding Procedures. They expressed serious concerns but were agreeable to considering an extension of the Phase 2 Bid Deadline, subject to several conditions. These conditions included the financing (subordinate to the DIP and to the approximately $100M of secured debt held by the Orion and IQ) of the costs resulting from the extra 30-day extension (estimated at $500K) and the confirmation that no further extension would be sought in the future.[10]

[44] Canada Inc. replied that it was prepared to advance a first tranche of $200K of a DIP loan within one week of the acceptance date of their request for a SISP extension, and the balance of $300K as needed. Canada Inc. contemplated that this proposed loan totaling $500K was to be made on the same terms and conditions as the existing DIP loan of the Secured Lenders, and was to rank *pari passu* with them in all respects.

[45] The Monitor estimated that it was unlikely that the extension sought would allow Canada Inc. to provide a proper bidding offer at the end of the extension. After further consultation with BlackRock and the Stalking Horse Bidders and with their support, the Monitor denied the extension and informed Canada Inc. accordingly on May 12, 2022.

[46] On May 11, 2022, Canada Inc. filed the present Bid Extension Application.

6.2 Opposing arguments of the parties

[47] Canada Inc. submits that its LOI conforms with the requirements of the Bidding Procedures in that, without limitation, it meets the "Minimum Purchase Price" requirement of providing at closing net cash proceeds that are not less than the aggregate of (a) the amount of cash payable under the Stalking Horse Agreement together with the amount of obligations being credit bid thereunder, (b) the amount of expense reimbursement payable to the Stalking Horse Bidders, plus (c) a minimum overbid amount of $1M.

[48] Canada Inc. also pleads that there is equity for the stakeholders of BlackRock, including the shareholders, based on their knowledge of the company and on recent pre-money valuations performed by third parties which ranged between USD$175M and 350M. In order to assist in designing and financing its final bid, Canada Inc. has retained at its own costs the services of two consultants, FTI Capital Advisors Canada and ERG Securities US.

[9] Exhibit R-6.
[10] Exhibit R-7.

2022 QCCS 2828 (CanLII)

[49] Canada Inc.'s consultants have contacted 156 investors to solicit interest in the opportunity. To date, seven remain highly interested in the opportunity and have executed NDAs and are continuing to perform due diligence on the asset. An additional three have expressed interest and are evaluating the opportunity internally before proceeding to execute an NDA. Investors that have executed NDAs have been added to the VDR and are actively analyzing and reviewing BlackRock's materials. The Consultants have prepared a report on the status of the financing process.[11] For example, Canada Inc. submits a signed non-binding letter of interest signed on May 6, 2022, from a serious investment fund for a USD$65M financing, conditional *inter alia* on a 30-day-due diligence.[12] Canada Inc. further argues that the recent events in Ukraine have improved the outlook of Project Volt and increased the value of its strategic metals.

[50] However, according to Canada Inc., based on the feedback provided to its consultants from investors and given the complexity of this transaction, the condensed timeframe of the SISP is a significant hurdle for investors to perform the necessary due diligence in order to provide a commitment to finance the its Phase 2 Qualified Bid. As such, the Consultants believe that additional time will have a material impact on the likelihood of raising the capital required.

[51] Canada Inc. argues that although it has made significant progress, it needs more time to pursue these various opportunities and finalize the business and financial terms which will form part of the its Phase 2 Qualified Bid.

[52] To that effect, Canada Inc. reminds the Court of its broad discretion under section 11 of the CCAA and points to case law[13] that suggests that the Court would be justified to refuse an asset sale in the presence of impropriety in the sales process.

[53] The Monitor, BlackRock, Orion and IQ and BlackRock's First Nation Partners[14] oppose to such extension of the Phase 2 Bid Deadline.

[54] BlackRock, the Monitor and Orion and IQ argue that such extension would run contrary to the clear rules of the Bidding Procedures and would break the integrity of the SISP, to the prejudice of all potential bidders who made their decisions based on the rules known to all. Moreover, the extension sought would maintain uncertainty for BlackRock for an additional period, with no realistic chance of obtaining a better offer. Also, the extension would increase the costs and the amounts to be advanced by the Orion and IQ as interim lenders while Canada Inc. is not ready to pay for those expenses for the requested additional period.

[11] Exhibit A-3.
[12] Exhibit A-4, filed under seal.
[13] *Royal Bank v. Soundair Corp.*, 1991 CanLII 2727 (Ont. CA); *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S.C.A.); *Bank of Montreal v. Maitland* (1983), 46 C.B.R. (N.S.) 75 (N.S.S.C.).
[14] Exhibit R-11.

2022 QCCS 2828 (CanLII)

6.3 Legal principles

[55] The CCAA primarily seeks to refinance and restructure insolvent companies rather than liquidate them.[15] When selling the assets of the company, one of the objectives is thus naturally to achieve the best possible price for the assets. This usually coincides with finding the best outcome for the company's creditors.

[56] To achieve this goal, the court benefits from a wide discretionary power pursuant to section 11 of the CCAA:

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

[57] The three baseline requirements to meet for an order to be considered "appropriate in the circumstances" are appropriateness, good faith and due diligence.

[58] In addition, the order sought must advance the policy and remedial objectives of the CCAA to qualify as "appropriate" within the meaning of section 11.[16] The overarching remedial objectives pursued by the CCAA include:[17]

1. providing for timely, efficient and impartial resolution of a debtor's insolvency;
2. preserving and maximizing the value of a debtor's assets;
3. ensuring fair and equitable treatment of the claims against a debtor;
4. protecting the public interest; and
5. in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

[59] Hence, although the objective of any sale process is obviously to obtain the best possible price from prospective purchasers, monetary considerations cannot be the only relevant factor when the Court determines if it is appropriate to deviate from a process that has been duly followed by all parties involved.

[15] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 14-15.
[16] *Canada v. Canada North Group Inc.*, 2021 SCC 30, par. 21; *9354-9186 Québec inc v. Callidus Capital Corp*, 2020 SCC 10, par. 48-51.
[17] *9354-9186 Québec inc v. Callidus Capital Corp*, 2020 SCC 10, par. 40.

2022 QCCS 2828 (CanLII)

[60] On the contrary, it is well established that sale processes are important in CCAA proceedings and that modifying same *post facto* every time there is a chance of a better financial outcome could have a negative impact on all the parties involved. Therefore, Courts have often insisted on the importance of preserving the integrity of the sales process. As this court held in *Re Boutiques San Francisco Inc.*:

> [20] Dans le cadre des plans d'arrangement qu'elle autorise, le but de la LACC est, entre autres, de favoriser un processus ordonné et encadré où les paramètres choisis doivent par conséquent avoir un sens. Dans le contexte de cette loi, tout comme par exemple dans celui de la *Loi sur la faillite et l'insolvabilité*, la recherche du meilleur prix possible pour les créanciers ne peut se faire en vase clos, en ignorant la protection nécessaire de l'intégrité et de la crédibilité du processus choisi pour atteindre cet objectif.[18]

[61] The Bidding Procedures, which govern the SISP approved by this Court, are fundamentally important for assessing the Proposed Transaction as well as the arguments of the parties.[19]

6.4 Discussion

[62] The Monitor also explains that efforts have already been made for some years before the beginning of the CCAA proceedings in order to further finance Project Volt. BlackRock, with the assistance of its financial advisors at the time, have conducted a global search since 2015, but, and despite considerable time and effort, have not been able to secure the required funding.

[63] At the inception of the CCAA proceedings, the Court also modified the proposed Bidding Procedures to include a 30 day extension to the "Phase 1 Bid Deadline" based on a request from the Intervenors and their submission that such further time would suffice to ensure a fulsome and fair process. This extension has not led to the desired results.

[64] The Monitor then conducted a thorough solicitation process as part of the Phase 1 of the SISP, as mentioned previously, which culminated in a single LOI submitted by Canada Inc.:

> Based on the various discussions with prospective bidders during Phase 1 of the SISP, it was apparent to the Monitor that the BRM project, which had previously been promoted extensively in the market by BRM and its financial advisors for financing purposes, was already very well known by most of the strategic and industry leaders. This situation likely explains why many potentially interested

[18] *Boutiques San Francisco Inc., Re*, 2004 CanLII 480, par. 20 (QC CS). See also *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064, par. 70 (leave to appeal dismissed, 2015 QCCA 754).

[19] See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 14 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).

parties declined the opportunity without signing an NDA and without performing due diligence of the VDR.[20]

[65] The lack of interest of other bidders in taking part in the Debtor's restructuring has thus been apparent since the very first stages of the SISP process. According to the Monitor, potential players who were contacted either found the opportunity too risky, or not strategic or profitable enough, or did not believe in the feasibility of the technology involved. It remains unlikely that this situation will change in the near future.

[66] Moreover, Canada Inc. was unable to secure financing of its own bid during the extended 60 days of Phase 1 of the SISP and waited all the way until that phase's deadline to execute an NDA and to enter into the process.

[67] In determining that Canada Inc.'s non-binding LOI constituted a Phase 1 Successful Bid, the Monitor relied on Canada Inc.'s reassurance that it had both the ability and the means required to pay the offered purchase price and to raise or contribute further capital resources to BlackRock's business to continue it as a going concern. The LOI went on to state that the net worth of the Bidder's representatives was, collectively, well above the said amount and that "[b]ased on their extensive experience and engagement in the industry", they were "well placed to obtain both direct and/or third party financing in an aggregate amount sufficient both to complete the Transaction and thereafter required to proceed with the Business and lead it to profitability as a going concern."[21]

[68] Canada Inc., in its Clarification Letter of March 14, 2022, refused to provide more details about its representatives' respective worth.[22] Still, it is not in doubt that they have enough assets to finance its bid if needed.

[69] However, Canada Inc. wrote that it was "unable to advise with certainty to what extent [its] three principals […] may contribute to the capital required to fund the transaction contemplated by the non-binding LOI." This issue would "clarify as [its] funding plan finalizes through [its] on-going efforts already well underway." Canada Inc. confirmed that it would "have its financing, to the extent necessary and sufficient for the purpose of the binding LOI, on or before the Phase 2 bid deadline", but added that "some or all" of the funds "may come from external sources", which was subject to further due diligence that could only be performed during Phase 2 of the SISP.

[70] These answers are evasive and, in retrospect, proved to include many loopholes. Still, the Clarification letter was considered and the Monitor nonetheless qualified Canada Inc. for Phase 2.

[71] The Monitor understood that Canada Inc.'s primary focus during Phase 2 of the SISP was to secure financing, through equity or debt, in order to submit a binding offer

[20] Fifth Report, par. 28.
[21] Exhibit A-2.
[22] Exhibit R-5, par. 3.

2022 QCCS 2828 (CanLII)

prior to the Phase 2 Bid Deadline. Indeed, the due diligence performed during that Phase was limited. Only one meeting occurred, at the request of Canada Inc.'s consultants, with BlackRock and the Monitor, to review the assumptions supporting the financial model of BlackRock. Also, all the groups that were granted access spent a relatively short amount time on the VDR reviewing the information available for this kind of project.[23]

[72] At the time of the meeting on May 9, 2022, despite some cursory interest manifested by certain potential capital partners, and except for a non-binding LOI received from a third party for an amount (USD$65M) significantly less than the one required to exceed the Stalking Horse Bid ($100M), Canada Inc. received no other letter of intent or confirmation of interest in writing from a potential capital partner during the SISP.

[73] Critically, Canada Inc. also revealed on May 9, 2022 that none of its representatives actually intended to participate in the financing of an eventual Phase 2 Qualified Bid, should there be such a bid.

[74] The Monitor testified that had he known in due time that the shareholders had no intention to finance the bid using their own personal assets, Canada Inc. would likely not have qualified for Phase 2 of the SISP. This aspect of the LOI was described as a key consideration in the Monitor's decision at the time.

[75] In addition, the failure by Canada Inc. to confirm that it would fund all of the Debtor's costs, including professional costs, during the extended 30-day period, indicates that it is not willing to put "skin in the game" as evidence of its *bona fide* intentions. It appears that Canada Inc. is unwilling to fund the costs of a further delay notwithstanding that any successful bid would necessarily have to cover those costs in order to exceed the value of the Stalking Horse Bid.

[76] The above findings remain, in spite of the letter from VanadiumBank Inc., which Canada Inc. filed the day before the hearing.[24] This letter is presented as a new "financing proposal" in favor of Canada Inc. for up to $125M in support of its bid.

[77] Actually, it appears that VanadiumBank was incorporated only a few weeks before the hearing.[25] Notwithstanding its name, it is not a bank. Its offer to Canada Inc. is not to lend funds out of its own pocket, but rather to arrange a loan facility after seeking and obtaining the required financing from third parties in the market.

[78] In other words, with VanadiumBank's proposal, Canada Inc. is nowhere closer to achieving its financial goals before the proposed extended Phase 2 Bid Deadline. The Court therefore gives no weight to VanadiumBank's letter.

[23] Fifth Report, par. 38-41.
[24] Exhibit A-11.
[25] Exhibit R-14.

2022 QCCS 2828 (CanLII)

[79] It now seems clear that, as it was unable to meet the requirements of the Initial order, Canada Inc. instead decided to launch what could be described as a parallel SISP, which was nowhere authorized and which runs contrary to the letter and spirit of the SISP as ordered by the Court.

2022 QCCS 2828 (CanLII)

[80] Although the Court recognizes Canada Inc. and its representatives' efforts in securing third party financing for their bid, and their belief in the potential of BlackRock's projects to attract new interest as the market evolves, it is time for the SISP to come to an end and for the CCAA proceedings to move forward.

[81] It is advantageous to the stakeholders generally that BlackRock complete the restructuring process as soon as possible in order to, in particular, end the negative narrative surrounding the company, to limit any further uncertainty and risk and facilitate the completion of the financing necessary for Project Volt, if possible.

[82] The SISP provided for a level playing field to all potential bidders. The rules were known to all parties and certain potential bidders might have decided not to participate in the SISP because of its duration (which is often the case in insolvency proceedings). Any modification of the rules after they are set and after all the players have made their choices accordingly should not be taken lightly. In the case at hand, there is no justification whatsoever to such a disruption of the fairness of the process. The overarching remedial objectives of the CCAA are better served by rejecting the Bid Extension Application.

7. RVO APPLICATION

[83] The Court's refusal to further extend the Phase 2 Deadline leaves the Stalking Horse Bid from IQ and Orion as the only Phase 2 Qualified Bid. Pursuant to the RVO Application, the Court shall now turn to the question of whether it should approve the Proposed Transaction as per the terms of his bid and, in particular, BlackRock's restructuration through a reverse vesting order (**RVO**).

7.1 Legal Principles

[84] In assessing the relevant criteria and determining whether the proposed transaction shall be approved, the Court is mindful not to modify the contractual terms that have been duly negotiated between the parties.[26] In this case, it takes the form of a RVO.

[85] RVOs are a fairly new way to achieve the remedial objective of the CCAA: instead of selling the assets of a debtor, a series of transactions will result in i) the purchaser becoming the sole shareholder of a debtor and ii) the unwanted liabilities be vested out

[26] *Mecachrome Canada Inc. (In the matter of the plan of compromise or arrangement of)* c. *Ernst & Young Inc.*, 2009 QCCS 6355, par. 28.

to a separate entity, thereby ensuring that the purchaser will not inherit the unwanted liabilities.[27]

[86] Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure.[28] In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

[87] In addition to section 11, discussed above, section 36 of the CCAA has been interpreted as providing courts with the jurisdiction and the relevant criteria to issue an RVO:

> **36 (1) [Restriction on disposition of business assets]** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> **(2) [Notice to creditors]** A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> **(3) [Factors to be considered]** 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;

[27] Exhibit R-2.

[28] See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 71-79 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999); *Quest University Canada (Re)*, 2020 BCSC 1883, par. 151-172 (leave to appeal dismissed, 2020 BCCA 364); *Clearbeach and Forbes*, 2021 ONSC 5564, par. 24-26; *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 36-39, 77.

2022 QCCS 2828 (CanLII)

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

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

[…]

(6) [Assets may be disposed of free and clear] 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.

[…] [Emphasis added]

[88] This Court approved an RVO in the face of opposition by a creditor in *Arrangement relatif à Nemaska Lithium inc.*[29]. It was held that section 36 should be interpreted broadly and in accordance with the policy and remedial objectives of the CCAA and the wide discretionary power vested to the supervising judge pursuant to section 11. The Court relied in part on the Supreme Court ruling in *9354-9186 Québec inc. v. Callidus Capital Corp.*[30] It added:

[52] La *LACC* donne donc au juge surveillant la flexibilité nécessaire pour rendre les ordonnances «indiquées» afin de faciliter la restructuration d'une compagnie insolvable.

[53] La nature des problèmes économiques contemporains commande que des solutions innovatrices soient envisagées et, si elles permettent que les objectifs fondamentaux de la *LACC* soient atteints, au bénéfice de tous, alors elles doivent être entérinées.

[…]

[71] Le Tribunal est d'avis que les termes «disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires» / «sell or otherwise dispose of assets outside the ordinary course of business» de l'article 36(1) *LACC* permettent un grand éventail d'actes et modes de disposition, incluant, en partie ou en totalité, par voie de «dévolution inversée», une solution innovatrice, à être analysée au cas par cas.

[72] L'article 36(1) *LACC* ne comporte aucune restriction à cet égard.

[29] 2020 QCCS 3218 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).
[30] 2020 CSC 10.

2022 QCCS 2828 (CanLII)

2022 QCCS 2828 (CanLII)

> [73] Sortir des sentiers battus n'est pas contre-indiqué, au contraire, surtout lorsque cela permet de meilleurs résultats.
>
> [74] D'ailleurs, dans l'Affaire *Callidus*, la Cour suprême mentionne ce qui suit quant au pouvoir discrétionnaire général du Tribunal prévu à l'article 11 *LACC* :
>
> > «[…] le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.»
>
> [75] Dans la présente affaire, la solution d'une «dévolution inversée», efficace et rapide, n'affecte pas le résultat final pour les créanciers des Débitrices, au contraire, elle l'améliore.
>
> [76] En effet, le maintien des permis, licences et autorisations existants et des contrats essentiels à l'exploitation des entreprises, et l'utilisation possible des divers attributs fiscaux disponibles, ont facilité l'obtention de concessions de la part des Offrants, et confirmées par le Contrôleur, ce qui devrait permettre qu'une distribution plus importante soit éventuellement effectuée au bénéfice des créanciers des Débitrices.

[89] The Court of Appeal refused leave in that case, while noting that some issues raised by the appeal did "appear to qualify as being significant to the practice of insolvency":

> [36] […] This is particularly the case regarding the issue of the scope of authority of the CCAA supervising judge in the context of an order that is not strictly limited to the "sale or disposition of assets" provided for under section 36 (6) CCAA, which, according to the Applicants, results in an outcome that would normally form part of an arrangement subject to prior approval by the creditors. There is also an issue of principle raised regarding the granting of broad third party releases (that are not limited to the transaction itself), outside the confines of an arrangement and without determining their appropriateness and submitting same to the required vote of creditors.[31]

[90] In *Re Quest University Canada*, the Supreme Court of British Columbia cautioned that in the case of an RVO, "the ability of a CCAA court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the CCAA […]."[32] On the other hand, the Court added that "[t]here is no provision in the CCAA that prohibits an RVO structure. As is usually the case in CCAA matters, the court must ensure that any relief is 'appropriate' in the

[31] *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488 (leave to appeal to SCC dismissed, 2021 CanLII 34999).

[32] *Quest University Canada (Re)*, 2020 BCSC 1883, par. 154 (leave to appeal dismissed, 2020 BCCA 364).

circumstances and that all stakeholders are treated as fairly and reasonably 'as the circumstances permit' […]."[33]

[91] Similarly, the Ontario Superior Court of Justice relied on sections 11 and 36 of the CCAA to issue an RVO in *Clearbeach and Forbes*.[34]

[92] An RVO structure was approved most recently by the same court in *Harte Gold Corp.*[35] Although the Court was unconvinced that such an order could rely entirely on section 36 of the *CCAA*, it concluded that its discretion under section 11 was clearly broad enough to encompass it. Furthermore, the criteria set out at paragraph 36(3) provide an analytical framework that could be applied *mutatis mutandis* to an RVO transaction:

> [36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.
>
> [37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.[36]

[93] It is true that a Canadian appeal court has yet to rule definitively on the legality of an RVO under the CCAA. This being said, and although the contexts might differ, the Court sees no compelling reason why it should set aside its reasoning in *Nemaska Lithium*.

[94] Even if this type of transaction was not contemplated by section 36 of the CCAA, section 11 could clearly step in as a basis for the Court's jurisdiction. The Supreme Court of Canada recently held that the other provisions of the CCAA, dealing with specific orders which the courts can issue, do not restrict the general language and power of section 11.[37]

[33] *Id.*, par. 157, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 14-15.
[34] 2021 ONSC 5564, par. 24.
[35] 2022 ONSC 653.
[36] *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 36-37.
[37] *Canada v. Canada North Group Inc.*, 2021 SCC 30, par. 23. See also *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 70.

2022 QCCS 2828 (CanLII)

2022 QCCS 2828 (CanLII)

[95] The Court agrees with the judge in *Harte Gold Corp* that paragraph 36(3), in any event, lays out a useful analytical framework for the issue at bar. These criteria, which are laid out above, should be applied in conjunction with the factors enumerated in *Royal Bank v. Soundair Corp.*:[38]

95.1. “whether sufficient efforts to get the best price have been made and whether the parties acted providently”;

95.2. “the efficacy and integrity of the process followed”;

95.3. “the interests of the parties”; and

95.4. “whether any unfairness resulted from the process.”[39]

[96] The Court also agrees that an RVO structure should remain the exception and not the rule, and should be approved only in the limited circumstances where it constitutes the appropriate remedy.

[97] Some authorities indeed call for caution. For instance, Professor Janis Sarra recently stressed the importance for courts to provide detailed reasons when approving RVOs.[40] Among other things, Professor Sarra reminds us that this type of order deviates significantly from the usual CCAA framework, which is meant to provide all creditors with an opportunity to be heard in the process:

> […] [T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both secured and unsecured creditors a meaningful voice/vote in the proceedings, as they are the residual claimants to the value of the debtor’s assets during insolvency. […]
>
> […]
>
> The CCAA, particularly in its various amendments over the years, has sought to achieve an appropriate balance between various interests affected by a debtor company’s insolvency. Part I sets out the framework of the statute, well-known to practitioners and Canadian courts. It allows for a compromise or arrangement to be proposed between a debtor company and its secured and unsecured creditors, a meeting of the creditors to vote on the plan, and, if a majority in number representing two-thirds in value of the creditors, or the class of creditors, present and voting either in person or by proxy at the meeting, agree to any plan of compromise or arrangement, the plan may be sanctioned by the court and, if so sanctioned, is

[38] 1991 CanLII 2727 (Ont. CA); *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742, par. 34-35.

[39] See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 50 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999); *Clearbeach and Forbes*, 2021 ONSC 5564, par. 25.

[40] Janis SARRA, “Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions”, 2022 CanLIIDocs 431.

binding. There are specific provisions addressing Crown claims, employees and pensioners, and treatment of equity claims, all designed to balance multiple interests in complex proceedings.

[…]

This statutory framework represents a careful balancing of interests and prejudice, and gives voice and vote to the creditors that are the residual claimants to the value of the debtor company. Many of the provisions are aimed at mitigating the imbalance in power that secured creditors have in insolvency proceedings, at least during the period of negotiations for a plan, with a view to maximizing the value of the assets, preserving going-concern value, and protection of employees and the public interest.

It makes sense, therefore, that in any application to bypass this carefully crafted statutory process, the court consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it. Reasons are important for stakeholders to understand the benefits and prejudice that may accrue to any particular transaction.[41]

[98] As the Supreme Court of British Columbia held in *Quest University*:

[171] I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.[42]

[Emphasis added]

[99] In particular, the following comments made in *Harte Gold Corp* are enlightening:

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the “norm” or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an

[41] *Id.*, p. 4, 26. See ss. 4-6 of the CCAA.

[42] *Quest University Canada (Re)*, 2020 BCSC 1883, par. 171 (leave to appeal dismissed, 2020 BCCA 364).

2022 QCCS 2828 (CanLII)

2022 QCCS 2828 (CanLII)

unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[Emphasis added]

7.2 Discussion on criteria to approve an RVO

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

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

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

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

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

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

2022 QCCS 2828 (CanLII)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2022 QCCS 2828 (CanLII)

2022 QCCS 2828 (CanLII)

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

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

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

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

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

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

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

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

[46] See *supra*, note 28.

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

they would have no economic interest because the purchase price paid would not generate any value for the unsecured creditors (and even less so for the shareholders).

[121] This is consistent with the conclusions of the Ontario Superior Court of Justice in *Harte Gold Corp.*:

> [59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.
>
> [60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.
>
> [61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the Bankruptcy and Insolvency Act or an order made under the Companies Creditors Arrangement Act approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.
>
> [62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.
>
> […]
>
> [64] […] In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed,

2022 QCCS 2828 (CanLII)

> inappropriate to require a vote of the shareholders […]. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.[48]
>
> [Emphasis added]

[122] In particular, paragraphs 61 and 62 of the above excerpt answer the Intervenors' argument about the jurisdiction of the Court to cancel their shares under *the Canada Business Corporations Act*[49] (**CBCA**). The same logic applies with sections 173 and 191 of that statute. The power to cancel and issue shares in the context of an RVO is captures by the possibility for an court order to "change the designation of all or any of [the corporation's] shares, and add, change or remove any rights, privileges, restrictions and conditions […] in respect of all or any of its shares, whether issued or unissued", pursuant to 191(2) and 173(1)(g) of the CBCA.

[123] It should also be noted that the Intervenors' opposition to the RVO structure in particular appears to be new. Canada Inc.'s non-binding LOI had already conceded on March 9, 2022 that its proposed bid could itself "take the form of a reverse vesting order".[50] Ultimately, it seems that the Intervenors are not objecting to the use of an RVO *per se*, but only to the extinguishment of their equity interests, which would occur irrespective of the use of an RVO structure or of a traditional vesting order.

[124] Therefore, the fact that the transaction is structured as an RVO only has benefits and does not prejudice any of the stakeholders. The Court finds that in the specific circumstances of the present case, the proposed RVO is an appropriate arrangement.

7.3 Discussion on the releases

[125] The Proposed Transaction contemplates releases for various parties, including Orion and IQ, from all claims relating to, in particular, BlackRock, its restructuring or the Proposed Transaction.

[126] While the Intervenors do not object to a release being granted to BlackRock directors or to the Monitor, they argue that Orion and IQ's actions constitute an abuse of both their rights as shareholders and of the CCAA process. Thus, the effect of the requested releases in favour of Orion and IQ would be to dismiss the Intervenors' potential claims without the benefit of hearing any evidence allowing for the determination of their potential liability.

[127] For the reasons below, the Court holds that the releases in favor of Orion and IQ will form part of the Proposed Transaction.

[48] *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 59-64.
[49] R.S.C. 1985, c. C-44.
[50] Exhibit A-2.

2022 QCCS 2828 (CanLII)

2022 QCCS 2828 (CanLII)

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

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

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

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

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

c) Whether the plan could succeed without the releases;

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

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

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

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

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

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

[53] 2020 ONSC 4006.

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

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

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

2022 QCCS 2828 (CanLII)

hopefully, secure financing for Project Volt. They are also fair and reasonable in the present circumstances.

[133] The eventual claims for which Orion and IQ should not be released, according to the Intervenors, are based on allegations of abuse related solely to Orion's and IQ's Stalking Horse Bid and their conduct during the SISP.

[134] The Court was sensitive to the shareholders' submissions initially and extended the SISP delays to ensure that the process was as fulsome and fair as possible. Still, and in spite of all the efforts made over the years, IQ and Orion remain the only entities who are ready to take over the development of BlackRock and to further invest in same.

