Court File No. CV-23-00707394-00CL

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 TACORA RESOURCES INC.

Applicant

RESPONDING FACTUM OF THE MONITOR

April 6, 2024

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RESPONDING FACTUM OF THE MONITOR

PART I - THE ISSUES

1. As described by the Ontario Court of Appeal: "The Monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the CCAA and its restructuring purpose".[1]

2. It is in that context, to address issues specifically relating to the objectives of the CCAA[2] and its restructuring purpose, that the Monitor files this factum focussing on two points:

(a) **The discretion granted to the Court pursuant to section 11 of the CCAA should not be restricted by rigid, bright line rules, other than in exceptional circumstances based on clear statutory language**: in this respect, Cargill's position that an approval and reverse vesting order ("**RVO**") cannot be used to transfer a contract to a newly incorporated entity ("**ResidualCo**") absent compliance with the assignment provisions contained in section 11.3 of the CCAA ("**s. 11.3**") or the prior disclaimer of the contract under section 32 of the CCAA ("**s. 32**") should not be adopted by this Court. That novel position, if adopted, would (i)

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[1] *Ernst and Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, para. 109.
[2] Unless otherwise indicated, all capitalized terms used in this factum but not defined have the meanings given to them in the Fourth Report of the Monitor dated March 14, 2024 (the "**Fourth Report**") and the Supplement to the Fourth Report of the Monitor dated March 26, 2024 (the "**Supplement to the Fourth Report**").

contravene numerous RVO decisions where contracts have been transferred to ResidualCos without having first been disclaimed in circumstances where the requirements of s. 11.3 have not been met; and (ii) amounts to an improper restriction of the Court's discretion under section 11 of the CCAA ("**s. 11**"); and

(b) **The integrity of sale processes – such as the Solicitation Process – is fundamental to the administration of Canada's insolvency statutes**: as this Court has determined in similar circumstances, Cargill's request to reopen the Court-approved Solicitation Process at this late stage, if granted, would make a mockery of that process and compromise one of the fundamental principles of Canadian insolvency law: the importance of maintaining the integrity of a Court-approved sales process.

PART II - THE FACTS

3. In the Fourth Report of the Monitor and the Supplement to the Fourth Report of the Monitor, the Monitor provides a comprehensive description of (i) the events leading up to the Solicitation Process; (ii) the conduct of the Solicitation Process; (iii) the factors leading the Monitor to support the RVO requested by Tacora; and (iv) the purpose and effect of the RVO on Tacora and its various stakeholders. The Monitor does not repeat that information here, but relies on and refers to certain facts from those Reports and adopts the facts set out in Tacora's factum dated March 27, 2024.

PART III - LAW & ARGUMENT

4. The Monitor will address the following three issues:

(a) the Monitor's responsibility to support the objectives of the CCAA;

(b) the Court's exercise of discretion to grant an RVO is not restricted by s.11.3 and s.32 of the CCAA; and

(c) the importance of respecting the integrity of the Solicitation Process.

A. Role of The Monitor to Support the Objectives of the CCAA and the Restructuring Purpose

5. The Monitor's role is best understood in the context of the objectives of the CCAA. As the Supreme Court of Canada has stated:

> …the purpose of the CCAA is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies…Parliament recognized that companies have more value as going concerns, especially since they are "key elements in a complex web of interdependent economic relationships."[3]

6. To achieve the remedial purpose of the CCAA, "supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests."[4] The Monitor is "uniquely situated to comment on the overall circumstances so as to assist the Court in the balancing exercise" inherent in a CCAA proceeding.[5] The Monitor is expected to evaluate the conduct of the parties, independently report to the Court, express opinions and make recommendations, and assist the Court in its supervisory role in the CCAA proceeding.[6] While the Monitor is not an advocate for a particular party, the Monitor's role has evolved from that of a passive observer to that of an active participant.[7]

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[3] *Canada v. Canada North Group Inc.*, 2021 SCC 30, para. 137; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, paras. 15, 59, 77; *Ernst and Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, paras. 100-101.
[4] *Canada v. Canada North Group Inc.*, 2021 SCC 30, para. 22.
[5] *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037, para. 49; *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, para. 52.
[6] *Nelson Education Ltd. Re*, 2015 ONSC 3580, para. 35; *Ernst and Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, para. 110.
[7] *Ernst and Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, paras. 107-110; *Canada v. Canada North Group Inc.*, 2021 SCC 30, para. 28.

7. In connection with its role, the Monitor has a responsibility to ensure that the relevant legal principles and broader policy considerations are before the Court. The Monitor submits this factum for that purpose.

B. Discretionary Authority to Grant an RVO Not Constrained by Sections 11.3 or 32 of the CCAA

(i) The RVO Structure

8. Tacora seeks to implement the Investor Transaction as the Successful Bid under the Solicitation Process through an RVO. Under the proposed RVO, "the Applicant shall be deemed to have transferred to ResidualCo the Excluded Assets, the Excluded Contracts and the Excluded Liabilities."[8] It is common ground (i) that the Cargill Offtake Agreement and certain other agreements are Excluded Contracts; and (ii) that damages arising from the failure of Tacora to perform the Offtake Agreement are an Excluded Liability.

9. The RVO sought by Tacora follows the typical structure for reverse vesting orders, described by the Court as follows:

> (a) the purchaser becomes the sole shareholder of the debtor company;
>
> (b) the debtor company retains its assets, including key contracts and permits; and
>
> (c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity or entities.
>
> The assets and liabilities are vested out in the separate entity or entities (which are referred to in the RVO as "Residual Cos.") which may then be addressed through a bankruptcy or similar process. The reverse vesting order is therefore contrasted with a traditional vesting order in which the assets of a debtor company that the purchaser acquires are vested in the purchaser free and clear of any encumbrances or claims, other than those assumed by the purchaser, as contemplated by s. 36(4) of the CCAA. The purchase price stands in place of the

[8] Draft Order, para. 7(c), Tacora Motion Record dated February 2, 2024, Tab 5 [emphasis added].

> assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.[9]

(ii) Broad Jurisdiction Under Section 11

10. Courts have held that "there is no provision in the CCAA that prohibits a reverse vesting order structure"[10] and "it is settled law that courts have jurisdiction to approve a transaction involving a reverse vesting order."[11] That jurisdiction is found in s.11, which "as broadly interpreted in the jurisprudence…clearly provides the court with jurisdiction to issue [an RVO], provided the discretion available under s.11 is exercised in accordance with the objects and purposes of the CCAA".[12] The objects and purposes of the CCAA 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.[13]

11. That interpretation of s.11 is consistent with the typical application and interpretation of s.11, which the Supreme Court of Canada has described as vast and flexible because the CCAA "is famously skeletal in nature" and "does not 'contain a comprehensive code that lays out all that is permitted or barred'".[14] The broad discretion provided to the supervising judge in the CCAA proceeding is a unique feature of the CCAA and one of the principal means through which the CCAA achieves its objectives to respond to the "circumstances of each case and 'meet contemporary business and social needs'… in 'real time.'"[15]

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[9] *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.,* 2022 ONSC 6354, para. 27.
[10] *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.,* 2022 ONSC 6354, para. 29.
[11] *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.,* 2022 ONSC 6354, para. 31; *Arrangement relatif à Blackrock Metals Inc*., 2022 QCCS 2828, paras. 85-86.
[12] *Harte Gold Corp. (Re)*, 2022 ONSC 653, para. 37.
[13] *Harte Gold Corp. (Re)*, 2022 ONSC 653, para. 32.
[14] *Canada v. Canada North Group Inc.*, 2021 SCC 30, para. 138. See also: *Canada v. Canada North Group Inc.*, 2021 SCC 30, para. 21.
[15] *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, paras. 47-48.

12. The Supreme Court of Canada has held that:

> 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 … Additionally, the court must keep in mind three 'baseline considerations'… 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.[16]

13. On its face, s.11 is "subject to the restrictions set out in this Act". However, as noted by the Ontario Court of Appeal, "the plain meaning of the words 'subject to the restrictions set out in this Act' refers to express restrictions" and where provisions of the statute are intended to restrict section 11, "they do so in unequivocal terms". [17]

(iii) Jurisdiction to Grant an RVO

14. In *Harte Gold*,[18] this Court approved an RVO which involved "certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy." The Court referred to the transfer as an "assignment" but did not conduct an analysis pursuant to s.11.3 to determine whether those contracts could be assigned.[19] Rather, the Court held that its jurisdiction to grant the RVO was grounded in s.11, and that section 36(3) of the CCAA provided an analytical framework that should be applied, with necessary modifications, to transactions effected through an RVO.[20]

15. It is a hallmark of the RVO structure that the emerging operating company disposes of various liabilities, including contracts and significant claims. Cargill's elevation of s.11.3 and s.32 to rigid pre-requisites that must be fulfilled would put in doubt many, if not all, of the RVO transactions completed in the last five years, since the *Nemaska Lithium* decision. [21] The

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[16] *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, para. 49.
[17] *U.S. Steel Canada Inc. (Re),* 2016 ONCA 662, paras. 84, 87.
[18] *Harte Gold Corp. (Re)*, 2022 ONSC 653.
[19] *Harte Gold Corp. (Re)*, 2022 ONSC 653, para. 15.
[20] *Harte Gold Corp. (Re)*, 2022 ONSC 653, para. 37.
[21] *Arrangement relatif à Nemaska Lithium Inc*., 2020 QCCA 1488, para. 19.

unopposed nature of some of those decisions does not dilute their precedential value. If the Court did not have jurisdiction to grant an RVO in those cases, the Court could not have done so.

16. In other words, a lack of opposition does not create jurisdiction.[22] If the approving Courts in *Harte Golde*, *Quest*, and the various other decisions granting RVOs did not have the basic jurisdiction to conduct the various divestitures required via those RVOs, then those decisions were all errors of law. That cannot be the case.

17. The impact of s.11.3 and s.32 on s.11 have not been expressly considered by the Court in the context of an RVO. However, the Court has acknowledged that an RVO involves the transfer of contracts from the debtor company to a separate entity. The Court has not concluded that its power to grant the order is limited by s.11.3 and s.32.

18. It is not surprising that s.11.3 has not been considered in the context of an RVO as the purpose of s.11.3 is not engaged in an RVO transaction. Specifically, the Court has described the purpose of s.11.3 as permitting "the Court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with."[23] There is no suggestion that under an RVO scenario, a counterparty must accept future performance of a contract from ResidualCo. Indeed, such a proposition is the antithesis of the RVO structure.

19. Similarly, in *Quest*, a non-debtor counterparty objected to the RVO (in part) on the basis that the Court did not have jurisdiction to vest off a lease. The non-debtor counterparty argued that the RVO was simply a "disguised disclaimer" and the transfer of the lease was subject to s.32. The Court concluded that the contract at issue was not a lease but rather an "agreement to

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[22] Transcript of the Reasons for Judgment of the Honourable Justice Nixon, dated July 27, 2020, Action No.: 2001-08434, E-File Name: CVQ2012178711CANADA, pages 7-8, Responding Factum of the Monitor, Tab 1.
[23] *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678, para. 27.

agree" (*i.e.* a contractual right) and, even if the face of explicit opposition, that it had the power under section 36(6) of the CCAA to vest off that contract that had not been disclaimed.[24]

20. That approach is consistent with *Nemaska Lithium*. In *Nemaska Lithium*, the non-debtor counterparty asserted that the debtor company needed to disclaim the contracts at issue pursuant to s.32 or obtain the consent of the counterparty before the contracts could be transferred. The Court held that so long as the requirements of section 36(3) were met, the Court had the power to transfer the contracts without the consent of the non-debtor counterparty. The Court went on to conclude that requiring the consent of the non-debtor counterparty would give that counterparty a veto right over the proposed transaction, which would be unacceptable.[25]

21. Based upon the above analysis, the question for this Court is not whether it can issue the RVO based on a bright-line test, but whether it should exercise its discretion to do so as it is appropriate in the circumstances of this case, keeping in mind the open-ended and flexible nature of the CCAA and the test for approval of an RVO established in the case law.[26]

22. To return to the central question of these proceedings, the critical decision is whether the Court should approve the Investor Transaction. In its Fourth Report the Monitor followed the guidance of the Court in *Harte Gold* and evaluated the Investor Transaction using the section 36(3) criteria as guidelines. The Monitor concluded based upon its observations of the proceeding that:[27]

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[24] *Quest University Canada (Re)*, 2020 BCSC 1883, paras. 35-40.
[25] *Arrangement relatif à Nemaska Lithium Inc*., 2020 QCCS 3218 (Certified Translation), paras. 108-109, Responding Factum of the Monitor, Tab 2; Re-Modified and Restated Contestation of Nemaska's Approval Application dated September 30, 2020, paras. 30-31, Responding Factum of the Monitor, Tab 3.
[26] *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.,* 2022 ONSC 6354, paras. 29, 31; *Harte Gold Corp. (Re)*, 2022 ONSC 653, paras. 29, 32, 38; *Arrangement relatif à Blackrock Metals Inc*., 2022 QCCS 2828, paras. 85-87, 90, 115-117.
[27] Fourth Report, para. 59.

(a) The process leading to the Investor Transaction was reasonable in the circumstances;

(b) The Court and Monitor approved the Solicitation Process;

(c) The Investor Transaction is more beneficial to the creditors as a whole than a sale or disposition under a bankruptcy;

(d) The effects of the Investor Transaction on the creditors and other interested parties as a whole favoured approval; and

(e) The consideration is reasonable and fair, taking into account the Applicant's market value.

C. Cargill's Proposed Plan Impacts the Integrity of the Solicitation Process

23. Cargill has criticized the conduct of the Court-approved Solicitation Process which resulted in the selection of the Investor Bid as the Successful Bid. However, Cargill's complaint appears to be that its bid was not chosen. Notably, Cargill's complaints only surfaced following the selection of the Investor Bid as the Successful Bid.

24. Cargill points to the general provisions of the Solicitation Process that, like many sales processes, permit Tacora and the Monitor to exercise discretion to waive strict compliance with the Solicitation Process. Although Cargill participated in the development of the Solicitation Process, including the specified timelines, Cargill argues that Tacora and the Monitor should have waived strict compliance to provide Cargill with more time to obtain committed financing. However, the waiver provisions are intended to provide flexibility to Tacora to enhance value for all stakeholders – not to destabilize a Court-approved bidding process.

25. Respect for the bidding process is a cornerstone of Canadian insolvency sales proceedings and has been since *Royal Bank of Canada v. Soundair Corp* ("***Soundair***").[28] Once a process has been put in place by the Court, "that process should be honoured, excepting extraordinary circumstances."[29]

26. Under the *Soundair* guidelines, a sales process should only be set aside if there is serious cause for concern that it unfolded in an unfair fashion. The Monitor's view is that the Solicitation Process was carried out in accordance with its terms and it did not unfold in an unfair fashion so as to compromise the selection of the Investor Bid as the Successful Bid.[30]

27. The Monitor is aware of the dynamic environment that faced the Tacora Board, the risks it had to evaluate regarding the compliant and non-compliant bids, including further litigation and the uncertain end date for this CCAA proceeding if an actionable bid was not accepted by Tacora.

28. At its core, Cargill's challenge to Tacora's decision to select the Investor Bid, in large part, appears to rest on its view that the Investor Bid was conditional on the Court granting the RVO.[31] Cargill alleges that Tacora did not conduct the Solicitation Process appropriately because it should have known that an RVO was not available in the circumstances. That argument pre-supposes that Cargill's legal position on the preliminary motion is correct and that numerous other cases in which RVOs have been granted in similar circumstances are incorrect.

29. In contrast, Cargill could have submitted its now proposed Plan[32] in accordance with the milestones set out in the Solicitation Process. It chose not to. Rather, now that the "court-approved [Solicitation Process] ha[s] run its course and [Tacora has] entered into an agreement with the

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[28] *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (CA).
[29] *Re Grant Forest Products Inc.*, 2010 ONSC 1846, paras. 29-31.
[30] Supplement to the Fourth Report, para. 11; *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCA 1488, paras. 16-17.
[31] Cargill Factum re Responding Cross-Motion, dated March 27, 2024, para. 19.
[32] As defined in Cargill's Factum re Responding Cross-Motion, dated March 27, 2024, para. 1.

successful bidder"[33] Cargill essentially seeks to reopen the solicitation process. The Ontario Court of Appeal has recently held that even where a bidder seeks to redeem a secured creditor in full, such a late bid should not be accepted. Although the comments are in the context of a receivership sale, they are equally applicable in a CCAA proceeding:

> We see no error in the motions judge applying the following principles to guide her consideration of whether, in the specific circumstances, 273 Ontario should be granted leave to redeem:
>
> - In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;
>
> - Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 1991 CanLII 2727 (ON CA), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view, the reason the *Soundair* principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court's process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor; and
>
> - In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process.
>
> We adopt the rationale for those guiding principles articulated in *B&M Handelman Investments Limited v. Mass Properties Inc.* (2009), 2009 CanLII 37930 (ON SC), 55 C.B.R. (5th) 271 (Ont. S.C.), where the court stated, at para. 22:
>
> > A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.[34]

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[33] *Rose-Isli Corp. v. Smith*, 2023 ONCA 548, para. 8; *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2023 ONSC 832, para. 78.
[34] *Rose-Isli Corp. v. Smith*, 2023 ONCA 548, paras. 9-10.

