



No. S-238572
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF
MYRA FALLS MINE LTD.

PETITIONER

APPLICATION RESPONSE

Application response of: Amalgamated Mining & Tunnelling Inc. (the "**application respondent**")

THIS IS A RESPONSE TO the notice of application of Myra Falls Mine Ltd. filed June 17, 2024.
The application respondent estimates that the application will take one hour.

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: Paragraph 1(a) and (e).

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in paragraphs 1(b), (c) and (d) of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in none of the paragraphs of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. The application respondent, Amalgamated Mining & Tunnelling Inc. ("AMTI"), has been in the business of selling and leasing new and used mining equipment since 1999, and is one of

the largest renters of mining equipment in North America. AMTI is the lessor of the following mining equipment to MFM (the “**Leased Equipment**”):

Year	Make	Model	Serial No.
2023	Sandvik	LH514 Loader	SLHL514DKNA0A1038
2023	Sandvik	TH545i Truck	T545DCPAOA0249
2020	Getman	EXC 4000	100-10101
2021	Sandvik	TH545i Truck	T545DEMA0A0125
2016	Sandvik	LH514 Loader	L614D818

Affidavit #1 of Donald MacLellan made June 24, 2024
 (“**MacLellan Affidavit**”), paras 3-4.

2. AMTI has registered its leases for the Leased Equipment (collectively, the “**Leases**”) at the Personal Property Registry in the Province of British Columbia.

MacLellan Affidavit, para 4.

3. In the days leading up to December 18, 2023, prior to MFM commencing its CCAA proceedings, AMTI had arranged trucks to repossess the Leased Equipment, due to defaults by MFM on the Leases, including failures to pay monthly lease payments. As a result of discussions with MFM (and in particular, Hein Frey, the general manager of MFM) in advance of MFM applying for the Initial Order on December 18, 2023, AMTI agreed to not repossess its Leased Equipment, in order to work collaboratively with MFM, and with a mutual goal with MFM of eventually shipping that Leased Equipment to Nyrstar (MFM's parent organization), for use at its zinc mining operation in Tennessee. As a result, and in reliance in good faith (to AMTI’s own detriment) on the advice of MFM, AMTI did not repossess the Leased Equipment prior to MFM commencing the CCAA proceedings.

MacLellan Affidavit, para 8.

4. MFM commenced its CCAA proceedings by way of the Initial Order granted December 18, 2023. Since then, MFM has not made any rental payments on any of the Leased Equipment and is in default on the Leases. MFM takes the position that paragraph 10(b) of the Initial Order (and of the Amended and Restated Initial Order granted December 28, 2023 (the “**ARIO**”)) prohibits it from paying lease payments owed to AMTI, on the basis that the Leases are financing leases which create security interests. MFM has also refused to allow AMTI to repossess the

Leased Equipment. The stay of proceedings in the CCAA proceedings prevents AMTI from terminating the Leases and repossessing the Leased Equipment notwithstanding that the Leases are in default.

MacLellan Affidavit, paras 9-10.

5. MFM's mine has been in care and maintenance since the commencement of the CCAA proceedings, and MFM advises that the Leased Equipment has, save and except for one piece of the Leased Equipment that has been buried underground (the 2016 Sandvik LH514 Loader, SN L614D818), been brought to the surface, stored and winterized. MFM has advised AMTI that the Leased Equipment is not being used and is not needed by MFM. The Leased Equipment is not unique to the MFM mine.

MacLellan Affidavit, paras 5-6, 16.

6. Counsel for AMTI has followed up regularly with counsel for MFM since January 2024 to determine MFM's intentions with respect to the Leased Equipment and provided payout statements for the Leased Equipment to counsel for MFM on February 20, 2024 at counsel's request (which had been provided by AMTI to MFM directly on December 15, 2023).

MacLellan Affidavit, paras 11-12, 15.