[135] In the process leading to the Bidding Procedures Order, to the refusal of the Bid Extension Application and to the approval of the Proposed Transaction (Reverse RVO), the Court was able to appreciate the context leading up to the final outcome ordered as per the present judgment and also found the Proposed Transaction, as proposed by Orion and IQ, to be fair and reasonable. The Court sees little to no room for a finding of abuse in the events leading to the CCAA proceedings, to the SISP or to the approved transaction.

[136] To the contrary, there is no good reason to leave the door open to the Intervenors' potential claims against Orion and IQ, to BlackRock's detriment.

[137] Therefore, the release provided for in the Proposed Transaction will be granted.

FOR THESE REASONS, THE COURT:

[138] **DECIDES** in accordance with the attached orders.

____
MARIE-ANNE PAQUETTE, Chief Justice

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Me Jonathan Warin
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2022 QCCS 2828 (CanLII)

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Hearing dates: May 30, 31, 2022

2022 QCCS 2828 (CanLII)

TAB 5

See para. 171.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re),* 2020 BCSC 1883

Date: 20201202
Docket: S200586
Registry: Vancouver

2020 BCSC 1883 (CanLII)

In the Matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

\- and -

In the Matter of the *SEA TO SKY UNIVERSITY ACT*, S.B.C. 2002, c. 54

\- and -

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Sale Approval)

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Counsel for Southern Star Developments Ltd.:	P. Reardon K. Strong
Counsel for Vanchorverve Foundation:	C.D. Brousson
Counsel for Dana Hospitality LP:	D.V. Bateman

Counsel for Halladay Education Group:	D. Lawrenson
Counsel for Capilano University:	K. Mak
Counsel for Landrex Ventures Inc.:	J. D. West
Counsel for Quest University Faculty Union:	J. Sanders S. Rogers
Counsel for Bank of Montreal:	K. Davies
Counsel for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training:	A. Welch
Counsel for 1114586 B.C. Ltd.:	K.E. Siddall
Counsel for Association for the Advancement of Scholarship:	L. Hiebert
Place and Date of Hearing:	Vancouver, B.C. November 12-13, 16, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. November 16, 2020
Place and Date of Written Reasons:	Vancouver, B.C. December 2, 2020

2020 BCSC 1883 (CanLII)

2020 BCSC 1883 (CanLII)

INTRODUCTION

[1] On November 3, 2020, the petitioner, Quest University Canada ("Quest"), applied for various orders in these *Companies' Creditors Arrangement Act,* R.S.C. 1985 c. C-36 ("*CCAA*") proceedings. Orders sought by Quest included approval of a sale transaction with Primacorp Ventures Inc. ("Primacorp") and orders necessary to facilitate that transaction, namely allowing Quest to implement a claims process and calling a meeting to consider its plan of arrangement.

[2] On November 3, 2020, I granted the Claims Process Order and a Meeting Order to allow the creditors to consider Quest's plan of arrangement dated November 1, 2020 (the "Plan"). I also approved Quest's agreement to pay Primacorp a Break Up Fee and granted a charge to secure that amount: *Quest University Canada (Re)*, 2020 BCSC 1845.

[3] I adjourned Quest's application for a Transaction Approval and Vesting Order (TAVO) to approve the Primacorp transaction to these hearing dates to allow opposing parties to consider the matter further and prepare necessary materials.

[4] Southern Star Developments Ltd. ("Southern Star") has since formalized its opposition to the granting of the TAVO. Indeed, its opposition has since increased in force because Quest and Primacorp have now changed the relief sought to approve the Primacopr transaction within the context of a "reverse vesting order" ("RVO"), as explained below. Southern Star also now applies for an order prohibiting Quest from disclaiming certain subleases, as is required in order for the Primacorp transaction to proceed.

[5] In the meantime, other parties have joined in opposing the approval of the Primacorp transaction for a variety of reasons, including those advanced by Southern Star in relation to the RVO.

[6] At the conclusion of this hearing, I granted the RVO and dismissed Southern Star's application, with written reasons to follow. These are my reasons for those orders.

2020 BCSC 1883 (CanLII)

BACKGROUND FACTS

[7] This *CCAA* proceeding has been underway for almost ten months, after the granting of the Initial Order on January 16, 2020.

[8] Since that time, the Court has extended the stay of proceedings a number of times, to allow Quest to undertake efforts to find a restructuring solution to its financial difficulties that would allow it to continue its educational endeavours. Many stakeholders have been actively involved in these proceedings, including secured creditors who, collectively, will be owed approximately $30.7 million by the end of December 2020.

[9] I have also approved interim financing to allow Quest to continue its operations while in this proceeding, with that debt now approaching $11 million.

[10] Quest's assets include lands in Squamish, BC, being Lot 1, on which the campus is located (the "Campus Lands"), as well as the surrounding 38 acres (the "Development Lands".) Lot 1 is encumbered by various charges, liens, interests, mortgages and assignments of rent, including a mortgage held by Capilano University ("CapU"). In addition, CapU holds various rights of first refusal, including a right of first refusal to purchase, a right of first refusal to lease and rights of first refusal to acquire the charges of Quest's major secured creditor, Vanchorverve Foundation ("VF") (collectively, the "ROFR").

[11] Quest is also the registered owner of five real property lots (Lots A-E), four of which are the sites of its university residences (on Lots A-D) (collectively, the "Residences").

[12] One of the significant flashpoints in this proceeding has been, and continues to be, in relation to the Residences that Quest leases from Southern Star. After the Residences became vacant in March 2020 following the onset of the COVID-19 pandemic, Quest attempted to defer payment of the substantial lease payments owed to Southern Star. On June 19, 2020, I denied that relief: *Quest University Canada (Re)*, 2020 BCSC 921 (the "Rent Deferral Reasons").

[13] Quest's principal focus in these proceedings has been toward identifying a partner/investor to purchase its land assets and/or identifying an academic partner/investor that would permit Quest to continue as a post-secondary institution.

2020 BCSC 1883 (CanLII)

[14] Since January 2020, Quest's Board of Governors and its Restructuring Committee have been working with a private educational consultant, Halladay Education Group Inc. to find a prospective academic partner. In addition, since March 2020, Quest has been working with Colliers Macaulay Nicolls Inc. to find prospective purchasers for Quest's real property assets.

[15] There is no dispute that the sale and partner search process (SISP) has been extensive, as confirmed by the Monitor. Quest submits, and I accept that its management, the Restructuring Committee, and the Board analyzed all proposals based on a number of factors, including:

a) Creditor recovery from the purchase price or other consideration under the proposal;

b) That the proposal would result in a completed transaction;

c) That the proposal offered allowed for Quest's long-term continuation as a post-secondary academic institution; and

d) That the proposal would lead to the continuation of a school on Quest's lands that aligned with Quest's current vision and academic quality.

[16] The SISP resulted in a number of academic and real estate organizations approaching Quest to express interest in pursuing a transaction. Quest engaged with a number of potential purchasers or partners from Canada, the United States and other countries. Some parties executed Non-Disclosure Agreements (NDAs) and Quest received numerous Letters of Intent (LOIs) and other proposals.

[17] On May 28, 2020, this Court granted an extension of the stay of proceedings. At that time, Quest stated that there was a realistic potential of a transaction with the

party identified as the “Academic Partner”. Unfortunately, that transaction did not proceed.

[18] On August 7, 2020, this Court granted a further extension of the stay of proceedings to December 24, 2020 to allow Quest to continue seeking proposals towards a transaction by that deadline and to allow Quest to offer the fall term to its students. Quest was still in discussions with various interested parties at that time. By then, Quest had received LOIs, including one from Primacorp (identified as “Academic Partner #2) as of July 29, 2020.

[19] Since August 7, 2020, Quest and Primacorp have worked extensively to negotiate the definitive documents toward completing a transaction. On September 16, 2020, Quest and Primacorp executed a Purchase and Sale Agreement (the “Primacorp PSA”).

[20] The Primacorp transaction, as originally presented, provided for:

a) Sufficient funds to pay Quest’s secured creditors’ claims, including claims secured by the *CCAA* charges;

b) Funding for a plan of arrangement to be voted on by Quest’s unsecured creditors;

c) Funds for these insolvency proceedings; and

d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

[21] The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They were complete by October 28, 2020 and included, as defined in the Monitor’s Fourth Report, the Primacorp PSA, the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms included:

2020 BCSC 1883 (CanLII)

a) Primacorp will purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the residence Lands (Lots A-E; four of which involve Southern Star's subleases), chattels and vehicles;

b) Primacorp will lease specific Campus Lands back to Quest under a long-term lease arrangement;

c) Primacorp will provide marketing and recruiting expertise to support Quest as a university;

d) The Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales;

e) Primacorp will fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and $1.35 million under Quest's Plan; and

f) Primacorp will provide Quest with a $20 million secured working capital facility to support its operations.

[22] The Primacorp transaction was subject to a number of significant conditions:

a) Quest's disclaimer of the four Southern Star subleases of the Residences or an agreement with Southern Star. On October 23, 2020, Quest disclaimed those subleases;

b) Court approval of the Primacorp transaction including approval of a Break Up Fee and Break Up Fee Charge to secure Primacorp's costs. On November 3, 2020, I approved the Break Up Fee and granted a charge to secure this amount;

c) Creditor approval of Quest's Plan under the *CCAA*. On November 3, 2020, I granted the Meeting Order to allow Quest to present the Plan, after having completed a claims process under the Claims Process Order, also granted on that date; and

2020 BCSC 1883 (CanLII)

d) Court approval of the Plan under the *CCAA*.

[23] On November 3, 2020, when Quest sought the TAVO (which was adjourned), Quest asserted that the Primacorp transaction was beneficial in many respects. Quest argued that it maximized the value of Quest's assets, offered the greatest benefit to stakeholders, had a high likelihood of completing, provided a recovery for secured and unsecured creditors, and had the highest likelihood that Quest will continue to operate within its current academic model.

[24] The Monitor concurred. In its Fourth Report dated November 2, 2020, the Monitor referred to the fact that there were only two viable proposals, with Primacorp's offer being the superior one. The Monitor's Supplemental and Confidential Report dated November 2, 2020 (the "Confidential Report") is also before the Court, although filed under seal. That Confidential Report referred to four other proposals received by Quest that were "not currently at a stage such that they are capable of being accepted by Quest".

[25] Quest and Primacorp both see the closing of the Primacorp transaction as very time sensitive. Pursuant to agreements with the Interim Lender, Quest was required to enter into a transaction by October 30, 2020 with an anticipated closing of November 30, 2020. The Interim Lender has since agreed to amend that requirement to extend the necessary closing date to December 24, 2020 in accordance with the Primacorp transaction.

[26] In addition to satisfying increasing pressure to repay its secured creditors, Quest seeks to exit these *CCAA* proceedings as soon as possible to allow it to recruit and plan for the upcoming 2021/22 academic year. Finally, there are other more financially driven and critical concerns. The Interim Lender has indicated that it will not fund its loan past December 2020. Without funding of some sort, Quest has no liquidity or financial ability after that time to continue operations.

2020 BCSC 1883 (CanLII)

2020 BCSC 1883 (CanLII)

ISSUES

[27] The paramount issue for consideration is, of course, whether the Court should approve the Primacorp transaction under s. 36 of the *CCAA*. A number of subsidiary issues also emerged at this hearing, as a result of submissions from various stakeholders:

a) Lot E: Southern Star objects to the TAVO (now RVO), as vesting off any interest it may have under an unregistered lease of Lot E;

b) ROFR: CapU objects to the sale to Primacorp, asserting that Quest is ignoring its rights under the ROFR that allows CapU to purchase/lease Quest's lands;

c) Other Offer: Landrex Ventures Inc. ("Landrex"), together with CapU, assert that they should be given further time to finalize their offer for Quest's assets;

d) Disclaimers: Southern Star, supported by its secured creditor, Bank of Montreal (BMO), applies for an order that the subleases of the Residences not be disclaimed by Quest; and

e) RVO: Southern Star and another unsecured creditor, Dana Hospitality LP ("Dana"), object to the TAVO (now RVO), as being inappropriate and unfair in the circumstances and contrary to the spirit of the *CCAA*.

[28] I will address the subsidiary issues in the first instance, before turning to an overall assessment of the Primacorp transaction and whether the Court should approve that transaction.

Lot E

[29] As I described in the Rent Deferral Reasons (at para. 62), Quest, Southern Star and other parties are involved in a complex suite of agreements concerning the Residences that were built some time ago.

[30] Quest is the limited partner in a limited partnership agreement with Southern Star, who is the General Partner (GP). They formed the Southern Star Developments Limited Partnership (the "LP") to build the Residences. Quest, as the owner of Lots A-D, leases those lands under Ground Leases to Southern Star (as the GP of the LP). The ground leases are at a nominal rate. In turn, Southern Star (the GP), as landlord, and Quest, as tenant, entered into Subleases for the Residences, once they were built.

[31] The initial arrangements between Quest and Southern Star anticipated that a fifth student residence would be built on Lot E, the lot adjacent to Lot D.

[32] In September 2017, as part of those arrangements, Quest and Southern Star executed certain Land Title documents (Form C Charges) attaching a Ground Lease and a Sublease with respect to Lot E. When the parties executed the Form C Charges, the Ground Lease was incomplete in many respects; it did not include any legal description because Lot E was created after the execution of the Form C Charges; and, it did not specify the applicable dates of the 99-year term. Finally, the Schedules to the Ground Lease included various documents between Quest, Southern Star and Southern Star's lender intended to be later executed once the Ground Lease, the Sublease and the mortgage were finalized and registered at the Land Title Office.

[33] The parties delivered to Form C Charges to a law firm to be held in escrow pending the commencement of construction of the Lot E residence. Only recently, in response to this application, did a lawyer of the law firm complete the legal description for Lot E. Quest authorized this addition some time ago and I do not consider that matter as determinative of Southern Star's rights, if any, under the Lot E Ground Lease.

[34] At present, Quest's title to Lot E remains clear of any registration relating to Southern Star's Ground Lease so there is no need for Quest to obtain a vesting order to remove it from the title. However, Quest and Primacorp seek an order that any claims that arise from the yet incomplete and unregistered Ground Lease on

2020 BCSC 1883 (CanLII)

Lot E shall not attach to Quest's assets that are to be vested in Primacorp. They also seek an order permanently enjoining Southern Star from registering the Lot E Ground Lease against title to Lot E.

2020 BCSC 1883 (CanLII)

[35] Southern Star objects to the RVO as vesting off any interest it may have in the unregistered Lot E Ground Lease, arguing:

a) This Court has no jurisdiction to do so under the *CCAA*. Southern Star argues that this is simply a disguised disclaimer of the Ground Lease that the *CCAA* expressly prohibits. Disclaimers are allowed pursuant to s. 32 of the *CCAA*, however, limits are imposed by s. 32(9)(d) which provides that disclaimers can not be made:

> . . . in respect of real property or of an immovable if the company is the lessor.

b) If such jurisdiction exists under the *CCAA*, the relief sought is not fair and equitable in the circumstances.

[36] I will begin by discussing the nature of any interest held by Southern Star in relation to the Lot E Ground Lease.

[37] In my view, no "lease" *per se* is yet in existence and valid and enforceable between Quest and Southern Star. Although the parties executed the Form C Charges relating to the Lot E Ground Lease, Southern Star's principal, Michael Hutchison, acknowledges that they were not to be registered until construction had commenced. I conclude that the parties did not intend that the Ground Lease would be valid and effective between them until that time, in conjunction with the registration of the Sublease and the execution and registration of Southern Star's mortgage that would allow construction to begin.

[38] Southern Star does not argue that it has acquired any legal or beneficial interest in Lot E. At its highest, I conclude that Southern Star's rights to Lot E are purely contractual; Quest agreed that it would grant the Lot E Ground Lease in the future and it would become effective upon certain conditions being satisfied – in

essence, an agreement to agree. Those conditions included that Quest would decide to build a residence building on Lot E and that Southern Star would arrange financing to construct the building. In these circumstances, I readily conclude that this condition has not been satisfied and will never be satisfied by Quest given Quest's insolvency.

2020 BCSC 1883 (CanLII)

[39] Further, even assuming that this is a "disguised" disclaimer, I conclude that Quest is not a "lessor" as that term is used in s. 32(9)(d) of the *CCAA*. Quest agreed that, if certain conditions were satisfied, it would become a "lessor" under the Ground Lease; however, that has not come to pass.

[40] I conclude that I have the jurisdiction under s. 11 of the *CCAA* to grant the order sought by Quest to ensure that Southern Star does not assert any rights under the Lot E Ground Lease at a future date. In addition, I rely on s. 36(6) of the *CCAA* that allows the Court to exercise its jurisdiction to vest off "other restrictions".

[41] The exercise of the Court's jurisdiction under s. 11 and 36 of the *CCAA* requires that the relief sought be "appropriate". This is in the sense that it accords with the statutory objectives of the *CCAA*, not only in terms of what the order will achieve, but the means by which it employs to that end: *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

[42] In this respect, the parties have advanced arguments as to equitable considerations in terms of whether such relief is appropriate in the circumstances, while taking into account the respective positions of the parties. While in the receivership context, Quest has referred to various authorities that discuss the balancing of interests in similar situations where leases (in these cases effective and enforceable) were vested off title: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.) at paras. 19-23, citing *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154; *Romspen Investments Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648 at para. 66; rev'd other grounds *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817 at para. 25.

[43] Southern Star argues that the equities favour it, not Quest, in these circumstances.

[44] Southern Star contends that neither Quest nor Primacorp have made any attempt to negotiate with it concerning its interest in Lot E. I would not accede to this argument. While the negotiations between Quest, Primacorp and Southern Star were not fruitful, it remains the case that Quest has made good faith efforts to address Southern Star's interests, although its ability in that respect were hampered by Primacorp's willingness to accommodate those interests.

[45] Southern Star also argues that it will be prejudiced if its contractual right is vested off in that Quest and Primacorp are not offering compensation for the loss of that interest. Southern Star focusses on what it says is the "status *quo*", arguing that it has the "right" to build a residence on Lot E. However, any such "right" is illusory at best, since Quest has no present ability to occupy the Residences, let alone the financial capability to participate in the construction of a fifth one on Lot E. Nor is there any realistic prospect that Quest will be in a position to do so in the future.

[46] Southern Star's argument in relation to Lot E is an attempt to gain leverage more than anything else. If Southern Star's argument succeeds and the relief sought is refused, Southern Star would be in the same position—facing a sale of Lot E and a likely order vesting off any rights or interests it may have. It is a condition of the Primacorp transaction that Lot E be transferred to it without any further involvement with Southern Star. Without an order rejecting Southern Star's claim in respect of the escrowed Ground Lease on Lot E, the likely result would be the end of these proceedings and the commencement of realization proceedings by the Interim Lender and other secured creditors.

[47] The Ground Lease is not effective and enforceable; the Ground Lease is not registered on title to Lot E. Given the circumstances, Quest has no ability to build a residence on Lot E and there is no reasonable prospect of that happening, given its insolvency and the need to dispose of its assets, including Lot E.

2020 BCSC 1883 (CanLII)

[48] While I acknowledge the negative impact on Southern Star arising from this relief, that impact must be balanced in the context of Quest's restructuring efforts in this proceeding. Those efforts are intended to address not only Southern Star's interests, but also the myriad interests held by other stakeholders. The sale of Lot E to Primacorp will allow Quest to realize on its interest in Lot E to the benefit of the stakeholders as a whole.

[49] I conclude that the relief sought by Quest in the RVO in relation to Lot E is appropriate and it is granted.

CapU ROFR

[50] Lot 1 and Lots A-E are subject to various charges in favour of CapU.

[51] In March 2019, Quest granted mortgage security in favour of CapU in connection with a loan made to Quest. As part of these agreements, in April 2019, Quest also granted the ROFR in favour of CapU. CapU registered the ROFR against these lands. Under the Primacorp transaction, Quest is required to obtain title to Lot 1 and Lots A-E without reference to the ROFR.

[52] Pursuant to s. 9 of the *Property Law Act*, R.S.B.C. 1996, c. 377, a right of first refusal to land is an equitable interest in land.

[53] CapU has referred to two non-*CCAA* cases that discuss ROFRs generally.

[54] In *Adesa Auctions of Canada Corp. v. Southern Railway of B.C.*, 2001 BCSC 1421 at paras. 26-30, the Court found that the contractual terms were to be strictly enforced and that the rights under the ROFR could not be defeated or circumvented by an offer that included other lands not covered by the ROFR. To similar effect, *Alim Holdings Ltd. v. Tom Howe Holdings Ltd.*, 2016 BCCA 84 at para. 41 states, following *Adesa*, that a ROFR will be triggered by a package sale that includes the subject property, subject to contrary language in the ROFR.

2020 BCSC 1883 (CanLII)

[55] It is common ground, however, that different considerations may also apply in the *CCAA* context. Having said that, there is little case authority on the ability of a court in *CCAA* proceedings to vest off a ROFR, whether triggered or not.

[56] In "Rights of First Refusal and Options to Purchase in Insolvency Proceedings" (2019) 8 J.I.I.C. 103 (the "ROFR Article"), the authors Virginie Gauthier, David Sieradzki and Hugo Margoc extensively review the issue, including in relation to Options to Purchase (OTPs). At 106, the authors state:

> . . . Section 11 of the *CCAA* grants courts the right to "make any order that it considers appropriate in the circumstances" except as limited by the CCAA. As such, the *CCAA* court is well equipped to approve the sale of an OTP- or ROFR-encumbered asset to a party other than the rights-holder and without having first complied with the restrictive covenants if the transaction is in the best interests of the creditors at large, provided that the interest of the OTP or ROFR-holders is taken into account. The court will consider, *inter alia,* the monitor's views on these issues before making any such approvals.

[57] At 118-119, the authors conclude that:

> While jurisprudence on this matter is not conclusive, it appears that a *CCAA* court would likely only vest out a valid and unexpired OTP that runs with the land in exceptional circumstances such as in the context of a going-concern restructuring where obtaining the highest possible price for the encumbered asset is paramount to support the restructuring efforts of the debtor company, and where the OTP rights-holders are also creditors in the proceeding and could seek compensation for any loss incurred due to the removal of the OTP right.
>
> . . .
>
> In summary, common law *CCAA* courts may vest out valid or unexpired ROFRs and OPTs in a case where the equities favour such an order or on consent.

[58] Quest has referred to *Bear Hills Pork Producers Ltd. (Re),* 2004 SKQB 213*,* additional reasons 2004 SKQB 216. In that *CCAA* proceeding, the debtors sought approval of a sale of bundled assets relating to a hog farm, in the face of a ROFR that applied to the land only. Justice Kyle referred to the overall security affecting the assets; the court also commented that a withdrawal of the lands from the sale would not allow the proposed sale to complete, leading possibly to a liquidation (at paras. 4-5).

2020 BCSC 1883 (CanLII)

[59] However, in *Bear Hills*, Kyle J. relied on authorities that have since been questioned in *Alim Holdings* (see paras. 38-41). Justice Kyle's conclusion at para. 10 that the ROFR was not triggered runs contrary to the court's conclusion in *Alim Holdings* at para. 41.

2020 BCSC 1883 (CanLII)

[60] I have no doubt that courts across Canada have vested off ROFRs in the context of assets sales approved in *CCAA* proceedings. For example, Quest refers to *Artic Glacier Income Fund (Re)*, [2012] M.J. No. 451 (Q.B.) where a ROFR was vested off title, although the circumstances under which that *CCAA* relief was granted is not clear.

[61] Similarly, in *Great Slave Helicopters Ltd. v. Gwichin Development Corp*. (November 23, 2018), CV-18-604434-00CL (Ont. S.C.J.), Justice Hainey's endorsement directed that a purchaser of aggregated assets in a *CCAA* proceeding provide certain information to the holder of the ROFR with respect to the purchase price allocation. The ROFR Article, which discusses the circumstances before the court in *Great Slave Helicopters* at 108-109, indicates that the issue of the exercise of the ROFR was ultimately resolved consensually.

[62] Fortunately, in this case, there is no dispute concerning the Court's jurisdiction to address CapU's rights arising under the ROFR. Both Quest and CapU agree that the Court has jurisdiction under the *CCAA* to vest off the ROFR, subject to a consideration of the equities as between the parties.

[63] For the following reasons, I conclude that a balancing of the equities favours vesting off CapU's ROFR to allow the Primacorp transaction to proceed:

a) Since January 2020, Quest has been pursuing a going concern restructuring that will permit it to remain as a university and employer in the Squamish area. CapU has been involved in this proceeding from the outset and was well aware of the opportunity to participate in that pursuit;

b) There is a significant issue as to whether the ROFR has even been triggered by delivery of the Primacorp PSA. The definition provided in the ROFR of “Bona Fide Offer to Purchase” means, in part, an offer that is:

> (iii) only for the entirety of the Property [the lands] and all chattels thereto and no other property, rights or assets
>
> [Emphasis added.]

The definition of “Purchased Assets” in the Primacorp PSA is broad and refers not only to lands and chattels, but a variety of other assets (for example, contracts, plans, permits, vehicles and intellectual property). This express language is what the court in *Alim Holdings*, at para. 41, described could indicate an intention that any such aggregated offer would *not* trigger the ROFR;

c) The term of the ROFR expires in March 2024. The ROFR appears to contemplate that, even if CapU does not exercise the ROFR, the purchaser of the lands must still agree to grant CapU a ROFR on the same terms. Similarly, “change of control” provisions are potentially effective that would allow CapU to later acquire control of Quest in place of anyone else. This would frustrate Primacorp’s expectation under the Primacorp PSA that it would have the right to nominate the board of governors for Quest after closing;

Primacorp does not agree to assume these restrictions. In addition, every other offer for Quest’s assets required that the ROFR be vested off title to the lands. It is difficult to see that any purchaser would agree to take title to purchased assets with such significant restrictions. If the ROFR is effective, this would give rise to a severe “chilling effect” on the market, with potentially disastrous results for Quest’s restructuring efforts;

2020 BCSC 1883 (CanLII)

d) The 60-day period within which CapU is entitled to consider any "Bona Fide Offer to Purchase" is simply unworkable in these circumstances. This is not a matter of expediency, without regard to any rights held by CapU. Quest will have no funds to continue its operations past December 2020 and, if realizations by the secured creditors ensue, CapU's ROFR rights will be illusory at best;

e) CapU complains that it received the redacted Primacorp PSA only recently, on October 29, 2020. CapU then requested an unredacted copy, which Quest agreed to do upon CapU executing an NDA. CapU refused to sign the NDA, stating that it would hamper its ability to participate in its own offer. Again, CapU has had months to formulate its own offer;

f) Quest asserts that CapU has no intention to or ability to make its own offer for all of Quest's assets in competition to the Primacorp transaction. CapU has not put forward any evidence at this hearing to confirm such intention or ability. Similarly, there is no evidence that CapU truly wishes to or is able to exercise any rights under the ROFR to purchase Quest's lands and chattels;

g) I consider that the evidence conclusively supports that CapU advances its arguments under the ROFR simply as a tactic to oppose the Primacorp transaction and delay the matter so that it and Landrex can seek to advance their own joint competing offer;

h) As I will discuss below, the terms of the joint Landrex/CapU proposal is only semi-formed at this point and Quest has indicated that some major terms are not acceptable. As such, it is highly questionable that this joint offer is, as CapU asserts, a "better, higher offer";

i) I conclude that Quest has given proper regard to and has not ignored CapU's rights under the ROFR in the context of these proceedings.