30. The integrity of the Court-approved Solicitation Process, like other sale processes in insolvency proceedings is "very important" and "should be carefully protected so that the ability…to negotiate the best price possible is strengthened and supported".[35]

31. The Court's focus on, and prioritization of, the integrity of the process stands even where a creditor may lose a great deal if the Court grants the order requested by the applicant.[36] In other words, the magnitude of the loss does not give the creditor suffering that loss the ability to block a transaction resulting from a sales process that was – as in this case – conducted fairly. The Court's focus must be on whether the Investor Transaction, which is the only Successful Bid, arising from the Solicitation Process "promote[s] the best outcome for all stakeholders" considering and balancing the interests at play to achieve "the greatest benefit" for the overall stakeholder group.[37]

32. Tacora requires substantial capital investment to achieve consistent, profitable operations so that it can withstand a number of variables including fluctuating commodity pricing, seasonal weather events, and other operational risks. The Monitor remains extremely concerned that Tacora is unable to obtain the necessary substantial capital investment while in this CCAA proceeding. As a result, it is the Monitor's view that it is imperative that Tacora emerge from this CCAA proceeding as soon as possible. The Investor Transaction is the only viable path currently available to do so.

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[35] *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2023 ONSC 832, para. 109.
[36] *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2023 ONSC 832, para. 104; *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.,* 2022 ONSC 6354, paras. 58-60.
[37] *Quest University Canada (Re)*, 2020 BCSC 1883, para. 172.

PART IV - ORDER REQUESTED

33. The Monitor therefore supports the relief sought by Tacora on the Sale Approval Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of April, 2024.

CASSELS BROCK & BLACKWELL LLP

SCHEDULE "A"

LIST OF AUTHORITIES

1. *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10
2. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828
3. *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCA 1488
4. *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCS 3218 (Certified Translation)
5. *Canada v. Canada North Group Inc.*, 2021 SCC 30
6. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
7. *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678
8. *Ernst and Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014
9. *Harte Gold Corp. (Re)*, 2022 ONSC 653
10. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.,* 2022 ONSC 6354
11. *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037
12. *Nelson Education Ltd. Re*, 2015 ONSC 3580
13. *Quest University Canada (Re)*, 2020 BCSC 1883
14. *Re Grant Forest Products Inc.*, 2010 ONSC 1846
15. *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2023 ONSC 832
16. *Rose-Isli Corp. v. Smith*, 2023 ONCA 548
17. *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (CA)
18. Transcript of the Reasons for Judgment of the Honourable Justice Nixon, dated July 27, 2020 Action No.: 2001-08434, E-File Name: CVQ2012178711CANADA
19. *U.S. Steel Canada Inc. (Re),* 2016 ONCA 662

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

General power of court

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

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

(4) 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.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

Restriction on disposition of business assets

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

Notice to creditors

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

Factors to be considered

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

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

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

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

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

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

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

Additional factors — related persons

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

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

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

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

(a) a director or officer of the company;

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

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

Assets may be disposed of free and clear

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

Restriction — employers

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

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is

included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Action No.: 2001-08434
E-File Name.: CVQ2012178711CANADA
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF SECTION 192 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, C. C-44, AS AMENDED

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 12178711 CANADA INC., CALFRAC WELL SERVICES LTD., CALFRAC (CANADA) INC., CALFRAC WELL SERVICES CORP. and CALFRAC HOLDINGS LP, by its General Partner CALFRAC (CANADA) INC.

P R O C E E D I N G S

Calgary, Alberta
July 27, 2020

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Reasons for Judgment

THE COURT: Good afternoon everyone. Before I begin I just would like to apologize from the Court's perspective there was a downfall in allocation of duties amongst the clerks. That was entirely the fault of the Court. Again, my apologies for the delay.

Decision

This is in respect of the application by the Wilks Brothers LLC and the Calfra Group or Calfrac Entities, as I will refer to them as. This is a Comeback Application.

These are oral reasons for judgment of myself, Justice Blair Nixon.

Insofar as this is an oral judgment I retain the right to review the transcript and to add case names and citations. I may issue a written decision on this, although I have not yet made a final decision in that regard.

In oral judgments it is not my practice to cite the legislation, jurisprudence, or the *Rules of*

Court in detail notwithstanding that they have all been considered.

Before I turn to the introduction I would just also like to acknowledge the number of submissions that I received. They were all appreciated.

I. Introduction

This is a Comeback Application (the "Comeback Application"). The Comeback Application is being filed by the Wilks Brothers LLC, (the "Wilks Brothers").

The Wilks Brothers seek an order to vary or amend paragraph 7 of the Preliminary Interim Order granted on July 13th, 2020 (the "Preliminary Interim Order").

The Preliminary Interim Order created a stay of proceedings as against, among others, holders of the Second Lien Secured Notes of Calfrac Holdings LP. (I will refer to that Stay, as the "Stay Provision"; and I will also refer to the "Second Lien Noteholders" and the "Second Lien Notes", where appropriate).

The Wilks Brothers argue that the Stay Provision does not apply to the Second Lien Noteholders.

II. The Issue

Does the Stay Provision apply to the Second Lien Noteholders?

III. The Facts

On July 13th, 2020, this Court granted the Preliminary Interim Order to 12178711 Canada Inc., Calfrac Well Services Ltd, Calfrac (Canada) Inc, Calfrac Well Services Corp, and Calfrac Holdings LP, by its general partner, Calfrac (Canada) Inc. (I will refer to those entities collectively as the "Calfrac Entities".)

The Calfrac Entities sought the Preliminary Interim Order pursuant to Section 192 of the *Business Corporations Act*, (the *"CBCA")* in connection with a plan of arrangement under the *CBCA* (the "Plan of Arrangement").

The Preliminary Interim Order was obtained by the Calfrac Entities on an *ex parte* basis. The focus of the Comeback Application is on paragraph 7 of the Preliminary Interim Order, which establishes the Stay Provision.

The relevant portions of paragraph 7 of the Preliminary Interim Order read as follows: (as

read)

> From 12:01 AM, (Calgary time) on the date of this Preliminary Interim Order and until further order of the Court (the "Stay Period"), no right, remedy, or proceeding, including, without limitation, any right to terminate, demand, accelerate, set off, amend, declare in default or take any other action under or in connection with any loan, note, commitment, contract or other agreement, at law or under contract, may be exercised, commenced or proceeded with by: (i) the Second Lien Noteholders;...or (iv) any person (other than HSBC in its capacity as Agent under, and the lenders party to, the Credit Agreement, who are expressly not subject to the stay of proceedings herein) that is party to or a beneficiary of any other loan, note, commitment, contract or other agreement with one or more of the Calfrac Entities, against or in respect of the Calfrac Entities, or any of the present or future property, assets, rights or undertakings of any of the Calfrac Entities, of any nature in any location, whether held directly or indirectly by any of the Calfrac Entities, by reason or as a result of:
> (a) the Applicants having made an application to this Court pursuant to Section 192 of the *CBCA*;
> (b) any of the Calfrac Entities being a party to or involved in these proceedings or the Arrangement;
> (c) any of the Calfrac Entities taking any step contemplated by or related to these proceeding or the Arrangement including but not limited to the commencement or prosecution of any foreign proceedings for the recognition of these proceedings or the Arrangement;
> (d) the non-payment of principal, interest and any other amounts due and payable in respect of any of the Senior Unsecured Notes, or any related documents, or the expiry of any applicable grace periods hereunder, or
> (e) any default or cross-default under or in connection with any of the Second Lien Notes, the Senior Unsecured Notes or any related documents, in each case except with the prior consent of the Applicants or leave of this Court.

On July 14th, 2020 the request for relief by the Calfrac Entities was heard by the U.S. Bankruptcy Court for the Southern District of Texas, located in Houston, Texas (the "U.S. Bankruptcy Court"). The U. S. Bankruptcy Court granted an Order Granting Emergency Provisional Relief pursuant to Chapter 15 of the *Code* (the "U.S. Order").

The Wilks Brothers appeared at the U.S. Bankruptcy Court hearing on July 14th, 2020 to object to the relief being sought, but was unsuccessful (the "July 2020 U.S. Bankruptcy

Court Hearing"). At the July 2020 U.S. Bankruptcy Court Hearing, the Wilks Brothers stated, "We really believe this should have been commenced in a Chapter 11 before this Court".

The Calfrac Entities have also taken steps to apply for recognition that the *CBCA* proceedings are a "foreign main proceeding". The U. S. Bankruptcy Court is scheduled to hear that application on August 25th, 2020.

The Calfrac Entities have garnered significant support for the Plan of Arrangement among the affected security holders, including the unsecured noteholders and the common shareholders (collectively, the "Affected Securityholders".)

IV. Analysis

A. The Onus

The Calfrac Entities have the onus of demonstrating the appropriateness of the Stay Provision on the Comeback Application.

The Wilks Brothers assert that the Calfrac Entities have a higher standard to satisfy to justify interfering with the bargained for legal rights of the Second Lien Noteholders. I disagree.

The standard of proof in all civil claims is the balance of probabilities. Contrary to the suggestion made by counsel for the Wilks Brothers, there is no higher burden to satisfy concerning the alleged interference with the bargained rights of the Second Lien Noteholders: *FH v McDougall*, 2008 SCC 53 at paras 39, 40 and 49. The *Supreme Court of Canada* has stated the following in the context of this issue: (as read)

> I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities.

B. Plans of Arrangement using the *CBCA*

The use of Plans of Arrangement to implement corporate restructurings under federal and provincial *Business Corporations Act* has become more common over the past few decades. The scope within which Plans of Arrangement have been permitted to operate has expanded during this period.

Plans of Arrangement legislation is being used by bodies corporate in a number of

circumstances, including when the underlying businesses are financially challenged. The difficulty for all participants is to determine the appropriate boundaries within which the arrangement should be permitted to apply. As gatekeepers, the judiciary is on the front lines of this challenge.

C. *CBCA* Framework

The policy underlying the *CBCA* is to allow a corporation to manage its own affairs, subject to the caveat that minority stakeholders must be protected: See *Proposals for a New Alberta Business Corporations Act*, Report No 36, vol 1 and 2 (Edmonton: Institute of Law Research and Reform, 1980) at 52 ["**Alberta Law Institute Report.**"]. This management policy extends to Plans of Arrangement. *FH v McDougall*, 2008 SCC 53 at paras 39, 40, 49.

From the inception of the *CBCA*, the policy thrust was to allow a corporation to make an application for an arrangement including "...a compromise involving creditors and anything else that comes within the term 'arrangement' as interpreted by the courts": Alberta Law Institute Report at 53, although it is discussing the ABCA proposal in this context. The thread embedded in this legislative scheme is flexibility, and the Courts were granted the discretion to deal with matters as they saw fit.

As a result of this legislative policy and the resulting jurisprudence, the Plans of Arrangement framework has gained popularity. The attractiveness of Plans of Arrangement has developed because the Courts have been persuaded of the benefits of the speed and flexibility provided by that legislative framework.

This judicial endorsement of arrangements is supported by policy statements issued through the Executive Branch of the federal government. In particular, the Director appointed under the *CBCA* has stated that the arrangement provisions of that statute are intended to be facilitative and should not be construed narrowly: Innovation, Science and Economic Development Canada, "Policy on arrangements - Canada Business Corporations Act, section 192" (1 August 2014) Government of Canada, online: <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs01073.html> para 1.02 ["**CBCA Policy**"]. That endorsement by the Executive Branch of the federal government goes on to state that any proposed arrangement transaction must satisfy the requirements of procedural and substantive fairness.

Notwithstanding the endorsements by the judiciary and the Executive Branch of the federal government, I acknowledge that the statutory framework which provides for Plans of Arrangement is not comprehensive. The absence of a comprehensive framework has caused a number of tensions to evolve concerning the use of arrangements. These

tensions include the role of the stay of proceedings in facilitating arrangements.

D. Wilks Brothers' Focus - Second Lien Notes and The Stay Provision

The focus of the Comeback Application is on paragraph 7 of the Preliminary Interim Order. The Wilks Brothers seek an Order to vary or amend paragraph 7 of the Preliminary Interim Order. They seek to remove the Second Lien Parties from the Stay Provision.

Section 7 is the only provision of the Preliminary Interim Order that has been challenged on this application.

The Calfrac Entities obtained the Preliminary Interim Order in the context of advising the Court that they were developing a proposed Plan of Arrangement under the *CBCA*.

The Wilks Brothers assert the Second Lien Notes have automatically accelerated by its terms and by operation of law. As such, the Wilks Brothers assert the second lien notes are now fully due and payable. Consistent with this position, the Wilks Brothers assert that the Stay Provision has no impact on the automatic acceleration of the Second Lien Notes under the Second Lien Indenture.

E. Does the Court have Jurisdiction to Grant Stay Provisions?

In reviewing matters for the Preliminary Interim Order, I found in the requirements for relief under Section 192 were satisfied. This conclusion was not challenged by the Wilks Brothers, and does not form any part of its objection on the Comeback Application.

Concerning the Preliminary Interim Order granted in this case, the only question is whether it is appropriate for this Court to exercise its discretion to grant the Stay Provision in the form previously granted on July 13th, 2020. I turn to review the issues relating to this question.

1. Does the Court require the consent of the Wilks Brothers in order to have jurisdiction?

The Wilks Brothers assert that the precedents relied on by the Calfrac Entities are of limited assistance because the orders obtained were consensual or unopposed. I disagree.

The Court either has jurisdiction or it does not. A party's consent is immaterial to that determination.

Based on my review of the jurisprudence, I find that this Court has jurisdiction and has exercised its discretion to grant orders similar to the Stay Provision in prior *CBCA* proceedings.

Given that precedent and my review of the law, I find that I have the jurisdiction to issue the Stay Provision. I do not need the consent of the Wilks Brothers as a prerequisite to decide the matter.

Given my jurisdiction, my obligation is to determine whether it is appropriate in each case to exercise that discretion. I exercise my discretion based on the facts and circumstances before me.

Given the facts and analysis, I find I have the jurisdiction to issue the Stay Provision, and that I do not need the consent of the Wilks Brothers.

2. Does the Court have the jurisdiction to grant the Stay Provision when it applies to third parties?

The Wilks Brothers assert it is a "third party" to the Plan of Arrangement. Notwithstanding my jurisdiction, the assertion advanced by the Wilks Brothers raises the question as to whether the Stay Provision applies to third parties.

The fundamental purpose of a stay proceeding is to preserve the *status quo* that existed prior to the filing. To give effect to that fundamental purpose, third parties are often subject to a temporal procedural stay of their contractual rights during a restructuring under the *CBCA*.

Based on my review of the law, I find that the Courts have approved the stay of proceedings against a broad spectrum of "third parties": ***Essar Steel Canada Inc***, 2014 ONSC 4285 at paras 46-48; ***RGL Reservoir Management Inc (Re)***, 2017 ONSC 7302 at para 50; see also Tervita Preliminary Interim Order at para 3; Lighstream Preliminary Interim Order at para 3; Concordia Preliminary Interim Order at para 2; ***Concordia (Re)***, 2017 ONSC 6357 [Concordia] at paras 44-45 & 50.

Given the facts and analysis, I find that I have the jurisdiction to grant the Stay Provision when it applies to third parties including the Wilks Brothers.

3. Does the Court have the jurisdiction to grant orders that interfere with contractual rights?

Courts exercising jurisdiction under the *CBCA* have made orders which prevent creditors

from calling defaults under credit agreements where they would otherwise be entitled to do so. (I refer to those as "No Default Orders".) The purpose for doing so is the same as a stay of proceeding: To maintain the *status quo* that existed prior to the filing, pending consideration of the arrangement: ***8440522 Canada Inc***, 2013 ONSC 2509 [***Mobilicity]*** at paras 69-71.

When considering whether to grant a No Default Order, the Courts have held that the words of section 192(4) of the *CBCA* "not only suggest a large discretion for the Court, but also one that should be reasonably exercised in furtherance of the object of the provision. Namely, to facilitate an arrangement and, at the very least, to allow for it to be subject to a meaningful approval process": ***45133541 Canada Inc***, 2009 QCCS 6444 [***Abitibi***] at para 105, as cited in ***Mobilicity***.