7. On February 22, 2024, counsel for MFM served an application upon the service list seeking, among other relief:

- (a) court approval of a sale and investment solicitation process ("**SISP**"); and
- (b) an approval and vesting order over the sale of a lease between MFM and Epiroc Canada Inc. ("**Epiroc**") for a long-hold production drill rig for medium-to-large drift mining (the "**Simba Equipment**") to Breakwater Resources Ltd. ("**Breakwater**"), a mining company related to MFM (the "**Breakwater Transaction**").

MacLellan Affidavit, para 13.

8. On February 27, 2024, MFM obtained court approval of the SISIP which required (among other things as described in paragraph 16 of the SISIP) that any bid must be "an offer to: (i) acquire

all or substantially all of the Property or Business, whether through an asset purchase, a share purchase, a share subscription, or a combination thereof (any of these, a “**Sale Proposal**”); or (ii) to make an investment in, recapitalize, restructure or refinance MFM and/or its Business (an “**Investment Proposal**”);” (a “**Phase 1 Qualified Bid**”).

MacLellan Affidavit, para 14.

9. The Phase 1 Bid Deadline pursuant to the SISP was April 12, 2024 at 12:00 p.m. Pacific Time. No Phase 1 Qualified Bids were received by the deadline (or at all).

MacLellan Affidavit, para 15.

10. Between December 2023 and April 2024, AMTI had a number of conversations with Hein Frey, the general manager of MFM, wherein Mr. Frey advised that Nyrstar was interested in acquiring the Leased Equipment. On or about April 25, 2024, counsel for MFM advised that MFM was now considering if it would sell and assign the Leases to Nyrstar, located in Tennessee, and that it was currently engaged in discussions in that regard. AMTI cooperated with Mr. Frey in working toward a transaction in that regard; however, MFM did not accept any offers made by Nyrstar to acquire the Leased Equipment.

MacLellan Affidavit, paras 8, 15, 23.

11. After becoming aware that the SISP had failed, in that no Phase 1 Qualified Bids had been received, and upon concluding that there did not seem to be a realistic possibility of MFM accepting any bid from Nyrstar to acquire the Leased Equipment, AMTI obtained permission (through counsel for MFM) to attend onsite and inspect the Leased Equipment on May 10, 2024, and AMTI’s counsel discussed with the Monitor and its counsel AMTI’s interest in making a credit bid to purchase the Leased Equipment, wherein a credit bid for the amounts owed to AMTI on the Leased Equipment would form part of the consideration for the Leased Equipment. During a call on or about May 9, 2024, the Monitor advised counsel for AMTI that:

- (a) MFM would not consider any credit bids because of the high exposure under the court-ordered charges in the CCAA proceedings, including interim financing advanced in the amount of approximately \$15 Million as of May 9, 2024; and

- (b) MFM was considering conducting a further equipment sales process with respect to redundant equipment; however, it was unknown whether MFM would seek court approval of that further sales process, and the details and timing of such a process were unknown.

MacLellan Affidavit, para 26.

12. The Cash Flow Variance Analysis at page 13 of the Monitor's Third Report filed June 18, 2024 that as of June 7, 2024, \$17.5 Million in interim financing had been advanced. Trafigura US Inc. (a related party to MFM) is the interim financier.

Third Report of the Monitor filed June 18, 2024 ("**Third Report**"), p 13.

13. No equipment sales process has been advanced. Notwithstanding that the Phase 1 Bid Deadline was April 12, 2024, over two months ago, and notwithstanding that MFM has filed an application to extend the stay of proceedings to October 31, 2024 and for authorization to borrow interim financing up to an aggregate amount of \$34 Million, and notwithstanding that it has now been over six months since these CCAA proceedings began and over two months since the Phase 1 Bid Deadline in the SISP expired without any Phase 1 Qualifying Bids having been made, MFM has not advanced any application for court approval of an equipment sale process, and has not initiated or provided any particulars of any equipment sale process. No such details or timelines are reported on in the Third Report of the Monitor filed June 18, 2024.