2020 BCSC 1883 (CanLII)

CapU has had sufficient information even from the redacted Primacorp PSA to discern the substance of the Primacorp transaction in terms of advancing any competing offer or exercising the ROFR;

j) Given the above circumstances, including CapU's involvement in Quest's lengthy efforts to restructure, I cannot conclude that CapU will suffer significant prejudice if the ROFR is vested off. Quest has indicated that CapU will have the opportunity to file a proof of claim in respect of any loss alleged to arise because of the vesting off of the ROFR. Of course, the value of any such claim would be questionable unless CapU can establish that its rights were triggered by the Primacorp transaction and that it had the ability to complete under the ROFR; and

k) The Monitor supports the Primacorp sale, as maximizing the value of Quest's assets for the stakeholders and allowing a successful restructuring of Quest's business.

[64] If CapU has rights under the ROFR, allowing CapU to assert those rights would delay the Primacorp sale and potentially negate it, all with potentially devastating effect on the broader stakeholder group. The Primacorp sale is the only sale that is before the Court that would result in a restructuring of Quest for the benefit of the stakeholders. Clearly, within that context, the rights of all affected stakeholders must be balanced in respect of any rights held by CapU.

[65] In *Bear Hills,* similar considerations were before the court. The Saskatchewan Court of Queen's Bench approved a bundled sale of assets, without first requiring compliance with a ROFR. In part, the prospective purchaser would only consider purchasing the complete bundle of properties for an aggregate purchase price and did not allocate value on a property-by-property basis.

[66] As I have sought to do here, the court in *Bear Hills* (at para. 9) was attuned to the overarching and remedial statutory purpose and objective of the *CCAA* to avoid

2020 BCSC 1883 (CanLII)

the “social and economic losses resulting from liquidation of an insolvent company”: *Century Services* at para. 70 and *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 40-41. This objective is not to be achieved simply in the most expedient manner and without due regard to interests of stakeholders that are affected in that process. As the Court further stated in *Century Services* at para. 70, any restructuring is best achieved when “all stakeholders are treated as advantageously and fairly as the circumstances permit”.

[67] I am satisfied that it is appropriate, in the context of the Primacorp transaction, to vest off the ROFR held by CapU. In that regard, I have also considered the factors set out in s. 36(3) of the *CCAA* in terms of assessing any rights of CapU under the ROFR in that context.

Landrex / CapU Offer

[68] Landrex, supported by CapU, opposes approval of the Primacorp transaction. Landrex argues that they should be given further time to present an offer for Quest’s assets in competition with the Primacorp transaction.

[69] As with CapU, Landrex has been fully engaged in discussions with Quest for some time now, having been alerted to the possibility of a transaction as long ago as fall 2019. Landrex’s interest in Quest has always been in conjunction with securing an academic partner, namely, CapU.

[70] In June 2020, Landrex and Quest entered into an agreement for a sale; however, the conditions lapsed.

[71] On October 8, 2020, Landrex and Quest executed a further purchase and sale agreement (the “Landrex PSA”) providing for a purchase price of $51 million for most of Quest’s assets (Lot 1 only and excluding Lots A-E: obviating any need for disclaimers of the Southern Star Subleases or vesting off any of Southern Star’s rights under the Lot E Ground Lease). The closing date under the Landrex PSA is December 23, 2020.

2020 BCSC 1883 (CanLII)

2020 BCSC 1883 (CanLII)

[72] By the start of this hearing, significant conditions precedent in respect of the Landrex PSA were still outstanding. Those included the financing condition in favour of Landrex and the mutual condition by which "another party" (CapU) was to have secured a sublease with Quest after Landrex had granted CapU a lease in the first instance.

[73] Landrex suggests that Quest is contractually bound to honour the Landrex PSA by allowing it further time to remove the conditions precedent, citing the good faith organizing principle discussed in *Bhasin v. Hrynew*, 2014 SCC 71. Further, Landrex argues that Quest has a duty to take all reasonable steps to satisfy the conditions precedent: *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072.

[74] Further discussions and negotiations continued between Landrex and Quest beyond October 8, 2020; however, matters under the Landrex PSA were not advanced.

[75] By late October 2020, Quest was under significant pressure, if not a legal requirement from the Interim Lender, to conclude a transaction. At that time, only two potentially viable proposals were on the table, one being from Primacorp. As above, where the Monitor noted in its Confidential Report that other proposals were "not currently at a stage such that they are capable of being accepted by Quest", those "other proposals" included the Landrex PSA.

[76] By the time the Landrex PSA was executed on October 8, 2020, Landrex was not aware that Quest had already signed the Primacorp PSA. However, I agree with Quest's counsel that Landrex had not secured any rights of exclusivity in terms of advancing its offer. The Landrex PSA provided:

> 20.2 Notwithstanding anything else contained herein, Landrex acknowledges and agrees that, following from date of the acceptance of this Offer by the Vendor until the date that the Vendor waives or declares satisfied the Vendor's Condition, the Vendor will be authorized to negotiate with or offer the Property for sale to any third party (including the entering into of any agreement by the Vendor with any third party). . . .

[77] Under the Landrex PSA, Quest's Vendor's Condition was approval from its Board of Governors. Quest never obtained that approval because Quest's Board of Governors did not agree to certain deal terms under the Landrex PSA.

[78] By October 29, 2020, Landrex would have been fully aware that its offer was not going to be advanced by Quest any further since, by then, Quest had chosen Primacorp.

[79] On November 2, 2020, Landrex made a further offer for $53.5 million. The only other significant change to their offer was to describe the requirement for a lease/sublease arrangement between Landrex, "another party" (intended to be CapU) and Quest as Landrex's condition precedent, not a mutual condition precedent. Quest did not accept this offer.

[80] In any event, by that time, Landrex's financing condition was far from being satisfied. On November 9, 2020, TD Asset Management ("TD"), Landrex's lender, provided a letter simply stating that it was continuing to work with Landrex and CapU to provide that financing.

[81] I acknowledge that, since the initial hearing date of November 3, 2020, Landrex has moved to finalize its offer but it has only done so to some extent.

[82] On November 13, 2020, Landrex secured a letter from TD that referred to a term sheet being in place after a final financing structure was negotiated (no documents were disclosed). However, TD's commitment is clearly conditional upon CapU's board approving the lease between Landrex and CapU at a meeting that is not scheduled to take place until November 24, 2020. There is no evidence as to what those lease terms are and whether there is a reasonable likelihood that CapU's board will approve it. Further, this whole arrangement continues to hinge on a negotiated sublease between CapU and Quest, which is not in place.

[83] On November 16, 2020, Landrex's counsel advised of yet further developments: (i) removal of its financing condition; (ii) an LOI with Southern Star by

2020 BCSC 1883 (CanLII)

which it would take over the Residences but not require disclaimer of the Subleases; and, (iii) agreement with CapU to remove the ROFR.

[84] Despite these developments, Quest advised that it was still not agreeable to the terms of the Landrex transaction. In addition, the Monitor continues to support approval of the Primacorp transaction, noting the uncertainty and potential delay of CapU obtaining ministerial approval to allow its participation in the Landrex transaction.

[85] The s. 36(3) factors continue to provide a useful structure for consideration of the Landrex transaction, and these late breaking developments.

[86] I am satisfied that Landrex was given a reasonable opportunity to participate in the SISP and that it has been aware of this opportunity for many months, even before it officially began. The fact that the cash consideration under the Landrex transaction exceeds that of Primacorp is deserving of consideration. However, other considerations arise, including that the Primacorp transaction involves significant other benefits to Quest in terms of its future operations, including the working capital facility of $20 million.

[87] Both Quest and the Monitor continue to be of the view that the Primacorp transaction is more beneficial to the creditors. I agree with this, particularly considering the continuing uncertainty and risk associated with the Landrex/CapU transaction that is yet to be resolved, leaving aside that Quest has unequivocally stated that it has no intention to pursue it. Even if the further negotiations required under the Landrex sale were advanced in an expeditious manner, it seems unlikely to be finalized by the end of the year. To the contrary, the Primacorp transaction has been finalized after weeks of complex negotiations and Quest and Primacorp are ready to close without further delay. I agree that time is of the essence at this stage of the proceedings, for the reasons already noted above.

2020 BCSC 1883 (CanLII)

[88] In the overall circumstances here, I see no reason to delay, if not risk, the "bird in hand" transaction that arose through a reasonable sales process, in the hope that a more uncertain transaction may be finalized, such as with Landrex.

Southern Star Disclaimers

[89] On October 23, 2020, and with the approval of the Monitor, Quest issued notices of disclaimer (the "Disclaimers") to Southern Star relating to the Subleases on Lots A-D by which Southern Star leases those lands and the Residences to Quest.

[90] A condition precedent of the Primacorp transaction is that either Quest will disclaim the Subleases or Primacorp will have entered into an agreement with Southern Star to its satisfaction. The evidence discloses that negotiations did take place between the parties but they did not reach a mutually acceptable agreement.

[91] Quest's rent payments to Southern Star under the Subleases for the Residences on Lots A-D total approximately $236,218 per month.

[92] Very recently, on November 15, 2020, before the conclusion of this hearing, Quest voluntarily withdrew the Disclaimers with respect to Lots A-B. Accordingly, failing an agreement between Primacorp and Southern Star, it remains a condition of the Primacorp transaction that Quest's Disclaimers of the Subleases in relation to Lots C-D be upheld.

[93] The Ground Leases are registered against Lots A-D. BMO's security is registered against Southern Star's interest under the Ground Leases; in addition, Fivestone Capital Corp. ("Fivestone"), a company controlled by Mr. Hutchison, has registered security against the Grounds Leases. Quest does not seek any relief in respect of the Ground Leases; unlike Lot E, those documents are fully effective and enforceable and have been the basis upon which the parties have developed those properties.

2020 BCSC 1883 (CanLII)

[94] What remains to be addressed is Southern Star's application pursuant to s. 32(2) of the *CCAA*, supported by BMO, for an order disallowing any disclaimer by Quest of the Subleases of the Residences on Lots C-D. Section 32(4) of the *CCAA* lists various non-exhaustive factors that the court is to consider in relation to disputes over disclaimers:

> In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[95] In *League Assets Corp. (Re)*, 2016 BCSC 2262, I discussed the significance of disclaimers in *CCAA* proceedings, both from the point of view of the counterparty and that of the entire stakeholder group:

> [49] These *CCAA* provisions are not inconsequential in the face of this type of proceedings. At this point, the matter is no longer between the debtor company and a counterparty. There are other stakeholders involved and the statutory provisions, and the provisions of court orders such as the Initial Order, are meant to protect the stakeholder group as a whole, while also allowing a certain amount of flexibility for the debtor company. A disclaimer of a contract has consequences not only to the debtor company, but the estate generally. Such an action can substantially increase the debt being faced by the estate or divest the debtor of a substantial benefit that might be realized for the benefit of the creditors. It is in that context that the *CCAA* requires that certain procedures be followed by the debtor company, with the necessary oversight by the Court's officer, the Monitor, as to whether any disclaimer will be approved or not.

[96] The factor under s. 32(4)(b) of the *CCAA* as to enhancing the prospects of a viable restructuring applies equally in respect of disclaimers in the context of a sales process by which the business is to continue as a going concern: *Timminco Ltd. (Re)*, 2012 ONSC 4471 at paras. 51-52 and *Aveos Fleet Performance Inc. (Re)*, 2012 QCCS 6796 at paras. 48-50. In addition, the disclaimer need not be proven as "essential", only "advantageous and beneficial": *Timminco* at para. 54.

2020 BCSC 1883 (CanLII)

[97] Quest asserts that the Disclaimers are necessary to pursue and complete the Primacorp transaction, which it considers the best possible outcome for Quest and its stakeholders, including students, faculty, staff, secured and unsecured creditors, suppliers and vendors. In its letter dated October 28, 2020 to Southern Star, Quest also refers to its liquidity crisis and that amounts owing to its secured creditors became due some time ago.

[98] In its Fourth Report dated November 2, 2020, the Monitor confirmed its approval of the Disclaimers, based on:

> 2.8.1 The residences are not currently being used by Quest (other than two units being used by staff members and some limited use by a film crew recently) given on-line learning format being employed as a result of COVID 19;
>
> 2.8.2 It is a term of the Primacorp Agreement that the subleases be disclaimed; and,
>
> 2.8.3 The Monitor noted that the two most promising alternative parties in discussions with Quest also required the Southern Star subleases to be disclaimed.

[99] Southern Star advances a number of arguments in relation to the Disclaimers.

[100] Firstly, it argues that the Disclaimers will not result in a viable compromise or arrangement. Southern Star argues that there is no indication that Quest and Primacorp do not wish to continue to have the Residences as part of the student experience for those attending Quest.

[101] I agree that, in the Rent Deferral Reasons, many of my comments (at paras. 23-26, 90) were confirmatory of the importance of the Residences to Quest in respect of its future operations. However, that was then and this is now. The pandemic continues in full force and Quest is necessarily required to make decisions in the face of current circumstances. I agree that it is likely that Quest will seek to continue the student residence experience once the pandemic has receded, however, when that might happen is anyone’s guess.

[102] In the meantime, Quest, under the Primacorp transaction, must make decisions as to its financial capabilities going forward. Maintaining two empty

2020 BCSC 1883 (CanLII)

Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances. It was Primacorp, an arms length purchaser, who has imposed this condition.

[103] Further, the Monitor agrees with Quest that the Disclaimers are necessary to enhance the prospects of Quest making a viable compromise or arrangement in these proceedings. There is no reason to question the Monitor's view as it is apparent that the Monitor has considered all relevant matters.

[104] I agree that the Disclaimers will enhance the prospects of Quest making a viable compromise or arrangement. The Monitor overwhelmingly agrees after a consideration of all the circumstances including those particularly faced by Southern Star as a result.

[105] Secondly, Southern Star argues that Quest delivered the Disclaimers simply to secure a bargaining advantage for Quest and Primacorp toward a re-visitation of the rent deferral issue or to attempt to reduce the rent. I agree that there is some indication that Quest and Primacorp had that in mind; however, that is often the reality that arises after a debtor concludes that it is no longer viable to abide by those contractual commitments and that a disclaimer is appropriate. If it were possible to come to an amicable resolution with Southern Star in the context of the Primacorp transaction, I expect Quest would have done so.

[106] Southern Star refers to the statements in *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503 at para. 59, where Justice Veit considered whether certain contracts should be terminated. She was attuned to whether the termination was fair, appropriate and reasonable and whether it arose after good faith negotiations. In this case, there is no evidence to suggest that the parties did not approach the negotiations in good faith. Clearly, it is not my role on this application to assess the reasonableness of the respective positions of Quest, Primacorp and Southern Star in those negotiations. It does appear, however, that Quest and Primacorp have moved toward a middle ground by the withdrawal of the Disclaimers in relation to Lots A-B.

2020 BCSC 1883 (CanLII)

[107] Thirdly, Southern Star places great emphasis on what it says will be the significant hardship it will suffer if the Disclaimers are upheld. Southern Star says that it has spent approximately $41.7 million to construct the Residences.

[108] The monthly mortgage payments to BMO and Fivestone are approximately $220,000. The outstanding balance of the BMO loan facility is $34.4 million. Mr. Hutchison indicates that, without payment of rent by Quest, Southern Star will not be able to make its mortgage payments to BMO. In that event, BMO will be in a position to foreclose on the Ground Leases. Mr. Hutchison has guaranteed the BMO debt, as has another of Mr. Hutchison's companies.

[109] As noted by Quest, any financial consequences to Southern Star will largely depend on what mitigating measures are undertaken. Those could include a re-letting of the Residences or a sale of its interests under the Ground Leases. At present, with no clear indication as to how those matters might evolve, I am unable to conclude with certainty that any hardship suffered by Southern Star would be "significant".

[110] Regardless of any hardship faced by Southern Star, the reality is that Quest has only one viable means by which to advance the restructuring at this time – the Primacorp transaction. Within the confines of that transaction, Primacorp sees no merit in maintaining the Subleases on these two Residences. Apparently, no other interested party expressed an interest in maintaining the Subleases besides Landrex. In light of Landrex's submissions at the conclusion of this hearing on November 16, 2020, I have considered that the Landrex/CapU transaction may have presented a more palatable resolution of the Subleases given the recent LOI between Landrex and Southern Star. However, I conclude that delaying the Primacorp sale, on the prospect that the Landrex/CapU transaction will come about, is not a viable option for the reasons discussed above.

[111] I agree that this decision will visit hardship, even arguably significant hardship, upon Southern Star. However, it is difficult to see that preventing delivery of the Disclaimers would avoid that result in any event. If the Primacorp transaction

2020 BCSC 1883 (CanLII)

does not proceed, there is no transaction and Quest has no financial means to continue past December 2020. The Interim Lender has indicated that it will not advance funds to Quest beyond that date, and specifically, that it has no interest in funding continued rent payments to Southern Star.

2020 BCSC 1883 (CanLII)

[112] In that event, Southern Star will be in the same position post December 2020, with Quest unable to pay the rent for the Residences at that time: see *Target Canada Co. (Re)*, 2015 ONSC 1028 at paras. 27-28.

[113] As the court noted in *Target Canada* at paras. 24-25, the court must give due consideration to the stakeholder group as a whole in assessing whether the Disclaimers are fair and reasonable: *Doman Industries Ltd. (Re)*, 2004 BCSC 733 at para. 33. The price of setting aside the Disclaimers is that the Primacorp transaction will not proceed and a receivership at the behest of the Interim Lender will likely follow. In my view, this is not in the best interests of that larger stakeholder group which, in my view, has primacy here even in the face of the hardship and prejudice caused to Southern Star.

[114] I dismiss Southern Star's application for order that the Subleases of the Residences on Lots C-D not be disclaimed by Quest.

RVO

[115] At the November 3, 2020 hearing, when Quest originally sought the TAVO, Quest was seeking to uphold the Disclaimers of the Subleases. At that time, Southern Star's evidence and submissions were to the effect that, if the Court upheld the Disclaimers, it would have a substantial unsecured claim against the estate. As indicated above, the amount of any claim that Southern Star might advance in the estate is far from clear, given possible mitigation, although there is potential for a significant claim.

[116] This position did not come as a surprise to Quest; however, it appears that Quest did not appreciate the potential magnitude of Southern Star's claim. More importantly, Quest has not fully appreciated that a very unhappy claimant – Southern

Star under the Disclaimers – was not likely to vote in favour of the Plan and that the value of its claim could swamp the class votes to prevent any approval by the creditors. Again, creditor approval of the Plan is a requirement of the Primacorp Transaction.

2020 BCSC 1883 (CanLII)

[117] In early November 2020, known unsecured creditor's claims were estimated at approximately $2.3 million. "Restructuring Claims" (which will include any claim of Southern Star under the Disclaimers) were yet unknown.

[118] Initially, Primacorp agreed to fund Quest's Plan in the amount of the lesser of 50% of the claims or $1.35 million. The Monitor now states that there is a "high probability" that Southern Star's claim will be large enough such that Southern Star will control the value of the votes at the creditors meeting. Other major unsecured creditor claims have also since emerged, being that of Dana (estimated $1 million) and the Association for the Advancement of Scholarship (estimated $5 million).

[119] As the Monitor notes, any of these claims could effectively veto the Plan.

[120] Quest and Primacorp were then facing a dilemma. They determined that, while they might succeed on the Disclaimer issue, they could not likely obtain approval of the Plan, a further requirement of the Primacorp PSA, if Southern Star carried through with its suggested negative vote. While Quest could raise arguments in relation to the value of any claim advanced by Southern Star, uncertain and lengthy litigation would likely result; even if Quest was successful, it would be too late to factor into this restructuring.

[121] Quest, with Primacorp's approval, solved this dilemma by revising the TAVO to an RVO. In addition, the Primacorp PSA was amended to delete the conditions precedent requiring creditor and court approval of the Plan. Accordingly, the only condition precedent that remains before closing of the Primacorp transaction is the granting of the RVO.

[122] The Monitor supports this change as necessary in the circumstances in order to allow Quest to complete the Primacorp transaction. The Monitor supports the granting of the RVO.

[123] In its Fifth Report dated November 10, 2020, the Monitor describes the characteristics of the new structure and steps under the RVO, which involves Quest's subsidiary, Guardian Properties Ltd. ("Guardian"):

> RVO Structure & Impact
>
> 2.6 The RVO provides for the following to occur in sequential order on the closing of the Primacorp Transaction:
>
> 2.6.1 A wholly owned subsidiary of Quest, Quest Guardian Properties Ltd. ("Guardian") shall be added as a Petitioner in these CCAA proceedings. Guardian was incorporated on January 25, 2018 and has never carried on any business and has never held any assets or liabilities;
>
> 2.6.2 All of Quest's right, title and interest in and to the Excluded Assets (as defined in the Primacorp PSA and the RVO) shall be transferred to and vested in Guardian;
>
> 2.6.3 All Contracts (other than Approved Contracts), Claims and Liabilities of Quest shall be transferred to Guardian and Quest shall be released from and in respect of all obligations in respect of such Contracts, Claims and Liabilities;
>
> 2.6.4 Primacorp will pay the Purchase Price to the Monitor to the extent of the Secured Charges and all the Secured Claims and the Secured Charges shall be extinguished and cancelled. The Purchase Price will stand in the place of the Purchased Assets;
>
> 2.6.5 All of Quests right, title and interest in the Purchased Assets shall vest in Primacorp free and clear of any security interests, Claims and Liabilities; and,
>
> 2.6.6 Quest will cease to be a Petitioner in these CCAA proceedings leaving Guardian as the sole Petitioner.
>
> 2.7 The RVO contains release provisions similar to those contained in the Plan. Quest, its employees, legal advisors and other representatives, Quest's Governors and Officers, and the Monitor and its legal counsel shall be released from any and all demands and claims relating to, arising out of, or in connection with these CCAA Proceedings. The releases do not apply in the case of wilful misconduct or fraud.
>
> 2.8 As a result of the amendments to the Primacorp Transaction and the RVO, if the RVO is granted:
>
> 2.8.1 There will be no uncertainty as to whether the Primacorp Transaction can close and the condition precedent for the

2020 BCSC 1883 (CanLII)

approval of the Plan is no longer applicable. As a result, there will be certainty for the go-forward operations of Quest, thereby creating security for the Quest students, faculty and staff leading into the critical enrolment period for the winter term;

2.8.2 Guardian will become responsible for the obligations under the Southern Star subleases should they not be disclaimed. As Guardian will not have the financial resources to meet those obligations, it is expected that Guardian would default on the Southern Star subleases in January 2021; and

2.8.3 The Plan, which will now compromise the debts of Guardian, will be funded through the Primacorp Transaction and therefore this aspect of the Primacorp Transaction and the Plan has not changed.

2020 BCSC 1883 (CanLII)

[124] As I will discuss below, the effect and substance of the RVO is to achieve what Quest has originally sought by way of a restructuring in these proceedings; namely, a sale of certain assets to Primacorp and, importantly, Quest continuing as a going concern as an academic institution, in partnership with Primacorp. The only aspect now missing is that, under the RVO, Quest will avoid having to obtain creditor or Court approval of the Plan.

[125] The intention is that the amounts that Primacorp was to fund under the Plan will now be transferred to Guardian to be distributed under Guardian's plan in relation to the Quest's liabilities that are to be transferred to Guardian. Effectively, Guardian will be funded just as it was originally intended that Quest's Plan was to have been funded to resolve those claims.

[126] Southern Star and Dana, as unsecured creditors of Quest, object to the granting of an RVO, contending that it effectively and unfairly negates their right to vote on Quest's Plan under s. 6 of the *CCAA*. They object to the transfer of their claims to Guardian. They say that, although they will have the ability to vote on Guardian's plan, it will effectively mean that they cannot vote to block Quest's restructuring to enable it to continue as a going concern within the context of the Primacorp transaction.

RVO Jurisdiction and Authorities

[127] There is no dispute between the parties that this Court has authority to grant the RVO under its general statutory jurisdiction found in s. 11 of the *CCAA*.

[128] Quest has referred me to a number of decisions across Canada where courts have exercised that jurisdiction to grant an RVO in the context of sale approvals considered under s. 36 of the *CCAA*. I will review those decisions in some detail below to highlight the relevant circumstances.

[129] In *Re T. Eaton Co.* 2000 CarswellOnt 4502, 26 C.C.P.B. 295, the Ontario court granted such an order under its *CCAA* proceedings. There are no written reasons discussing the circumstances in that case. The only brief reference to that structure is found in Claims Officer Houlden's decision in *Eaton's* that addressed an unrelated issue. The agreed statement of facts before the Claims Officer provided:

> 5. The *CCAA* Plan contemplated that all of the assets of Eaton's which were not being retained by Eaton's under the Sears Agreement would be transferred to a new corporation, Distributionco Inc. ("Distributionco"). These assets would then be liquidated by Richter & Partners Inc. ("Richter") in its capacity as court-appointed liquidator of the estate and effects of Distributionco. Richter would then distribute the assets of Distributionco to unsecured creditors and others in accordance with priorities set out in the *CCAA* Plan.
>
> 6. Under the *CCAA* Plan, unsecured creditor claims against Eaton's are converted into a right to participate in distributions in the liquidation of Distributionco based on the amount of the creditor's claim against Eaton's. Accordingly, a critical initial step in the liquidation of Distributionco is the determination of the validity and amount of claims asserted against Eaton's. For this purpose the *CCAA* Plan establishes a Claims Procedure for the resolution of such claims, of which the parties to this matter are aware.

[130] It is unclear as to the basis upon which the court approved this structure in *Eaton's* although, as Southern Star notes, it was a transaction approved within the context of a *CCAA* Plan.

[131] More recently, this structure was approved in *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]). In those *CCAA* proceedings,

2020 BCSC 1883 (CanLII)

an agreement was approved that "effectively" transferred current tax losses and intellectual property to a purchaser. Justice Wilton-Siegel's endorsement stated:

> The Global Settlement contemplates implementation of a corporate reorganization by which the shares of Plasco will be transferred to an acquisition corporation owned by NSPG and CWP and the remaining assets of the applicants will be held by a new corporation, referred to as "New Plasco", which will assume all of the liabilities and obligations of Plasco. I am satisfied that the Court has authority under section 11 of the *CCAA* to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the *CCAA* insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise. For this purpose, I consider that the Global Settlement is analogous to such a plan in the context of these particular proceedings. …

2020 BCSC 1883 (CanLII)

[132] Justice Gouin granted an RVO in the *CCAA* proceedings of *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]). There are no written reasons from the court; however, the motion materials disclose that, under the transaction, the purchasers acquired substantially all the debtor's assets by purchasing 100% of the shares of one debtor company (SDCI, which held the acquired assets). In consideration, the purchaser released certain liabilities owed by the debtors and agreed to assume others.

[133] In *Stornoway Diamond*, to ensure the purchaser acquired the assets free and clear of all encumbrances, the debtors incorporated a new subsidiary (Newco), added Newco as an applicant in the *CCAA* proceedings, and transferred all liabilities, obligations, and unacquired assets of SDCI to Newco. The debtor's motion referred to this transaction as the only viable alternative to preserve the going concern value of the debtor. The debtor noted that the equity and "non-operational related unsecured claims" had no value. As in the RVO sought here, the court's order included familiar aspects found in sanction orders, including releases.

[134] An RVO was also approved in the *CCAA* proceedings of *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]). Approval was sought in the context of preserving valuable cannabis licenses. Justice Hainey's brief endorsement indicates that the relief was unopposed. The court

approved a sale of substantially all of the debtor's assets to the successful bidder under a share purchase agreement after a sales and investment solicitation process.