In this respect, the Courts have found that their powers under the *CBCA* can be exercised to restrain rights that are normally enjoyed by secure creditors, and include "the power to restrain enforcement of security and thus attempt to preserve the *status quo* pending consideration of the arrangement": ***In the Matter of a Plan of Arrangment proposed by Trizec Corporation Ltd*** (April 6, 1994), Calgary (Alta QB), unreported [***Trizec***], as cited in ***Mobilicity*** at para 69.

In keeping with these judicial guidelines, interim orders that prevent creditors from calling defaults under credit agreements have been granted in a number of *CBCA* Plan of Arrangement cases: ***In Abitibi*** at para 108.

Similarly, under the *CCAA*, the jurisdiction to impose a stay during the restructuring period to prevent a creditor relying on an event of default has been found to apply "equally to the creditor of the debtor company in circumstances where the debtor company has chosen not to compromise the indebtedness owed to it.": ***Re, Doman Industries Ltd (Trustee of)***, 2003 BCSC 376 [***Doman***] at paras 15-16. The case law under the *CCAA* has been accepted as instructive in these circumstances. Justice Morawetz, as he then was, made it clear in ***Concordia*** when he stated that: ***In the Matter of a Proposed Arrangement of Concordia International Corp. et al***, Court File No. CV-17-584836-00CL [***Concordia Preliminary Interim Order***]; and ***Concordia*** at para 49. (as read)

> Where there is an expectation of debt compromise, the parties should not hesitate to incorporate structures or processes that are found in the *CCAA* and the *Bankruptcy and Insolvency Act*.

Given the facts and analysis, I find that the Court has the jurisdiction to grant orders that interfere with contractual rights. This is supported by the jurisprudence which has

established that under both the *CBCA* and the *CCAA*, the fact that a creditor is legally unaffected by an arrangement does not impact the jurisdiction of the Court or the appropriateness of the stay of proceedings applying to that creditor. Further, I find the Stay Provision is not an order that would be impermissible under all of the insolvency legislation in Canada, including proceedings under the *CBCA*.

F. Does the Stay Provision preserve the *status quo* for the Calfrac Entities?

The jurisdiction of the Court under Section 192 of the *CBCA* is routinely exercised to grant broad stays of proceedings to facilitate arrangement proceedings under that statute. These discretionary orders are made with the purpose of preserving the *status quo* and avoiding any disruption of business during the essential arrangement process.

For judicial authority on this point, I need look no further than earlier comments by this Court. In the ***Trizec*** case this Court stated: ***Trizec***, cited in ***Abitibi*** at para 106 and ***Mobilicity*** at para 69; see also discussions in ***Abitibi*** at paras 92-122, ***Mobilicity*** at paras 66-73, and ***Essar*** at paras 46-48. (as read)

> The power to restrain enforcement of security and thus attempt to preserve the *status quo* ending consideration of arrangement by parties affected can be found in the broad general language of section 192(4).

Other Superior Courts within Canada have also made similar supportive comments. In the course of considering Stay Provisions in orders analogous to the Stay Provision, the Courts have commented that "[t]he aim of such clauses is to maintain the *status quo* while the proposed arrangements are considered and implemented": ***Essar*** at para 47.

In a similar context, the Courts have stated that the discretion under Section 192(4) ought to be exercised in a manner that furthered the purpose of the provision, namely, to facilitate an arrangement and, at the very least, to allow for it to be subject to a meaningful approval process.

When I speak of maintaining the *status quo* in the context of the Stay Provision in the Preliminary Interim Order, I mean the *status quo* ante. In other words, the state of the facts as they existed before the commencement of the relevant proceedings. This point has been emphasized by other superior courts which have framed the point as follows: ***In the Matter of the Companies' Creditors Arrangement Act and in the Matter of JTI-Macdonald Corp***, 2019 ONSC 222 at para 29. (as read)

> In accepting that the orders proposed by Imperial ought to go in all three applications I am convinced that this would best preserve the *status quo*

> as it existed at the time of the filings and provide for a level playing field needed to attempt a resolution of all claims.

The concept of *status quo ante* is well-understood in law, and refers to a state of facts before the intervention of an act or acts being considered by the Court.

In this case, the *status quo ante* to be preserved by the Stay Provision as expressly set out at paragraph 7 of the Preliminary Interim Order is the state of facts that existed prior to 12:01 AM on July 13th, 2020. That pinpointed time is before the Calfrac Entities had filed pleadings or made an application for the Preliminary Interim Order.

As at 12:01 AM time on July 13th, 2020, the Calfrac Entities: (i) had filed no court documents; (ii) had made no court application; and (iii) were still within the grace period for the periodic interest payment due under the Unsecured Note Indenture.

In considering the position being advanced by the Wilks Brothers, I also reviewed the words in Article 4.06 and Article 6.01(a)(9) of the Second Lien Indenture in the context of the particular facts of this case. Based on that review, I find that prior to 12:01 AM on July 13, 2020 none of the Calfrac Entities had:

> (i) insisted upon, pleaded, claimed, or taken advantage of any stay, extension or usury law; and
> (ii) commenced a voluntary case.

In summary, I accept the interpretation of paragraph 7 of the Stay Provision as argued by the Calfrac Entities during the comeback hearing.

Given the facts and analysis, I find the *status quo ante* is preserved by the Stay Provision.

Preserving the *status quo ante* is also consistent with the approach of the Canadian courts.

While the Calfrac Entities finalized the Plan of Arrangement and bring it forward in these *CBCA* proceedings, all parties are procedurally stayed from maneuvering, relying on, or exercising any rights or remedies. All substantive rights are preserved in the same state they existed prior to 12:01 AM on July 13, 2020.

In effect, the Stay Provision provides protection to all parties and preserves a level playing field for all parties. The intention in these circumstances is to prevent any positioning maneuvers amongst the creditors during the interim period that would give the aggressive creditor an advantage. The policy objective in these circumstances is to make sure that other creditors are not prejudiced because they are less aggressive or

assertive. Any such maneuvering would undermine the financial position of an operation such as the Calfrac Entities making it less likely that the eventual arrangement would succeed: ***Meridian Developments Inc v Toronto-Dominion Bank*** (1984), 11 DLR (4th) 576, [1984] 5 WWR 215 at para 23.

Given the facts and analysis, I find the preservation of the Stay Provision in its current form is entirely appropriate. Further, the preservation of the Stay Provision in its current form is necessary to preserve the *status quo ante*. To find otherwise would shift the substantive rights to, and for the benefit of, the Wilks Brothers. That would be to the detriment of both the Calfrac Entities and their other stakeholders. Importantly, that would be contrary to the whole purpose and intent that underlies restructuring in an insolvency context.

In addition to my above comments, Canadian courts prohibit the kind of "automatic" or "deemed" acceleration relied on by the Wilks Brothers in this case. I turn to review that law.

G. Does the Anti Deprivation Rule apply in this case?

On this Comeback Application the Wilks Brothers highlight two provisions under the Second Lien Indenture.

First, Article 4.06, which provides that the parties, to the extent they may lawfully do so, shall not take the benefit of a stay; and

Second, Article 6.02 which provides for the immediate acceleration of the Second Lien Notes upon the occurrence of certain events of default.

In my view, the law is clear. Parties cannot contract out of the jurisdiction of the Court.

If a party was able to agree not to seek relief in the form of a stay of proceedings, such a provision would be inserted into every agreement with a borrower to the detriment of all of its other stakeholders. Based on my review of the law, the Court has a jurisdiction under the *CBCA* to temporarily stay the contractual rights of a third party, including automatic acceleration provisions.

The *CCAA* and the *BIA* contain express statutory provisions prohibiting the termination of an agreement or the acceleration of payment obligations purely by reason that proceedings are commenced under the respective statutes and expressly provide that such contractual provisions are void.

The provisions in these respective statutes are commonly referred to as a Rule against *"ipso facto*" clauses. They prohibit counterparties from relying on contracts that purport to automatically result in consequences or deem things to have happened upon the commencement of a debtors' restructuring proceedings.

These statutory provisions in the *CCAA* and the *BIA* are codifications in part of the common law. In particular, these codifications on the "Fraud on Bankruptcy Principle". That principle has two elements: (i) the *Pari-Passu* Rule, which invalidates contractual provisions that would alter the bankruptcy scheme of distribution; and (ii) the Anti-Deprivation Rule, which invalidates contractual provisions that purport to remove property from a bankrupt's estate in the event of an insolvency.

Prior to the codification of, for example, section 34 of the *CCAA*, orders consistent with the fraud on bankruptcy principle were made under the general jurisdiction of the *CCAA* Court. That is akin to the general jurisdiction of the Court under Section 192(4) of the *CBCA*.

The Anti-Deprivation Rule was originally adopted from English law, and continues to apply in Canada. Its common law application was endorsed in 2019 by a majority of the Alberta Court of Appeal: ***Capital Steel v Chandos Construction Ltd***, 2019 ABCA 32 [***Chandos***] at paras 20-21; on appeal to the Supreme Court of Canada, judgment reserved. The Rule applies to all provisions that have a prejudicial impact on stakeholders stipulating that: ***Chandos*** at para 32.

> Contracting parties cannot rely on provisions that are engaged by a debtor's insolvency and remove value from the debtor's estate to the prejudice of creditors.

I acknowledge that these *CBCA* proceedings are not strictly insolvency proceedings. However, recent guidance from the Ontario Superior Court has expressly stated that in a *CBCA* Plan of Arrangement where there is an expectation of debt compromise, the parties should not hesitate to incorporate structures or processes that are found in the *CCAA* and *Bankruptcy and Insolvency Act*: see again, ***Concordia*** at para 49, which is a comment of Justice Morawetz (as he then was).

Given that judicial guideline, I find the *CCAA* and the *BIA* provide me with guidance as to the determination I can make in these proceedings in respect of the Wilks Brothers and the Calfrac Entities.

In particular, I find that the underlying principles and policy informing the Anti-Deprivation Rule are applicable in this case. Those principles and policies guide me

in the exercise of my discretion to stay the remedies within the Second Lien Indenture.

The Plan of Arrangement is intended to restructure the Calfrac Entities businesses and avoid insolvency. That plan is for the benefit of all stakeholders.

Based on my review of the underlying facts and evidence, I infer that the Wilks Brothers are attempting to rely on a contractual provision that it submits is engaged by the very fact of the commencement of this restructuring proceeding, to the prejudice of all other stakeholders.

Given the facts and analysis, I find the policy rationale justifying the application of the Anti-Deprivation Rule is thus present in this case. This is another reason why the Stay Provision should be maintained in its present form. In particular, I find that the present form of a Stay Provision will prevent the Wilks Brothers from altering the substantive rights of the parties by way of an "automatic" acceleration clause in the Second Lien Indenture, to the detriment of all other stakeholders.

H. Does the Stay Provision prejudice the Wilks Brothers?

The Wilks Brothers submit that the potential prejudice that may be caused by the Stay Provision outweighs the benefits that may be achieved for all stakeholders. In support of this submission, the Wilks Brothers state that the Stay Provision interferes with its contractual rights under the Second Lien Note Indenture.

The "serious prejudice" articulated by the Wilks Brothers is that the Stay Provision would prevent the Second Lien Noteholders from exercising their contractual and bargained for rights to deliver a notice to commence the 180 day "standstill period" as required under the Intercreditor Agreement. Given these particulars, I find the Wilks Brothers is not actually prevented from taking any meaningful procedural enforcement steps, as it would be subject to a standstill period in any event.

The Calfrac Entities anticipate that the Plan of Arrangement is to be completed within 180 days and will leave the Second Lien Noteholders substantially unaffected. Therefore, there should be no prejudice to the Wilks Brothers.

If for some reason the Plan of Arrangement does not succeed, and a decision is made to terminate the Stay Provision, the Court at that time would have the authority and discretion to grant appropriate relief to the Wilks Brothers to alleviate any timing prejudice that it claims it may have suffered as a result of the Stay Provision.

On the other hand, the prejudice to the Calfrac Entities, and all other stakeholders, has the

potential of derailing a heavily negotiated restructuring. The Plan of Arrangement provides the Calfrac Entities with a path forward, sustaining business operations and creating value for all interested parties.

Without the Stay Provision, the Calfrac Entities may be forced to file insolvency proceedings. That could result in, among other things, an automatic and permanent destruction of all value for the shareholders and a significant additional expense of the restructuring or sale process under insolvency legislation. The Plan of Arrangement and Stay Provisions provide a way to avoid that outcome.

Given the facts and analysis, I find the prejudice to the Wilks Brothers of a temporary procedural stay does not outweigh the significant benefits to all stakeholders provided by the Stay Provision in its present form.

In my view, it is important that the rights of opposing parties in a *CBCA* proceeding be balanced with the interest of all stakeholders in a complex reorganization. As stated by this Court in other *CBCA* proceedings, the Court must be careful not to cater to the special needs of one particular group, but must strive to be fair to all involved in the transaction, depending on the circumstances that exist. In addition, as has been recognized in *CCAA* proceeding, a creditor should not be allowed to forestall an application, or try to neutralize the Court's exercise of its statutory jurisdiction, at a preliminary stage, even if it is insisting that it will oppose any final plan. Rather, the interests of all stakeholders must be considered.

I find the Preliminary Interim Order is necessary to support the Plan of Arrangement. I make this finding because the capital structure and liquidity position of the Calfrac Entities is no longer sustainable.

Based on the evidence before me, I find the Calfrac Entities are seeking to advance the Plan of Arrangement that will save their business in the best interests of all stakeholders. I further find that the Preliminary Interim Order, including the Stay Provision, is the first step in that process.

Conclusion

Given the evidence and analysis, I find: (i) the Calfrac Entities have met their evidentiary burden; and (ii) the Stay Provision applies to the Second Lien Noteholders.

Based on this finding, the Comeback Application by the Wilks Brothers to vary or amend paragraph 7 of the Preliminary Interim Order to remove the Second Lien Noteholders from the Stay Provision is dismissed.

Concerning costs, the parties may speak to costs in due course if they cannot otherwise agree.

Is there any other business that we need to address today?

MR. SIMARD: My Lord, it is Mr. Simard. I don't think there is any other business we need to address because, of course, you granted the order in its present form on July 13th and so we don't need you to sign an order as a result of today's hearing. I will speak with my friends on behalf of Wilks Brothers about costs and we will see if we can agree on it.

THE COURT: Okay. Thank you Mr. Simard. Hearing from no other parties, I will ask madam clerk to adjourn court. Thank you again. Madam clerk, if we could adjourn?

PROCEEDINGS CONCLUDED

Certificate of Record

I, unknown, certify that this recording is the record made of the evidence held in courtroom 1602 at Calgary, Alberta, on the 27th day of July, 2020, and that Nancy Arevalo and myself were the court officials in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Laurie Stenberg, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Laurie Stenberg, Transcriber
Order Number: AL-JO-1005-7059
Dated: July 28, 2020

LIONBRIDGE

STATE OF NEW YORK)
)
) ss
COUNTY OF NEW YORK)

CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from French into English of the attached Judgment of the Superior Court (Commercial Division), dated October 15, 2020.

Ethan Ly, Managing Editor
Lionbridge

Sworn to and subscribed before me
this 13th day of March, 2024.

LAURA E MUSICH
Notary Public - State of New York
NO. 01MU6386791
Qualified in Queens County
My Commission Expires Jan 28, 2027

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-057716-199

DATE: October 15, 2020

UNDER THE CHAIRMANSHIP OF THE HONORABLE LOUIS J. GOUIN, S.C.J.

In the matter of the *Companies' Creditors Arrangement Act* of:

NEMASKA LITHIUM INC.
NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC.
NEMASKA LITHIUM P1P INC.
NEMASKA LITHIUM WHABOUCHI MINE INC.
NEMASKA LITHIUM INNOVATION INC.
Debtors
v.
PRICEWATERHOUSECOOPERS INC.
Monitor
and
VICTOR CANTORE
Opposing creditor
and
OMF FUND II (K) LTD. AND OTHERS
INVESTISSEMENT QUÉBEC
THE PALLINGHURST GROUP
Interested parties
and
FMC LITHIUM USA CORP. BRIAN SHENKER
Interested party

JUDGMENT
(on the Debtors' Application for a Reverse Vesting Order)

JG 2270

1. BACKGROUND

1.1 RVO Application

[1] The Court has been seized with an "Application Seeking Leave to Enter into the Orion/IQ/Pallinghurst Transaction with Issuance of an Approval and Vesting Order and Ancillary Relief" (the "**Application for Reverse Vesting Order**" or the "**RVO Application**") filed by the Debtors Nemaska Lithium Inc, Nemaska Lithium Shawinigan Transformation Inc, Nemaska Lithium P1P Inc, Nemaska Lithium Whabouchi Mine Inc. and Nemaska Lithium Innovation Inc. (collectively the "**Debtors**") under sections 11 and 36 of the *Companies' Creditors Arrangement Act*[1] ("***CCAA***").