14. On May 28, 2024, AMTI made a bid to MFM to purchase the Leased Equipment, wherein a credit bid for the amounts owed to AMTI on the Leased Equipment would form part of the consideration for the Leased Equipment. AMTI also obtained an independent third party appraisal of the Leased Equipment, which it provided to counsel for MFM in connection with its bid. That appraisal, which had not been reviewed by AMTI prior to being sent to counsel for MFM, confirms that the consideration offered by AMTI to purchase the Leased Equipment is fair and reasonable. MFM has not accepted AMTI's bid.

MacLellan Affidavit, para 33.

15. MFM has been in CCAA proceedings for over six months. The SISP had failed in its entirety, and there had been no progress in selling and assigning the Leases.

16. AMTI has gained no benefit whatsoever from these CCAA proceedings, and AMTI has been significantly prejudiced by these CCAA proceedings, in that:

- (a) it has not received payment of the lease payments owed to it pursuant to the Leases;
- (b) it has not been able to repossess the Leased Equipment;
- (c) it has not been able to re-lease the Leased Equipment to a solvent lessee;
- (d) MFM has not sold / assigned the Leases for the Leased Equipment to a solvent party;
- (e) MFM has not bought out the Leased Equipment in accordance with the terms of the Leases;
- (f) no further sales process in relation to MFM's interests in equipment (including the Leased Equipment) has been commenced or even particularized with any timelines or details; and
- (g) despite the Phase 1 Bid Deadline having expired over two months ago, MFM has done nothing to materially advance these CCAA proceedings for the benefit of AMTI and other creditors, yet has incurred \$17.5 Million as of June 7, 2024 for the creditors of MFM to bear, and seeks to increase its interim financing to a maximum of \$34 Million.

MacLellan Affidavit, para 30.

17. AMTI is suffering significant financial prejudice as a result of these circumstances.

MacLellan Affidavit, para 31.

18. MFM's conduct in these CCAA proceedings, and in its failure or refusal to accept the credit bid made by AMTI on May 28, 2024 for the Leased Equipment, must be considered with regard to the Breakwater Transaction.

MacLellan Affidavit, paras 13, 18-23, 32.

19. Breakwater is a related party to, and a parent company, of MFM.

MacLellan Affidavit, paras 13, 18.

20. The purchase price for the Breakwater Transaction was stated at paragraph 35 of the Affidavit #3 of Hein Frey affirmed February 21, 2024 to be fair market value of the leased Simba Equipment, less the payout amount owing by MFM to the lessor (Epiroc). Specifically, the purchase price to be paid by Breakwater to acquire MFM's rights, title and interest in and to the lease of the Simba Equipment was based on the appraised fair market value as of January 2024, less the payout amount owing by MFM to Epiroc (the lessor) inclusive of legal costs and expenses and taxes. As the Breakwater Transaction contemplated an assignment of the lease with Epiroc for the Simba Equipment, the result of the Breakwater Transaction is that Breakwater assumed all obligations under that lease, including obligations to make lease payments to Epiroc for the Simba Equipment, going forward. This is confirmed by the purchase agreement in relation to the Breakwater Transaction at Exhibit "A" to the Affidavit of Michèle Hay sworn February 22, 2024.

Affidavit #3 of Hein Frey affirmed February 21, 2024 ("Frey Affidavit #3"), para 35.

Affidavit of Michèle Hay sworn February 22, 2024, Exhibit "A".

21. The Affidavit of Stuart Olley, counsel for MFM, affirmed in these CCAA proceedings on March 6, 2024 and tendered in support of MFM's application for approval of the Breakwater Transaction states:

- (a) at paragraph 5: "Following the hearing on February 27, 2024, I contacted counsel for Epiroc to solicit interest in purchasing the [Simba] Equipment. On February 27, 2024, Epiroc's counsel advised me that Epiroc is not interested in any proposal to buy-back the [Simba] Equipment."
- (b) at paragraph 6: "Also on February 27, 2024, I am advised by a representative of the Company [MFM] that he requested an estimate of the value of the Equipment from Amalgamated Mining & Tunnelling Inc. ("Amalgamated"). I have reviewed that e-mail exchange and the fair market value of the Equipment set out therein is well below the value of the Breakwater Agreement." MFM thus relied on AMTI's

valuation of the Simba Equipment in determining to accept Breakwater's offer to purchase the lease of the same, on the basis that Breakwater's offer exceeded fair market value of the Simba Equipment.