[135] Other information before me regarding the *Wayland Group* transaction is found in the applicant's factum. The factum refers to both *Plasco Energy* and *Stornoway Diamond*, while also referring to ss. 11 and 36(3) of the *CCAA* as the jurisdictional basis for the relief. The applicants argued that transferring certain assets and liabilities of the debtors into a "newco" would ensure that the purchaser acquired the underlying assets of the target company free and clear of all claims and encumbrances and allow the business to continue as a going-concern. They asserted that this was the "only way" to complete the sale to realize the value in the assets; it was also argued that this transaction was in the best interests of stakeholders and did not prejudice major creditors. In *Wayland Group*, the transaction value was only sufficient to repay the interim lender and perhaps some amount for the first secured creditor.

[136] The Ontario court again approved a similar RVO transaction in the *CCAA* proceedings of *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]). Justice Hainey granted the RVO while again indicating in a brief endorsement that the relief was unopposed. The share sale preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business. The purchaser was a related party who was making a credit bid for the assets.

[137] In *Comark Holdings*, the purchaser acquired all the issued and outstanding shares of the primary *CCAA* debtor and agreed to pay out all the secured debt and priority claims. The excluded assets, agreements, liabilities and encumbrances were transferred to another entity that became a debtor in the *CCAA* proceedings, with the result that the *CCAA* debtor held its assets free and clear of all claims and encumbrances and was then removed from the *CCAA* proceedings. The purchaser and the primary *CCAA* debtor then amalgamated. The new *CCAA* debtor (Newco) was authorized to make an assignment into bankruptcy. The monitor, along with the

2020 BCSC 1883 (CanLII)

principal secured creditors, including the interim lender, supported the transactions. As in *Plasco Energy*, *Stornoway Diamond* and *Wayland Group*, the debtors in *Comark Holdings* argued that this was the "only option" to preserve the business, that the value in that business would be lost in a liquidation and that the transaction was in the best interests of the stakeholders generally.

2020 BCSC 1883 (CanLII)

[138] Justice Conway granted an RVO in the *CCAA* proceedings of *Beleave Inc.* (September 18, 2020), Toronto, CV-20-00642097-00CL (Ont. S.C.J. [Comm. List]). As in *Wayland Group*, the preservation of valuable cannabis licenses were at stake. The motion was supported by the monitor and unopposed. Justice Conway stated in her brief endorsement:

> The Applicants seek approval of the transaction whereby . . . (the Purchaser) will acquire the operating business of the Applicants. The structure of the transaction is partly by share sale and partly by asset sale. The reason for the structure is to accommodate the licensing requirements of Health Canada. The order is structured as a reverse vesting order, in which excluded liabilities and assets will be transferred to "Residualco", which will then become one of the Applicants in the *CCAA* proceedings. Reverse vesting orders have been approved by the courts in other cases: see *Re Stornoway Diamond Corporation* . . . and *Re Wayland Group Corp*. . . .
>
> The transaction is the culmination of a stalking horse sales process approved by the court. The motion is unopposed. The Monitor recommends and supports the transaction in its Fourth Report. In particular, the Monitor states that the proposed transaction is economically superior to the estimated liquidation value of the Beleave Group's assets and operations, will allow the Purchaser to maintain operations and use of the Cannabis licenses and will provide for continued employment for a majority of the existing employees. In my view, the transaction satisfies s. 36(3) of the *CCAA* and the *Soundair* test and should be approved.

[139] In *Beleave*, the RVO included releases of claims similar to that granted in other RVO decisions. These provisions were also consistent generally with sanction orders and are similar to the relief sought by Quest here.

[140] Even more recently, the Alberta court approved an RVO structure in the *CCAA* proceedings of *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.Q.B.). Justice Eidsvik approved the RVO structure as part of a sale approval. No written reasons of the court are available, however, the monitor's bench brief discloses the relevant facts.

[141] As in the above cases, the transaction addressed in *JMB Crushing* arose from a sale and investment solicitation process that yielded only one offer, with the RVO described as a critical component. The underlying intention was to preserve the value of the paid up capital and regulatory permits in the *CCAA* debtor.

[142] In *JMB Crushing*, the monitor relied on the orders granted in *Plasco Energy*, *Stornoway Diamond*, *Wayland Group* and *Beleave*, arguing that the RVO structure was justified in those circumstances:

> 24. In recent *CCAA* proceedings, where it was not practical to compromise amounts owed to creditors through a traditional plan of compromise and arrangement, but it was critical to the viability of a transaction to “cleanse” the debtor company, such that a prospective purchaser may: (i) utilize non-transferrable regulatory licenses (by way of amalgamation or the purchase of the shares of the debtor company); or, (ii) make use of tax attributes of the debtor company, such as [paid up capital], Courts have recently approved and utilized reverse vesting orders to achieve such objectives.
>
> 25. The purpose of a reverse vesting order is to transfer and vest all of the assets and liabilities of a debtor company, which are not subject to a sale, to another company within the same *CCAA* proceedings. The cleansed debtor company is then able to: (i) be utilized by a purchaser as a go-forward vehicle, without any concern regarding creditors and obligations that may otherwise be “laying in the weeds”; and, (ii) allow the purchaser to make use of the debtor company’s tax attributes and non-transferrable regulatory licenses. This approach is necessary in situations where the parties would otherwise be unable to preserve the value of significant assets that are subject to restraints on alienation and to provide a corresponding realizable benefit for creditors and stakeholders.

[143] In *JMB Crushing*, the monitor further justified the RVO structure in asserting that the debtor’s secured creditors would suffer a shortfall even with such measures. The monitor stated that the unsecured creditors had no economic interest in the transaction and there was no reasonable prospect of any recovery to them. The debtor did not intend to undertake a claims process or present a plan to its unsecured creditors.

[144] By pure coincidence, another and perhaps more compelling authority came to the attention of the parties during this hearing.

2020 BCSC 1883 (CanLII)

2020 BCSC 1883 (CanLII)

[145] On November 11, 2020, the Québec Court of Appeal dismissed an application for leave to appeal the granting of an RVO by Gouin J. of the Québec Superior Court on October 15, 2020: *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218; leave to appeal denied *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488. The Court of Appeal's decision is in English; Gouin J.'s decision is in French and no English translation was available. As such, all references to *Nemaska Lithium* will be to the QCCA.

[146] All counsel agree that Gouin J.'s decision in *Nemaska Lithium* is the first time a Canadian court has granted an RVO in contested *CCAA* proceedings.

[147] In *Nemaska Lithium* (at para. 5), the court stated that the RVO allowed the purchaser to carry on the operations of the Nemaska Lithium entitles (mining in James Bay) by maintaining existing permits, licenses and authorizations. This goal was accomplished via a credit bid for the shares in Nemaska Lithium in return for assumption of the secured debt. At para. 22, the court refers to the intention of the "residual companies" to later present a plan of arrangement to the "remaining creditors", but the details are not disclosed.

[148] In denying leave to appeal in *Nemaska Lithium*, the court stated that an appeal would hinder the progress of the proceedings. More relevant to this application were the court's comments on the legitimacy of the position of the only objecting creditor, Cantore, and the court's rejection that it was appropriate to allow Cantore to exercise a veto in the restructuring:

> [38] As it turns out, the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at $8,160 million out of a total value of provable claims of $200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors'' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?
>
> [39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in the first instance.

[149] Similar to Cantore's position in the *Nemaska Lithium* restructuring, Southern Star and Dana's objections to the RVO are grounded in the assertion it will negate their effective veto on the Plan (and hence the Primacorp transaction) by which they seek to leverage further concessions. For obvious reasons, those concessions can only come about at a cost to other stakeholders, whose interests remain to be addressed.

2020 BCSC 1883 (CanLII)

Discussion

[150] Quest, with the support of the Monitor, submits that the Primacorp transaction satisfies s. 36 of the *CCAA* and that the Court should grant the RVO pursuant to ss. 11 and 36 of the *CCAA*.

[151] As with the structures approved in the above *CCAA* proceedings, the RVO has certain aspects that Southern Star says are objectionable. Those include primarily: (i) the addition of Guardian as a petitioner in the *CCAA* proceeding; (ii) the vesting of the Excluded Liabilities and Excluded Contracts in Guardian; (iii) Quest's exit from this *CCAA* proceeding; and (iv) the release of Quest in respect of the Excluded Liabilities and Excluded Contracts.

[152] Essentially, unsecured claims against Quest and minor assets are transferred to Guardian and Quest continues as a going concern after having transferred the bulk of its assets to Primacorp free and clear of any encumbrances (save for certain Retained Liabilities). Quest no longer requires approval of the Plan by the creditors and the Court to complete the Primacorp transaction.

[153] At para. 19, the QCCA in *Nemaska Lithium* referred to Gouin J.'s comment that s. 36 of the *CCAA* allows the court a broad discretion to consider and, if appropriate, grant relief that represents an innovative solution to any challenges in a proceeding. Justice Gouin considered that approving an RVO structure was such an innovative solution. Indeed, this is the history of *CCAA* jurisprudence under the court's broad statutory discretion and court approval of innovative solutions continues to this time.

[154] That said, the ability of a *CCAA* court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the *CCAA*: *Century Services*.

[155] I find further support for Quest's position in the recent comments of the Court in *Callidus.* The Court was there addressing a different issue – whether a *CCAA* judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is "acting for an improper purpose" – but the Court's comments on the exercise of jurisdiction under the *CCAA* ring true in relation to the RVO structure:

> [49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).
>
> [50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:
>
>> Good faith
>>
>> 18.6(1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>>
>> Good faith — powers of court
>>
>> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>>
>> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)
>
> . . .
>
> [65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, <u>*CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction</u>

2020 BCSC 1883 (CanLII)

a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

. . .

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). . . .

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

. . .

[70] . . . The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

. . .

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . *If the CCAA is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.*

2020 BCSC 1883 (CanLII)

> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))
>
> In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.
>
> [76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.
>
> [Underline emphasis added; italic emphasis in original.]

[156] Quest is not seeking to bar Southern Star or Dana from voting on the Plan. It is seeking approval of a structure that would result in Guardian submitting its own plan to the unsecured creditors, which would include Southern Star and Dana, at which time they are generally free to vote their "self-interest" subject to any relevant constraint (for example, if the court finds that they are voting for an improper purpose): *Callidus* at para. 24 and 56.

[157] There is no provision in the *CCAA* that prohibits an RVO structure. As is usually the case in *CCAA* matters, the court must ensure that any relief is "appropriate" in the circumstances and that all stakeholders are treated as fairly and reasonably "as the circumstances permit": *Century Services* at para. 70.

[158] As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the *only* transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. As was noted by Gouin J. in *Nemaska Lithium* (at para. 12), it is not up to the Court to dictate the terms and conditions that are included in an offer. Primacorp has presumably made the best offer that it is prepared to make in the circumstances – that is the offer the Court must consider.

[159] I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is

2020 BCSC 1883 (CanLII)

receivership, liquidation and bankruptcy, a future that looms in early 2021 if the transaction is not approved.

[160] Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable “assets” that could be not transferred.

[161] Akin to the tax losses, permits and licences that could not be transferred in those RVO cases, is Quest’s ability to confer degrees under its statutory authority under s. 4(2) of the *Sea to Sky Act*, S.B.C. 2002, c. 54 (the "*Sea to Sky Act*"). Quest cannot sell its ability to grant degrees under s. 4(2) of the *Sea to Sky Act*. Nor can any purchaser acquire the right to grant degrees indirectly through a purchase of the shares in Quest. Pursuant to s. 2 of the *Sea to Sky Act*, Quest is a corporation “composed of the members of the board” and no shareholders exist. Pursuant to s. 1 of the *Sea to Sky Act*, the “board” means the board of governors of the university.

[162] It is a critical requirement under the Primacorp transaction that Quest remain a viable entity to continue its operations and, in particular, continue to grant degrees. That is a significant component of the Primacorp transaction and the value that Primacorp is prepared to pay under the transaction reflects that component. In other words, the stakeholders are receiving a benefit from this transaction by which Primacorp ensures that Quest continues after exiting these *CCAA* proceedings.

[163] At para. 38, the court in *Nemaska Lithium* asked:

> . . . whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

[164] I acknowledge the negative consequences that arise particularly for Southern Star if the Primacorp transaction is approved, although there is significant uncertainty about the extent of any loss that may be suffered. Dana’s unsecured claim has little, if any value, outside of the benefits of the Primacorp transaction.

2020 BCSC 1883 (CanLII)

2020 BCSC 1883 (CanLII)

[165] In that light, I would ask Southern Star and Dana a similar question to that of the QCCA—to what end is your veto if Quest's Plan is put presented for creditor approval?

[166] Both creditors potentially hold the sword of Damocles over the head of the significant broad stakeholder group who stand to benefit from the Primacorp transaction. Recently, Southern Star has secured further benefits by the withdrawal of two of the Disclaimers. Both objecting creditors have nothing to lose at this point in this dangerous game of chicken with Primacorp, with only the oversight of this Court to oversee this strategy. By any stretch, no one is blinking at this point, while significant other interests hang in the balance.

[167] The Monitor's comments in its Fifth Report as to the jeopardy to those other interests are apt:

> 2.15 The Monitor has considered the competing interests of Southern Star and the interests of Quest's other stakeholders. In the Monitor's view, the Primacorp Transaction should not be jeopardized by the lack of agreement between Southern Star and Primacorp. Southern Star can mitigate its financial hardship by entering into an agreement with Primacorp for use of some or all of the residences. By contrast, Quest's other stakeholders have no ability to mitigate their potential losses in the event that the Primacorp Transaction does not close. They are reliant on the completion of the Primacorp Transaction or face significant losses themselves should it not complete.

[168] In my view, in the vein of the Court's discussion in *Callidus*, these are unique and exceptional circumstances where the Court may grant the relief by allowing Quest to employ the RVO structure within the context of this sale transaction.

[169] Southern Star and Dana seek to effectively block the only reasonable outcome here by insisting that they must approve of Quest's Plan in conjunction with the sale. However, creditor approval of a sale is not required under s. 36 of the *CCAA*.

[170] The granting of the RVO in these circumstances is in accordance with the remedial purposes of the *CCAA*. To use the words of Dr. Sarra, quoted above in

Callidus, I conclude that Southern Star and Dana are working actively against the goals of the *CCAA* by their opposition to the RVO.

[171] I do not consider that an RVO structure would be generally employed or approved in a *CCAA* restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the *CCAA*.

[172] Here, in these complex and unique circumstances, I conclude that it is appropriate to exercise my discretion to allow the RVO structure. Quest seeks this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. I have considered the balance between the competing interests at play. This transaction is unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group, a group that includes Southern Star and Dana.

[173] The structure also allows Quest to continue its operations in partnership with Primacorp, a result that will avoid the devastating social and economic consequences that will be visited upon the stakeholders if this transaction is not approved. Ironically, the continuation of Quest's operations will also benefit Southern Star in the future through the continued payment of rent for two of the Residences. Other potential benefits may also arise if Southern Star and Quest are later able to come to terms once the pandemic has receded and students return to campus.

THE PRIMACORP TRANSACTION

[174] Quest applies for the granting of the RVO in favour of Primacorp pursuant to s. 36(1) of the *CCAA*.

2020 BCSC 1883 (CanLII)

[175] Section 36(1) of the CCAA allows the court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) of the *CCAA* lists the relevant non-exhaustive factors to be considered:

> (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.

[176] The well-known considerations identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are consistent with and overlap many of the s. 36(3) factors: see *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at para. 25, referring to various authorities such as *Canwest Publishing Inc. (Re)*, 2010 ONSC 2870 at para. 13. Those considerations include: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and, (iv) whether there has been any unfairness in the sales process.

[177] More generally, in analyzing whether a transaction should be approved, taking into consideration the s. 36(3) and *Soundair* factors, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable: *Veris Gold* at para. 23.

[178] I conclude that the s. 36(3) and *Soundair* factors all favour approving the Primacorp transaction and granting the RVO. Specifically:

a) The process leading to the Primacorp transaction has been lengthy and exhaustive. The Monitor has overseen that entire process;

2020 BCSC 1883 (CanLII)

b) Quest ‘s Restructuring committee and its Board of Governors have sought and obtained professional advice throughout the *CCAA* process toward finding a suitable academic partner and/or a purchaser/developer for Quest’s lands;

c) No stakeholder objects to the proposition that the sales process was conducted in an appropriate, fair and reasonable manner;

d) The Primacorp transaction will see the repayment of Quest’s secured creditors, now totalling approximately $42.2 million in what has been an increasingly pressurized environment to do so after long standing defaults;

e) Since August 7, 2020, the Interim Lender and VF, Quest’s major secured creditors, have been kept apprised of developments. They both support the Primacorp transaction. In addition, other secured creditors have been involved throughout these proceedings and support the transaction;

f) There has been significant community and stakeholder involvement throughout the sales process;

g) The Primacorp transaction will ensure that Quest continues as a going concern, by continuing operations as a post-secondary institution in Squamish. This will result in continuing benefits to the broad stakeholder group. This includes faculty, staff, students, secured and unsecured creditors, suppliers, landlords and the community generally;

h) The broader stakeholder interests must be balanced against those who will be negatively affected by the transaction, such as Southern Star under the Disclaimers, although no viable offer has emerged that does not include the Disclaimers;

2020 BCSC 1883 (CanLII)

i) Quest's Board of Governors have exercised their business judgment and determined that the Primacorp transaction is the best option to fulfil the goals of Quest's restructuring;

j) The Primacorp transaction will fund a Plan for unsecured creditors;

k) The Primacorp transaction provides Quest with significant benefits in terms of its future operations. These include the $20 million working capital facility and Primacorp support for Quest's marketing, recruiting and operations to allow it to continue as a post-secondary institution into the future;

l) No other or better offer or proposal has emerged that can be considered superior to the Primacorp transaction;

m) The Monitor is satisfied that the consideration to be received from Primacorp is reasonable and fair, taking into account the market value of the assets and the other unique factors of these proceedings;

n) The Monitor is of the view that this transaction will yield a greater benefit to the stakeholders than might be achieved in a liquidation or bankruptcy;

o) Any delay of approval is likely to lead to ruinous consequences after December 2020, when Quest will be out of funds and the Interim Lender will be in a position to commence a receivership and liquidation of Quest's assets; and

p) Simply, Quest has run out of time to find a restructuring solution and the Primacorp transaction presently stands as the *only* viable option to avoid the devastating social and economic consequences to its stakeholders if a liquidation results.

2020 BCSC 1883 (CanLII)

CONCLUSIONS

[179] I grant the RVO as sought by Quest, and as supported by the Monitor.

[180] The Primacorp transaction is the best option available that maximizes recovery for Quest's creditors and preserves Quest's university operations. Allowing Quest to continue as a university will benefit all stakeholders, including Quest's current and former employees, current and future students of Quest and the community generally. The RVO structure is an appropriate means to accomplish this result in these unique and exceptional circumstances.

"Fitzpatrick J."

2020 BCSC 1883 (CanLII)

TAB 6

See paras. 58, 59.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re),* 2020 BCSC 1845

Date: 20201126
Docket: S200586
Registry: Vancouver

2020 BCSC 1845 (CanLII)

In the Matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

- and -

In the Matter of the *SEA TO SKY UNIVERSITY ACT*, S.B.C. 2002, c. 54

- and -

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment
(Claims Process / Meeting Orders / Break Up Fee)

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Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.:	K. Jackson
Counsel for Southern Star Developments Ltd.:	P. Reardon K. Strong
Counsel for Vanchorverve Foundation:	C.D. Brousson
Counsel for Halladay Education Group:	D. Lawrenson

Counsel for Capilano University:	K. Mak
Counsel for Confidential Party (Development Partner #1):	G. Barr R. McKenna
Counsel for Quest University Faculty Union:	J. Sanders
Counsel for Bank of Montreal:	S.A. Poisson
Counsel for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training:	A. Welch
Counsel for 1114586 B.C. Ltd.:	K.E. Siddall
Counsel for Association for the Advancement of Scholarship:	L. Hiebert
Place and Date of Hearing:	Vancouver, B.C. November 3, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. November 3, 2020
Place and Date of Written Reasons:	Vancouver, B.C. November 26, 2020

2020 BCSC 1845 (CanLII)

2020 BCSC 1845 (CanLII)

INTRODUCTION

[1] The petitioner, Quest University Canada ("Quest"), seeks a number of orders on this application, all steps toward what it considers will be a successful restructuring of its affairs under the *Companies' Creditors Arrangement Act,* R.S.C. 1985 c. C-36 (the "*CCAA*").

[2] Quest seeks: a Claims Process Order, to identify and determine claims against it; a Meeting Order, to allow Quest to present a plan of arrangement to its creditors; and, a Transaction Approval and Vesting Order ("TAVO") to approve the proposed purchase and sale transaction between it and Primacorp Ventures Inc. ("Primacorp").

[3] There is minor opposition to the granting of the Claims Process Order and Meeting Order.

[4] There is substantial opposition to the granting of the TAVO. To allow the opposing parties further time to develop their materials, the Court adjourned that aspect of the application to November 12–13, 2020. In the meantime, however, Quest seeks approval of its agreement to pay Primacorp a Break Up Fee and that the Court grant a Break Up Fee Charge to secure those amounts. Various parties oppose this relief.

[5] At the conclusion of this hearing, I granted the Claims Process Order and the Meeting Order. I also approved Quest's agreement to pay the Break Up Fee and granted the Break Up Fee Charge. These are my reasons for those orders.

BACKGROUND FACTS

[6] On January 16, 2020, these proceedings began with the granting of the Initial Order.

[7] Quest's restructuring has been unique in many respects. Quest is a not-for-profit post-secondary educational institution, a status that bears on its options in this proceeding. Quest has never really been self-sustaining financially; rather, it has

historically relied on donations, secured loans and land sales to supplement its revenue.

[8] Quest's asset holdings are complex. The campus, which includes the main buildings and residences, is located in Squamish, BC. Initially, Quest held substantial development lands that surrounded the campus lands; however, over the years, Quest sold some of those lands to generate revenue. Even so, a significant amount of development land remains.

[9] Given Quest's history, its debt structure is also complex. There are many secured creditors, including Vanchorverve Foundation and Capilano University ("CapU"), with the latter holding a right of first refusal over certain lands. In addition, I approved Quest obtaining secured interim financing to assist its refinancing efforts in these *CCAA* proceedings: *Quest University Canada (Re)*, 2020 BCSC 318 and *Quest University Canada (Re)*, 2020 BCSC 860.

[10] Quest also has complex financial agreements concerning four residence buildings on the campus, as discussed in *Quest University Canada (Re)*, 2020 BCSC 921 (the "Rent Deferral Reasons"). Other agreements entered into by Quest, such as leases and naming rights agreements, potentially affect any disposition of its assets.

[11] Quest has faced numerous challenges in these proceedings in continuing its educational endeavours, particularly arising from the impact of the COVID-19 pandemic beginning in March 2020. Nevertheless, Quest has continued throughout these proceedings to pursue some form of partnership, including an academic partnership that would see a continuation of its education services. Quest has also engaged with various development partners to determine if that option would resolve its financial difficulties, either alone or in conjunction with a transaction with an academic partner.

[12] Quest has been disappointed along the way. In March 2020, a development partner withdrew from the process after submitting a bid. On May 28, 2020, I granted

2020 BCSC 1845 (CanLII)

an order extending the stay until August 10, 2020, to allow Quest to pursue an agreement with the party identified as “Academic Partner”. Unfortunately, a transaction with the Academic Partner did not materialize by June 2020: Rent Deferral Reasons at paras. 20–22.

[13] On August 7, 2020, I granted an order extending the stay to December 24, 2020 to allow Quest to pursue another transaction over that time, while also offering an uninterrupted fall term to its students. Over this last extension period, Quest has chosen to enter into a transaction with Primacorp.

[14] It is a condition precedent of the Primacorp transaction that the Court grant the TAVO and that Quest obtain creditor and this Court’s approval of a plan of arrangement. Other conditions precedent also arise. Quest is required to disclaim subleases held by Southern Star Developments Ltd. (“Southern Star”). Quest has already delivered those disclaimers. As a result, Southern Star is opposing the granting of the TAVO and challenging the disclaimers, with both matters to be addressed at the later hearing. Other conditions precedent relate to various agreements and charges and litigation claims relating to Quest’s assets, including its lands.

[15] Having reached this stage in the sales process, Quest now seeks the Claims Process Order and the Meeting Order, and will shortly seek the TAVO, as the first steps toward a conclusion to these proceedings. Quest takes the position that the Primacorp transaction maximizes the value of its assets and offers the greatest benefit to its stakeholders.

[16] It is not necessary at this stage to consider the sales process in detail, since that will be relevant to Quest’s later application for the TAVO. Having said that, it is of note that the Monitor, in its Fourth Report dated November 2, 2020, describes that process as “thorough”. In that Report, the Monitor also supports the Primacorp transaction as the one most beneficial to Quest’s creditors.

2020 BCSC 1845 (CanLII)

[17] Writ large, the Primacorp transaction, or more accurately described as a series of transactions, provides for:

a) Sufficient funds to pay all Quest's secured creditors' claims, including claims secured by the *CCAA* charges;

b) Funding for a plan of arrangement to be voted on by Quest's unsecured creditors;

c) Funds for these insolvency proceedings; and

d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

[18] The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They include, as defined in the Monitor's Fourth Report, the Primacorp Purchase and Sale Agreement (the "Primacorp PSA"), the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms include that Primacorp will:

a) Purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the Residence Lands, chattels and vehicles;

b) Lease specific Campus Lands back to Quest under a long-term lease arrangement;

c) Provide marketing and recruiting expertise and sufficient working capital to allow Quest to continue as a university;

d) Fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and $1.35 million under a plan of arrangement. In addition, the Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales; and

2020 BCSC 1845 (CanLII)

e) Provide Quest with a $20 million secured credit facility.

[19] All of the transaction documents are in settled form and the signed documents are in escrow. Primacorp and Quest are working towards a closing date in late December 2020.

2020 BCSC 1845 (CanLII)

CLAIMS PROCESS

[20] The remedial objective of the *CCAA* is to facilitate a restructuring of a debtor company. Section 11 of the *CCAA* imbues the supervising judge with a broad statutory authority to make such orders as are appropriate toward achieving that objective: *Bul River Mineral Corporation (Re),* 2014 BCSC 1732 at para. 29 ("*Bul River* #2").

[21] Establishing a claims process toward determining claims to be advanced under the *CCAA* is a recognized step in proceedings across Canada: *ScoZinc Ltd. (Re)*, 2009 NSSC 136 at para. 23; and *Bul River #2* at paras. 31-32.

[22] In *Timminco Limited (Re),* 2014 ONSC 3393 at paras. 41–44, Regional Senior Justice Morawetz (as he then was) discussed "first principles" from the *CCAA* in relation to claims process orders and the establishment of a claims bar date. He stated:

> [41] It is also necessary to return to first principles with respect to claims-bar orders. The *CCAA* is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the *CCAA*, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

[23] Quest submits that a claims process is necessary to enable it to implement a plan and close the Primacorp transaction.

[24] Quest indicates that there are five secured creditors holding approximately $30.7 million in debt. Quest estimates that there are 446 unsecured creditors holding

approximately $2 million in debt. If the Court upholds the Southern Star disclaimers, Southern Star will also be entitled to advance a claim against Quest as an unsecured creditor.

[25] Quest developed the proposed claims process with input and support from the Monitor. The features of the proposed claims process are:

a) The claims process will not address claims arising post-filing, save for a Restructuring Claim and amounts secured by *CCAA* Charges;

b) The claims process addresses claims against Governors and Officers in relation to a pre-filing claim or Restructuring Claims;

c) The claims process requires that secured creditors prove their claims;

d) The claims bar date for claims is November 24, 2020; the claims bar date for Restructuring Claims is the later of November 24, 2020 and ten days after the date on which a Creditor receives a Notice of Disclaimer or Resiliation;

e) To facilitate creditor participation in the Claims Process, Quest designed a negative claims process for almost all vendors, students and employees. As such, after receipt of a claims package indicating Quest's determination of the claim, that creditor need only respond if there is disagreement as to the amount of its claim set out in the notice; and

f) Disputes will be handled in the usual fashion, but by the Monitor. After consultation with Quest, the Monitor will deliver any Notices of Revision or Disallowance. Creditors may then deliver a Notice of Dispute to the Monitor. Failing settlement of a dispute, the Monitor may refer the matter to the Court for a determination after a hearing *de novo*.