[2] A "reverse vesting order" ("**RVO**") consists, in essence, of the sale to a purchaser of the shares of an insolvent company, divested of certain of its assets and debts not wanted by the purchaser, which then continues the company's operations.

[3] Thus, the RVO Application seeks to authorize a transaction comprising a series of corporate, tax, and commercial transactions, at various stages in time, between the Bidders (defined below) and the Debtor, including, inter alia, the exchange, transfer, cancellation, reduction, and subscription of shares of various companies, the merger between certain of them, and the disposal of certain assets and liabilities, not necessary for the purposes of the transactions, to newly-incorporated subsidiaries, which will then be under the *CCAA* and will eventually file an arrangement plan.

[4] All of these transactions, provisions, and planned stages make it possible, among other things, to keep existing permits, licenses and authorizations, and essential contracts in force, and to maximize the use of the various tax advantages available, with a view to efficiency and speed.

[5] What is more, this whole exercise in corporate, tax and commercial high acrobatics ultimately benefits everyone.

[6] Resorting to the more familiar route of disposing of assets such as a sale (a vesting order) is admittedly much less complex, but a sale does not generally allow existing permits, licenses and authorizations, and key contracts, to remain in force, as well as the various tax advantages available, especially in highly regulated sectors such as mining.

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

[7] At this point, the Court wishes to mention that the explanations requested by the Court at the beginning of the hearing, so that everyone could fully grasp and understand the contemplated transaction, and provided by the tax experts Me Patrick Boucher, of the firm McCarthy Tétrault, counsel for the Debtors, and Me Derek G. Chiasson, of Norton Rose Fulbright, counsel for IQ, by means of the documents entitled "Transaction Steps" (the "**Steps**") and "Nemaska - Proposed reorganization structure" attached (Exhibit A) to the draft "Share Purchase Agreement", itself attached (Schedule A) to the draft[2] reverse vesting order submitted by the Debtors, were very eloquent and illuminating, and convinced the Court of the legitimate purpose pursued by the "reverse vesting" structure proposed in the transaction subjected to its approval.

[8] This is a very complex, innovative facility and it is only the 6th time that such a facility has been part of a transaction submitted to a Canadian court for approval under section 36 *CCAA*, but this is the 1st time it has been challenged, the transactions in the other five cases[3] having been approved unopposed.

[9] More specifically, by means of the RVO Application, the Debtors request the Court to approve, by issuing an RVO pursuant to section 36 CCAA, the July 10, 2020 bid filed by OMF Fund II (K) Ltd., OMF Fund II (N) Ltd. and OMF (Cayman) Co-VII Ltd. (collectively "**Orion**"), Investissement Québec ("**IQ**"), and The Pallinghurst Group ("**Pallinghurst**"), as amended by letters dated August 10 and 23, 2020 (the "**Orion/IQ/Pallinghurst Bid**").[4]

[10] Orion, IQ and Pallinghurst are hereinafter collectively referred to as the "**Bidders**".

[11] The Orion/IQ/Pallinghurst Bid was received as part of the solicitation process for the Debtors' assets and businesses entitled "Sale or Investment Solicitation Process" (the "**SISP**"), process authorized pursuant to the Court's January 29, 2020 judgment and entitled "**SISP Approval Order**".[5]

[12] The SISP Ordinance includes an Appendix A, entitled "**SISP Procedures**", describing the various procedures of the process to be followed by the Debtors, including the following general explanations:

---

[2] Exhibit P-3B.

[3] *Plasco Energy Group Inc., Re* (July 17, 2015), Ont SJC, Toronto CV-15-10869-00CL (Settlement Approval Order), Spence J; *Stornoway Diamond Corporation, Re* (October 7, 2019), Que SC, Montréal 500-11-057094-191 (Approval and Vesting Order), Gouin J; *Wayland Group Corp., Re* (April 21, 2020, Ont SCJ, Toronto CV-19-00632079-00CL (Approval and Vesting Order), Haney J; *Comark Holdings Inc., Re* (July 13, 2020), Ont SCJ, Toronto CV-20-00642013-00CL (Approval and Vesting and CCAA Termination Order), Hainey J; *Beleave Inc., Re* (September 18, 2020), Ont SCJ, Toronto CV-20-00642097-00CL (Approval and Vesting Order, and Endorsement), Conway J.

[4] Exhibit P-2 filed "under seal" and delivered confidentially to the Cantore Creditor's counsel.

[5] Exhibit P-1.

> Recitals
> [...]
> C. Pursuant to an order of the Court dated January 29, 2020 (as it may be amended, restated or supplemented from time to time, the "**SISP Approval Order**"), the Court approved a sale or investor solicitation process to be conducted in respect of the business and assets of Nemaska [the Debtors] (as such process may be amended, restated or supplemented pursuant to the terms herein, the "**SISP**"), in accordance with the procedures, terms and conditions set out herein (the "**SISP Procedures**").
>
> D. The SISP Procedures sets out the manner in which (i) bids and proposals for a broad range of executable transaction alternatives (restructuring, recapitalization and/or refinancing) involving the business of Nemaska [the Debtors], as more particularly described in the Teaser Letter (the "**Business**"), and all property, assets and undertaking of Nemaska (the "**Property**"), whether *en bloc* or any portion(s) thereof, will be solicited from interested parties, (ii) any bids received will be negotiated, (iii) any Successful Bid(s) will be selected and, (iv) the Court's approval of any Successful Bid(s) will be sought.
>
> E. An investment in the Business may involve, among other things, a restructuring, recapitalization, or other form of reorganization of the business and affairs of the Business or any part thereof, and such investment may be consummated pursuant to a plan of compromise or arrangement (a "**Plan**"), an arrangement pursuant to the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 (respectively an "**Arrangement**" and the "**CBCA**") or otherwise.
>
> F. The SISP Approval Order, the SISP Procedures, and any other orders of the Court made in the CCAA proceedings relating to the SISP shall exclusively govern the process for soliciting and selecting bids for the sale of the Property or investment in the Business pursuant to a broad range of executable transaction alternatives.
> [...]
>
> (underlining added by the Court)

[13] Thus, the SISP Approval Order, issued without any opposition, covers all the Debtor's assets, without distinction, as a whole or separately, and opens the door to a panoply of potential transactions in order to find a solution to the Debtor's financial problems.

[14] The SISP Approval Order is therefore the cornerstone, the "**Backdrop**" of the RVO Application, and it is essential that the parties always bear it in mind, especially when presenting their arguments.

[15] Furthermore, the RVO Application does not constitute an application for certification of a plan under the *CCAA*, but rather, as mentioned above, a request for approval by the Court[6] of the bid selected by the Debtors following the SISP Approval Order, namely the Orion/IQ/Pallinghurst bid.

[16] The Orion/IQ/Pallinghurst Bid is submitted to the Court as filed, and it is not for the Court to indicate to the Bidders which terms and conditions should form part thereof.

[17] The Court's choice is whether to approve or reject the Orion/IQ/Pallinghurst Bid.

1.2 The Cantore Application

[18] The RVO Application includes, among other things, an application for the existing real rights in the Debtor's assets to be written off.

[19] Also, in parallel with the RVO Application, creditor Victor Cantore (the "**Cantore Creditor**"), one of the shareholders of the debtor Nemaska Lithium Inc. filed an application entitled "Real Rights Application" (the "**Cantore Application**") against the Debtors Nemaska Lithium Inc., Nemaska Lithium Shawinigan Transformation Inc., and Nemaska Lithium Whabouchi Mine inc. (collectively "**Nemaska**").

[20] This dispute between the Cantore Creditor and Nemaska was the trigger for the Cantore Creditor's opposition to the RVO Application, and although the merits of the Cantore Application were not the subject matter of the RVO Application, the fact remains that this dispute was omnipresent throughout the hearing, with the Cantore Creditor being the only one to oppose the RVO Application, and to do so tirelessly.

[21] It is therefore relevant, in these circumstances, to properly situate this dispute between the Cantore Creditor and Nemaska, by specifying that it originates from the "Agreement to Acquire 16 Claims (Cantore Property) [the '**Cantore Property**'[7]]" of September 17, 2009 (the "**Agreement**")[8], between Nemaska Exploration Inc. ("**Exploration**") (now the debtor Nemaska Lithium Inc.) and the Cantore Creditor, as Exploration acquired 100% of the Cantore Creditor's interest in said claims[9].

[6] Exhibit P-1, SISP Procedures, art. 15.1.
[7] Exhibit P-1 of the Cantore Application
[8] Exhibit P-2 of the Cantore Application.
[9] Exhibits P-3 and P-5 of the Cantore Application.

[22] As consideration for this acquisition, the Agreement provides, among other things, for the payment of a "Royalty" by Exploration to the Cantore Creditor, as follows:

> **1. Royalty**
>
> The payment to Cantore Group, of a Royalty equal to 3% NSR [Net Smelter Return] on all metals. The royalty will be payable monthly, on the 15th of the month and will be calculated for the preceding one (1) calendar month. The company will have the option, at its discretion, at any time until the expiry of a period of 3 months following the declaration of official production, to repurchase 1% of the NSR from the holders, in proportion to their interest, for a sum of $1,000,000, payable in 2 equal installments, the first on the day of exercise of the repurchase option and the second 90 days later.
>
> (the "**NSR Royalty**")

[23] During a case management conference [*conférence de gestion*] held on September 9, 2020, the Cantore Creditor acknowledged that this text of the Agreement providing for the payment of the NSR Royalty did not grant it any real rights as such and, if this text were strictly and restrictively referred to, then the Cantore Application should be rejected[10].

[24] On the other hand, as appears from the Cantore Application, the Cantore Creditor seeks instead to obtain from the Court, as a first step, an acknowledgment and declaration to the effect that he is the beneficiary, by acquisitive prescription or otherwise, of a "*sui generis* real right" attached to the NSR Royalty and constituting a dismemberment of a non-nominated right of ownership [*droit de propriété innommé*], such that the Court should, according to the Cantore Creditor, order Nemaska to sign, among other things, a document, not yet produced, evidencing this alleged "*sui generis* real right" affecting the Cantore Property (the "**Cantore *sui generis* Real Right**") and proceed with its publication in the Quebec land register, failing which, the judgment to intervene on the Cantore Application should have this effect.

[25] In a second step, the Cantore Creditor asks the Court to expressly exempt the Cantore *sui generis* Real Right from the cancellation of real rights requested by the Debtors under the terms of the RVO Application, hence the Cantore Creditor's opposition to the RVO Application, not only on the grounds of this requested cancellation, but for many reasons, as explained below, with the Cantore Creditor sparing no efforts in this regard.

1.3 Agreed framework for RVO Application hearing

[10] See the Court's judgment of September 15, 2020, para. [14].

[26] In order to alleviate, as far as possible, the hearing on the RVO Application, the parties took for granted, but strictly for the purposes of this hearing, that the Cantore Creditor did in fact hold a Cantore *sui generis* Real Right, the debate on the merits of the Cantore Application being postponed until later.

[27] Thus, at a case management conference held on September 18, 2020[11], the Court reported the following in this regard:

> b. As to the *sui generis* real right claimed by the Cantore Creditor, whose extinction is sought under the RVO Application, the Debtors contend that, even if it were eventually decided that the Cantore Claim is well-founded and that the Cantore Creditor does in fact hold a *sui generis* real right, then the Court has, in any event, the power to extinguish it, and this is what they are requesting in the RVO Application.
>
> What then is the point of undertaking a lengthy debate for the purposes of determining whether the Cantore Creditor indeed holds a *sui generis* real right if, in the end, the Court is asked simply to extinguish it?
>
> <u>The parties will therefore limit the first stage of the Cantore Application to debating the Court's power to order such an extinction</u>. A positive answer may thus cut short the debate as to whether or not the Cantore Creditor actually benefits from a *sui generis* real right.
>
> (<u>underlining</u> added by the Court)

[28] On the other hand, after a few days of hearing the RVO Application, which stretched much longer than expected, it was decided to postpone to a later date, not only the question of the existence or not of the Cantore *sui generis* Real Right, but also that relating to the Court's power to extinguish it, if the Cantore *sui generis* real right indeed exists, and this without any consequence for the Court's power to extinguish other real rights affecting the Debtor's assets.

[29] The draft RVO attached as Exhibit[12] to the RVO Application was then amended to provide a temporary exception for the Cantore Application and the Cantore *sui generis* real right claimed therein, so that if it is ever decided by the Court that this right exists and cannot be extinguished, then it will affect the assets covered by and forming part of the Orion/IQ/Pallinghurst Bid, and the Bidders will have to bear any consequences.

[11] See the minutes from the case management conference of September 18, 2020.
[12] Exhibit P-3B, further amended on the last day of hearing, i.e., October 8, 2020, see paras. [36] and [37].

[30] The postponement of this debate, which was essentially intended to ensure that the Cantore Application would no longer be an obstacle to urgently obtaining the Court's approval of the Orion/IQ/Pallinghurst Bid, insofar as the Court was willing to do so, did not put an end to the Cantore Creditor's opposition to the RVO Application, far from it.

[31] Thus, the Cantore Creditor continued to argue that the Court simply did not have the authority and jurisdiction to grant the RVO Application unless, on the other hand, it also included a settlement of the Cantore Application, which would then be approved by the Court.

[32] As discussed below, it was clear to the Court throughout the hearing that the Cantore Creditor, by the arguments he presented, was in no way taking into consideration what had been decided by the SISP Approval Order, the backdrop to the RVO Application.

[33] Everything was dissected piecemeal by the Cantore Creditor, isolated from the overall picture, far from what the Court had already authorized.

[34] On several occasions, the Court had the strange impression that the Cantore Creditor's opposition was an exercise in negotiations with the Debtors and Bidders, thereby casting doubt on the legitimacy of the arguments he was putting forward.

[35] So much so that, on October 8, 2020, 05:19, the Court sent an e-mail to the counsel present at the hearing, mentioning, among other things, the following:

> [...]
> I ask you all to be practical and don't take a legal position in front of the Court on this issue, or any other issue, as a bargaining tool.
> [...]
> (underlining added by the Court)

1.4 Unfortunate incident

[36] Furthermore, at the same management conference on September 18, 2020, the Court allowed the counsel representing a few hundred shareholders of Nemaska Lithium Inc., as well as one of the Bidders in the SISP, namely the Bidders Edda Stock Finance S.A.S. and Zingher Construct S.R.L. ("**E&Z**"), to eventually ask questions when the SISP that led to the filing of the RVO Application would be explained again, and to do so strictly for the sake of transparency, as no challenge to the RVO Application had been filed by them.

[37] On that occasion, the Court formulated the following warnings, amongst others, first with respect to the SISP, already authorized by the SISP Approval Order, and then with respect to the rights of the shareholders of Nemaska Lithium Inc.:

> The Court wishes to reiterate that if the process was followed as rigorously as the Monitor implies in its Report and only one bidder, in this case EDDA [E&Z], did not follow and respect the rules applicable to the process and its bid was thus rejected, then it has only itself to blame. There is no question, in such circumstances, of this bidder having "*a second kick at the can*." The credibility and seriousness of the entire applications process depend on it.
>
> Furthermore, the Court wishes to reiterate that in an insolvency context, such as in the present case, the economic interests of the shareholders, if such interests still exist, are entirely subordinate to those of all the creditors of the Debtors, until such time as these creditors have been paid in full, which is by no means contemplated in the present case and has, it seems, never been contemplated by anyone. This is a fundamental principle that must never be lost sight of.
>
> Notwithstanding this, and out of a strict concern for transparency, the Court will allow the shareholders' counsel to ask the three witnesses mentioned above [a representative of the Debtors (Mr. Jacques Mallette, Chairman of the Board), their financial adviser (Mr. Thomas Bachand of NBF) and the Monitor (Mr. Christian Bourque)] some questions, but this fundamental principle must never be forgotten, this being said with the greatest sympathy for the shareholders, who are going through a very difficult period.

[38] Now, after hearing, on September 25, 2020, the witness testimony of Mr. Thomas Bachand, representative of the Debtor's financial adviser, National Bank Financial ("**NBF**"), then questioned by the Debtor's counsel regarding the conduct of the SISP, including the filing of the E&Z Bid (the "**E&Z Bid**"), it became clear to the Court that E&Z had disregarded the fundamental rules applicable to the SISP established by the Court under the SISP Approval Order and the SISP Procedures, with the Court pointing this out in no uncertain terms to E&Z's counsel at the end of that day.

[39] Primarily, the required deposit of 5% of the amount of the E&Z Bid was never made, nor was the filing of the contract documents corresponding to the transactional structure proposed by E&Z under the E&Z Bid, which is also required when submitting a Bid under the SISP.

[40] Before doing so, E&Z required that the E&Z Bid first be accepted by the Debtors as filed, and that the terms and conditions imposed by the SISP Approval Order and the

SISP Procedures be set aside and not apply to the E&Z Bid[13].