Affidavit of Stuart Olley affirmed March 6, 2024, paras 5-6.

22. Trafigura US Inc., as MFM's Interim Lender and a secured creditor of MFM (and a party related to MFM), had guaranteed the lease of the Simba Equipment. Part of the grounds provided in the Monitor's Second Report in support of the Breakwater Transaction was that "a timely assignment of the Epiroc Lease may allow the Interim Lender [Trafigura] or affiliates to avoid exposure under the guarantee".

Second Report of the Monitor dated February 23, 2024, para 24(d).

23. An approval and vesting order approving the Breakwater Transaction was granted by this Court and filed on March 7, 2024.

MacLellan Affidavit, Exhibit "11".

24. In other words, MFM's unwillingness to accept the credit bid by AMTI for its own Leased Equipment must be considered in the context where at the outset of the SISP, MFM pursued, accepted, applied for and was granted court approval of the Breakwater Transaction involving a bid for the lease by MFM of the Simba Equipment, with a purchaser related to MFM and so as to avoid Trafigura (also a related party) having exposure on the guarantee of the lease obligations for the Simba Equipment, and resulting in the ongoing payment to Epiroc of the amounts owed to it on the lease for the Simba Equipment.

MacLellan Affidavit, para 32.

25. By accepting the Breakwater Transaction at the outset of the SISP on the basis of a bid from a related party, and failing to accept AMTI's credit bid for its Leased Equipment, notwithstanding over six months of unpaid rent on the same and a lack of any meaningful progress in the CCAA proceedings, MFM has preferred Breakwater and Trafigura (each a party related to MFM) and Epiroc, over AMTI and all other creditors of MFM.

MacLellan Affidavit, para 34.

26. AMTI disputes that MFM has been carrying out these CCAA proceedings in good faith or with due diligence.

MacLellan Affidavit, para 36.

27. Further, there is a lack of information as to why MFM requires an increased authorization to borrow interim financing up to an aggregate amount of \$34 Million, to ultimately be borne by AMTI and other creditors of MFM, or what MFM's plan is in these CCAA proceedings, going forward.

MacLellan Affidavit, para 36.

Part 5: LEGAL BASIS

1. To obtain an extension of a stay, an applicant must establish three pre-conditions:
 - (a) that circumstances exist that make the order appropriate;
 - (b) that the applicant has acted and continues to act in good faith; and
 - (c) that the applicant has acted and continues to act with due diligence.

Companies' Creditors Arrangement Act, [RSC 1985, c C-36](#), as amended [[CCAA](#)], [s. 11.02\(3\)](#).

2. In *Re Worldspan Marine Inc.*, this Court confirmed that an extension of a stay should only be granted in furtherance of the CCAA's fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors. Other factors to be considered on an application for a stay include the debtor's progress during the previous stay period toward a restructuring, whether the creditors will be prejudiced if the court grants the extension, and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension.

Re Worldspan Marine Inc., [2011 BCSC 1758](#), at paras 17, 21-22, citing *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp.*, [2008 BCCA 327](#) at para 26.

3. Despite these CCAA proceedings having commenced over six months ago, the stay of proceedings has not furthered the CCAA's fundamental purpose of facilitating a plan of arrangement between MFM and its creditors in this case.