2020 BCSC 1845 (CanLII)

[26] I agree that the timeline set for the claims process is ambitious. As noted by the Monitor, it is relatively short. However, in my view, the negative claims process in relation to many of the unsecured creditors ameliorates any concerns. In addition, the secured creditors have been aware of these proceedings since the outset; those secured creditors who might have more complicated claims have been actively involved. I can only presume that the secured creditors are well aware of their own claims. The requirement that secured creditors file proof of claims will flush out any issues well ahead of the intended closing of the Primacorp transaction later this year, if approved.

2020 BCSC 1845 (CanLII)

[27] The Quest University Faculty Union (the "Union") was the only party who objected to the granting of the Claims Process Order. In October 2019, the Union was certified as the bargaining agent of Quest employees although no bargaining has yet occurred. The Union indicates that the employees are entitled to compensation in relation to accrued credits. The Union is uncertain as to whether this is a pre- or post-filing claim, with only the former giving rise to the need to file a proof of claim.

[28] I agree with Quest that this uncertainty is not an appropriate basis upon which to delay this relief. Clearly, the Union can engage with Quest toward clarifying this issue as to whether or not the Union needs to file a proof of claim. Under the Primacorp transaction, Quest intends to continue to operate as an entity and will, presumably, retain most, if not all, current employees.

[29] I agree that approval of a claims process is an important step forward allowing Quest to identify and quantify claims against it and members of its Board of Governors and Officers. Whether or not this Court ultimately approves the TAVO, this process will assist in the implementation of any later plan and any distributions to creditors.

THE MEETING ORDER

[30] Quest has developed a plan of compromise and arrangement dated November 1, 2020 (the "Plan"). It is a requirement of the Primacorp transaction that

Quest do so and that Quest seek and obtain approval of the Plan by its creditors and this Court.

[31] The *CCAA* expressly allows the court to order a meeting of the secured and unsecured creditors to consider a plan of arrangement:

> Compromise with unsecured creditors
>
> 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.
>
> Compromise with secured creditors
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company, or 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.

[32] It is not the role of the Court at this stage to consider or rule on the fairness or reasonableness of the Plan. Rather, I adopt the discussion in *ScoZinc Ltd. (Re),* 2009 NSSC 163 at para. 7; namely, that I should only exercise my discretion to refuse to refer the Plan to the creditors if the plan is doomed to fail at either the creditor or court approval stage.

[33] The Plan provides for one class of creditors for the purposes of voting, namely the Affected Creditor Class. The Plan provides for payment in full of Convenience Creditors (Creditors with Affected Claims that are less than or equal to $1,000). The Plan also allows Affected Creditors with a Proven Claim greater than $1,000 to make a Cash Election to receive $1,000 in satisfaction of their Claim. These latter provisions will significantly affect approximately 250 students who have claims within these limits.

[34] All Convenience Creditors and Cash Election Creditors are deemed to vote in favour of the Plan.

2020 BCSC 1845 (CanLII)

2020 BCSC 1845 (CanLII)

[35] Affected Creditors who are not Convenience Creditors or Cash Election Creditors (the “Remaining Creditors”) shall receive fifty cents ($0.50) for every dollar of their Affected Claim, up to a maximum total disbursement of $1.35 million for Convenience Claims, Cash Election Claims and the Affected Claims of Remaining Creditors (the “Maximum Claim Pool”). In the event the Affected Claims exceed the Maximum Claim Pool, Convenience Creditors will receive the lesser of their Affected Claim and $1,000; Cash Election Creditors will receive the sum of $1,000; and, the Remaining Creditors will receive their *pro rata* share of the Maximum Claim Pool after deduction of the amounts payable to Convenience Creditors and Cash Election Creditors.

[36] The Plan is premised on payment in full of all secured creditors to the extent of their claims, upon closing of the Primacorp transaction. The Plan provides for the payment of such amounts owed to Her Majesty in Right of Canada and employees, as required by the *CCAA*.

[37] The Plan will not compromise Unaffected Claims that include: post-filing claims (other than certain Restructuring and Governor/Officer Claims); secured claims; claims secured by *CCAA* Charges; claims against any Governor and Officer that cannot be compromised pursuant to the *CCAA*; and, claims in respect of payments referred to in s. 6 of the *CCAA*.

[38] The Monitor assisted in the development of the Plan and it supports the Plan. The Monitor’s Fourth Report indicates that the Monitor considers the Plan fair and reasonable.

[39] The Meeting Order authorizes Quest to convene a meeting on December 2, 2020. Due to the COVID-19 pandemic, the Monitor has arranged to hold the Creditors’ Meeting virtually in accordance with the Electronic Meeting Protocol.

[40] Another matter for consideration is whether the Plan has properly established the classes of creditors for voting at the proposed meeting. The Plan provides that all Affected Creditors will be placed into one creditor class at the meeting.

[41] Section 22(1) of the *CCAA* provides:

> A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

2020 BCSC 1845 (CanLII)

[42] Section 22(2) of the *CCAA* lists the factors to be considered when taking into account placing all the creditors in the same class:

> 22(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account
>
> a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> b) the nature and rank of any security in respect of their claims;
>
> c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

[43] The test to determine the classification of creditors is known as the "commonality of interests" test: *Canadian Airlines Corp. (Re),* [2000] A.J. No. 1693 (Q.B) at paras. 17–19.

[44] No stakeholder objects to the classification of the creditors under the Plan.

[45] I agree that the Plan properly classifies the creditors—namely, the Affected Creditors—in one class for voting purposes. They all hold unsecured claims against Quest and they all rank the same in priority. While the Convenience and Cash Election Creditors will be treated slightly differently, practical reasons justify this approach, and they are common in *CCAA* plans: *Nelson Financial Group Ltd. (Re)*, 2011 ONSC 2750 at para. 14 and *Angiotech Pharmaceuticals Inc. (Re)*, 2011 BCSC 450 at para. 6.

[46] The classification of the creditors under the Plan is appropriate in the circumstances. I concur with the Monitor that Quest has a reasonable chance of

obtaining approval of the Plan from the creditors and the Court. Quest's Plan meets the low threshold at this stage. The Plan should be put before the creditors, and if approved, before the Court.

2020 BCSC 1845 (CanLII)

THE BREAK UP FEE / CHARGE

[47] The Primacorp PSA executed by Quest requires, as a condition precedent, that Quest obtain court approval of its agreement to pay Primacorp what is defined as a "Break Up Fee". In addition, the Primacorp PSA requires that Quest obtain a court ordered charge (the "Break Up Fee Charge" or "Charge") against Quest's assets to secure the Break Up Fee, ranking only behind the Administration Charge, the Interim Lender's Charge and Directors and Officers Charge ("D&O") (as defined in the Amended and Restated Initial Order ("ARIO")).

[48] The Primacorp PSA provides:

> 10.13 Expense Reimbursement. In consideration of [Primacorp] having expended considerable time and expense in connection with this Agreement and the negotiation thereof, and the identification and quantification of assets to be included in the Purchased Assets, if the transactions do not close . . . [Quest] shall pay to [Primacorp] . . . an amount equal to [Primacorp's] actual out of pocket fees incurred in connection with the transactions contemplated by this Agreement together with the preparation, negotiation and execution of delivert of this Agreement . . . (the "Break Up Fee"). . . .
>
> [Emphasis added.]

[49] The agreed upon Break Up Fee was initially limited to $500,000 to a certain stage of the negotiations. At this point, that limit no longer applies.

[50] Quest's obligation to pay the Break Up Fee is engaged where the Primacorp transaction fails to close as a result of (i) Quest materially breaching the Primacorp PSA; (ii) Quest refusing to work in good faith towards negotiating, execution or delivery of the required closing documents; or (iii) Quest executing and delivering a letter of intent or purchase agreement with another person that is inconsistent with and prevents the completion of the Primacorp transaction.

[51] Quest is not be obligated to pay the Break Up Fee if this Court does not approve the Primacorp transaction in accordance with the application for the TAVO to be heard next week.

[52] Quest submits that the Break Up Fee is commercially reasonable in the circumstances, consistent with other transactions that have been approved in *CCAA* proceedings. Quest's request for approval of the Break Up Fee and Charge is supported by the Monitor.

[53] Section 11 of the *CCAA* allows this Court to exercise its discretion to grant orders as are appropriate toward achieving the broad statutory and policy objectives under the *CCAA*. In *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60, the Court stated:

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

[54] Quest has also referred to s. 11.2 of the *CCAA* that provides the court with specific authority to grant a charge in favour of a person who is lending money to the debtor company. That provision does not apply since Primacorp is not lending Quest any monies; however, I have found the s. 11.2(4) factors to be useful in my analysis.

[55] In "Rights of First Refusal and Options to Purchase in Insolvency Proceedings" (2019) 8 J.I.I.C. 103, the authors Virginie Gauthier, David Sieradzki and Hugo Margoc discussed the rationale for break fees at 125–126:

2020 BCSC 1845 (CanLII)

> It is well established convention in both Canadian and U.S. insolvency proceedings that a party willing to incur the time and expense to perform the level of diligence required to submit an unconditional "stalking horse" offer prior to the commencement of a sale process should be entitled to bid protections. Those bid protections typically include a "break fee" and "expense reimbursement" mechanism. The overriding rationale for these types of bid protections is to compensate the stalking horse bidder for its substantial time and expense to the extent it is ultimately not the successful bidder at the conclusion of the sale process.

2020 BCSC 1845 (CanLII)

[56] As noted by the authors of the above article, numerous Canadian courts have considered break fees or break up fees with or without an accompanying charge. These can arise in *CCAA* proceedings, proposal proceedings, receiverships and foreclosures.

[57] In the *CCAA* context, cases include *Mosaic Group Inc. (Re)*, [2004] O.J. No. 2323 (Ont. Sup. Ct. J.) at para. 16; *Tiger Brand Knitting Co. (Re)*, [2005] O.J. No. 1259 (Ont. Sup. Ct. J.) at paras. 13 and 37 (described as a “stay fee”); *Stelco Inc. (Re)*, [2005] O.J. No. 4733 (Ont. C.A.) at para. 20; *Boutique Euphoria inc. (Re)*, 2007 QCCS 7129 at paras. 63-72; *Nortel Networks Corp. (Re)*, [2009] O.J. No. 3169 (Ont. Sup. Ct. J.) at para. 56 and [2009] O.J. No. 4487 (Ont. Sup. Ct. J.) at para. 10; *Brainhunter Inc. (Re)* (2009), 62 C.B.R. (5th) 41 at para. 10 (Ont. Sup. Ct. J.); *Bul River Mineral Corporation (Re),* 2014 BCSC 645 at paras. 110–111; and, *Green Growth Brands Inc. (Re)*, 2020 ONSC 3565 at para. 52.

[58] There is no doubt that some break fees and related charges may be seen as unfairly and unreasonably extracting value from the estate with little or no benefit to the stakeholders. As in many exercises of its discretion under the *CCAA*, the court must be mindful of such concerns. Each situation must be considered in the context of its own unique circumstances, including the present state of affairs faced by the debtor company and its stakeholders.

[59] If a break fee is fair and reasonable in all of the circumstances in the sense that it provides a corresponding or greater benefit to the estate, court approval of such a fee and a related charge may be warranted. Relevant factors that may be

considered by the court when asked to approve a break fee and grant a charge include:

a) Was the agreement reached as a result of arm's length negotiations?;

b) Has the agreement been approved by the debtor company's board or specifically constituted committees who are conducting the sales process?;

c) Is the relief supported by the major creditors?;

d) What may be the effect of such a fee/charge? Will it have a chilling effect on the market, or will it facilitate the sales process?;

e) Is the amount of the fee reasonable? In relation to expenses anticipated to be covered, is the amount reasonable given the bidder's time, resources and risk in the process?;

f) Will the fee and charge enhance the realization of the debtor's assets?;

g) Will the fee and charge enhance the prospects of a viable compromise or arrangement being made in respect of the company?; and

h) Does the monitor support the relief?

[60] The Primacorp transaction is not a true stalking horse bid in the sense that Quest seeks approval of the transaction with the Break Up Fee and with the expectation that Quest will then use that bid to entice other proposals. Quest is seeking approval of the Primacorp transaction now; however, it remains the case that other persons remain interested in Quest's assets and they may later seek approval of another bid.

[61] Quest is pursuing the Primacorp transaction at this time on a tight timeline given Quest's need to achieve a speedy resolution in order to provide assurances to its students and other stakeholders for the 2021 academic school calendar. In

2020 BCSC 1845 (CanLII)

addition, Quest has been facing increasing pressure from its secured creditors to move to a resolution of the matter after almost ten months in this proceeding.

[62] All of the relevant circumstances were considered by the Monitor who has indicated its support of the Break Up Fee and Break Up Fee Charge (the s. 11.2(4)(g) factor). It its Fourth Report, the Monitor states:

> 5.17 . . . Quest's agreement to the Break Up Fee was instrumental in encouraging Primacorp to expend time and expense engaging in extensive discussions with Quest to reach a definitive agreement at a time when no other proposals were forthcoming. Quest benefited from this commitment as it resulted in the Primacorp Agreement as well as the advancement of other potential proposals thereby giving Quest the confidence that Primacorp was the superior partner. The quantum of the Break Fee is calculated on an expense recovery basis and the Monitor considered it to be reasonable in light of the value of the transaction.

[63] I agree with Quest and the Monitor that the Break Up Fee and Charge is appropriate in these circumstances, particularly given the following factors:

a) The Break Up Fee has been approved by Quest's board of directors and Quest's Restructuring Committee, both having integral knowledge of Quest's options at this stage of the proceedings;

b) The Break Up Fee is not akin to a "fee" that one sees in many stalking horse bids, including those approved by Canadian courts, that is driven by the purchase price. Rather, the Break Up Fee is limited to Primacorp's actual out-of-pocket fees incurred in connection with the transaction. It is evident from the materials before the Court that the negotiations leading to the transaction were extensive and that Primacorp has already expended significant resources engaging in that process and doing its necessary due diligence;

c) The Break Up Fee and Break Up Fee Charge is only expected to be material for a short period of time. It will become irrelevant if the Primacorp transaction is approved under the TAVO;

2020 BCSC 1845 (CanLII)

d) The Break Up Fee is only payable if the Transaction does not close due to Quest's breach of its obligations in respect of the transaction or Quest takes steps to pursue a transaction that makes it impossible to close the Primacorp transaction;

e) Quest's management has remained intact throughout the proceedings and the Monitor continues to be of the view that Quest is acting with good faith and due diligence;

f) The major secured creditors Vanchorverve Foundation, and the Interim Lender have been kept apprised of Quest's consideration of its options and, in particular, the Primacorp transaction, which includes the requirement for the Break Up Fee and Charge. They remain supportive of this relief;

g) The Break Up Fee and Charge will enhance Quest's ability to put forward the Plan and obtain creditor approval of the Plan, which will provide for the funds to satisfy Quest's creditors' claims and allow Quest to continue as a viable post-secondary institution;

h) The value of Quest's assets and property is substantial and there is every indication that there is sufficient value to repay all the secured creditor's claims and the Break Up Fee; and

i) No creditor will be materially prejudiced by the Break Up Fee and Charge. The only creditor who registered an objection to this relief was CapU, a secured creditor. CapU submitted that the Court should adjourn this relief and address it at the later application for the TAVO. However, CapU stands to recover its secured loan under this transaction or any alternate transaction. CapU also holds a right of first refusal but has failed to identify any prejudice in that respect arising from this relief referring only vaguely to the possibility of its rights being affected.

2020 BCSC 1845 (CanLII)

[64] The only other person objecting to the approval of the Break Up Fee and Charge was Development Partner #1, who asserted that it was premature to grant that relief. I decline to address these submissions as they come from a potential competing bidder whose future involvement is unclear and who presently has no standing in this proceeding.

2020 BCSC 1845 (CanLII)

CONCLUSION

[65] I grant the relief sought by Quest at this preliminary stage, including granting the Claims Process Order and the Meeting Order. I also approve the Break Up Fee and grant the Break Up Fee Charge.

"Fitzpatrick J."

TAB 7

See paras. 65, 67-68.

Boutique Euphoria inc. (Arrangement relatif à) **2007 QCCS 7129**

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-030746-073

DATE: **JULY 19, 2007**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF:

BOUTIQUE EUPHORIA INC.
and

LINGERIE STUDIO INC.
Petitioners
and

RAYMOND CHABOT INC.
Monitor

REASONS FOR JUDGMENT RENDERED ORALLY ON A "REQUÊTE AFIN D'OBTENIR L'APPROBATION DE LA COUR POUR LA MISE EN PLACE D'UN PROCESSUS DE SOLLICITATION D'OFFRES" (# 26)

INTRODUCTION

[1] Under what conditions, if any, should a Court approve a stalking horse bid process in the context of a *CCAA* restructuring? Should a priority charge be created to protect the payment of the termination fee attached to such bid process?

[2] These are, in short, the two questions that this judgment addresses.

[3] The factual context is the following.

2007 QCCS 7129 (CanLII)

2007 QCCS 7129 (CanLII)

THE FACTS

[4] On June 18, 2007, this Court issued an Initial Order pursuant to Sections 4, 5 and 11 of the *CCAA* with respect to two companies, Euphoria Boutique inc. (**EBI**) and Lingerie Studio Inc. (**LSI**).

[5] As it was indicated in this Initial Order, EBI and LSI are two entities involved in the lingerie field. EBI is a retailer of lingerie; it operates fifteen (15) stores under the trade name Moments Intimes and two (2) stores under the trade name Victoire Delage. LSI is a wholesaler of lingerie. The sole shareholder of both is Ace Style International Ltd. (**ACE**).

[6] EBI acquired these seventeen (17) stores on March 4, 2004 from Boutiques San Francisco Incorporées, together with the equipment, inventory, trademarks and assets necessary to operate the retail lingerie business previously owned by the latter.

[7] EBI employs one hundred twenty-eight (128) people, one hundred eight (108) in its retail stores and twenty (20) at its head office, while LSI employs nine (9) persons.

[8] The Initial Order was issued for a period of thirty (30) days. It expired on July 18, 2007. It has been renewed until today, pending the issuance of this judgment.

[9] It is noteworthy to remind the parties of three paragraphs of the reasons given for the issuance of this Initial Order:

> [15] Cirex main concern is the following. Failing the appointment of an interim receiver, it considers that the process under the *CCAA* will lack either transparency or proper surveillance by an independent person. Its concern is expressed as follows.
>
> [16] In a nutshell, Cirex believes that without an interim receiver, there is a risk that EBI or LSI will proceed with a rapid sale or disposition of their assets, without any opportunity for their creditors, including Cirex, to either participate in the process or insure that it is made at the best available conditions.
>
> […]
>
> [26] That said, it is too early at this stage to conclude that the *CCAA* is merely used here for a pure liquidation process or that it is the only potential outcome of the process contemplated. This issue, if need be, will be addressed at a later point.

[10] At the present time, some thirty days after this Initial Order, the likely outcome of the *CCAA* process is not very positive.

[11] According to the Monitor's first report of July 16, 2007[1], the actual situation of EBI and LSI is as follows.

[12] EBI has suffered important losses over the last three financial exercises. Its operations may be viable if they are integrated within a more important group in order to reduce its fixed costs. LSI has no viability.

[13] Simply put, LSI must be liquidated and the assets of EBI must all be sold so that they be potentially integrated within another organization.

[14] The description of the liabilities of both entities indicates that there are in total Secured Creditors for over 2.3 millions dollars and Unsecured Creditors in excess of 11.2 millions dollars.

[15] At the moment, it is fair to say that this liquidation and sale process will likely trigger no more than 1.2 to 1.6 million dollars in recovery, in the best-case scenario.

[16] Thus, the Unsecured Creditors will not receive a penny and the secured claims, as they stand now, will not be covered in totality.

[17] It is faced with this background that the Monitor presents its Motion to the Court.

THE MOTION

[18] The Motion is entitled "*Requête du contrôleur afin d'obtenir l'approbation de la Cour pour la mise en place d'un processus de sollicitation d'offres*".

[19] In a nutshell, the Monitor is asking the Court to approve what is otherwise known as a “stalking horse” bid process.

[20] Such a process is described as follows by Professor Janis Sarra[2], perhaps the most trusted writer on *CCAA* issues in Canada at the moment:

> Stalking horse processes under the *CCAA* are a relatively new phenomenon. The term "stalking horse" comes originally from using a horse or a painted screen of a horse to serve as a screen to camouflage hunters as they stalked their prey. In the insolvency context, it is used to signify a situation where the debtor makes an agreement with a potential bidder for a sale of the debtor's assets or business, and that agreement forms part of a process whereby an auction or tendering process is conducted to see if there is a better and higher bidder that will result in greater returns to creditors. The premise is that the stalking horse has undertaken considerable due diligence in determining the value of the debtor corporation, and other potential bidders can rely, to an extent, on the value attached by that bidder based on that due diligence.

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1 Exhibit R-1.

2 Janis P. SARRA, “*Rescue! : The Companies' Creditors Arrangement Act*" (Toronto: Carswell, 2007), at 118.

2007 QCCS 7129 (CanLII)

[21] Here, the stalking horse bidder is Lilianne Lingerie and its offer (or stalking horse bid) is filed under seal as Exhibit R-3 for confidentiality reasons. Because of that, the Court will refrain from stating openly in this judgment the figures contained in this offer. Those who needed to know the figures are already aware of them.

2007 QCCS 7129 (CanLII)

[22] The main features of the Lilianne offer are the following:

1. It covers twelve (12) out of seventeen (17) stores of EBI and all inventory of both entities. Five (5) locations are thus excluded;

2. The offer is for a total amount of X $, namely X $ for the twelve (12) stores or X $ for each, and X $ for the inventory, namely X $ for LSI and X $ for EBI;

3. It includes offers of employment to employees of the retail locations not excluded, but it entails the termination of all employees of LSI and those of the head office of EBI, as well as its districts and areas managers;

4. It provides that there will be a termination fee of X $ (partly reduced at the hearing) payable to Lilianne if a “Superior Offer” is received by the Monitor pursuant to the bid process. A Superior Offer is defined as one that provides for a minimal cash consideration of X $ for the assets already described. This amount was also slightly reduced at the hearing.

[23] The bidding process that the Monitor wants to put in place on the basis of this stalking horse bid is to begin as soon as judgment is rendered, for a completion date of August 7, 2007.

[24] The Monitor identifies a list of potential interested parties[3] who will be asked for their interest in bidding through a document entitled "Call for Overbids-Stalking Horse Notice".

[25] The Call for Overbids documentation states that the overbid must be received by August 7, 2007, that it must be made for an amount of cash consideration only, and that it should exceed the amount of the Superior Offer.

[26] It finally makes reference to the contemplated Assets Purchase Agreement whose terms are already agreed to by the stalking horse bidder. These terms include a mention that the purchased assets are transferred free and clear of any charges. In other words, it takes as an assumption that this Court will issue a vesting order with respect to the purchased assets.

[27] The Motion is contested by one Secured Creditor, Cirex, and an Unsecured one, Arianne Lingerie.

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[3] Exhibit R-4.

[28] Suffice to say here that they are of the view that the stalking horse bid process proposed by the Monitor should not be sanctioned by the Court for two main reasons:

a) The process followed by the Monitor was not in line with the prerequisites for a proper stalking horse bid process;

b) The termination fee claimed by the stalking horse bidder is excessive.

2007 QCCS 7129 (CanLII)

ANALYSIS AND DISCUSSION

[29] As Professor Sarra says in her book published in the spring of 2007[4], "S*talking horse processes under the CCAA are a relatively new phenomenon. (…)*".

[30] Besides the comments found in Professor Sarra's book, at pages 118 to 123, Counsels and the Court have indeed identified merely two articles in terms of writing on the subject in Canada[5].

[31] The first one is the article by Dowdall and Dietrich entitled "*Do Staking Horses Have a Place in Intra-Canadian Insolvencies*?"[6]. The second one is the article of Fitch and Jackson entitled "*Face the Music: The A. & B. Sound CCAA Proceeding - A Stalking Horse of a Different Colour*"[7].

[32] Both are published in the Annual Review of Insolvency Law (2005), a publication regrouping the articles discussed at the annual conference on insolvency organized by Professor Sarra.

[33] In terms of case law, there is not much more. Barely three reported Canadian decisions have explored and discussed the stalking horse bid process.

[34] One is that of *Stelco*[8] of Farley J., of the Ontario Superior Court of Justice, rendered in 2004. Another one is that of *Tiger Brand Knitting Co.*[9] of Campbell J., also

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4 *Supra* note 2.

5 After giving these reasons orally, the Court found one article published in Quebec that discusses the stalking horse bid process. In his article entitled "*Les processus de vente - Maximiser la réalisation et prévenir les litiges*", published as part of the *3rd Advanced Conference on Bankruptcy and Insolvency* of the Canadian Institute, Montreal, September 22, 2003, Roger SIMARD describes the process in his section dealing with the American Sale Process, at pages 53 to 58. He does not refer to any reported decision rendered by a Canadian Court on the subject.

6 Daniel R. DOWDALL and Jane O. DIETRICH, "*Do Staking Horses Have a Place in Intra-Canadian Insolvencies*?", in Janis Sarra*, ed., Annual Review of Insolvency Law, 2005* (Toronto: Carswell, 2006) at 1-14.

7 Michael FITCH and Kibben JACKSON, "*Face the Music: The A. & B. Sound CCAA Proceeding - A Stalking Horse of a Different Colour",* in Janis Sarra*, ed., Annual Review of Insolvency Law, 2005* (Toronto: Carswell, 2006) at 15-36.

8 *Stelco Inc., Re* (2004), 2004 CarswellOnt 5076 (Ont. S.C.J. [Commercial List]).

9 *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th), 315 (Ont. S.C.J. [Commercial List]), leave to appeal refused (2005), 19 C.B.R. (5th) 53 (Ont. C.A.).

of the Ontario Superior Court of Justice, issued in 2005. The last one is the decision rendered in 2005 by the British Columbia Supreme Court (Madam Justice Brown) in the *A. & B. Sound* restructuring. The main features of that decision are summarized in the second article referred to before.

2007 QCCS 7129 (CanLII)

[35] There are no decisions rendered in Quebec on this issue.

[36] Even though the process is a new phenomenon, unknown of in *CCAA* proceedings in Quebec, it does not mean that it should not be considered. In theory, nothing prevents a Court in this province from assessing whether or not such a sale process should be implemented in a given situation. It all depends upon the applicable circumstances.

[37] Bearing that in mind, and based on this Court's review of the above-mentioned doctrine, articles and case law, it is fair to say that the following four factors, while not necessarily exhaustive, are important considerations in assessing whether or not a stalking horse bid process should be approved and authorized:

1. Has there been some control exercised at the first stage of the competition (namely that to become the stalking horse bidder) and to what extent?

   Two main reasons explain that first consideration.

   On the one hand, the stalking horse bid establishes the benchmark to attract other bids and its accuracy is therefore key to the integrity of the whole process.

   On the other hand, as the stalking horse bid is normally subject to a break up fee, it is even more important that it be accurate, as the call for overbids will have to exceed a certain margin over and above the stalking horse bid.

   In other words, some assurances should exist that the horse chosen is indeed the right one.

2. Is there a need for stability within a very short time frame for the debtor to continue operations and the restructuring contemplated to be successful?