[41] Only upon such acceptance of the E&Z Bid, would E&Z make said deposit and file said contract documents, for the purposes of negotiation with the Debtors.

[42] This is totally unacceptable!

[43] This is a categorical rejection of the fundamental terms and conditions of a serious and rigorous process, as enshrined in the SISP Approval Order.

[44] What is more, after numerous requests from NBF to E&Z for the purpose of identifying who was actually involved behind E&Z, the documents[14] finally handed over by E&Z consisted of nothing more than simple private notes, drawn up in a haphazard manner, with no supporting documentation, only confirming to the Court that the E&Z Bid was simply not serious.

[45] In light of the comments then made by the Court, E&Z's counsel asked to suspend the hearing until Monday morning, September 28, 2020, which would allow him to review the case in detail and take stock with his clients.

[46] However, at the start of the hearing on September 28, 2020, E&Z's counsel informed the Court that he was ceasing to act for E&Z, and also for the shareholders Alain Fournier and Denis Carrier.

[47] At the same time, the E&Z representatives ended their semi-virtual presence at the hearing, and the Nemaska Lithium Inc. shareholders present left the courtroom.

[48] The Court then put an end to this unfortunate saga surrounding the E&Z Bid by asking the following from the counsel still present, as recorded in the hearing minutes of September 28, 2020, 9:50:

> [...]
> In view of this, the Court informs the counsel present that the subject of the bid submitted by Edda Stock Finance S.A.S. and Zingher Construct S.R.L. should no longer be dealt with at this hearing, and the Court asks the counsel to ensure that this is the case.

2. LEGISLATIVE AND JURISPRUDENTIAL FRAMEWORK OF THE RVO APPLICATION

[13] See, among others, Exhibit-8A E.
[14] Exhibits P-8A U and V.

[49] As already mentioned, the RVO Application is submitted under section 36 *CCAA*, which provides as follows:

> **Restriction on disposition of business assets**
>
> **36 (1)** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> **Notice to creditors**
>
> **(2)** A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> **Factors to be considered**
>
> **(3)** In deciding whether to grant the authorization, the court is to consider, among other things,
>
> **a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> **b)** whether the monitor approved the process leading to the proposed sale or disposition;
>
> **c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> **d)** the extent to which the creditors were consulted;
>
> **e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> **f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> [...]
>
> **Assets may be disposed of free and clear**
>
> **(6)** The court may authorize a sale or disposition free and clear of any security, charge, or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security,

> charge or other restriction in favor of the creditor whose security, charge or other restriction is to be affected by the order.
>
> [...]
>
> (underlining added by the Court)

[50] When analyzing the factors listed in section 36(3) *CCAA*, the Court must verify and ensure the following:

- 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.[15]

[51] Furthermore, the Court considers it particularly appropriate to quote large excerpts from the unanimous decision of the Supreme Court of Canada in *9354-9186 Québec inc. v. Callidus Capital Corp*.[16] (the "***Callidus* Case**"), in order to fully grasp the backdrop provided by the *CCAA* for restructuring and the evolving nature of the proceedings instituted under it, and thus fully understand the role that the court responsible for supervising restructuring must play:

> [38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the CCAA regime. Accordingly, before turning to those issues, we review (1) the evolving nature of CCAA proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.
>
> (1) The Evolving Nature of CCAA proceedings
>
> [39] The CCAA is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (WURA, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the CCAA is

[15] *AbitibiBowater inc. (Arrangement relating to)*, 2010 QCCS 1742, paras [34]-[35]; *Royal Bank v. Soundair Corp.*, (1991) 7 C.B.R. (3d) 1 (Ont. C.A.) para. 16.
[16] 2020 SCC 10.

restricted to debtor companies facing total claims in excess of $5 million (CCAA, s. 3(1)).

[40] Taken together, Canadian insolvency laws pursue a large number of broad remedial objectives that reflect the wide range of potentially "catastrophic" consequences that can flow from insolvency (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, par. 1.). 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 (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 13-14; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding social and economic losses resulting from the liquidation of an insolvent company" (*Century Services*[17], para. 70). For this reason, test cases under this law have historically facilitated the restructuring of the debtor company that has not yet filed a proposal by keeping it in an operational state, i.e., in permitting it to continue as a going concern. Where such restructuring was not possible, it was considered that liquidation should then be carried out by way of receivership or under the *BIA* regime. This was precisely the result sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going- concern value where possible, preservation of jobs and communities affected by the firm's financial distress. . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ("Essar"), at para. 103). In pursuit of those objectives, CCAA proceedings have evolved to permit outcomes that do

[17] *Century Services Inc. v. Canada (P.G.)* [2010] 3 S.C.R. 379.

not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs," and they are now commonplace in the CCAA landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[43] Liquidating *CCAAs* take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re- Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating *CCAAs*. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the

ordinary course of business[18]. Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 163). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

[46] Ultimately, the relative weight that the different objectives of the CCAA take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the BIA context. In *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5, [2019] 1 S.C.R. 150, para. 67, this Court explained that, broadly speaking, the *BIA* has two objectives: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take center stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

[18] We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-168; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-244 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

(2) The Role of a Supervising Judge in *CCAA* proceedings

[47] One of the principal means through which the CCAA achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law* 2005 (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 10 (Ont. C.A.), para. 36).

[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 the 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.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically maneuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

[...]

[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). Section 11 states:

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

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).

(underlining added by the Court)

[52] The *CCAA* therefore gives the supervising judge the flexibility to issue "appropriate" orders to facilitate the restructuring of an insolvent company.

[53] The nature of contemporary economic problems demands that innovative solutions be considered and, if they enable the fundamental objectives of the *CCAA* to be achieved, to the benefit of all, then they must be adopted.

[54] The case at hand is a fine example of this.

3. COURT DECISION

[55] In light of the report of PricewaterhouseCoopers Inc. controller (the "**Monitor**"), entitled "Tenth Monitor's Report on the Approval of the Proposed Transaction" and dated September 10, 2020 (the "**Report**"),[19] large excerpts of which are reproduced below, and

[19] Exhibit P-7.

in light of the witness testimonies of Jacques Mallette, Thomas Bachand and Christian Bourque, the Court can only conclude that the Debtors acted in good faith and with due diligence, and that the reverse vesting order requested by the RVO Application is appropriate in the circumstances.

[56] The Court does not accept the reasons put forward by the Cantore Creditor, some of which are listed below, in his attempt to convince it to reject the RVO Application, especially since the other choices are (i) the realization of the securities held by Orion, which has already been waiting for several months, (ii) the "mothballing" of the Debtors in order to possibly redo a SISP, in a few months' time, at a very high cost and in a market that has already been analyzed from every angle, and is highly uncertain and risky, or (iii) the bankruptcy of the Debtors, choices that would be catastrophic for everyone: employees, creditors, including the Cantore Creditor, suppliers, the Cree community and, in general, for the economies of the regions affected.

[57] It is in a case like this, where the Court is satisfied that the factors to be considered under section 36 *CCAA* are met and the benefits are, in the circumstances, obvious, that the court overseeing the restructuring and thus having an overview of the case and everyone's interests, must exercise its discretion wisely and allow the proposed solution, no matter how innovative and creative, to be authorized and ratified, because it definitely ensures a better outcome for everyone than the other choices.

[58] Moreover, faced with the Cantore Creditor's insistent opposition despite the disastrous consequences of the other choices, the Court asked his counsel whether he would maintain his grounds for opposing the RVO Application in the event that the alleged Cantore *sui generis* Real Right was settled to his satisfaction and the agreed settlement then incorporated into the Orion/IQ/Pallinghurst Bid for approval by the Court; his answer was: NO.

[59] That says much about the legitimacy of his reasons for opposing the RVO Application, some of which are claimed to be "vital."

4. MONITOR'S REPORT ON BIDS RECEIVED

[60] As previously mentioned, on January 29, 2020, following the uncontested hearing of the "Amended Application to Approve a Claims Process and a Sale or Investor Solicitation Process" submitted by the Debtors and covering their assets and businesses, the Court issued the SISP Approval Order.

[61] The SISP Approval Order therefore established the SISP Procedures applicable to all bids, which were analyzed by the Debtors and the Monitor within this well-defined framework.

[62] The Monitor's Report gives an account of the various stages leading up to its recommendation that the RVO Application be granted by the Court.

[63] From the outset, the Monitor explains that the purpose of the Report is:

> "[…] to provide a complete overview of the Sale and Investor Solicitation Process (the "**SISP**") leading to the acceptance of the sale proposal submitted by (i) Investissement Québec ("**IQ**"), (ii) The Pallinghurst Group (acting through Quebec Lithium Partners (UK) Limited ("**QLP**") ("**Pallinghurst**", and together with IQ, the "**Sponsors**"), (iii) OMF Fund II (K) Ltd. and OMF Fund II (N) Ltd. (together "**Orion**") and (iv) OMF (Cayman) Co-VII Ltd. ("**OMF Cayman**", collectively with the Sponsors and Orion, the "**Bid Group**") (the "**Accepted Bid**" or "**Proposed Transaction**"). The Monitor's Report will also provide information on the other bids received as part of the SISP and on the Proposed Transaction."[20]

[64] The Report thus reviews the entire process followed by the Debtors to dispose of their assets and businesses, by sale or investment, in light of the SISP Approval Order and the SISP Procedures, and the Court retains, among others, the following comments and findings of the Monitor, which were repeated in the testimony of Christian Bourque, the person in charge of the Debtors' file with the Monitor, and corroborated, as to certain aspects, by Jacques Mallette, Chairman of the Board of Directors of Nemaska Lithium Inc., and by Thomas Bachand of NBF:

> [...]
> **C. OVERVIEW OF THE SISP LEADING TO THE PROPOSED TRANSACTION**
> [...]
> 21. The Monitor is of the opinion that the SISP process that led to the Accepted Bid was conducted in a transparent and fair manner.
> [...]
> **E. STRUCTURE OF THE PROPOSED TRANSACTION**
>
> 26. The transactions contemplated by the Accepted Bid (collectively, the "**RVO Transaction**") are achieved through a corporate structure consistent with a reverse vesting order ("**RVO**") and provide for a reorganization of Nemaska Lithium and its subsidiaries (the "**Nemaska Entities**").
>
> 27. The RVO Transaction provides for the acquisition by the Sponsors of the Nemaska Entities' business and assets (other than certain excluded assets and excluded liabilities), by way of a RVO to be sought from the Court, the culmination of which will result in the Sponsors acquiring, on a

[20] Report, p. 2, para. 2.

50-50 basis, all of the issued and outstanding shares of an entity resulting from the amalgamation of the Nemaska Entities ("**AmalCo2**"), which will itself emerge from the CCAA proceedings and subsequently be amalgamated with Orion to form the entity that will operate the business of the Debtors ("**AmalCo3**", referred to as "**New Nemaska Lithium**").

28. As mentioned above, the Bid Group consists of the IQ, Pallinghurst, Orion and OMF Cayman.

29. The RVO Transaction will also involve: (i) the incorporation of a new entity ("**New ParentCo**") to ultimately hold those liabilities that are designated by the Sponsors not to be assumed by New Nemaska Lithium (the "**Excluded Liabilities**"); (ii) the incorporation by New ParentCo of a wholly-owned subsidiary ("**ResidualCo**" and collectively with New ParentCo, "**Residual Nemaska Lithium**") which will ultimately hold certain excluded assets (i.e., those assets of the Nemaska Entities that are designed by the Sponsors not to be kept by New Nemaska Lithium) (the "**Excluded Assets**"); and (iii) the exchange of the shares of Nemaska Lithium for common shares of Residual Nemaska Lithium, resulting in Residual Nemaska Lithium becoming a successor reporting issuer.

30. New Nemaska Lithium will be a private company and will not be a reporting issuer under applicable Canadian securities laws.

31. The RVO structure will not require the reissuance or transfer of the Nemaska Entities' mining lease, mining claims or environmental permits, which will ensure that the business can be developed on an expedited timeline by New Nemaska Lithium. It allows for all of the permits to stay in place.

32. Pursuant to the Accepted Bid, substantially all of the current employees of the Nemaska Entities will be retained by New Nemaska Lithium in their current roles and responsibilities in all material respects.

33. The RVO Transaction is not subject to significant closing conditions, other than (i) the issuance of the RVO and (ii) the completion of required steps provided for under the *Competition Act* (Canada).

34. The Sponsors intend to invest, from and after closing of the RVO Transaction and subject to the fulfillment of certain conditions and receipt of appropriate approvals, up to $600,000,000 in New Nemaska Lithium (inclusive of amounts paid to OMF Cayman in connection with the transaction) for the financing of the project, comprised of the mine and the electrochemical plant.

F. THE ACCEPTED BID [the Orion/IQ/Pallinghurst Bid]

[...]

36. The Accepted Bid is submitted as a credit bid and the full amount of the Orion Secured Claim is used as such by the Bid Group as consideration.

37. The consideration offered under the Accepted Bid includes (i) the assumption by New Nemaska Lithium of the Orion Secured Claim ($134,500,000); (ii) the assumption by New Nemaska Lithium of the Johnson Matthey Battery Materials Ltd. ("**JMBM**") secured claim ($12,000,000); (iii) the assumption of various liabilities and obligation (including the Livent obligations and all of the Debtors' obligations under the Chinuchi Agreement from the closing onwards) and (iv) the transfer to Residual Nemaska Lithium of Nemaska Lithium's cash on hand on closing, subject to certain adjustments (the "**Residual Cash**") and any Excluded Assets.

38. The Residual Cash is comprised of: (i) the cash still on hand as at the closing date (to be determined and subject to adjustments), the amount of US$7M from the US$20M escrowed funds held in respect of the Livent litigation (plus accrued interest on US$20M), an amount under the Directors and Officers (the "**D&O**") trust of approximately $2M, less (ii) the sum of $12M to be retained by New Nemaska Lithium to cover its assumption of the secured claim of JMBM.

39. The Excluded Liabilities include, without limiting the liabilities forming part of the Excluded Liabilities, any claim on the part of construction suppliers and sub traders holding a valid legal hypothec against the Debtors' assets.

40. With respect to JMBM, as a result of the issuance of the RVO and the implementation of the RVO Transaction, the JMBM's secured claim shall be secured only by the movable and immovable assets of Nemaska Lithium P1P Inc. as such assets exist immediately prior to the implementation of the RVO Transaction (including assets in replacement of such assets, as applicable), and only to the same extent that such assets are secured as at that time, with any other encumbrances over assets of the Nemaska Entities, other than the assets of Nemaska Lithium P1P Inc., to be discharged as a result of the RVO Transaction.

41. The RVO Transaction contemplates that the rights of the Cree parties pursuant to the Chinuchi Agreement will not be affected.

42. The Accepted Bid specifically provides that the Debtors and the Monitor shall use their commercially reasonable efforts to obtain the RVO and therein a declaration that the Whabouchi mine is conveyed free and clear

of all encumbrances, including the alleged claims and rights of Victor Cantore, except for certain permitted encumbrances.

G. BENEFITS OF THE PROPOSED TRANSACTION FOR STAKEHOLDERS

43. After submission by the Bid Group of their initial Qualified Bid, the Debtors successfully negotiated a higher consideration that eventually led to the Accepted Bid.

44. The RVO Transaction should enable the restart of the project and, therefore, the completion of the Whabouchi mine. By doing so, many creditors will benefit from conducting business with New Nemaska Lithium for the finalization of the mine.

45. Also, the RVO Transaction should allow the retention of substantially all of the current employees.

46. Finally, the RVO Transaction will enable Residual Nemaska Lithium to submit a plan of compromise and arrangement (the "**Plan**") to the Debtors' remaining creditors, excluding claims assumed by New Nemaska Lithium, which will account for the payment in full of the secured claims and will provide a cash pool for the unsecured creditors.

47. The Monitor has considered whether the Accepted Bid would be more beneficial to the Debtors stakeholders than a sale or disposition of assets under a bankruptcy.

48. Given the SISP and the value of the Debtors' assets, the Monitor is of the view that a sale or disposition of assets under a bankruptcy would not result in a better outcome for the Debtors' stakeholders.

49. The estimated amount to be distributed to the unsecured creditors can be illustrated as follows:
[...]
[between] $14,240,000 [and] $6,240,000
[…]

H. CONCLUSION AND RECOMMENDATIONS

50. The Monitor is of the view that the Debtors have canvased [sic] the market since the beginning of 2019, including through the SISP, and that the Proposed Transaction is the best option available in the circumstances. The monitor is also of the view that:

    i. The aggregate consideration provided under the Proposal Transaction is fair and reasonable in the circumstances; and

ii. There is no evidence to suggest that any viable alternative exists that would allow a better recovery for the Debtors' stakeholders.