4. MFM has not acted in good faith:

- (a) In the days leading up to MFM's application for the Initial Order on December 18, 2023, MFM persuaded AMTI to not repossess its Leased Equipment, despite the Leases being in default, on the basis that MFM would work collaboratively with AMTI, and with a mutual goal with AMTI of eventually shipping the Leased Equipment to Nyrstar. However, since commencing the CCAA proceedings, MFM has not entered into any transaction with Nyrstar in relation to the Leased Equipment;
- (b) MFM preferred its related-party creditor, Trafigura, its creditor, Epiroc, and its related party, Breakwater, over AMTI and all other creditors of MFM, by entering into a transaction to sell the Simba Equipment to Breakwater so as to avoid Trafigura having exposure on the guarantee of the lease obligations for the Simba Equipment;
- (c) MFM has incurred \$17.5 Million in interim financing and is applying for authorization to increase its interim financing to \$34 Million, secured by an interim financing charge in priority to secured and unsecured creditors, without any evidence of any strategy or plan to emerge from or conclude the CCAA proceedings or to benefit any of MFM's creditors.

MacLellan Affidavit, paras 8, 23, 29, 34-35.

5. MFM has not acted and is not acting with due diligence, and there is no evidence that MFM made progress during the previous stay period toward a restructuring:

- (a) It took MFM over two months from the time it commenced the CCAA proceedings to bring an application for Court approval to commence the SISF, which was limited in scope to only consider Sale Proposals or Investment Proposals, all while the costs of MFM's care and maintenance of its mine and the professional fees associated with these CCAA proceedings continued to increase dramatically, at the expense of the creditors of MFM;

- (b) The Phase 1 Bid Deadline expired over two months ago and did not result in any Phase 1 Qualified Bids. The SISP failed. Despite that:
 - (i) MFM still has not applied for court approval of or provided any details or timing of any proposed equipment sales process;
 - (ii) MFM has not entered into any transaction to sell and assign the Leases to Nyrstar;
 - (iii) The Monitor has advised that MFM will not consider a credit bid for the Leased Equipment;
 - (iv) MFM has not accepted (or rejected) AMTI's bid to purchase the Leased Equipment;
 - (v) MFM has not articulated any strategy or plan for resolving these CCAA proceedings;
- (c) MFM seeks an extension of the stay of proceedings to October 31, 2024, notwithstanding that it has not articulated any plan or strategy to be carried out in the CCAA proceedings, going forward, nor any evidence or justification for a stay extension of that duration;
- (d) Notwithstanding that MFM commenced these CCAA proceedings over six months ago, the evidence of MFM is that it "requires additional time to develop a restructuring plan and strategy";
- (e) MFM has incurred over \$17.5 Million in interim financing, with no benefit to AMTI or other creditors of MFM; and
- (f) MFM proposes to increase its interim financing to \$34 Million, yet has not provided any specificity as to the need or reason for the same, and with no apparent benefit (or evidence of any proposed benefit) to AMTI or any other creditors of MFM.

Affidavit #4 of Hein Frey affirmed June 17, 2024, para 32.

6. AMTI will be prejudiced if this Court grants MFM's application for an extension of the stay of proceedings to October 31, 2024. AMTI has not received payments on the Leases for over six months, and has been unable to repossess its Leased Equipment or to lease the same to a solvent lessee. The interim financing, secured by way of a court-ordered charge in priority to claims of secured creditors, has increased drastically during that six-month period, and will nearly double to \$34 Million over the next four months, while correspondingly reducing the likelihood of recovery by secured creditors, including AMTI, of the amounts owed to them by MFM.

MacLellan Affidavit, para 30.

7. By contrast, MFM has not put forth compelling evidence of any prejudice that will be suffered by any party if the requested stay extension is not granted.

8. As AMTI opposes MFM's application for an extension of the stay of proceedings, AMTI also opposes MFM's application for an increase in the interim financing and the interim financing charge, and its application for a key employee retention plan. That relief goes hand-in-hand with an extension of the stay of proceedings.

9. Further, specifically in relation to MFM's application for increased interim financing, section 11.2(4) of the CCAA requires that the court consider, among other things:

- (a) The period during which the company is expected to be subject to proceedings under the CCAA;
- (b) How the company's business and financial affairs are to be managed during the proceedings;
- (c) Whether the company's management has the confidence of its major creditors;
- (d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) The nature and value of the company's property;

- (f) Whether any creditor would be materially prejudiced as a result of the security or charge for interim financing; and
- (g) The monitor's report on the reasonableness of the company's cash flow.