   This second consideration is explained by the fact that the stalking horse bid process is generally more stringent and less flexible than a traditional call for tenders process. As a result, to resort to such a process, time should normally be of the essence.

3. Are the economic incentives for the stalking horse bidder, in terms of break up fee, topping fee and overbid increments protection, fair and reasonable?

This third consideration is justified by the fact that excessive economic incentives in terms of a break up fee or other fees may chill the market and deter other potential bidders. Thus, rendering the process inefficient and, in fact, inadequate in terms of meeting its goal. The concept of fairness to all bidders here comes to mind.

4. Are the time lines contemplated reasonable to insure a fair process at the second stage of the competition, namely that to become the successful over bidder?

This fourth consideration is obviously also linked to the fairness of the bid process to ensure, inasmuch as possible, an equal opportunity to all interested bidders.

2007 QCCS 7129 (CanLII)

[38] In this case, the Court is of the view that the stalking horse bid process followed by the Monitor does not satisfy the first and third considerations expressed before. Hence, it should not be authorized as sought.

[39] Here is why.

[40] First, the Court is not satisfied that there has been proper control exercised over the choice of the stalking horse bidder.

[41] According to the evidence heard, and mostly that of the Monitor himself, there has been no attempt made to canvass the market in order to see if any other party would be interested in becoming a stalking horse bidder.

[42] The Monitor has elected to merely negotiate the conditions of the stalking horse bid with one entity, namely Lilianne.

[43] The main reasons given were that prior to the *CCAA* Initial Order, Lilianne had an accepted offer to buy most of the contemplated assets and that the other offer received at that time by the Debtors was not anywhere close to what Lilianne was then willing to pay.

[44] The Court finds theses explanations not convincing.

[45] A stalking horse bid is very different than any normal bid, and the Monitor had simply nothing to compare the Lilianne's stalking horse bid to.

[46] Not only was this the situation, but the Monitor had not even completed his own evaluation of the leases that, according to Lilianne's witness, represent the only real value of the purchased assets.

[47] Yet, the Monitor said in his testimony before the Court that this evaluation was requested by him in order to "*…bench-marqué les offres…*". It has still to be received.

[48] As a result, the Monitor had simply no benchmark whatsoever against which to assess the Lilianne's stalking horse bid.

[49] This is surprising, and indeed difficult to accept in this case, mostly when one remembers the prior concerns expressed by Cirex at the Initial Order stage, as stated in paragraphs 15 and 16 of the Judgment rendered by this Court.

[50] This is even more so when one considers that the same locations, no less than three years ago, were the subject of a call for tenders in a sale of assets process conducted under the *CCAA* in the Boutiques San Francisco restructuring.

[51] In that process, ultimately won by Ace, the current shareholder of EBI and LSI, there were five (5) bids received and two identified as the best ones: that of Ace and that of another entity.

[52] Nonetheless, that entity, while identified in Exhibit R-4 as one to whom the call for overbids should be sent, was not even contacted, if not simply to enquire for its interest in becoming a stalking horse bidder.

[53] Furthermore, not trying to canvass any other entity is difficult to understand when the Monitor tells the Court that he apparently received many calls of organizations showing interest in the Debtors' assets.

[54] In short, based on the evidence presented in front of the Court, it appears that any competitive element has been ignored at the first stage of this stalking horse bid process.

[55] In the article of Dowdall and Dietrich referred to before[10], they mention the following:

> Courts have given no reason to shy away from the auction process solely on the basis that tender is better. Courts have, in fact, given the signal that, as long as the process meets the principles as laid out in *Soundair*, the process will be considered acceptable. (…)

[56] In this *Soundair*[11] case, the Ontario Court of Appeal summarized as follows the duties a court must perform when deciding whether a receiver who has sold property acted appropriately:

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.

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[10] *Supra* note 6, at 10.
[11] *Royal Bank* v. *Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at ¶16.

2007 QCCS 7129 (CanLII)

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.

2007 QCCS 7129 (CanLII)

[57] In the judgment of the Ontario Superior Court of Justice in *Tiger Brand Knitting Co. Re*[12], Campbell J. cites the same extract from *Soundair* in the context of a sale process that ended up turning to be a stalking horse bid process.

[58] After the citation, he said this:

> 35. To my mind, those same duties of the Court are implicit in a marketing and sale process pursuant to Court Order under the CCAA.

[59] Interestingly, in that case, there was a sale process first initiated that generated a number of offers, the best of which was then chosen to become the stalking horse bid in the amended sale process.

[60] Here, the Court is not convinced that the Monitor has made sufficient efforts to get the best price at the stalking horse bid level. He merely focussed on one alternative, with no consideration for the others. Even in the context of a *CCAA* restructuring, this is hardly acceptable.

[61] In the present situation, it is even more true as a few days or a couple of weeks delay would not have made, in all likelihood, much of a difference in the scenarios contemplated.

[62] That is not all.

[63] Second, based on what the Court understands as being the applicable standards, the Court also considers that the Monitor has not established that the break up fee and overbid increments protection of the stalking horse bidder are fair and reasonable.

[64] On that issue, Dowdall and Dietrich[13] say the following:

> (…) The U.S. courts seem to have settled in on break fees in the range if 1-2 per cent as being reasonable.
>
> Courts in the U.S. have examined break-fee arrangements with the concern that excessive break fees would chill the market and deter other potential bidders; however, commentators also suggest that break fees are necessary to attract a first bidder and get the auction process going. Generally, three lines of analysis have been used by courts to determine the appropriateness of the break fee.

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12 *Supra* note 9, at ¶34.

13 *Supra* note 6, at 6 and 7.

2007 QCCS 7129 (CanLII)

First, in some situations courts have relied on the business-judgment rule and left to the seller's discretion the appropriateness of the existence of and/or amount of a break fee.

Second, courts in some situations have taken a harder look and applied a more thorough best interest of the estate test. For example in *Re Hupp Industries* [140 B.R. 191 (Bank N.D. Ohio 1992)] the court stated that the business-judgment rule was not appropriate in the insolvency context with respect to break fees because of the potentially detrimental effect that the allowance of such a fee would have on the debtor's estate. The court suggested the following factors be examined before approval of a break fee:

1. whether the fee requested co-relates with a maximization of value to the debtor's estate;
2. whether the request is arm's-length;
3. whether the principal stakeholders are supportive;
4. whether the break-up fee constitutes a fair and reasonable percentage of the proposed purchase price;
5. whether the dollar amount of the break-up fee would have a "chilling effect" on the market;
6. The existence of available safeguards; and
7. whether there exists a substantial adverse impact upon unsecured creditors where such creditors are in opposition.

Third, some U.S. case law has indicated that break fees should only be allowed to the extent that they compensate the stalking-horse bidder for the administrative expense associated with such role.

[65] Looking at these three lines of analysis, the Court disregards the first one as not satisfactory. Merely relying upon the business-judgment rule and seller's discretion to assess the appropriateness of the break up fee is not for a court to properly exercise its judgment and jurisdiction.

[66] As for the other two lines of analysis, both the doctrine and the case law appear to suggest that break up fees of 1 to 3 per cent are normally seen as reasonable. While this may sometimes vary depending upon the circumstances, the economic incentives of the stalking horse bidder here well exceed 10 per cent. Based on these authorities, they indeed appear excessive in terms of mere percentages.

[67] The Court's conclusion may have been different if, in accordance with the third line of analysis suggested before, some indications of the real administrative expenses associated with this stalking horse bidder role would have been given.

[68] However, this evidence is absent and there is simply no manner for this Court to gauge the appropriateness of these fees under the circumstances.

[69] To the contrary, the testimony of Lilianne's witness appears to indicate that a good part of the amount of these fees relates to a compensation for its now useless efforts to arrive at an agreement with the Debtors in May 2007.

[70] Such agreement has not been implemented because of the *CCAA* proceedings. As this witness said, "*il se sent brimé"* because of that, since Lilianne needed to reassess the whole inventory value.

[71] While these complaints may well be legitimate, the Court does not consider that in the context of a stalking horse bid process, the break up fee exists to cover that. These fees must rather be related to the stalking horse bid process itself and the efforts undertaken towards that end.

[72] All in all, these two important issues are sufficient for this Court not to give its blessing to the suggested process. In doing so, the Court fully realizes that another process, like a traditional call for tenders, may not trigger a better result. That may well be and only time will tell.

[73] Notwithstanding, mere uncertainty is not enough in itself for this Court to approve a process that is not satisfactory for the above reasons.

[74] From that standpoint, Cirex's Counsel is right in saying that what transpires here is that the Court is asked to ratify a transaction that is presented as a "*fait accompli*", with no proper canvassing of the market to start with and a break up fee of a magnitude high enough to chill out the over bidders. The whole process would thus be flawed.

[75] One may add that in the situation of a restructuring that is, in reality, a liquidation leading to minimal recovery, if any, for the Creditors, it is even more important to ensure that the process followed is beyond reproach.

[76] The Court does not have the elements to so conclude in this case.

[77] That being so, it is unnecessary to comment further on the possibility of granting a priority charge for the break up fee attached to this stalking horse bid process, as also asked by the Monitor.

[78] Suffice to say at this stage that none of the authorities cited on the subject seems to discuss this and that the request appears awkward at first sight.

[79] The termination fee is, in essence, included in the over bids to be received. There thus appears to be many other ways to guarantee its payment. It seems doubtful that using the extraordinary measure of the creation of a priority charge would consequently be appropriate in such situations.

2007 QCCS 7129 (CanLII)

[80] In closing, this is not a matter that warrants the granting of costs in favour of anyone.

FOR THESE REASONS GIVEN VERBALLY AND REGISTERED, THE COURT:

[81] **DISMISSES** the Monitor's Motion;

[82] **WITHOUT COSTS**.

CLÉMENT GASCON, J.S.C.

Me Bertrand Giroux
BCF
Attorneys for the Debtors

Me Alain Tardif
McCarthy, Tétrault
Attorneys for the Monitor

Me Alain Gaul
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Me Gordon Levine
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Attorneys for Cirex Group Inc.

Me Robert Pancer
Phillips Friedman Kotler
Attorneys for Collection Arial inc.

Dates of hearing: July 18 and 19, 2007
Reasons transcribed and revised on July 26, 2007

2007 QCCS 7129 (CanLII)

TAB 8

See paras. 31, 36, 38.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.,* 2014 BCSC 1855

Date: 20141002
Docket: S-139627
Registry: Vancouver

2014 BCSC 1855 (CanLII)

Between:

Leslie & Irene Dube Foundation Inc. and 1076586 Alberta Ltd.

Petitioners

And

P218 Enterprises Ltd., Wayne Holdings Ltd., Okanagan Valley Asset Management Corporation, Willow Green Estates Inc., BMK 112 Holdings Inc., 0720609 B.C. Ltd., 0757736 B.C. Ltd., 0748768 B.C. Ltd., Dr. T. O'Farrell Inc., Pinloco Holdings Inc., 602033 B.C. Ltd., Andrian W. Bak, MD, FRCPC, Inc., Interior Savings Credit Union, Valiant Trust Company, Mara Lumber (Kelowna) (2007) Ltd., Rona Revy Inc., Rocky Point Engineering Ltd., Mitsubishi Electric Sales Canada Inc., BFI Canada Inc., John Byrson & Partners, Winn Rentals Ltd., 0964502 B.C. Ltd., Denby Land Surveying Limited, Mega Cranes Ltd., Weq Britco LP, Roynat Inc., Mcap Leasing Inc., Bodkin Leasing Corporation, HSBC Bank Canada, and Bank of Montreal

Respondents

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Receiver, Ernest & Young Inc.:	J.D. Schultz J.R. Sandrelli
Counsel for the Petitioners:	D.E. Gruber
Counsel for Valiant Trust Company:	J.D. Shields
Counsel for 0964502 B.C. Ltd.:	C.K. Wendell

Counsel for Interior Savings Credit Union:	S.A. Dubo (by telephone)
Counsel for Maynards Financial Ltd.:	R.H. Harrison
Place and Date of Hearing:	Vancouver, B.C. September 24, 2014
Place and Date of Judgment:	Vancouver, B.C. October 2, 2014

2014 BCSC 1855 (CanLII)

2014 BCSC 1855 (CanLII)

Introduction

[1] This proceeding concerns the receivership of a retail, office and residential real estate development in Kelowna, British Columbia called "Sopa Square" (the "Development").

[2] The Receiver (the "Receiver") of the Respondents, P218 Enterprises Ltd., Wayne Holdings Ltd. and The Sopa Square Joint Venture (collectively the "Debtors"), seeks the following orders:

a) approval of a stalking horse bidding process in respect of the sale of the assets of the Development in the form of the Bidding Procedures Order attached as Schedule B to the Notice of Application;

b) a vesting of title to the Development in the stalking horse bidder, subject to the outcome of the stalking horse bidding process;

c) approval of a pre-stratification contract for purchase and sale of one of the proposed strata lots in the retail/office phase of the Development;

d) an increase in the Receiver's borrowing charge by $1 million from $2.5 million to $3.5 million; and

e) approval of the Receiver's activities as set out in the Receiver's First Report dated January 30, 2014 and the Receiver's Second Report dated August 26, 2014.

[3] The Receiver also seeks an order sealing an appraisal of the Development dated March 3, 2014 on the basis that it may unduly prejudice the marketing of the Development.

Background

[4] The Development consists of two phases: Phase 1 is a two story building comprised of retail outlets on the first floor and office space on the second floor and Phase 2 is a multi-story residential tower.

[5] The Respondent, Valiant Trust Company ("Valiant Trust"), is the trustee for 36 original investors in the Development, each of whom holds a bond from the Debtors entitling the bondholder to purchase a unit in the Development (the "Bond Holders").

[6] The Development ran into financial difficulty several times over the course of its development and construction. Builders liens were filed and the project was halted due to lack of financing. As part of a recapitalization plan, these lien claimants (the "Lien Claimants") agreed to discharge their liens and consolidate the amounts they were owed into a subordinated mortgage, which allowed additional financing to be provided by the lead lender, the Petitioner, Leslie & Irene Dube Foundation Inc. ("Dube Foundation").

[7] Ultimately the recapitalization plan failed prior to completion of Phase 1, resulting in the commencement of this receivership proceeding in December 2013. The Receiver was appointed on January 27, 2014.

[8] The Receiver is empowered by its appointment to market the Development and to negotiate such terms and conditions of sale as it, in its discretion, deems appropriate.

[9] The Receiver determined that the best course of action to preserve value was to complete Phase 1 of the Development and to market it without completing Phase 2. It did so, at least substantially, and has begun to market the units in Phase 1. Construction of Phase 2 has not yet commenced.

[10] In order to complete Phase 1, the Receiver borrowed $2.5 million from Maynards Financial Ltd. ("Maynards") secured by a priority Receiver's Borrowing Charge subordinate only to the existing first mortgage of Interior Savings Credit Union ("ISCU"). This borrowing charge was approved by a court order dated February 6, 2014.

[11] The Receiver has entered into various leases of the first floor retail space. It has also entered into a contract of purchase and sale with respect to proposed Strata Lot 6 in the second floor office space with Dr. Keith Yap. Dr. Yap has spent

2014 BCSC 1855 (CanLII)

substantial money on improvements to that space and, pursuant to an arrangement with the Receiver, is currently occupying the space for his medical practice awaiting stratification and completion of the purchase and sale agreement.

[12] The major creditor in the receivership, Dube Foundation, is currently owed approximately $21.3 million and has made it clear to the Receiver that it will oppose any sale of the Development that results in it receiving less than substantially all of its mortgage security. Dube Foundation's mortgage ranks behind the ISCU mortgage (approx. $5.0 million), the Maynards mortgage ($2.5 million) and property taxes owing of approx. $275,000. In order for Dube Foundation to be paid out in full, sale proceeds for the Development of at least $29 million will be required.

[13] An appraisal of the Development dated April 22, 2013, nine months before the appointment of the Receiver and prior to the completion of Phase 1, valued the Development as follows:

a) Phase 1:	$21,575,000
b) Phase 2:	$6,830,000
	$28,405,000

[14] The Receiver obtained a second appraisal of Phase 2 by Altus Group dated March 3, 2014 which was based upon an inspection of the Development on December 30, 2013. The Receiver seeks an order that this appraisal be sealed on the basis that it may compromise any future bidding process in respect of the sale of the Development.

[15] Instead of implementing a tender process in which bidders can submit a bid within a specific period without knowledge of other bids, the Receiver concluded that the most effective and efficient way to sell the Development was through a stalking horse sale process. That process involves the receiver identifying a potential buyer (the "stalking horse") and negotiating an agreement with the stalking horse for the purchase of the assets. The stalking horse's purchase price becomes the floor price

2014 BCSC 1855 (CanLII)

for a subsequent bidding process which takes place to determine if a better price can be achieved. The premise is that the stalking horse has undertaken considerable due diligence for determining the value of the assets and other bidders can then rely, at least to some extent, on the value attached by the stalking horse to those assets. If no bid is received during the bidding process that exceeds the stalking horse's bid, the stalking horse becomes the purchaser. If a qualified bid is received that exceeds the stalking horse bid, the stalking horse receives a termination or break fee.

2014 BCSC 1855 (CanLII)

[16] In July 2014, Dube Foundation, with the assistance of the Receiver, entered into a Term Sheet with an experienced real estate developer known as the Aquilini Investment Group ("Aquilini"). It contemplated that Aquilini would submit a stalking horse bid to the Receiver and Dube Foundation would provide financing to Aquilini if its bid was successful, on terms to be negotiated.

[17] By agreement dated August 12, 2014 (the "SH Agreement"), Aquilini (through an entity called AD Sopa Limited Partnership) entered into a stalking horse bid agreement with the Receiver, the key terms of which are:

a) a purchase price of $29.5 million;

b) a deposit of $1.0 million;

c) the bid is conditional on approval of the court, the granting of a conditional vesting order and the completion of a stalking horse bidding process with no better bid being submitted; and

d) a termination fee of $1.5 million if a better bid is submitted in the bidding process (the "Termination Fee").

[18] The SH Agreement includes detailed stalking horse bidding procedures (the "Bidding Procedures").

[19] The Receiver seeks an order approving the SH Agreement and vesting the assets in Aquilini, subject to the Bidding Procedures and no better bid being received.

Analysis

The Stalking Horse Bid

[20] The use of stalking horse bids to set a baseline for a bidding process in receivership proceedings has been recognized by Canadian courts as a legitimate means of maximizing recovery in a bankruptcy or receivership sales process: *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.,* 2012 ONSC 1750 at para. 7 [*CCM*]; *Bank of Montreal v. Baysong Developments Inc.,* 2011 ONSC 4450 at para. 44 [*Baysong*]; *Re Digital Domain Media Group Inc.*, 2012 BCSC 1567.

[21] The factors to be considered when determining the reasonableness of a stalking horse bid are those used by the court when determining whether a proposed sale should be approved: *CCM* at para. 6. Some of those factors were set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.) at para. 16:

a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

b) the efficacy and integrity of the receiver's sale process by which offers were obtained;

c) whether there has been unfairness in the working out of the process; and

d) the interests of all parties.

[22] The Receiver submits that the SH Agreement is reasonable based upon the appraisals it has received. If the SH Agreement is approved, the Receiver proposes to follow the Bidding Procedures by publishing several newspaper advertisements and retaining the firm of Colliers International ("Colliers"), a well know firm that provides a variety of real estate services, to assist in the marketing of the project to

2014 BCSC 1855 (CanLII)

potential bidders. The Receiver has populated a detailed data room to streamline due diligence by potential bidders.

[23] The Receiver submits that the stalking horse bidding process will provide a public and transparent process under which potential purchasers will be identified and the Development will be marketed. The Receiver has put forward a detailed timetable by which it expects the Bidding Procedures to be completed.

[24] The Receiver submits that each of the factors set out in *Soundair* has been or will be met in this case. It says that the process has been designed to obtain the highest price for the assets because the SH Agreement sets a floor price that is at least sufficient to pay the majority of the claims of the major creditors in a reasonable period of time.

[25] The Receiver submits further that the Termination Fee is reasonable because it not only reflects the expenses that Aquilini has incurred in conducting its due diligence and the structuring of the transaction, which will be of benefit to any other bidder that submits a bid exceeding that set out in the SH Agreement, but also provides compensation to Aquilini for having committed the deposit funds, thereby foregoing the use of the funds for other potential opportunities. It says that the Termination Fee also provides value for the cost of stability that is being achieved through the process. It also submits that the Termination Fee in this case is within the range for termination fees of 1% to 5% that have been approved in other stalking horse cases: *Baysong* at para. 44.

[26] Mr. Shields, counsel for Valiant Trust, strenuously opposes an approval by the court of the SH Agreement. He submits that there is a complete absence of evidence that would allow the court to make a determination as to whether the SH Agreement is reasonable. He argues that there is no evidence from the Receiver regarding what, if any, alternate marketing steps have been considered or taken or why, if any were considered or taken, they were rejected. He points out that the first appraisal is approximately 18 months old, was done before Phase 1 was completed and has not been updated. The second appraisal report is based upon an

2014 BCSC 1855 (CanLII)

inspection of the Development that took place over nine months ago, also before Phase 1 was completed. Moreover, he says that the veracity of the second appraisal cannot be tested due to the non-disclosure restrictions placed upon it by the Receiver.

[27] He argues that the Receiver has, to date, not marketed the Development at all. Instead, the Receiver identified three potential developers, who are all located in Western Canada, entered into negotiations with two of them and chose Aquilini to be the stalking horse. It has not provided the court with any particulars of how the three developers were chosen or why, what was discussed or what took place during the negotiations. As a result, he argues, the court is in no position to say that the proposed stalking horse bidding process will likely result in a more favourable outcome.

[28] Moreover, Mr. Shields argues that the Receiver's submission that the Termination Fee is justified because it will minimize the due diligence costs of other potential bidders cannot be supported. Plainly, he says, Aquilini is not about to disclose to competitors its strategies or the due diligence it performed and, as a result, all other bidders will have to do their own due diligence, saving them nothing. Moreover, he emphatically submits that the Termination Fee of $1.5 million will put a "millstone" around the necks of potential bidders because they will have to bid at least $1.5 million more than the SH Agreement price in order to qualify. This, he argues, effectively gives Aquilini a $1.5 million credit in the bidding process.

[29] Simply put, Mr. Shields submits that, while the SH Agreement may be in the best interests of the ISCU and the Dube Foundation, the Receiver has not properly considered the interests of the Bond Holders and Lien Claimants who will lose everything if the SH Agreement completes.

[30] There are many stakeholders in this matter. They include the Bond Holders and the Lien Claimants who will likely end up with nothing if significantly better bids are not received and the Stalking Horse Bid ultimately completes.

2014 BCSC 1855 (CanLII)

[31] To be effective for such stakeholders, the sale process must allow a sufficient opportunity for potential purchasers to come forward with offers, recognizing that a timetable for the sale of the project requires that interested parties move relatively quickly in order that the value of the project is preserved and not allowed to deteriorate. The timetable must be realistic.

[32] In this case, I have several concerns.

The Stalking Horse Process

[33] No course of action other than a stalking horse bidding process appears to have been considered, including the traditional tendering process. There is no evidence that the Receiver has attempted to market the Development beyond discussions with three developers. There is no evidence regarding the extent to which the Receiver attempted to identify other developers who might be interested in bidding through a stalking horse bid. There is no evidence from which the court can assess whether the economic incentives behind the SH Agreement are fair and reasonable or whether they are excessive given the circumstances of the Bond Holders and the Lien Claimants.

The Appraisals.

[34] The accuracy of the stalking horse bid is key to the integrity of the stalking horse bid process because it establishes the benchmark against which other potential bidders will decide whether or not to submit a bit. One of the few tools available to the court for assessing the reasonableness of the stalking horse bid is a comparison of the bid to a valuation of the asset in question. Accordingly, an accurate valuation is also key to the integrity of the process.

[35] The appraisals of the Development are dated. Neither of them was prepared after the completion of Phase 1. I am not satisfied that the appraisals accurately reflect the current value of the Development.

2014 BCSC 1855 (CanLII)

Termination Fee

[36] While I accept that the SH Agreement effectively serves as a guaranteed floor bid over the course of the proposed marketing process and that a termination fee is warranted if a higher qualified bid is approved, the mere fact that the proposed Termination Fee is within the “range of reasonableness” as determined in other cases does not mean that it is reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable in each case. The court is not simply a rubber stamp for the agreement that was made.

[37] The foregoing notwithstanding, given the Receiver’s function and role, the Court will often defer to the Receiver’s recommendation unless there is a compelling reason to reject it. In Frank Bennett’s *Bennett on Receiverships,* 3d ed (Toronto: Carswell, 2011) at 329, the learned author writes:

> …The court should be very cautious before deciding that the receiver’s conduct was improvident based upon information which has come to light after it has made its decision. If the receiver’s recommendation is challenged, the court should have evidence of other offers that are significantly or substantially higher before it can adjudicate on this point. The court should readily accept the receiver’s recommendation on the motion for court approval and reject the receiver’s recommendation only in the exceptional cases since it would weaken the role and function of the receiver. The receiver deserves respect and deference.

[38] In this case, there is no evidence regarding how the Termination Fee was arrived at or how the $1.5 million fee compares to the expenses incurred by Aquilini in respect of its due diligence, the SH Agreement or its lost opportunity cost with respect to the deposit. Indeed, there is no evidence whatsoever upon which the court is able to gauge whether the Termination Fee is reasonable other than that it is within the “range”, albeit the high end of the range. In my view, such evidence is required. A termination fee of $1.5 million may well have a substantial adverse effect on the Bond Holders and the Lien Claimants.

[39] I accept that the court must balance the expenses, efficiencies and delays that will necessarily result if the Receiver has to go through what may prove to be a fruitless additional process due to the possibility that a more provident bid will be

2014 BCSC 1855 (CanLII)

2014 BCSC 1855 (CanLII)

received which results in some recovery for the Lien Claimants and Bond Holders. However, the dearth of evidence regarding (i) the extent to which marketing processes other than a stalking horse process have been considered; (ii) the value of the Development; and (iii) the basis upon which the Termination Fee was arrived at is such that the court has no benchmark against which to assess the reasonableness of the SH Agreement.

[40] There is no evidence before me of any urgency regarding the sale of the Development.

[41] Accordingly, I conclude that the Receiver has not demonstrated that the SH Agreement is in the best interests of the creditors as a whole. The application for a Bidding Procedures Order is dismissed.

Conditional Vesting Order

[42] Given my finding regarding the reasonableness of the SH Agreement and my decision regarding the Bidding Procedures Order, there is no need to consider this issue.

The SL6 Purchase Agreement

[43] At the time of the Receiver's appointment, the Debtors had entered into a contract of purchase and sale with Dr. Keith Yap and 0720609 B.C. Ltd. ("Dr. Yap") in respect of certain office space, known as SL 6, in Phase 1 of the Development (the "SL 6 Purchase Agreement"). The space is intended to become Strata Lot 6 following stratification of the building.

[44] Prior to the Receivership and in anticipation of completion of construction of the Development, Dr. Yap spent considerable sums improving SL 6.

[45] The Receiver has entered into an addendum to the SL 6 Purchase Agreement on terms that it considers to be commercially reasonable. The addendum contemplates a sale of SL 6, after stratification, at a price of $628,000.

2014 BCSC 1855 (CanLII)

Before entering into the SL 6 Purchase Agreement, the Receiver considered comparable sales for strata office property in the Kelowna marketplace.

[46] The Receiver seeks court approval of the addendum. The Bond Holders and the Lien Claimants oppose such an order on the basis that a further appraisal is required.