51. Accordingly, the Monitor recommends the approval by the Court of the Accepted Bid and the RVO Transaction.

[65] On reading the Report and noting that no evidence contradicting its contents has been presented, the Court is of the opinion, as mentioned, that all the elements set out in section 36(3) *CCAA* have been met to its satisfaction.

[66] Every reasonable effort has been made to find the best Bid under the circumstances, the only one still on the table, and this was done following a rigorous, efficient, fair, and transparent process, in compliance with the SISP Approval Order and the SISP Procedures.

[67] As explained above, the other choices would be catastrophic, for everyone, including the Cantore Creditor.

5. GROUNDS FOR OPPOSITION BY THE CANTORE CREDITOR

[68] The Cantore Creditor raised several grounds in an attempt to convince the Court that it should not authorize the Orion/IQ/Pallinghurst Bid and that the Court should therefore reject the RVO Application.

[69] On the other hand, as already mentioned, if the alleged Cantore *sui generis* Real Right were settled to the Cantore Creditor's satisfaction and the agreed settlement incorporated into the Orion/IQ/Pallinghurst Bid submitted for the Court's approval pursuant to the RVO Application, the Cantore Creditor would no longer maintain his grounds for opposition.

[70] Notwithstanding this, the Court reviews and comments on below, albeit briefly, some of these grounds, which are included either in the "Objecting Party's Argument Brief" of October 6, 2020, or in the "Re-Modified and Restated Contestation of Nemaska's Approval Application" of September 30, 2020.

5.1 There is no authority to grant a vesting order in respect of anything other than a sale or disposition of assets

[71] The Court is of the opinion that the wording "*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" of section 36(1) *CCAA* permit a wide range of acts and manners of disposition, including, in part or in whole, by way of "reverse vesting," an innovative solution to be analyzed on a case-by-case basis.

[72] Section 36(1) *CCAA* has no restrictions in this regard.

[73] Thinking outside the box is not a bad thing, quite the contrary, especially when it leads to better results.

[74] Moreover, in the *Callidus* Case, the Supreme Court mentions the following with regard to the Court's general discretionary power under section 11 *CCAA*:

> "[...] the power conferred by s. 11 is limited only by the restrictions imposed by the *CCAA* itself, as well as by the requirement that the order be 'appropriate' in the circumstances."[21]

[75] In the case at hand, the efficient and swift "reverse vesting" solution does not affect the final result for the creditors of the Debtors; on the contrary, it improves it.

[76] In fact, the maintenance of existing permits, licenses, and authorizations and contracts essential to the operation of the businesses, and the possible use of the various tax benefits available,[22] have facilitated the obtaining of concessions from the Bidders, and were confirmed by the Monitor, which should allow a larger distribution to be eventually made for the benefit of the Creditors of the Debtors.

[77] A sale is not the structure proposed in the Orion/IQ/Pallinghurst Bid, which rather provides for a "reverse vesting" structure; this must either be approved as submitted or rejected by the Court, with each party drawing its own conclusions from the forthcoming decision and assuming the consequences.

[78] At the same time, the sale or disposition free and clear of real rights provided for in section 36(6) *LACC* helps to implement a solution provided for and authorized under sections 36(1) and (3) *LACC*, otherwise, holders of real rights would have a veto over any such solution, which would be unacceptable, even when assets are not actually transferred out of a debtor company's assets, as in the present case.

[79] Insofar as the proposed solution achieves a better result for everyone, and even improves it, there is no reason why the extinction of real rights provided for in section 36(6) CCAA should not apply.

5.2 The Proposed Transaction and RVO are impermissible under the CCAA because they permit the Debtor Entities to emerge from CCAA protection outside the confines of a plan of arrangement

[21] *See above*, note 16, para. [67]
[22] Exhibit P-8A Y.

[80] The Court is of the opinion that a step back is required when analyzing a transaction involving a "reverse vesting" structure, such as that of the Orion/IQ/Pallinghurst Bid, in order to consider it as a whole (*the global picture*).

[81] One should not attempt to dissect and analyze each of the steps and components of such a transaction in order to find, for each of them, a legal basis under the *CCAA*, as the Cantore Creditor does.

[82] To do so is to severely and inappropriately restrict the range of innovative solutions to today's increasingly complex business and social problems.

[83] This exercise requires great flexibility and, more often than not, increases the benefits for interested parties, whereas rigid formalism becomes a straitjacket that severely limits choices, more often than not to the detriment of interested parties.

[84] As proof, refusing the only Bid on the table following the SISP, i.e. the Orion/IQ/Pallinghurst Bid, after more than 18 months in total of canvassing, would mean, as already mentioned, (i) the realization of the securities held by Orion, (ii) the "mothballing" of the Debtors at a very high cost and with no assurance that a better Bid could be obtained in several months' time, especially not in the current uncertain and risky economic climate, or (iii) the bankruptcy of the Debtors, with catastrophic consequences for creditors, employees, suppliers, the Cree community, and the affected regions.

[85] On the other hand, the Debtors' creditors are not required to vote on an application under section 36 *CCAA*; this is submitted only for approval by the Court, which then considers, among other things, the factors listed in section 36(3) *CCAA*.

[86] As already mentioned, the Orion/IQ/Pallinghurst Bid does not constitute an arrangement plan subject to a vote of the Debtors' creditors.

[87] In due course, most likely once the Proposed Transaction Steps under the Orion/IQ/Pallinghurst Bid have been completed, New ParentCo and ResidualCo will then be in a position to submit an arrangement plan to the remaining creditors of the Debtors, at which time they will vote on what will be proposed to them.

5.3 The Proposed Transaction contravenes the SISP Order on the basis that it is neither a Sale Proposal nor an Investment Proposal pursuant to the terms of the SISP Order

[88] The Orion/IQ/Pallinghurst Bid is a "hybrid" transaction proposal and, under the terms of the SISP Order and the SISP Procedures, the Debtors, and the Monitor have

benefited from the necessary latitude[23] in order to consider and provide for modifications appropriate to the circumstances, all the more so as there was only one bid left on the table, all of which subject to the ultimate authorization of the Court, hence the RVO Application.

[89] The SISP Approval Order and SISP Procedures thus provide the flexibility needed to find innovative solutions to contemporary social and economic problems, as discussed above.

[90] It was not necessary for the Debtors and the Monitor to address the Court every time a modification to the terms and conditions of the SISP Procedures was contemplated and, in the circumstances, it was preferable for this to be done at the RVO Application stage.

5.4 The Proposed Transaction and RVO contravenes applicable securities laws

[91] The Cantore Creditor's counsel has made much of the fact that the transaction proposed by the Orion/IQ/Pallinghurst Bid allegedly did not comply with certain provisions of *Regulation 61-101 respecting Protection of Minority Security Holders in Special Transactions* of the *Securities Act*,[24] something that is vigorously contested by the Debtors.

[92] In any event, the Court does not believe it appropriate to elaborate on this subject, especially in light of the e-mail[25] received on October 7, 2020, 15:15 by Me Patrick Boucher from Mr. Patrick Théorêt of the Autorité des Marchés Financiers, to the following effect:

> "[...]
> I can confirm that we have no objection to your interpretation of Regulation 61-101 in the context of the Proposed Transaction. We will not be intervening in Court on this point.
>
> We also understand that the NMX Debtor's request to the Court for an exemption from its continuous disclosure obligations (as this term is defined in the draft vesting order filed with the Court) will be withdrawn from paragraph 44 of the proceedings.
> [...]"

5.5 New ParentCo and ResidualCo cannot avail themselves of the CCAA

[93] The Cantore Creditor places considerable emphasis on the precise moment when the two newly-created subsidiaries by the debtor Nemaska Lithium Inc., namely, New

[23] Exhibit P-1, see, inter alia, paras. 1.5, 6.6, 11.2, 12.4. 12.9 and 17.2 of the "SISP Procedures" attached as Appendix A to the SISP Approval Order.
[24] CQLR, c. V-1.1, s. 331.1, r. 33.
[25] Exhibit P-14.

ParentCo and ResidualCo, will become insolvent and will then be able to benefit from the *LACC* regime, i.e., within a few days of the closing session of the transaction resulting from the Orion/IQ/Pallinghurst Bid, and therefore after obtaining the RVO from the Court.

[94] Of course, not everything can be done at the same time, and before the Orion/IQ/Pallinghurst Bid closing session can begin, it still needs to be authorized by the Court.

[95] As mentioned above, a step back is needed to consider the transaction as a whole (*the global picture*), always bearing in mind the Backdrop, and not seeking to analyze a specific step, separately from the others, for the purpose of identifying a legal basis justifying it under the *CCAA*.

[96] In any event, recourse to the *CCAA* is permitted when insolvency is imminent,[26] which is definitely the case for these two subsidiaries, New ParentCo and ResidualCo, in light of the overview of the Stages of the Proposed Transaction.

5.6 The Proposed Transaction is an impermissible disguised substantive consolidation of the estates of the Debtors

[97] The Cantore Creditor has long argued that the Debtors did not obtain prior authorization from the Court to present a “consolidated” plan.

[98] However, the RVO Application is not a request for approval of a “consolidated” plan, but rather a request for approval of the Orion/IQ/Pallinghurst Bid, which was endorsed by the Debtors after obtaining the SISP Approval Order, including the SISP Procedures, and following the framework and instructions included therein.

[99] As mentioned above, the SISP Approval Order and the SISP Procedures covered all of the Debtor’s assets, without distinction, as a whole or separately, and therefore allowed Bidders to submit bids including all of the Debtor’s assets, or only part of them.

5.7 The release in favor of the directors and officers of the Debtors pursuant to the Proposed Transaction should not be authorized

[100] The Orion/IQ/Pallinghurst Bid includes a general release for the benefit of, among others, the directors and officers of the Debtor.

[26] *Stelco Inc., Re*, 2004 CanLII 24933 (ON SC), paras 21, 25 and 26, Farley J. (permission to appeal to CA refused, 2004 CarswellOnt 2936 and permission to appeal to SCC refused, 2004 CarswellOnt 5200); see also art. 3 *CCAA*.

[101] The Cantore Creditor, who is also a shareholder of the debtor Nemaska Lithium Inc., and shareholder Brian Shenker objected to such a release being authorized by the Court at this time and asked that the debate on the matter be postponed until the filing of the forthcoming arrangement plan.

[102] In essence, these shareholders intend to sue, among others, the directors and officers of the Debtors for their conduct in connection with certain events.

[103] This general release is part of the Orion/IQ/Pallinghurst Bid and the Bidders have included it for their own reasons.

[104] It is not for the Court to order them to exclude it, but the Court can only note that they have indeed provided for an exception, reproduced in the draft RVO submitted to the Court, namely:

> "[41] […] provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim against the Directors (as this term is defined in the Initial Order) of the Debtors that is not permitted to be released pursuant to section 5.1(2) of the CCAA."

[105] Now, section 5.1(2) *CCAA* is to the following effect:

> A provision for the compromise of claims against directors may not include claims that (a) relate to contractual rights of one or more creditors; or (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

[106] The Court is of the opinion that this exception adequately protects the shareholders with respect to the directors and officers of the Debtors and that there is no need to elaborate further on this subject.

5.8 The Court should not authorize the transfer of the Excluded Liabilities, the Agreement and/or the NSR Royalty to New ParentCo

[107] This transfer is part of the Orion/IQ/Pallinghurst Bid and of the planned transaction as a whole, and there is no need to analyze it in isolation, in order to unravel all its facets.

[108] In any event, in the context of an application such as the RVO Application, the Court has the necessary power, after having satisfied itself that the criteria of section 36(3) are met, to order that such transfer be made, without the consent of the Cantore Creditor, or of any other creditor in respect of a contract to be transferred, otherwise the creditor concerned would benefit from a right of veto over the Proposed Transaction, which would be unacceptable.

[109] In the context of the Debtors' insolvency, the overall result of the Proposed Transaction with the Bidders is to the advantage of all, compared to the consequences of the other choices mentioned above.

[110] Although the Cantore Creditor would like the Agreement providing for the payment of the NSR Royalty to be fully protected, without any negative consequences for him, the Court cannot accept this, as it would mean the failure of the transaction provided for in the Orion/IQ/Pallinghurst Bid.

[111] Moreover, the Cantore Creditor draws a parallel between the treatment reserved for him and that provided by the Bidders for the secured creditor Johnson Matthew Battery Materials Ltd., and would like the same to apply to him.

[112] The Bidders have their own commercial reasons for doing so with this secured creditor and it is not the Court's role to ensure that all of the Debtor's creditors are treated equally in the Orion/IQ/Pallinghurst Bid.

[113] As explained above, the Cantore Creditor is amply protected by what has been agreed with the Bidders as to the forthcoming debate on his alleged Cantore *sui generis* Real Right.

[114] If he succeeds in establishing the validity of such right, then certain of the assets acquired by the Bidders will be subject to such right and, if he does not succeed, then he will benefit from a personal right, which will be treated by the Debtors as any other personal right of an ordinary creditor of the Debtors not addressed by the Bidders under the Orion/IQ/Pallinghurst Bid.

5.9 The Proposed Transaction is not fair and reasonable

[115] As discussed on several occasions above, there is no doubt in the Court's mind that the Orion/IQ/Pallinghurst Bid is fair and reasonable and must be accepted as filed, and as soon as possible.

[116] For several months now, the Court has been able to observe all the efforts made by the Debtors to save their businesses and, after serious steps and a SISP implemented rigorously and in compliance with the SISP Approval Order and the SISP Procedures, the Orion/IQ/Pallinghurst Bid is the only one on the table, and it allows the Debtors' "purified" operations to restart, with all the positive economic aspects this entails.

[117] Rejecting it would be catastrophic!

5.10 The Monitor's commitment to use "commercially reasonable efforts to obtain the RVO" and other stipulations of the successful bid compromise the integrity of the SISP

[118] The Cantore Creditor has questioned the Monitor's integrity and impartiality in several respects.

[119] The Court rejects all of the Cantore Creditor's allegations in this respect, which are totally unfounded.

[120] This is yet another demonstration of the fact that the Cantore Creditor is sparing no efforts in referring to certain terms used, and certain commitments made by the Monitor during negotiations with the Bidders or otherwise, in order to induce the Court to reach the conclusions he would wish.

[121] The Court has had several opportunities to observe the Monitor's high level of professionalism, rigor, and diligence. The Court has been periodically kept informed of developments in the case, and the Monitor has always clearly answered any questions the Court might have put to it from time to time.

[122] No event, no fact, no action allows the Court to conclude that this was not the case. The Monitor has discharged its responsibilities under the SISP Approval Order and the SISP Procedures very well.

[123] Moreover, given its in-depth knowledge of the file, it is definitely appropriate that the Monitor should play an active role in the implementation of certain stages of the transaction provided for in the Orion/IQ/Pallinghurst Bid.

[124] This will facilitate and speed up the process, and the Court approves this.

6. CONCLUSION AND ENFORCEABLE JUDGMENT NOTWITHSTANDING APPEAL

[125] The Court will therefore grant the RVO Application in accordance with its conclusions and the draft submitted to it for this purpose.

[126] Also, and as mentioned above several times, it is urgent that the Orion/IQ/Pallinghurst Bid be approved and implemented as soon as possible, and the Bidders need not suffer any further delays, which the Court considers unjustified in the present circumstances.

[127] In addition to harming the Bidders, any additional delay harms the Debtors, their employees and suppliers, their creditors, the Cree community, and the economies of the regions affected by this situation.

[128] Accordingly, this judgment and the attached "reverse vesting" order shall be enforceable immediately, notwithstanding appeal and without the necessity of furnishing any security whatsoever.

FOR THESE REASONS, THE COURT:

[129] **APPROVES** the Debtors' "Application Seeking Leave to Enter into the Orion/IQ/Pallinghurst Transaction with Issuance of an Approval and Vesting Order and Ancillary Relief";

[130] **REJECTS** the Cantore Creditor's "Re-Modified and Restated Contestation of Nemaska's Approval Application";

[131] **ISSUES** the "reverse vesting" order attached to this judgment and entitled "Approval and Vesting Order";

[132] **DECLARES** this judgment and said "reverse vesting" order enforceable immediately notwithstanding appeal and without the necessity of furnishing any security whatsoever;

[133] **ALL** with legal costs.

_____

LOUIS J. GOUIN, S.C.J.

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Norton Rose Fulbright
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Mes Denis Ferland and Hannah Toledano
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500-11-057716-199

Mes François D. Gagnon and Kevin Mailloux
Borden Ladner Gervais
Counsel for FMC Lithium USA Corp.

Mes Puya Fesharaki and Robert Thornton
TGF
Counsel for Brian Shenker

Hearing dates: September 21, 24, 25, and 28, and October 1, 2, 6, 7, and 8, 2020

COUR SUPÉRIEURE
(Chambre commerciale)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-11-057716-199

DATE : Le 15 octobre 2020

SOUS LA PRÉSIDENCE DE : L'HONORABLE LOUIS J. GOUIN, J.C.S.