CCAA, [s 11.2\(4\)](#).

10. There is no evidence put forth by MFM to meet this test; its evidence simply states that MFM "will continue to require interim financing to fund its operations during the proposed extension of the Stay Period" and that "Access to this additional interim financing is necessary to MFM's ongoing working capital requirements and the cost of these proceedings."

Affidavit #4 of Hein Frey affirmed June 17, 2024, para 30.

11. There is no evidence that MFM's management has the confidence of its major creditors. MFM does not have the confidence of AMTI.

MacLellan Affidavit.

12. As set out above, there is no indication of a plan or strategy for these CCAA proceedings, and thus no evidence of the expected duration of the CCAA proceedings, how MFM's business and financial affairs are to be managed throughout, or that increased interim financing would enhance the prospects of a viable compromise or arrangement being made in respect of MFM. There is no evidence as to the value of MFM's property. AMTI's evidence is that it has been and will continue to be prejudiced by these CCAA proceedings, including any increase in the interim financing.

13. Interim financing is to be restricted to what is reasonably necessary to meet the debtor's urgent needs while a plan is being developed. As no plan has been developed in the past six months, it cannot be determined what is reasonably necessary to meet MFM's urgent needs *while* a plan is being developed. Interim financing must be limited in time and scope, the benefits must outweigh the potential prejudice to creditors affected by the charge, and the court must be satisfied that it is just and equitable in all the circumstances to grant the order for the interim financing.

Re Royal Oak Mines Inc., [1999 CanLII 14840 \(ONSC\)](#),
(1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List])
at para 24.

Re Mecachrome International inc, [2009 QCCS 575](#) [translated using Google Translate], (2009), 58 CBR (5th) 15 (Que. SC.) at para 31.

14. AMTI submits that it is neither just nor equitable for this Court to grant an order authorizing MFM to incur a further \$16.5 Million, in addition to the \$17.5 Million already incurred, in interim financing, in priority to the claims of creditors of MFM.

15. AMTI respectfully requests that this Court dismiss the relief sought at paragraphs 1(b), (c) and (d) of its Notice of Application filed June 17, 2024.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Donald MacLellan, made June 24, 2024;
2. Affidavit #3 of Hein Frey, made February 21, 2024;
3. Affidavit #4 of Hein Frey, made June 17, 2024;
4. Affidavit #1 of Michèle Hay, made February 22, 2024;
5. Affidavit of Stuart Olley, made March 6, 2024;
6. Second Report of the Monitor, FTI Consulting Canada Inc., dated February 23, 2024;
7. Third Report of the Monitor, FTI Consulting Canada Inc., dated June 18, 2024;
8. Amended and Restated Initial Order granted December 28, 2023;
9. Order (Approval of Sale and Investment Solicitation Process and Engagement of Financial Advisor) granted and filed February 27, 2024; and
10. Such further and other materials as counsel may advise and this Honourable Court may allow.

The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Address for service:

Bennett Jones LLP
Barristers and Solicitors
4500 Bankers Hall East
855 – 2nd Street SW
Calgary, AB T2P 4K7
Phone: (403) 298-3323

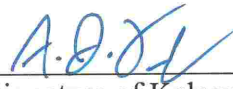
Fax number address for service (if any):

(403) 265-7219

E-mail address for service (if any):

meyerk@bennettjones.com

Dated: June 25, 2024



For: Signature of Kelsey Meyer

Application respondent

Lawyer for application respondent

THIS APPLICATION RESPONSE is prepared and delivered by Kelsey Meyer of the firm Bennett Jones LLP, Barristers & Solicitors, File No. 097241.1, whose place of business and address for delivery is 4500 Bankers Hall East, 855 2nd Avenue SW, Calgary, Alberta, T2P 4K7. Telephone: (403) 298-3323. Facsimile: (403) 265-7219. [meyerk@bennettjones.com]