[47] On the basis of the evidence before me, particularly that Dr. Yap has already installed fixtures and has set up a specialized office for his medical practice, that the terms of the SL 6 Purchase Agreement are considered reasonable by the Receiver and Aquilini and that Dr. Yip will be paying his portion of the Development's operating costs thereby not only reducing, at least to a small degree, the overall operating costs being paid by the Receiver but also adding occupancy to the Development which will undoubtedly assist in the lease or sale of other portions, I am satisfied that the SL 6 Purchase Agreement should be approved.

Increasing the Receiver's Borrowing Charge

[48] The Receiver has provided to the court a breakdown of the additional expenses it anticipates will be incurred through to the end of the stalking horse process as follows:

a) Phase 1 completion costs:	
i. completion payables:	$200,000
ii. parking lot and courtyard landscaping:	$100,000
b) interest and fees on financing:	
i. Interest accrued to date:	$150,000
ii. future fees and interest:	$100,000
c) Professional fees:	$450,000
d) fees from leasing activities:	$125,000

e) engagement of Colliers for SH Process:	$50,000
f) other consulting fees:	$75,000
g) office, utility and operating expenses:	$52,500
h) contingency:	$55,000
TOTAL	$1,357,500

2014 BCSC 1855 (CanLII)

[49] The Receiver seeks to amend the Receivership Order pronounced January 27, 2014, as amended February 6, 2014 such that its permitted borrowing charge is increased from $2.5 million to $3.5 million.

[50] The Bond Holders and the Lien Claimants oppose the increase on the basis that there is no evidence as to where the increase in financing will come from or what the rate will be and that no particulars have been provided as to who the money will be paid to or why.

[51] I agree that approval of an increase in the borrowing charge in a vacuum is not desirable. However, I understand that negotiations are underway with the lender. I am satisfied that there is a need for the Receiver's borrowing charge to be increased, particularly given that more work will be required regarding the valuation and marketing of the Development.

[52] I am prepared to allow the increase on the condition that the financial terms for the increase are no less favourable to the creditors than the current terms of the Receiver's borrowing charge.

Approval of the Receiver's Activities to Date

[53] The Receiver seeks approval of its activities as set out in its first and second reports to the Court dated January 30 and August 14, 2014, respectively.

[54] The court has inherent jurisdiction to review and approve or disapprove the activities of a court appointed receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court

may approve the activities set out in its report to the court: *Bank of America Canada v. Willann Investments Ltd*., [1993] O.J. No. 1647 (Ct. J.) at paras. 3-5, aff'd [1996] O.J. No. 2806 (C.A.); *Lang Michener v. American Bullion Minerals Ltd*., 2005 BCSC 684 at para. 21.

2014 BCSC 1855 (CanLII)

[55] I accept that the Receiver has essentially fulfilled its mandate with respect to completion of Phase 1. Its activities as set out in its first report are approved.

[56] After completion of Phase 1, the Receiver commenced on a sale process in an attempt to maximize the return for the creditors. It may well be that the Receiver will be able to demonstrate that the steps it took in this regard were objectively reasonable. However, given my previous comments, I am not satisfied that the Receiver has shown that the stalking horse bid process it entered into was done prudently. It is premature to approve its activities in this regard.

Sealing Order

[57] Given my ruling on the SH Agreement and my comments that the Altus Group's appraisal dated March 3, 2014 is outdated, there is no need to consider this issue.

Conclusion

[58] The Receiver's applications for a Bidding Procedures Order and a Conditional Vesting Order approving the stalking horse bid subject to the procedures set out in the Bidding Procedures Order is dismissed.

[59] The Receiver's application for an order approving the SL 6 Purchase Agreement is granted.

[60] The Receiver's application for an order amending Paragraphs 19 and 20(c) of the Receivership Order pronounced January 27, 2014, as amended February 6, 2014, such that the term "$2.5 million" is changed to "$3.5 million" is allowed on the condition that the terms of such increase will not be less favourable than the existing terms of the Receiver's borrowing charge.

[61] The activities of the Receiver as set out in its first report dated January 30, 2014 are approved. Approval of the Receiver's activities as set out in its second report dated August 14, 2014 is premature.

[62] The Receiver's application for an order sealing the appraisal of the Development dated March 3, 2014 by Altus Group is adjourned.

"G.C. Weatherill J."

G.C. Weatherill J.

2014 BCSC 1855 (CanLII)

TAB 9

See para. 42.

CITATION: American Iron v. 1340923 Ontario, 2018 ONSC 2810
COURT FILE NO.: CV-18-595577-00CL
DATE: 20180525

2018 ONSC 2810 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

RE: American Iron & Metal Company Inc., Applicant

AND:

1340923 Ontario Inc. and Waxman Realty Company Inc., Respondents

BEFORE: L. A. Pattillo J.

COUNSEL: *Wael Rostom* and *Stephen Brown-Okruhlik*, for the Applicant

Matt Moloci, for the Respondents

Steven Graff, for the proposed Receiver, A. Farber Group

A. Winton, for NASG Canada Inc.

Robert Brush and Clarke Tedesco, for American Iron & Metal, 134 Ontario and Waxman Realty Company Inc.

T. VanKlink, for the Business Development Bank

HEARD: April 20, 2018

ENDORSEMENT

[1] This is an application by American Iron & Metal Company Inc. ("AIM") for an order appointing A. Farber & Partners Inc. ("Farber") as receiver over all the property and assets of the Respondents, 1340923 Ontario Inc. ("134") and Waxman Realty Company Inc. ("Waxman Realty"). AIM also seeks approval of a stalking horse sale process "proposed by the proposed receiver" for the marketing and sale of the Respondents' respective ownership interests in certain real property, together with ancillary orders.

2018 ONSC 2810 (CanLII)

[2] The application is consented to by the Respondents. It is opposed, however, by NASG Canada Inc. ("NASG") on the grounds that approval of the stalking horse sale process and in particular the requested vesting order would remove its proprietary interest in the properties in question.

[3] AIM is part of a group of companies that carry on business in the scrap metal and recycling industry across North America and elsewhere.

[4] Waxman Realty was incorporated in July 2010 for the purpose of acquiring property located at 4350 Harvester Road, Burlington, Ontario (the "Burlington Property") which it acquired in the same month. The acquisition was financed by a loan from Roynat Capital Inc. pursuant to a loan agreement dated July 30, 2010. Waxman Realty issued a debenture in favour of Roynat granting it security over certain of Waxman Realty's assets, including its ownership interest in the Burlington Property.

[5] In December 2012, AIM purchased a 50% ownership interest in the Burlington Property from Waxman Realty. Since then, AIM and Waxman Realty have co-owned the Burlington Property as tenants in common pursuant to a joint venture agreement.

[6] 134 was incorporated in June 2007 for the purpose of acquiring property located at 143 Adams Boulevard, Brantford, Ontario (the "Brantford Property") which it acquired in the same month. In December 2012, AIM purchased a 50% interest in the Brantford Property from 134. Since then, AIM and 134 have co-owned the Brantford Property as tenants in common pursuant to a joint venture agreement.

[7] Both the Burlington Property and the Brantford Property have been operated as scrap yards.

[8] On October 12, 2012, both Waxman Realty and 134 issued demand debentures in favour of AIM, each in the amount of $3,000,000. Further, in July 2013, pursuant to a letter agreement with Waxman Realty, AIM paid $1,414,313.08 to Roynat on behalf of Waxman Realty and assumed the debt owed by it to Roynat on substantially the same terms as attached to the Roynat loan.

[9] AIM is owed $2,057,152.61 by Waxman Realty, as a result of advances made under the letter agreement, the Burlington Property joint venture agreement and the Waxman Realty demand debenture.

[10] AIM is owed $278,854.49 by 134 pursuant to advances made to 134 under the terms of the Brantford Property joint venture agreement and the 134 demand debenture.

[11] Waxman Realty and 134 (together the "Debtors") have acknowledged, among other things, their respective indebtedness and the validity of AIM's security over both the Burlington Property and the Brantford Property pursuant to a forbearance agreement dated December 22, 2017.

[12] On December 22, 2017, AIM, through its legal counsel, demanded payment of both Waxman Realty and 134's respective indebtedness and provided each of the companies with notice of intention to enforce its security in accordance with section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985. C. B-3, as amended (the "BIA").

[13] The purpose behind AIM's application to appoint a receiver is to facilitate a sale to itself of the Debtor's interests in both the Burlington Property and the Brantford Property. The proposed sale process contemplates the receiver marketing the two property interests based on a stalking horse bid by AIM. The stalking horse bid is set out in a stalking horse agreement and is comprised of a cash deposit in the amount of $360,000; a credit in the amount of $2,336,007.10, representing all the secured debt and accrued interest thereon outstanding on the loans provided by AIM to the Debtors; a further credit in an amount to be determined by the proposed receiver or the court as recoverable under a mortgage in favour of the Business Development Bank of Canada in the principal amount of $2,050,000 and an accompanying notice of assignment of rents in respect of the Brantford Property; and the balance to be paid in cash on closing.

[14] The stalking horse bid is supported by confidential valuations of both Waxman Realty and 134's interests in the respective properties. The terms of the bid include a $500,000 "break fee" plus a minimum overbid of $150,000. Finally, the proposed sale process seeks vesting orders that vest the Debtors' interests in the two properties "free and clear of any claims" in light of "separate ongoing litigation".

[15] Farber has filed a Report in its capacity as "proposed receiver" of Waxman Realty and 134 in which it outlines the proposed sale process, the stalking horse agreement and the break fee. It recommends that the sale process be approved and requests that the proposed Receiver be authorized to conduct the sale process, execute the stalking horse agreement and perform the receiver's obligations thereunder.

NASG

[16] The "separate ongoing litigation" referred to by AIM in its material in respect of the vesting orders, involves a claim by NASG against, among others, AIM, Waxman Realty, 134 and other Waxman parties including Camile Bouliane, commenced in the Superior Court on the Commercial List by Notice of Action dated June 25, 2014 (the "Action"). In the Action, NASG claims that the Defendants are liable for the theft of over 42 million pounds of carbon scrap metal from NASG which took place between January 2007 and May 2014. NASG states that the value of the carbon scrap stolen amounted to $7,384,524.99.

2018 ONSC 2810 (CanLII)

[17] NASG's statement of claim alleges numerous causes of action including negligence, negligent misrepresentation, unjust enrichment and/or breach of contract, oppression, theft and conversion and sets out multiple headings of relief including damages and "the imposition of a resulting and/or constructive trust over the funds and assets improperly acquired by the Waxman Defendants, the AIM Defendants and Bouliane, due to the conversion of or unjust enrichment relating to NASG Canada's carbon scrap metal."

[18] On June 26, 2014, NSAG obtained an *ex parte Mareva* Order requiring, among other things, that Waxman Realty and 134 (part of the Waxman Defendants) disclose their assets and provide a sworn statement with respect thereto. NASG's material filed in support stated that AIM was joined as a necessary party given its ownership interests in, among other things, the Burlington and Brantford Properties and expressly stated that no allegation of wrongdoing was being made against AIM.

[19] NASG's factum on the *Mareva* motion sought, among other things, a certificate of pending litigation ("CPL") against the Burlington and Brantford Properties on the basis of the allegation that the proceeds of the theft were used by the Waxman Defendants to purchase and/or improve the two properties and NASG was claiming a tracing order and constructive trust over the funds and assets improperly acquired by the Waxman Defendants.

[20] In granting the *Mareva* Order, Newbould J. refused to grant a CPL against the two properties. In the endorsement, he stated: "With respect to the two Waxman properties, I think that the request for a CPL should be dealt with after the material and today's order has been served. AIM has an interest in these properties and it is unlikely that the properties could be sold or financed before the return of the matter."

[21] When the matter returned to the court on July 4, 2014, the Defendants requested an adjournment. The June 26th order was extended to July 14, 2014. In respect of NASG's CPL request, Newbould J. wrote: "If there is any intent to deal with the Waxman/AIM properties before then, 48 hours' notice are to be given to the plaintiff's counsel."

[22] The matter came back before Newbould J. on December 2, 2014, at which time the parties agreed to a consent order which varied the June 26th order by, among other things, requiring that the Waxman Defendants provide 7 days' notice of intent to dispose or encumber either the Burlington or Brantford Properties.

[23] It was pursuant to the December 2, 2014 order that NASG was given notice of this application and have appeared by counsel to oppose it. It submits, given its propriety claim to the two properties (constructive trust), the court does not have the authority to vest off NASG's interest without due process which in the present case requires the trial of the Action. No trial date has been set for the Action.

[24] Initially, NASG requested a brief adjournment in order to complete the evidentiary record supporting its propriety claim. It subsequently withdrew that request and indicated that it was prepared to proceed on the basis of the record before the court.

2018 ONSC 2810 (CanLII)

[25] The court's authority to issue a vesting order is contained in section 100 of the *Courts of Justice Act*, R.S.O. 1990 c. C. 43 ("CJA"). That authority, however, does not extend to extinguishing third party proprietary rights: *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2018 ONCA 253.

[26] The question for determination, therefore, is whether NASG's contingent claim for a constructive trust in the Action gives it a proprietary interest in the two properties.

[27] A constructive trust is an equitable remedial remedy for certain forms of unjust enrichment. It does not automatically follow from a finding of unjust enrichment. In order for a constructive trust to be found, monetary compensation must be inadequate and there must be a link between the plaintiff's contributions and the property in which they claim an interest. Further, the extent of the constructive trust interest is proportionate to the claimant's contributions. See: *Peter v. Beblow*, [1993] 1 S.C.R 980, at para. 26; *Kerr v. Baranow*, [2011] 1 S.C.R 269 at pars. 47 to 53.

[28] In determining whether a monetary award is insufficient, the court may take into account the probability of recovery as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights: *Kerr* at para. 52.

[29] AIM submits that NASG's claim for a constructive trust is contingent and it has not established that it has any rights to the properties. In addition, it submits monetary damages are a sufficient remedy for NASG's claims. In that regard, it proposes that the net funds received from the sale of the two properties (after payment of encumbrances and costs) be held by the receiver pending a determination of NASG's claims in the Action.

[30] In my view, AIM's proposal is appropriate. Merely claiming a constructive trust does not create a proprietary interest. In my view, given AIM's proposal that the receiver hold the net sale proceeds pending the determination of NASG's claim coupled with the fact that AIM, who is a Defendant in the Action, continues to own the other ½ interest in the properties, I do not consider an award of monetary compensation to be inadequate. NASG agrees that AIM is a substantial company.

[31] Further, as there is no evidence of a link between the monies stolen from NASG and the properties, NASG's claim may only result in monetary damages. I recognize that NASG has had little time to prepare a complete record before me. Nevertheless, I am satisfied that even if NASG establishes that some of the funds for purchase or improvement of the properties came from funds obtained from the stolen scrap, in the circumstances, a monetary award would not be inadequate.

[32] Finally, there is no evidence that NASG seeks additional rights that may flow from potential property rights in the properties.

[33] Accordingly, I am satisfied that, based on AIM's proposal to have the receiver hold the net sale proceeds from the properties, vesting orders can issue upon the sale of both properties.

2018 ONSC 2810 (CanLII)

To the extent that NASG has any rights in the properties arising from the Waxman Defendants' actions, those rights are protected.

[34] NASG's request to dismiss the AIM's application is denied.

The Stalking Horse Bid

2018 ONSC 2810 (CanLII)

[35] As noted, the proposed sale process with the stalking horse bid includes a $500,000 break fee to AIM together with a minimum overbid amount of $150,000. I consider those amounts to be excessive in the circumstances.

[36] A "break fee" in the context of a receivership sale with a credit bid, is an amount which is intended to compensate the unsuccessful credit bidder for the costs it has incurred in carrying out the due diligence necessary to enter into the credit bid agreement in the event that another offer to purchase becomes the successful purchaser.

[37] Where break fees and overbid fees are reasonable, such that they do not jeopardize the ability of a competing bidder to make a bid, they have been approved by this court: *Re Parlay Entertainment*, 2011 ONSC 3492; *Re MPH Graphics Inc.*, 2014 ONSC 947.

[38] In this case, AIM has provided no evidence to justify the break fee of $500,000, apart from the Stalking Horse Agreement of Purchase and Sale which provides in section 6.1:

> In consideration for the Purchaser's expenditures of time and money in acting as the initial bidder in the Stalking Horse Bid and the preparation of this Agreement, and in performing due diligence pursuant to this Agreement, the Sale Process Orders shall also provide for liquidated damages in the amount of the Break Fee, payable by the Receiver to the Purchaser in the event that a materially higher offer than the Purchase Price advanced by the Purchaser pursuant to the terms herein is obtained for the Purchased Assets through the Sale Process and, as a consequence, the Receiver sells all or substantially all the Purchased Assets to a person or entity other than the Purchaser.

[39] Farber deals with the break fee at paragraph 17(k) of its Report and concludes, based on the underlying complexity of AIM's roles in negotiating the Stalking Horse Agreement as well as its ongoing requisite involvement and negotiation with any successful third party purchaser, that the break fee "represents a fair and reasonable estimate of the costs and damages which would be incurred by AIM if the Stalking Horse Bid is not consummated." Apart from its comments on complexity, Farber provides no analysis of how it arrived at that conclusion.

[40] Nor has Farber provided any information or recommendation concerning the proposed overbid fee of $150,000.

[41] I am not satisfied that the proposed break fee and the overbid fee are reasonable based on the material before me.

[42] With respect to the break fee, there is no evidence of what AIM's costs were in undertaking due diligence in respect of the transaction. I suspect that there was very little due diligence given that AIM has been a 50% owner of the properties with the Debtors since December 2012 and must be intimately familiar with them and their encumbrances. Nor, in my view is it appropriate to include in the break fee, as Farber has done, an amount in respect of future negotiations with the purchaser of the properties. While there will no doubt be negotiations with a third party purchaser of the Debtor's interests in the properties, it is not appropriate to require such purchaser to pay AIM's costs of such negotiations.

[43] As noted, there is no information concerning the overbid fee and why it is reasonable in the context of the proposed sale, particularly when it is viewed together with the proposed break fee.

[44] The purpose of the sale process in a receivership is to obtain the highest and best price for the property for the benefit of all creditors. It is important in approving the sale process to ensure that it is open to competing bidders. While there is a place for both break fees and overbid fees, they must be reasonable in the circumstances in that they must not jeopardize the ability of a competing bidder to make a bid. Given the property interests to be sold and the proposed credit bid in this case, I am not satisfied that the proposed break fee and the overbid fee, individually and combined, are reasonable.

[45] For the above reasons, therefore, I do not approve the Stalking Horse Agreement and the proposed sale process.

Conclusion

[46] Based on the material filed and the reasons set out herein, I am satisfied that it is just and convenient to appoint Farber as the receiver for both Waxman Realty and 134. As indicated, however, I am not prepared to approve the proposed stalking horse agreement or the sale process, without prejudice to the receiver and AIM revising them to address my concerns as noted herein and reapplying for approval.

[47] Given the commercial sensitivity of the valuations of both the Burlington Property and the Brantford Property in the context of the proposed sale, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 41 has been met and accordingly the Confidential Exhibits shall be sealed pending the completion of any sale.

[48] At the conclusion of the argument, AIM indicated that it may want to reconsider its request for the receiver pending my decision. Upon receipt of these reasons, AIM should arrange a 9:30 am appointment before me to advise how it wishes to proceed.

[49] Costs, if not agreed, can also be dealt with at the 9:30 appointment.

2018 ONSC 2810 (CanLII)

L. A. Pattillo J.

Released: May 25, 2018

2018 ONSC 2810 (CanLII)

TAB 10

2012 ANNREVINSOLV 7

See p. 7.

Annual Review of Insolvency Law
Editor: Janis P. Sarra

7 — Sales Process Dynamics The Monitor's Perspective

Sales Process Dynamics The Monitor's Perspective

Martin P. Rosenthal [*]

There have been a variety of recent developments with regard to sales processes in the context of proceedings under the *Companies Creditors Arrangement Act* [2] ("*CCAA*") and the *Bankruptcy and Insolvency Act* [3] ("*BIA*"), including the advent of credit bids, stalking horses, an increase in the use of interim financing arrangements (DIP loans) as loan to own facilities and the management of cross-border filings; where any or all of these issues is front and centre.

Credit bidding and stalking horse bidding procedures are not specifically codified in the *BIA* or the *CCAA*. Accordingly, the Canadian courts have looked to the US *Bankruptcy Code* [4] in developing precedents that provide guidance as to how to deal with these matters. This article addresses some of the practical issues surrounding sales processes and the factors that the monitor, receiver, or trustee, as the case may be, must consider. These issues include the appropriate valuation of credit bids and the impact of DIP terms and conditions on sales processes. As all of these matters have recently been raised in the White Birch matter, many of the examples cited in the present article will draw on the recent experience in this ongoing case.

This article will demonstrate the importance of interested parties to a case being proactive and engaged from the outset. In so doing, they may be able to influence the direction of the process, participate in establishing the structure or rules of the game, and affect the outcome and their recovery.

I. — An Overview of the White Birch Sale and Investor Solicitation Process

On February 24, 2010, the Québec Superior Court (Commercial Division) ("Court") issued an initial order declaring that White Birch Paper Holding Company and certain of its affiliates ("White Birch" or the "companies") were debtor companies to which the *CCAA* applies and appointing Ernst & Young Inc as monitor. [5] Bear Island Paper Company, LLC ("Bear Island"), a US subsidiary of White Birch commenced a case under Chapter 11 of the US *Bankruptcy Code* on the same date. [6]

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As part of the initial application for relief, the companies sought approval of a senior secured, super-priority debtor-in-possession/interim financing term loan (”DIP”), which was granted by the courts in both Canada and the US.

The milestones set out in the DIP agreement were designed to ensure that the restructuring process progressed rapidly. The milestones imposed a finite timeline on the companies to achieve a settlement with the creditors, whereby the companies had to obtain a lock-up and plan support agreement with the first lien term loan lenders, and file a plan of arrangement under the *CCAA* and a plan of reorganization under Chapter 11 within a period of approximately four months following the granting of the initial order, failing which the companies were obligated to sell the business as a whole.

In view of the tight timeline, the milestones contemplated that a sale and investor solicitation process (”SISP”) be undertaken in parallel with the efforts to negotiate and file a plan. The intent was to focus entirely on the sale process if and when White Birch determined that a settlement with the creditors would not be feasible within the permitted time frame.

Discussions were held between the senior management of the companies and representatives of Black Diamond Commercial Finance LLC (”Black Diamond”), which held a significant interest in both the DIP and the first lien term loan, regarding the possibility of filing a plan of reorganization and the general parameters of such a plan. However, Black Diamond indicated that it had no interest in exploring a restructuring plan at that time. In view of the voting power and financial leverage of Black Diamond, resulting from its holdings in respect of the DIP and the first lien term loan, the efforts of management of the companies were quickly focused on the sale process.

Management of White Birch, with the assistance of financial advisor Lazard Frères & Co LLC (”Lazard”), had sought interim financing from numerous potential lenders, and, at the end of the day, the sole party that was willing to provide a facility that met the anticipated requirements of the companies was Black Diamond. Black Diamond’s strategy from the outset was clearly “loan to own,” a strategy that has become a regular occurrence in recent proceedings. As long as the established rules are followed in a transparent manner, this strategy should not be questioned as less than honest or straight-forward. Any other party could have submitted an interim financing proposal and management would have eagerly considered it. Although management and Lazard actively solicited alternative financing proposals, none was forthcoming, including from other members of the first lien lending group or union sponsored investment funds, that met the anticipated requirements of the companies. The failure of the minority members of the first lien lending group to engage in the proceeding at this early stage, while not fatal, certainly had the effect of allowing competitive hurdles regarding the eventual outcome of the proceeding to be placed in their way. These hurdles included various matters set out in the DIP agreement, such as the requirement to engage in a rapid sale process early on subject to certain conditions and the lack of credit bidding limitations amongst others.

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The sale process was initiated within two months after the initial order, with the preparation of SISP procedures, identification of potential purchasers, and the presentation of a motion to the Court to approve the SISP. The monitor reported to the Court on April 21, 2010, in respect of White Birch's Canadian motion, and recommended that the Court authorize White Birch to implement the SISP procedures, which included the selection of a stalking horse bid, as contemplated in the motion. The SISP and related procedures were approved by the Court by order made on April 29, 2010 (”SISP order”). A similar motion was filed by Bear Island in the US Court on April 19, 2010 and was granted by order of the US Court entered on April 28, 2010.

The sale process was managed by Lazard. Lazard suggested an appropriately targeted approach to identify prospective purchasers and invite them to participate in the SISP. Lazard contacted 52 prospective purchasers, chosen from strategic prospects and financial investors. The strategic prospects were comprised of direct competitors and businesses in the same industry, while the financial investors were comprised of investment funds, equity providers, and some members of the first lien term loan lender group who were thought to have an interest in investing in the companies' industry. This list of contacts was shared for review and comments with advisors to the first lien term loan lenders and advisors to the official committee of unsecured creditors of Bear Island. The prospects targeted by Lazard were provided with a background document setting out limited information on the companies and their market (a “teaser” document), and were invited to sign a confidentiality agreement to receive more detailed information. The execution of the confidentiality agreement, together with the delivery of various documents, entitled the interested party to be designated as a “phase 1 qualified bidder”. As contemplated by the SISP, an exception to these rules was made with regards to the DIP and first term loan lenders, thus deeming them automatically to be phase 1 qualified bidders, the whole as authorized pursuant to the SISP order.

The SISP order required that the phase 1 qualified bidders provide Lazard with a non-binding expression of interest by June 15, 2010. The companies and Lazard were then required to analyze the expressions of interest to assess whether the expressions of interest could reasonably be expected to result in a sale. Where that was the case, the interested party would be designated as a “phase 2 qualified bidder,” and would be invited to participate in a due diligence process, with a view to prepare a formal offer. By the June 15, 2010 deadline, Lazard had received four responses from the phase 1 qualified bidders, although two responses were discarded as they did not meet the criteria set out in the SISP, primarily because they lacked an adequate quantification of their offers. The discussions continued between the companies and the two remaining phase 2 qualified bidders, and additional information was provided to satisfy the preliminary due diligence requests of the prospective purchasers through management presentations, tours of the plants, and transmission of financial information. The SISP order required that the phase 2 qualified bidders provide Lazard with a formal binding offer by July 15, 2010. By that date, one of the phase 2 qualified bidders indicated that it would not present a formal offer, and the sole remaining phase 2 qualified bidder submitted an offer.

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The offer received was formulated by BD White Birch Investments LLC ("BDWBI"), by letter dated July 15, 2010. This letter introduced BDWBI as an asset acquisition vehicle formed by Black Diamond Capital Management LLC, Credit Suisse Loan Funding LLC, and Caspian Capital Advisors LLC as well as their respective affiliates. The letter indicated that the sponsors of BDWBI also held the majority of the debt under the first lien term loan credit facility. The offer indicated a purchase price of US$90 million, plus an amount of cash to be set aside and held in trust by the monitor to pay certain disbursements anticipated to be necessary to wind down the companies' estates after the closing of the transaction, plus the assumption of certain selected liabilities of the companies.

The BDWBI offer specified those liabilities subject to assumption. In addition, the BDWBI offer specified the "excluded liabilities". Notably, amongst the excluded liabilities were obligations relating to pension or retirement liability of the companies to their then current and former employees.

Based on its estimate of the assumed liabilities and wind-down expenses, the purchase price was calculated to be approximately US$150 to US$178 million in total. If the transaction were to be completed on the terms of the stalking horse bid without an increase in the purchase price at the auction, the funds available for distribution to the creditors were estimated to be less than US$124 million.

Given that the DIP facility was expected to approximate US$122 million at the predicted emergence date of the proceeding, it was anticipated that the stalking horse bid, unless the purchase price were to be enhanced at the auction, would yield an insignificant recovery, if any at all, for the general body of creditors. As such, the advantages that could be expected from the transaction, as it was then contemplated, were that: (i) specified liabilities would be assumed by BDWBI; (ii) the suppliers would have a continuing customer; and (iii) the employment of the workforce would continue, without a loss of arrears of salaries and vacation pay.