Dans l'affaire de la *Loi sur les arrangements avec les créanciers des compagnies* de :

NEMASKA LITHIUM INC.
NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC.
NEMASKA LITHIUM P1P INC.
NEMASKA LITHIUM WHABOUCHI MINE INC.
NEMASKA LITHIUM INNOVATION INC.
Débitrices
c.
PRICEWATERHOUSECOOPERS INC.
Contrôleur
et
VICTOR CANTORE
Créancier opposant
et
OMF FUND II (K) LTD. ET AL.
INVESTISSEMENT QUÉBEC
THE PALLINGHURST GROUP
Mises en cause
et
FMC LITHIUM USA CORP.
BRIAN SHENKER
Mis en cause

JUGEMENT
(sur la Demande pour ordonnance de dévolution inversée des Débitrices)

JG 2270

1. MISE EN CONTEXTE

1.1 Demande pour ODI

[1] Le Tribunal est saisi d'une «Application Seeking Leave to Enter into the Orion/IQ/Pallinghurst Transaction with Issuance of an Approval and Vesting Order and Ancillary Relief» (la «**Demande pour ordonnance de dévolution inversée**» ou la «**Demande pour ODI**») présentée par les débitrices Nemaska Lithium inc., Nemaska Lithium Shawinigan Transformation inc., Nemaska Lithium P1P inc., Nemaska Lithium Whabouchi Mine inc. et Nemaska Lithium Innovation inc. (collectivement les «**Débitrices**») aux termes des articles 11 et 36 de la *Loi sur les arrangements avec les créanciers des companies*[1] («***LACC***»).

[2] Une ordonnance de «dévolution inversée» (une «**ODI**») consiste, en substance, en la vente à un acquéreur des actions du capital-actions d'une compagnie insolvable, délestée de certains de ses actifs et dettes non voulus par l'acquéreur, lequel poursuit alors les opérations de la compagnie.

[3] Ainsi, la Demande pour ODI vise à autoriser une transaction comprenant une série d'opérations corporatives, fiscales et commerciales, à diverses étapes dans le temps, entre les Offrants (définis ci-après) et les Débitrices, incluant, entre autres, l'échange, le transfert, l'annulation, la réduction et la souscription d'actions du capital-actions de diverses compagnies, la fusion entre certaines d'entre elles, et la disposition de certains actifs et dettes, non nécessaires pour les fins des opérations, à des filiales nouvellement incorporées, lesquelles seront alors sous le régime de la *LACC* et déposeront éventuellement un plan d'arrangement.

[4] L'ensemble de toutes ces opérations, dispositions et étapes projetées permet, entre autres, de maintenir en vigueur les permis, licences et autorisations existants, les contrats essentiels, et de maximiser l'utilisation des divers attributs fiscaux disponibles, dans un souci d'efficacité et rapidité.

[5] Qui plus est, tout cet exercice de haute voltige corporative, fiscale et commerciale fait en sorte, en bout de ligne, qu'il est au bénéfice de tous.

[6] Utiliser la voie plus connue de disposition d'actifs comme la vente (ordonnance de dévolution ou «Vesting Order») est certes beaucoup moins complexe, mais une vente ne permet pas, de façon générale, de maintenir en vigueur les permis, licences et autorisations existants, et les contrats essentiels, ainsi que les divers attributs fiscaux disponibles, surtout dans des secteurs hautement règlementés, tel que le secteur des mines.

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

[7] Dès à présent, le Tribunal tient à mentionner que les explications demandées par le Tribunal en début d'audition afin que tous puissent bien saisir et comprendre la transaction envisagée et fournies par les fiscalistes Me Patrick Boucher, du cabinet McCarthy Tétrault, procureurs des Débitrices, et Me Derek G. Chiasson, du cabinet Norton Rose Fulbright, procureurs de IQ, et ce, à l'aide des document intitulés «Transaction Steps» (les «**Étapes**») et «Nemaska – Proposed reorganization structure» joints (Exhibit A) au projet de «Share Purchase Agreement», lui-même joint (Schedule A) au projet[2] d'ordonnance de dévolution inversée soumis par les Débitrices, furent très éloquentes et éclairantes, et ont convaincu le Tribunal du but légitime visé par la structure de «dévolution inversée» proposée dans la transaction sujette à son approbation.

[8] Il s'agit d'une structure innovatrice très complexe et ce n'est que la 6e fois qu'une telle structure fait partie d'une transaction soumise à un tribunal canadien pour approbation aux termes de l'article 36 *LACC*, mais c'est la 1ère fois qu'elle est contestée, les transactions dans les 5 autres dossiers[3] ayant été approuvées sans aucune opposition.

[9] Plus spécifiquement, par la Demande pour ODI, les Débitrices demandent au Tribunal d'approuver, aux termes de l'article 36 *LACC*, l'offre du 10 juillet 2020 déposée par OMF Fund II (K) Ltd., OMF Fund II (N) Ltd. et OMF (Cayman) Co-VII Ltd. (collectivement «**Orion**»), Investissement Québec («**IQ**») et The Pallinghurst Group («**Pallinghurst**»), telle qu'amendée par lettres datées des 10 et 23 août 2020 (l'«**Offre Orion/IQ/Pallinghurst**»)[4], et ce, par l'émission d'une ODI.

[10] Orion, IQ et Pallinghurst sont ci-après collectivement appelées les «**Offrants**».

[11] L'Offre Orion/IQ/Pallinghurst fut reçue dans le cadre du processus de demande de soumissions visant les actifs et entreprises des Débitrices et intitulé «Sale or Investment Solicitation Process» (le «**SISP**»), processus autorisé aux termes du jugement du 29 janvier 2020 du Tribunal et intitulé «SISP Approval Order» (l'«**Ordonnance SISP**»)[5].

[12] L'Ordonnance SISP comprend une Annexe A, intitulée «SISP Procedures» (les «**Procédures SISP**»), décrivant les diverses procédures du processus à être suivi par les Débitrices, incluant les explications générales suivantes :

---

[2] Pièce P-3B.

[3] *Plasco Energy Group Inc., Re* (17 July 2015), Ont SJC, Toronto CV-15-10869-00CL (Settlement Approval Order), Spence J; *Stornoway Diamond Corporation, Re* (7 October 2019), Que SC, Montréal 500-11-057094-191 (Approval and Vesting Order), Gouin J; *Wayland Group Corp., Re* (21 April 2020, Ont SCJ, Toronto CV-19-00632079-00CL (Approval and Vesting Order), Haney J; *Comark Holdings Inc., Re* (July 13, 2020), Ont SCJ, Toronto CV-20-00642013-00CL (Approval and Vesting and CCAA Termination Order), Hainey J; *Beleave Inc., Re* (18 September 2020), Ont SCJ, Toronto CV-20-00642097-00CL (Approval and Vesting Order, and Endorsement), Conway J.

[4] Pièce P-2, déposée «sous scellés» et remise confidentiellement au procureur du Créancier Cantore.

[5] Pièce P-1.

> Recitals
> […]
> C. Pursuant to an order of the Court dated January 29, 2020 (as it may be amended, restated or supplemented from time to time, the «**SISP Approval Order**»), the Court approved a sale or investor solicitation process to be conducted in respect of the business and assets of Nemaska [les Débitrices] (as such process may be amended, restated or supplemented pursuant to the terms herein, the «**SISP**»), in accordance with the procedures, terms and conditions set our herein (the «**SISP Procedures**»).
>
> D. The SISP Procedures sets out the manner in which (i) bids and proposals for a broad range of executable transaction alternatives (restructuring, recapitalization and/or refinancing) involving the business of Nemaska [les Débitrices], as more particularly described in the Teaser Letter (the «**Business**»), and all property, assets and undertaking of Nemaska (the «**Property**»), whether *en bloc* or any portion(s) thereof, will be solicited from interested parties, (ii) any bids received will be negotiated, (iii) any Successful Bid(s) will be selected and, (iv) the Court's approval of any Successful Bid(s) will be sought.
>
> E. An investment in the Business may involve, among other things, a restructuring, recapitalization, or other form of reorganization of the business and affairs of the Business or any part thereof, and such investment may be consummated pursuant to a plan of compromise or arrangement (a «**Plan**»), an arrangement pursuant to the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 (respectively an «**Arrangement**» and the «**CBCA**») or otherwise.
>
> F. The SISP Approval Order, the SISP Procedures, and any other orders of the Court made in the CCAA Proceedings relating to the SISP shall exclusively govern the process for soliciting and selecting bids for the sale of the Property or investment in the Business pursuant to a broad range of executable transaction alternatives.
> […]
>
> (le Tribunal souligne)

[13] Ainsi, l'Ordonnance SISP, rendue sans opposition, vise tous les actifs des Débitrices, sans distinction, dans un tout ou séparément, et ouvre la porte à une panoplie de transactions possibles afin de trouver une solution aux problèmes financiers des Débitrices.

[14] L'Ordonnance SISP constitue donc la pierre angulaire, la toile de fond (la «**Toile de fond**») de la Demande pour ODI, et il est essentiel que les parties l'aient toujours à l'esprit, surtout lors de la présentation de leurs arguments.

[15] De plus, la Demande pour ODI ne constitue pas une demande d'homologation d'un plan aux termes de la *LACC*, mais plutôt, tel que mentionné précédemment, une demande d'approbation par le Tribunal[6] de la soumission retenue par les Débitrices suite à l'Ordonnance SISP, soit l'Offre Orion/IQ/Pallinghurst.

[16] L'offre Orion/IQ/Pallinghurst est soumise au Tribunal telle que déposée, et il ne revient pas au Tribunal d'indiquer aux Offrants quels termes et conditions doivent en faire partie.

[17] Le choix du Tribunal est le suivant : il approuve ou il refuse l'Offre Orion/IQ/Pallinghurst.

1.2 Demande Cantore

[18] La Demande pour ODI inclut, entre autres, une demande afin que les droits réels existants sur les actifs des Débitrices soient radiés.

[19] Aussi, parallèlement à la Demande pour ODI, le créancier Victor Cantore (le «**Créancier Cantore**»), l'un des actionnaires de la débitrice Nemaska Lithium inc., a déposé une demande intitulée «Real Rights Application» (la «**Demande Cantore**») contre les débitrices Nemaska Lithium inc., Nemaska Lithium Shawinigan Transformation inc. et Nemaska Lithium Whabouchi Mine inc. (collectivement «**Nemaska**»).

[20] Ce litige entre le Créancier Cantore et Nemaska fut l'élément déclencheur de l'opposition du Créancier Cantore à la Demande pour ODI et, même si le mérite de la Demande Cantore ne faisait pas l'objet de la Demande pour ODI, il n'en demeure pas moins que ce litige fut omniprésent tout au long de l'audition, le Créancier Cantore étant le seul à s'opposer à la Demande pour ODI, et ce, inlassablement.

[21] Il est donc pertinent, dans ces circonstances, de bien situer ce litige entre le Créancier Cantore et Nemaska, en précisant qu'il origine de l'«Entente d'acquisition de 16 claims (Propriété Cantore) [la «**Propriété Cantore**»[7]]» du 17 septembre 2009 (l'«**Entente**»)[8], entre Exploration Nemaska inc. («**Exploration**») (maintenant la débitrice Nemaska Lithium inc.) et le Créancier Cantore, alors qu'Exploration a acquis 100% des intérêts du Créancier Cantore dans lesdits claims[9].

[6] Pièce P-1, Procédures SISP, art. 15.1.
[7] Pièce P-1 de la Demande Cantore.
[8] Pièce P-2 de la Demande Cantore.
[9] Pièces P-3 et P-5 de la Demande Cantore.

[22] À titre de considération pour cette acquisition, l'Entente prévoit, entre autres, le paiement d'une «Royauté» par Exploration au Créancier Cantore, et ce, comme suit :

> **1. Royauté**
>
> Le paiement à Groupe Cantore, d'une Royauté égale à 3 % NSR [Net Smelter Return] sur tous les métaux. La royauté sera payable mensuellement, le 15 du mois et sera calculée pour la période de un (1) mois de calendrier précédent. La Société aura l'option à son gré, en tout temps jusqu'à l'expiration d'un délai de 3 mois suivant la déclaration de mise en production officielle, de racheter 1% NSR des détenteurs, au prorata de leur intérêt, pour une somme de 1,000,000 $, payable en 2 versements égaux, le premier le jour de l'exercice de l'option de rachat et le second 90 jours plus tard.
>
> (la «**Royauté NSR**»)

[23] Lors d'une conférence de gestion de ce litige, tenue le 9 septembre 2020, le Créancier Cantore a reconnu que ce texte de l'Entente prévoyant le paiement de la Royauté NSR ne lui octroyait aucun droit réel comme tel et, s'il était strictement et limitativement question de ce texte, alors la Demande Cantore devrait être rejetée[10].

[24] Par contre, tel qu'il appert de la Demande Cantore, le Créancier Cantore cherche plutôt à obtenir du Tribunal, dans un premier temps, une reconnaissance et déclaration à l'effet qu'il est bénéficiaire, par prescription acquisitive ou autrement, d'un «droit réel *sui generis*» rattaché à la Royauté NSR et constituant un démembrement du droit de propriété innommé, de telle sorte que le Tribunal devrait, selon le Créancier Cantore, ordonner éventuellement à Nemaska de signer, entre autres, un document, non encore produit, constatant ce prétendu «droit réel *sui generis*» affectant la Propriété Cantore (le «**Droit réel *sui generis* Cantore**») et procéder à sa publication au registre foncier du Québec, à défaut de quoi, le jugement à intervenir sur la Demande Cantore devrait avoir cet effet.

[25] Dans un deuxième temps, le Créancier Cantore demande au Tribunal d'exempter expressément le Droit réel *sui generis* Cantore de la radiation des droits réels demandée par les Débitrices aux termes de la Demande pour ODI, d'où l'opposition du Créancier Cantore à la Demande pour ODI, non seulement au motif de cette radiation demandée, mais pour moult raisons, tel qu'expliqué ci-après, le Créancier Cantore faisant flèche de tout bois.

1.3 Cadre convenu pour l'audition de la Demande pour ODI

[10] Voir le jugement du Tribunal du 15 septembre 2020, paragr. [14].

[26] Afin d'alléger, dans la mesure du possible, l'audition de la Demande pour ODI, les parties ont tenu pour acquis, mais strictement pour les fins de cette audition, que le Créancier Cantore détenait effectivement un Droit réel *sui generis* Cantore, le débat au mérite de la Demande Cantore étant reporté à plus tard.

[27] Ainsi, lors d'une conférence de gestion tenue le 18 septembre 2020[11], le Tribunal faisait état de ce qui suit à cet égard :

> b. Quant au Droit réel *sui generis* réclamé par le Créancier Cantore et pour lequel une purge est demandée aux termes de la Demande RVO [la Demande pour ODI], les Débitrices prétendent que, même s'il était éventuellement décidé que la Demande Cantore est bien fondée et que le Créancier Cantore détient effectivement un Droit réel *sui generis*, alors le Tribunal a, de toute façon et à tout événement, le pouvoir de le purger, et c'est ce qu'elles demandent dans la Demande RVO.
>
> À quoi cela sert-il alors d'entreprendre un long débat aux fins [de] déterminer si effectivement le Créancier Cantore détient un Droit réel *sui generis* si, en bout de ligne, il est demandé au Tribunal de le purger tout simplement.
>
> Les parties limiteront donc la première étape de la Demande Cantore à débattre du pouvoir du Tribunal d'ordonner une telle purge. Une réponse positive pourra ainsi couper court au débat aux fins de déterminer si oui ou non le Créancier Cantore bénéficie effectivement d'un Droit réel *sui generis*.
>
> (le Tribunal souligne)

[28] Par contre, après quelques jours d'audition de la Demande pour ODI, laquelle s'étirait beaucoup plus que prévu, il fut décidé de reporter à plus tard, non seulement la question de l'existence ou non du Droit réel *sui generis* Cantore, mais aussi celle relative au pouvoir du Tribunal de le purger, si tant est que le Droit réel *sui generis* Cantore existe, et ce, sans conséquence sur le pouvoir du Tribunal de purger les autres droits réels affectant les actifs des Débitrices.

[29] Le projet d'ODI joint à titre de pièce[12] à la Demande pour ODI fut alors modifié afin de prévoir une exception temporaire pour la Demande Cantore et le Droit réel *sui generis* Cantore qui y est réclamé, de telle sorte que si jamais il est décidé par le Tribunal que ce droit existe et qu'il ne peut pas être purgé, alors il affectera les actifs visés et faisant partie de l'Offre Orion/IQ/Pallinghurst, et les Offrants devront en assumer les conséquences, le cas échéant.

---

[11] Voir le procès-verbal d'audience de la conférence de gestion du 18 septembre 2020.