The monitor prepared a draft liquidation analysis to demonstrate the expected results of a theoretical liquidation carried out contemporaneously with the receipt of the offer from BDWBI. Based on the calculations made in estimating the value of the assets, in the event of an outright liquidation, the monitor considered that the purchase price as contemplated in the stalking horse bid represented, substantively, the liquidation value of the current assets, without any value allocated to the property, plant, and equipment. The analysis prepared by the monitor suggested that the liquidation value of the assets would have yielded an estimated dividend of between nil and 1.7% on average for the unsecured creditors.

On September 10, 2010, the court approved BDWBI as the stalking horse bidder and approved the proposed bidding procedures for an auction. The bidding procedures for an auction specifically permitted credit bidding of amounts due under the DIP and the first lien credit agreement.

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Thereafter, on September 17, 2010, pursuant to the next stage in the SISP, an offer was received from Sixth Avenue Investment Co., LLC ("Sixth Avenue"). This entity was formed by a group of lenders holding approximately 10% of the first lien term loan debt. This bid was deemed to be a qualified bid and accordingly an auction was scheduled. No other offer was received.

The auction was held on September 21, 2010 and each of BDWBI and Sixth Avenue submitted multiple bids throughout the auction. Ultimately, the final bid submitted by BDWBI was determined to be the winning bid. The total consideration offered for White Birch's assets was approximately US $236.1 million, structured as follows:

- a cash amount of US$94.5 million of which US$90 million was allocated to current assets and US$4.5 million was allocated to repay debt related to certain legal hypothecs (the Québec equivalent of construction liens) affecting certain fixed assets located in Québec;
- a credit bid of US$78 million allocated to the Canadian fixed assets;
- US$36.7 million of assumed liabilities; and
- up to US$26.9 million of cure costs.

Under this bid, US$126.7 million was allocated to current assets and US$82.5 million was allocated to fixed assets (the whole excluding allocation of cure costs).

Sixth Avenue's last bid was US$500,000 less than the total winning bid submitted by BDWBI, but included US$175 million of cash, and allocated US$173.4 million to current assets and US$35.3 million to fixed assets (the whole excluding the allocation of cure costs).

II. — Appropriateness of Credit Bidding

In determining the appropriateness of the credit bidding process, certain precedents do exist in Canada. In the *CCAA* proceedings of *Maax Corporation*, the ability to credit bid at a *CCAA* auction was recognized by the court when it approved the stalking horse bid, which was a secured credit bid.[7] In addition, in the *CCAA* proceedings of *Brainhunter*, the Ontario Superior Court of Justice (Commercial List) ("Ontario Court") recognized the ability of the secured note holders to credit bid at an auction.[8] Furthermore, in the cross-border *CCAA* and Chapter 11 proceedings of *Eddie Bauer*, the Ontario Court had approved bidding procedures that explicitly provided for the right to credit bid.[9]

In the *White Birch* case, BDWBI noted, in its intervention and memorandum of arguments, that the concept of credit bidding was accepted under Québec law generally, and drew comparison to

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a hypothecary creditor in Québec who purchases hypothecated property and who is permitted to retain the purchase price to the extent of its secured claim on the property. The purchaser argued that this concept is regularly applied in judicial sales in Québec and is the functional equivalent of credit bidding.

Subsequent to the filing of the motion to approve the sale of substantially all the WB Group's assets, [10] Justice Mongeon found that "[t]he words 'and other applicable law' could, in my view, tolerate the inclusion of similar rules of procedure in the province of Québec." [11] Accordingly, the Court found that "those bidders able to benefit from a credit bidding situation could very well revert to the use of this lever or tool to arrive at a better bid" and that there was nothing in the *CCAA* or Québec law that prevented them from doing so, given the terms of their credit and security documents. [12] However, the possibility of reverting to credit bidding was something that was already contemplated in the SISP. Paragraph 7 of the motion to approve the sale of substantially all the WB Group's assets quotes paragraph 24 of the SISP order, stating that:

> Notwithstanding anything herein to the contrary, including without limitation, the bidding requirements herein, the agent under the White Birch DIP facility (the "DIP Agent") and the agent to the WB Group's first lien term loan lenders (the "First Lien Term Agent") on behalf of the lenders under White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be deemed Qualified Bidders and any bid submitted by such agents on behalf of the respective lenders in respect of all or a portion of the Assets shall be deemed both Phase 1 Qualified Bids and Phase 2 Qualified Bids. The DIP Agent and First Lien Term Agent, on behalf of the lenders under the White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be permitted, in their sole discretion, to credit bid up to the full amount of any allowed secured claims under the White Birch DIP Facility and the first lien term loan agreement, respectively, to the extent permitted under Section 363(k) of the *Bankruptcy Code* and other applicable law. [13]

The possibility of using credit bidding was also mentioned in the bidding procedures sanctioned by the Court in a decision rendered September 2, 2010 and the companies' motion clearly indicated the impact stating, "[n]otwithstanding anything herein to the contrary, the applicable agent under the DIP credit agreement and the applicable agent under the first lien creditor agreement shall each be entitled to credit bid pursuant to section 363(k) of the US *Bankruptcy Code* and other applicable law." [14]

When focusing on the issue of credit bidding, people tend to concentrate on an assessment of value, rather than on other factors. The analysis concentrates more on the value that should be ascribed to a dollar of credit used to acquire assets, rather than on whether or not it is appropriate for the lender to acquire the assets in the first place. While the issue of the assessment of value

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is important, there is another inherent risk to credit bidding that must be kept in the forefront in planning the sale process.

Given the popularity of "loan to own" arrangements, there is a possibility that the DIP lender or some or all of the secured creditors may become one of the prospective purchasers. There is certainly nothing wrong with the concept of a lender becoming the prospective purchaser, and indeed, the secured creditor's interest in the assets may protect value by eliminating the possibility of deep discount prices solely because there is temporarily limited interest in certain assets. It is important however to realize that the presence of lenders in the group of prospective purchasers may create an information imbalance within the group of prospective purchasers, that may act as a disincentive to the prospective purchasers.

It is likely that the lenders will seek to have access to privileged information in the context of the sale process, with a view to protect their interests. The receipt of information about the sales process by a lender, in its dual capacity as lender and as prospective purchaser, may give the lender a competitive advantage over other bidders that would discourage the competition.

In developing the rules relating to the sale process, it is therefore important to be mindful of the possible impact of access to privileged information, and to set up safeguards to limit this possibility.

III. — Valuation of Assets Where Credit Bidding is Allowed

In *White Birch*, the court held that if credit bidding was to take place, the amount of the credit bid should not exceed the face value of the credit instrument on which the credit bidder is allowed to rely and that the credit bid should not be limited to the fair market value of the corresponding encumbered assets. Justice Mongeon held that it would be impossible to function otherwise because it would require an evaluation of the encumbered assets, which could be impractical due to the complexity and cost. [15]

In applying section 36 of the *CCAA*, the Court held that all elements of section 36 need not be fulfilled in order to grant an order. The Court should look at the transaction as a whole and decide whether or not the sale is appropriate, fair, and reasonable. [16] Justice Mongeon further indicated that section 36 of the *CCAA* provides a list of criteria that the Court must consider, but does not impede the Court's judicial discretion by providing a list of conditions that must be met. The Court can approve the process for reasons other than those mentioned in section 36 or refuse to grant it for reasons not mentioned in section 36. The Court relied on *Re Canwest Publishing Inc* and *Re Nortel Networks Corp*, [17] and held that the process applied to the *White Birch* case met the criteria set out in those decisions; the price to be paid by the winning bidder was satisfactory given the circumstances and the terms and conditions of the winning bid were acceptable.

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With regard to the valuation of a credit bid, the question as to whether a dollar for dollar of debt should be allowed or whether the credit should be limited to the value of the underlying asset has frequently been asked. Although the underlying value approach has been used in certain cases, it has been considered to be an incorrect application of credit bidding in other cases. A credit bid can be considered the same way as a foreclosure or taking in payment, where the secured creditor accepts ownership of the collateral in satisfaction of the entire indebtedness. In *Cohen v. KB Mezzanine Fund II LP*, [18] the US Court held that §363(k) "empowers creditors to bid the total face value of their claims — it does not limit bids to claims' economic value" and therefore supports the assertion that a dollar for dollar of debt should be allowed.

The approach and methodology to consider evaluation and sale proceeds allocation should be clear at the outset if the sale process proposes to sell both encumbered and unencumbered assets as a package.

In the *Cow Harbour Construction Ltd* matter, [19] the court authorized a global sale process that included encumbered assets; however, the encumbrances were held separately and not subject to inter-creditor agreements (leases, GSA and PMSI). In this case, the additional challenge that occurred was that some security holders wanted to take their security out of the global sale process, although ultimately, a deal was reached with these parties. This potential action by the secured lenders raised the question as to whether the secured lenders in a *CCAA* sale process need to bid or would they be allowed to watch the sale process unfold and if they were not satisfied with the result, attempt to exclude and repossess their security. From a practical perspective, this matter would have to be decided by the court prior to the commencement of the bidding process. If the secured creditor does not protest in advance and does not seek to have the assets subject to its security removed from the process prior to its commencement, it would be hard to argue at a later date that it reserved the right to do so.

In the *White Birch* case, the process adopted an approach whereby the debtor sold encumbered and unencumbered assets. In order to meet the requirements under the US *Bankruptcy Code* of allowing a secured creditor to protect its position through credit bidding, and recognizing the possibility that through this credit bid, the secured creditor could acquire unencumbered assets at a low value by skewing the allocation on a global bid, the debtor determined the minimum amount of cash that must be included and attributed to the unencumbered assets. Once that threshold was met, the credit bid was allowed on the dollar for dollar basis. [20] The minimum cash requirement was developed both with a view to avoid a "technical insolvency" of the estate, [21] and to ensure that adequate value would be allocated to the unencumbered assets, to protect the interests of the unsecured creditors, based on the estimated realizable value of the unencumbered assets.

Here, the asset sale agreement ("ASA") did not provide an allocation of value between the assets located in the US and Canada, or between the current assets, and in particular accounts receivable

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and inventories, and the capital assets. While these allocations were somewhat academic at the time that the stalking horse bid was approved, inasmuch as the value allocated to the assets did not exceed the amount due under the DIP agreement, the monitor had cautioned that these allocations could become relevant if the purchase price were to be enhanced at the auction.

The ASA stated that an allocation of the purchase price amongst the various entities comprising the White Birch group and between the various categories of assets would be provided by BDWBI prior to the auction, but after the hearing on the motion to approve the stalking horse, so that it would be available before the sale hearing. The monitor advised that it considered that the proposed timing was too late, and that a basis of allocation should be predetermined, in order to remove the possibility of a strategic allocation of value to benefit the first term loan lenders at the expense of the ordinary unsecured creditors; in view of the fact that the sponsors of BDWBI purported to hold the majority of the first term loan debt.

As stated above, the debtor established rules for the bidding at the auction that created a minimum allocation in cash to the unencumbered assets. The minimum amount of cash required can be established via valuation methods of either the forced or orderly liquidation value, net book value, or estimated market value. Other methods could also be applied to avoid a skewing of the allocation that would favour the secured creditor to the detriment of the unsecured creditors by allowing it to acquire the unencumbered assets at a discount. Such methods could include, for instance, bidding by step[22], or allocating less than full value to a credit bid, i.e. less than dollar for dollar, to compensate the fact that unencumbered assets are being acquired. This latter method, however, leads to complexities in the valuation of a credit bid that may be difficult to manage in the heat of the auction and that may lead to complicated valuation disputes with the secured creditor.

There is also the issue of the role of the monitor or receiver in terms of valuation, who must take a position as to whether the debtor or its advisors have properly valued the assets, including as to the principles that should be applied in valuing the assets. The process of the valuation should be fair and reasonable. The importance of ensuring adherence to sound valuation principles is further heightened because of the shortened timeline normally followed for the development and execution of the valuation process; the likely scrutiny underlying the probable and hypothetical assumptions associated with the valuation by stakeholders; and the lack of market comparables that typically exist for such distressed assets. In some cases, the monitor or receiver could suggest deferring the process; however, in other instances, when the market is unlikely to improve, it is difficult for the insolvency professional to say it will not accept the valuation, as it may be unclear where the bottom of the market will settle. In *CCAA* proceedings, management, the board of directors, or a chief restructuring officer are in place and they possess important information about the appropriate value of the assets, or what an appropriate floor value might be, on which a bidding process can be fashioned. To the extent that the process is equitable amongst stakeholders, business judgment and practical reality rules should apply.

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The *White Birch* stalking horse process resulted in a stalking horse bidder being approved notwithstanding that the offer received represented close to the liquidation value of the assets. Given the low quantum of the offer that ultimately became the stalking horse bid, the barrier to entry to participate at this stage of the process was practically non-existent. Yet there was only one bid and that bid attributed no value to the fixed assets. Obtaining a valuation at this point would have provided a theoretical value to the assets, but it would have been difficult to argue that a theoretical value was a better assessment of market value than that obtainable in an open, transparent, and rigorous sales process that involved the marketing of the assets in question. In all circumstances, the best determination of fair market value is the actual price parties are willing to pay for the asset when offered through a competitive sale process.

IV. — Standing of the Losing Bidder

A recurring theme in Canadian sales processes in the context of formal proceedings is the contestation of the efficacy of the process and the results thereof by the losing bidder or "the bitter bidder". More and more, the losing bidder disputes the process and its results as a standard and logical next step in the competition to gain standing in the next phase of the sale process that leads to the conclusion of a transaction to acquire business assets. This phenomenon has been witnessed in the *Rail Power Technologies*, *Abitibi Bowater*, and *White Birch CCAA* cases, amongst others. This trend only reinforces the importance of having a transparent process, run by or in conjunction with, appropriate advisors, as well as a clear communication plan with regard to the rules of engagement.

Although the "bitter bidder" arguably has no standing before the court, Canadian courts are reluctant to exclude such party from a hearing based on this point alone. The losing bidder will customarily be given an opportunity to make representations to the court, if only for the fact that ultimately the court has to be satisfied that the sale process and its results are reasonable in the circumstances, and that the process was fair and transparent.[23] One of the stakeholders in addressing the adequacy of the sale process is the unsuccessful bidder, who will have a keen interest in raising all irregularities or shortcomings in the process, up to the motion seeking approval of a proposed transaction. However, in the cases where the court has been satisfied with the reasonableness of the process, the bitter bidder has been ultimately told that it has no interest in the proceedings, and can therefore not affect its outcome.

For example, at the sale hearing in the matter of White Birch, the argument was raised when Sixth Avenue, the losing bidder group, contested the motion seeking approval of the sale of the White Birch assets to BDWBI. Here, the losing bidder did not have standing to make any of the arguments as it was simply a party who had lost at an auction and did not like the results. This same losing party had not previously objected to any of the orders rendered earlier in the case that had approved the credit bidding process, and, in fact, participated in the process by credit bidding during the

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auction. In this matter, Justice Mongeon chose to address each of the arguments put forward by the minority lenders before the Court and ultimately overruled each of the arguments on its merits. However Justice Mongeon did specifically note in his reasons that:

> I will make no comment as to the standing of the "bitter bidder". Sixth Avenue [may] have standing as a stakeholder while it may not have any, as a disgruntled bidder.
>
> I am, however, impressed by the comments of my colleague Clément Gascon, j.s.c., in *Abitibi Bowater*, in his decision of May 3rd, 2010 where, in no unclear terms he did not think that as such, a bitter bidder should be allowed a second strike at the proverbial can. [24]

It should be noted that the minority lenders at no time presented themselves as creditors of White Birch, at the sale hearing or in any other context in this matter. Throughout, they relied on the agent of the first lien term loan syndicate to represent their interests as members of the syndicate, as would be expected.

In similar fashion to the *White Birch* and *Abitibi Bowater* matters, in the *Rail Power Technologies* [25] matter, the judgment rendered by Justice Alary also made it clear that notwithstanding any issues relating to the standing of the stakeholder before the court, the court will tend to allow the bitter bidder to make its representations and consider such in its deliberations, where appropriate. In her judgment, Justice Alary notes the following:

> Finally, the Court notices that Progress's reasons for complaining about the sale process have evolved, if not changed, between its initial contestation and its final argument.
>
> As a matter of fact, Progress failed to show that many of its initial criticisms were well founded. [26]

Notwithstanding the complete rejection by the Court of the criticisms of the sale process levied by the bitter bidder, and the scepticism expressed by the Court as to the bitter bidders' true motives, the Court tolerated a four-day hearing on the subject. Although, in this matter, the resultant delays to conclude the transaction, with the incurrence of significant professional fees and operating costs prior to closing, did not create a material adverse outcome, the concern lies with even greater delays that could be caused by way of a hearing on whether the bitter bidder has standing. The lapse of time for such a hearing, rendering a judgment, and potentially an appeal of the judgment could add to the delays of the hearing on the efficacy of the process and could be more damaging. In a worse case scenario, this delay could prove self-fulfilling for the bitter bidder where the resultant delay and cost demises the ability to close the proposed acceptable transaction. The courts therefore, logically, have tended towards putting this matter aside and dealing with the more practical issue at hand.

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In *CCAA* matters, the courts have referred to jurisprudence relating to sales conducted by a court-appointed receiver. As set out in the judgment rendered by Justice Alary in the *Rail Power Technologies Corp* matter:

> When a sale occurs in the context of *CCAA* proceedings, the Court has to be satisfied that it is the result of the fair and transparent sale process. In considering the role of the Court, the jurisprudence has made an analogy with cases dealing with the approval of a sale by a Court-appointed receiver [*Royal Bank v. Soundair Corp.* (1991), 7 C.B.R.(3d) 1 p.6 (Ont. C.A).] It was decided that the Court's duties are: (i) to consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) to consider the interests of the parties; (iii) to consider the efficacy and integrity of the process by which offers are obtained; and, (iv) to consider whether there has been unfairness in the working out of the process. [27]

Notwithstanding the establishment of a process that clearly meets these goals and obtaining court approval thereof, it is still a frequent occurrence for the bitter bidder to criticize the sale process and its outcome, claiming that the process was not followed and/or that the recommendation of the monitor, or trustee, or receiver as the case may be, is flawed, as it is principled on unsound assumptions and facts. Such potential criticisms underpin the importance of adhering to the process in a rigorous manner, documenting the actions taken and even the conversations conducted throughout the process. Such documentation will serve to demonstrate adherence to process and the efforts expended by the professionals involved to secure the highest and best price for the associated assets. While the courts favour the recommendation of their appointed officer of the court, the delays caused by the intervention of a bitter bidder and the costs incurred in dealing with same can be unnecessarily disruptive to the sale and restructuring process. One could argue that exercising sound business judgement and foreseeing the criticism that may be levied by a bitter bidder in regard to the sale process will result in a better sales process. A sales process that is fully and effectually transparent and principled on equitable representation and participation by the varied stakeholders will achieve the objective of a sales process that withstands scrutiny by any stakeholder, including the bitter bidder. It will remain the role of the court to sift through the criticisms of the bitter bidder, or any other stakeholder, to determine the relative weight, if any, that should be applied against the criticisms in its deliberations; a role the court has effectively undertaken to date, and there is no reason to foresee any lesser effectiveness into the future.

Key terms of any sale process and the sale process procedures are often determined at the outset of the proceeding and subject to rules dictated by secured lenders and/or DIP lenders that reflect self-interest. The debtor, with the assistance of the professionals involved, must remain cognizant of stakeholder interests and devise a sales process that negates favouritism of one stakeholder over the other; avoiding an attempt by any party to "game" the process to their favour by introducing terms and conditions that would unduly favour their position.

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V. — Conclusion and Lessons Learned

The importance of being proactive and establishing a strategy regarding the sale process from the outset of the process is made clear in the judgment and reasons rendered by Justice Mongeon in the *White Birch* matter:

> I have dealt briefly with the process. I don't wish to go through every single step of the process but I reiterate that this process was put in place without any opposition whatsoever. It is not enough to appear before Court and say: "Well, we've got nothing to say now. We may have something to say later" and then, use this argument to reopen the entire process once the result is known and the result turns out to be not as satisfactory as it may have been expected. In other words, silence sometimes may be the equivalent to acquiescence. All stakeholders knew what to expect before walking into the auction room.
>
> Once the process is put into place, once the various stakeholders accept the rules, and once the accepted rules call for the possibility of credit bidding, I do not think that, at the end of the day, the fact that credit bidding was used a tool, may be raised as an argument to set aside a valid bidding and auction process. [28]

DIP terms may be negotiated and approved well in advance of an application to approve a sales process. The court and practitioners need to be mindful of DIP lending terms that may restrict the sale process, such as rights of first refusal, a veto right in respect of the acceptance of an offer, or other restrictive condition.

Given the popularity of "loan to own" arrangements, there is a possibility that the DIP lender or some or all of the secured creditors may become one of the prospective purchasers. Their informational needs to protect their position as secured creditors throughout the tenure of the proceeding may cause an information imbalance between themselves and prospective purchasers. This information imbalance may create a disincentive for the prospective purchasers to participate in the sale process. Although one could also argue, at times, having too much information can be a disincentive to the party with knowledge. It is therefore important to establish safeguards to limit the possibility of an information imbalance from compromising the equity and effectiveness of the sale process.

The general consensus is that credit bidding is an accepted practice in Canada. The accepted principle is that a secured creditor can credit bid up to the full amount of its secured debt, in the purchase of its collateral, and that it will be valued on a dollar for dollar basis. Also, although a credit bid can only be applied against the purchase price of the collateral securing the debt, the credit bid can also be used as part of an overall bid for the purchase of encumbered and unencumbered assets. This strategy is acceptable so long as the consideration tendered for the fair

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market value of the unencumbered assets, when assessing the value of an overall bid, is offered as cash or cash equivalence. However, at the end of the day, in order to improve their chances of having a successful outcome in the process, participants in an auction or sale process that have concerns about the ability of a party to credit bid or the manner in which the process will be conducted, must raise these concerns early on in the process. Those potential bidders who come to the table at the outset will be able to influence the rules of the game and improve their opportunity for a successful outcome.

Footnotes

* Martin P. Rosenthal, CPA, CA, CIRP is a Senior Vice President of Ernst & Young Inc. and a partner of Ernst & Young LLP. The author acknowledges and expresses his gratitude to Jean-Daniel Breton and Kevin Brennan who assisted in reviewing this paper. The author was actively involved in the White Birch and Railpower Technologies Corp matters referred to herein.

2 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

3 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

4 USC title 11 [US *Bankruptcy Code*].

5 *Arrangement relatif à White Birch Paper Holding Company*, 2010 QCCS 764, [2010] QJ No 1723.

6 *In Re Bear Island Paper Company, LLC*, 2010 Bankr LEXIS 5777 (Bankr ED Va, 2010).

7 *Re Maax Corp*, 2008 CarswellQue 15021 (CS).

8 *Re Brainhunter*, 2010 ONSC 1035, 70 BLR (4th) 123 (Sup Ct J [Commercial List]).

9 *Re Eddie Bauer of Canada Inc*, 57 CBR (5th) 24, 2009 CarswellOnt 5450 (Sup Ct J [Commercial List]).

10 *Re White Birch Paper Holding Company*, 2010 QCCS 4915, ¶22, [2010] QJ No 10469 [*White Birch*].

11 *Ibid* at para 31.

12 *Ibid* at para 33.

13 *Ibid* at para 30.

14 "Amended Bidding Procedures" *White Birch Paper [CCAA Monitor]* (1 September 2010), online: Ernst & Young <http://documentcentre.eycan.com> at 8.

15 *White Birch, supra* note 9 at para 34.

16 *Ibid* at paras 48-49.

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17 *Re Canwest Publishing Inc* (2010), 68 CBR (5th) 233, 2010 CarswellOnt 3509 (Sup Ct J [Commercial List]); *Re Nortel Networks Corp* (2009), 56 CBR (5th) 224, 2009 CarswellOnt 4838 (Sup Ct J [Commercial List]).

18 *Cohen v. KB Mezzanine Fund II LP*, 432 F 3d 448 at 459 (*sub nom In re SubMicron Sys Corp*) (3d Cir 2006).

19 *Royal Bank v. Cow Harbour Construction Ltd*, 2012 ABQB 59, 98 BLR (4th) 236.

20 US *Bankruptcy Code*, *supra* note 3, §363(k) ("[a]t a sale ... of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and ... may offset such claim against the purchase price or such property").

21 I.e., as a situation where the debtor is unable to pay the liabilities incurred after the commencement of the proceedings.

22 Bidding by step would occur where a bidder cannot step back from a previously bid value — in effect, an improved bid must meet a double requirement of having a greater overall value and an allocation that is no lower than the previously bid amount.

23 *Re Royal Bank v. Soundair, Corp*, 7 CBR (3d) 1 (Ont CA) (typically, the Court will try to assess whether the sale process meets the criteria developed by the Court).

24 *White Birch*, note 9 at paras 55-56.

25 *Re Rail Power Technologies Corp*, 2009 QCCS 2885, 71 CBR (5th) 258.

26 *Ibid* at paras 101-02.

27 *Ibid* at para 51.

28 *White Birch*, *supra* note 9 at paras 37-38.

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TAB 11

See para. 8.

CITATION: CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750
COURT FILE NO.: CV-12-9622-00CL
DATE: 20120315

2012 ONSC 1750 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: CCM Master Qualified Fund, Ltd., Applicant

AND:

blutip Power Technologies Ltd., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Rogers and C. Burr, for the Receiver, Duff & Phelps Canada Restructuring Inc.

A. Cobb and A. Lockhart, for the Applicant

HEARD: March 15, 2012

REASONS FOR DECISION

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

[1] By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

[2] D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

[3] The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two

convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

2012 ONSC 1750 (CanLII)

[4] At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

[5] As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

[6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

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[1] (1991), 7 C.B.R. (3d) 1 (C.A.).

[7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,[2] *BIA* proposals,[3] and *CCAA* proceedings.[4]

[8] Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.[5]

2012 ONSC 1750 (CanLII)

B. The proposed bidding process

B.1 The bid solicitation/auction process

[9] The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

[10] Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the

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[2] *Re Graceway Canada Co*., 2011 ONSC 6403, para. 2.
[3] *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 15.
[4] *Re Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13; *Re White Birch Paper Holding Co*., 2010 QCCS 4382, para. 3; *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 2, and (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.); *Re Indalex Ltd*., 2009 CarswellOnt 4262 (S.C.J.).
[5] Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding – Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

[11] The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

[12] The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

[13] The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.[6]

C. Analysis

[14] Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the

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[6] *Re Parlay Entertainment*, 2011 ONSC 3492, para. 12; *Re White Birch Paper Holding Co.*, 2010 QCCS 4915, paras. 4 to 7; *Re Nortel Networks Corp.* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.), para. 12.

2012 ONSC 1750 (CanLII)

prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

2012 ONSC 1750 (CanLII)

[15] In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

[16] Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.[7]

[17] For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

[18] Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

[19] As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

[20] Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that

[7] *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.), para. 7; *Re Graceway Canada Co.,* 2011 ONSC 6403, para. 5; *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 58.

secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

2012 ONSC 1750 (CanLII)

[21] I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc. (Re)*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> …
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.[8]

[22] In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a

[8] 2012 ONSC 1299 (CanLII).

receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

[23] In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

[24] The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

[25] May I conclude by thanking Receiver's counsel for a most helpful factum.

(original signed by)

D. M. Brown J.

Date: March 15, 2012

2012 ONSC 1750 (CanLII)

Court File No. CV-21-00658423-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC. ET AL.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES OF U.S. CLASS COUNSEL
(MOTION RETURNABLE AUGUST 17, 2022)

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