[12] Pièce P-3B, amendée de nouveau lors de la dernière journée d'audition, soit le 8 octobre 2020, voir les paragr. [36] et [37].

[30] Le report de ce débat, lequel avait essentiellement pour but que la Demande Cantore ne soit plus un obstacle à l'obtention urgente de l'approbation par le Tribunal de l'Offre Orion/IQ/Pallinghurst, dans la mesure où le Tribunal était disposé à aller dans ce sens, n'a pas mis fin à l'opposition du Créancier Cantore à la Demande pour ODI, loin de là.

[31] Ainsi, le Créancier Cantore a continué à prétendre que le Tribunal n'avait tout simplement pas l'autorité et la compétence pour accueillir la Demande pour ODI sauf, par contre, si elle incluait aussi un règlement de la Demande Cantore qui serait alors approuvé par le Tribunal.

[32] Tel que discuté ci-après, il est apparu clairement au Tribunal, tout au long de l'audition, que le Créancier Cantore, par les arguments qu'il présentait, ne prenait nullement en considération ce qui avait été décidé par l'Ordonnance SISP, la Toile de fond de la Demande pour ODI.

[33] Tout était décortiqué à la pièce par le Créancier Cantore, isolé du portait global, loin de ce que le Tribunal avait déjà autorisé.

[34] À plusieurs occasions, le Tribunal a eu l'étrange impression que l'opposition du Créancier Cantore était un exercice de négociation avec les Débitrices et les Offrants, portant ainsi ombrage à la légitimité des arguments qu'il avançait.

[35] À un tel point tel que, le 8 octobre 2020 05 :19, le Tribunal a fait parvenir un courriel aux procureurs présents à l'audition, mentionnant, entre autres, ce qui suit :

> […]
> I ask you all to be practical and don't take a legal position in front of the Court on this issue, or any other issue, as a bargaining tool.
> […]
>
> (le Tribunal souligne)

1.4 Incident malencontreux

[36] Par ailleurs, lors de cette même conférence de gestion du 18 septembre 2020, le Tribunal a permis au procureur représentant quelques centaines d'actionnaires de Nemaska Lithium inc. ainsi que l'un des soumissionnaires dans le cadre du SISP, soit le soumissionnaire Edda Stock Finance S.A.S. et Zingher Construct S.R.L. («**E&Z**»), d'éventuellement poser des questions lorsque le SISP ayant mené au dépôt de la Demande pour ODI serait de nouveau expliqué, et ce, par strict souci de transparence, aucune contestation de la Demande pour ODI n'ayant été déposée par eux.

[37] À cette occasion, le Tribunal a formulé, entre autres, les mises en garde suivantes, d'abord relativement au SISP, déjà autorisé par l'Ordonnance SISP, et quant aux droits des actionnaires de Nemaska Lithium inc. :

> Le Tribunal tient à réitérer que si le processus fut suivi aussi rigoureusement que le Contrôleur le laisse sous-entendre dans son Rapport et qu'un soumissionnaire, en l'occurrence EDDA [E&Z], n'a pas suivi et respecté les règles applicables au processus et que sa soumission fut ainsi rejetée, alors il n'a que lui à blâmer. Il n'est pas question, dans de telles circonstances, que ce soumissionnaire ait «*a second kick at the can*». Il en va de la crédibilité et du sérieux de tout le processus de demandes de soumissions.
>
> De plus, le Tribunal tient à répéter que dans un contexte d'insolvabilité, tel que dans la présente affaire, les intérêts économiques des Actionnaires, si tant est que de tels intérêts existent encore, sont entièrement subordonnés à ceux de tous les créanciers des Débitrices, et ce, jusqu'à ce que ces créanciers aient été entièrement payés, ce qui n'est nullement envisagé dans le présent dossier et n'a, semble-t-il, jamais été envisagé par qui que ce soit. Il s'agit d'un principe fondamental en la matière et qui ne doit jamais être perdu de vue.
>
> Nonobstant cela, et par strict souci de transparence, le Tribunal permettra au procureur des Actionnaires de poser aux 3 témoins mentionnés précédemment [un représentant des Débitrices (M. Jacques Mallette, président du conseil d'administration), leur conseiller financier (M. Thomas Bachand de FBN) et le Contrôleur (M. Christian Bourque)] quelques questions, mais ce principe fondamental ne devra jamais être oublié, ceci dit avec la plus grande sympathie ressentie pour les Actionnaires qui traversent une période très difficile.

[38] Or, après avoir entendu, le 25 septembre 2020, le témoignage de M. Thomas Bachand, représentant du conseiller financier des Débitrices, soit Financière Banque Nationale («**FBN**»), alors interrogé par le procureur des Débitrices relativement au déroulement du SISP, incluant le dépôt de la soumission de E&Z (la «**Soumission E&Z**»), il est apparu clairement au Tribunal que E&Z avait fait fi des règles fondamentales applicables au SISP et établies par le Tribunal aux termes de l'Ordonnance SISP et des Procédures SISP et, sans ambages, le Tribunal l'a indiqué au procureur de E&Z en fin de journée.

[39] Principalement, le dépôt requis de 5% du montant de la Soumission E&Z n'a jamais été effectué, ni le dépôt des documents contractuels correspondant à la structure transactionnelle proposée par E&Z aux termes de la Soumission E&Z, aussi requis lors du dépôt d'une soumission dans le cadre du SISP.

[40] Avant de ce faire, E&Z exigeait que la Soumission E&Z soit d'abord acceptée par les Débitrices, telle que déposée, et que les termes et conditions imposés par

l'Ordonnance SISP et les Procédures SISP soient mis de côté et ne s'appliquent pas à la Soumission E&Z[13].

[41] Ce n'est qu'après une telle acceptation de la Soumission E&Z, que E&Z ferait ledit dépôt et déposerait lesdits documents contractuels, pour fins de négociation avec les Débitrices.

[42] Totalement inacceptable!

[43] Un refus catégorique des termes et conditions fondamentaux d'un processus sérieux et rigoureux, entériné par l'Ordonnance SISP.

[44] Qui plus est, après de nombreuses demandes de FBN auprès de E&Z aux fins d'identifier qui était effectivement impliqué derrière E&Z, les documents[14] finalement remis par E&Z n'étaient constitués que de simples notes domestiques, préparées à la bonne franquette, sans pièce justificative, et ne faisant que confirmer au Tribunal que la Soumission E&Z n'était tout simplement pas sérieuse.

[45] À la lumière des commentaires alors formulés par le Tribunal, le procureur de E&Z a demandé de suspendre l'audition jusqu'au lundi matin 28 septembre 2020, ce qui lui permettrait de revoir en détail le dossier et faire le point avec ses clients.

[46] Or, dès le début de l'audition du 28 septembre 2020, le procureur de E&Z informait le Tribunal qu'il cessait d'occuper pour E&Z, et aussi pour les actionnaires Alain Fournier et Denis Carrier.

[47] Parallèlement, les représentants de E&Z ont mis fin à leur présence semi-virtuelle à l'audition et les actionnaires de Nemaska Lithium inc. présents ont quitté la salle d'audience.

[48] Le Tribunal a alors mis un terme à cette saga malencontreuse entourant la Soumission E&Z en demandant ce qui suit aux procureurs toujours présents, propos consignés au procès-verbal d'audience du 28 septembre 2020 9 :50 :

> […]
> Vu cela, le Tribunal fait part aux procureurs présents que le sujet concernant l'offre qui avait été déposée par Edda Stock Finance S.A.S. et Zingher Construct S.R.L. ne doit plus être traité dans le cadre de la présente audition, et le Tribunal demande aux procureurs de faire en sorte qu'il en soit ainsi.

2. CADRE LÉGISLATIF ET JURISPRUDENTIEL DE LA DEMANDE POUR ODI

[13] Voir, entre autres, Pièce-8A E.
[14] Pièces P-8A U et V.

[49] Tel que déjà mentionné, la Demande pour ODI est présentée aux termes de l'article 36 *LACC*, lequel prévoit ce qui suit :

> **Restriction à la disposition d'actifs**
>
> **36 (1)** Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.
>
> **Avis aux créanciers**
>
> **(2)** La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.
>
> **Facteurs à prendre en considération**
>
> **(3)** Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :
>
> **a)** la justification des circonstances ayant mené au projet de disposition;
>
> **b)** l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;
>
> **c)** le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;
>
> **d)** la suffisance des consultations menées auprès des créanciers;
>
> **e)** les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;
>
> **f)** le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.
>
> […]
>
> **Autorisation de disposer des actifs en les libérant de restrictions**
>
> **(6)** Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs

> à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.
>
> […]
>
> (le Tribunal souligne)

[50] Lors de son analyse des facteurs énumérés à l'article 36(3) *LACC*, le Tribunal doit vérifier et s'assurer de ce qui suit :

- 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.[15]

[51] Par ailleurs, le Tribunal considère plus qu'approprié de citer de larges extraits de la décision unanime de la Cour suprême du Canada dans l'affaire *9354-9186 Québec inc. c. Callidus Capital Corp.*[16] (l'«**Affaire *Callidus***»), afin de bien saisir la toile de fond que constitue la *LACC* pour une restructuration et la nature évolutive des procédures intentées sous son régime, et ainsi bien comprendre le rôle que le juge chargé de la supervision d'une restructuration doit jouer :

> [38] Pour répondre aux questions ci-dessus, nous devons les situer dans le contexte contemporain de l'insolvabilité au Canada, et plus précisément du régime de la *LACC*. Ainsi, avant de passer à ces questions, nous examinons (1) la nature évolutive des procédures intentées sous le régime de la *LACC*; (2) le rôle que joue le juge surveillant dans ces procédures; et (3) la portée du contrôle, en appel, de l'exercice du pouvoir discrétionnaire du juge surveillant.
>
> (1) La nature évolutive des procédures intentées sous le régime de la *LACC*
>
> [39] La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Les autres sont la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985 c. B-3 (« *LFI* »), qui traite de l'insolvabilité des personnes physiques et des sociétés, et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985 c. W-11 (« *LLR* »), qui traite de l'insolvabilité des institutions financières et de certaines autres personnes morales, telles que les compagnies d'assurance (*LLR*, par. 6(1)). Bien que la *LACC* et la *LFI* permettent toutes deux la restructuration de compagnies insolvables, l'accès à la *LACC* est limité

[15] *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742, paragr. [34]-[35]; *Royal Bank v. Soundair Corp.*, (1991) 7 C.B.R. (3d) 1 (Ont. C.A.) paragr. 16.
[16] 2020 CSC 10.

aux sociétés débitrices qui sont aux prises avec des réclamations dont le montant total est supérieur à 5 millions de dollars (*LACC*, par. 3(1)).

[40] Ensemble, les lois canadiennes sur l'insolvabilité poursuivent un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement « catastrophiques » qui peuvent découler de l'insolvabilité (*Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271, par. 1). Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie (J. P. Sarra, « The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 4-5, 14; Sénat du Canada, Comité sénatorial permanent des banques et du commerce, *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2003), p. 13-14; R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 4-5).

[41] Parmi ces objectifs, la *LACC* priorise en général le fait d'« éviter des pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable » (*Century Services*[17], par. 70). C'est pourquoi les affaires types qui relèvent de cette loi ont historiquement facilité la restructuration de l'entreprise débitrice qui n'a pas encore déposé de proposition en la maintenant dans un état opérationnel, c'est-à-dire en permettant qu'elle poursuive ses activités. Lorsqu'une telle restructuration n'était pas possible, on considérait qu'il fallait alors procéder à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI*. C'est précisément le résultat qui était recherché dans l'affaire *Century Services* (voir par. 14).

[42] Cela dit, la *LACC* est fondamentalement une loi sur l'insolvabilité, et à ce titre, elle a aussi [TRADUCTION] « comme objectifs simultanés de maximiser le recouvrement au profit des créanciers, de préserver la valeur d'exploitation dans la mesure du possible, de protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise [. . .] et d'améliorer le système de crédit de manière générale » (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 14; voir aussi *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, par. 103). Afin d'atteindre ces objectifs, les procédures intentées sous le régime de la *LACC* ont évolué de telle

[17] *Century Services Inc. v. Canada (P.G.)* [2010] 3 R.C.S. 379.

sorte qu'elles permettent des solutions qui évitent l'émergence, sous une forme restructurée, de la société débitrice qui existait avant le début des procédures, mais qui impliquent plutôt une certaine forme de liquidation des actifs du débiteur sous le régime même de la Loi (Sarra, « The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibium for Insolvency Law », p. 19-21). Ces cas, qualifiés de [TRADUCTION] « procédures de liquidation sous le régime de la *LACC* », sont maintenant courants dans le contexte de la *LACC* (voir *Third Eye Capital Corporation c. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, par. 70).

[43] Les procédures de liquidation sous le régime de la *LACC* revêtent différentes formes et peuvent, entre autres, inclure la vente de la société débitrice à titre d'entreprise en activité; la vente « en bloc » des éléments d'actif susceptibles d'être exploités par un acquéreur; une liquidation partielle de l'entreprise ou une réduction de ses activités; ou encore une vente de ses actifs élément par élément (B. Kaplan, « Liquidating CCAAs : Discretion Gone Awry? » dans J. P. Sarra, dir., *Annual Review of Insolvency Law* (2008), 79, p. 87-89). Les résultats commerciaux ultimement obtenus à l'issue des procédures de liquidation introduites sous le régime de la *LACC* sont eux aussi variés. Certaines procédures peuvent avoir pour résultat la continuité des activités de la débitrice sous la forme d'une autre entité viable (p. ex, les sociétés liquidées dans *Indalex* et *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (C.J. Ont.) (Div. gén.)), alors que d'autres peuvent simplement aboutir à la vente des actifs et de l'inventaire sans donner naissance à une nouvelle entité (p. ex, la procédure en cause dans *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, par. 7 et 31). D'autres encore, comme dans le dossier qui nous occupe, peuvent donner lieu à la vente de la plupart des actifs de la débitrice en vue de la poursuite de son activité, laissant à la débitrice et aux parties intéressées le soin de s'occuper des actifs résiduaires.

[44] Les tribunaux chargés de l'application de la *LACC* ont d'abord commencé à approuver ces formes de liquidation en exerçant le vaste pouvoir discrétionnaire que leur confère la Loi. L'émergence de cette pratique a fait l'objet de critiques, essentiellement parce qu'elle semblait incompatible avec l'objectif de « restructuration » de la *LACC* (voir, p. ex., *Uti Energy Corp. c. Fracmaster Ltd*., 1999 ABCA 178, 244 A.R. 93, par. 15-16, conf. 1999 ABQB 379, 11 C.B.R. (4th) 204, par. 40-43; A. Nocilla, « The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada » (2014), 56 *Rev. can. dr. comm.* 73, p. 88-92).

[45] Toutefois, depuis que l'art. 36 de la *LACC* est entré en vigueur en 2009, les tribunaux l'utilisent pour consentir à une liquidation sous le régime de la *LACC*. L'article 36 confère aux tribunaux le pouvoir d'autoriser la vente ou la disposition des actifs d'une compagnie

> débitrice hors du cours ordinaire de ses affaires[18]. Fait important, lorsque le Comité sénatorial permanent des banques et du commerce a recommandé l'adoption de l'art. 36, il a fait observer que la liquidation n'est pas nécessairement incompatible avec les objectifs réparateurs de la *LACC* et qu'il pourrait s'agir d'un moyen « soit pour obtenir des capitaux [et faciliter la restructuration], ou éviter des pertes plus graves aux créanciers, soit pour se concentrer sur ses activités rentables » (p. 163). D'autres auteurs ont observé que la liquidation peut [TRADUCTION] « être un moyen de restructurer une entreprise » en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 169; voir aussi K. P. McElcheran, *Commercial Insolvency in Canada* (4e éd. 2019), p. 311). D'ailleurs, dans l'arrêt *Indalex*, la compagnie a vendu ses actifs sous le régime de la *LACC* afin de protéger les emplois de son personnel, même si elle ne pouvait demeurer leur employeur (voir par. 51).
>
> [46] En définitive, le poids relatif attribué aux différents objectifs de la *LACC* dans une affaire donnée peut varier en fonction des circonstances factuelles, de l'étape des procédures ou des solutions qui sont présentées à la cour pour approbation. En l'espèce, il est possible d'établir un parallèle avec le contexte de la *LFI*. Dans l'arrêt *Orphan Well Association c. Grant Thornton Ltd*., 2019 CSC 5, [2019] 1 R.C.S. 150, par. 67, notre Cour a expliqué que, de façon générale, la *LFI* vise deux objectifs : (1) la réhabilitation financière du failli, et (2) le partage équitable des actifs du failli entre les créanciers. Or, dans les cas où la société débitrice ne s'extirpera jamais de la faillite, seul le dernier objectif est pertinent (voir par. 67). Dans la même veine, sous le régime de la *LACC*, lorsque la restructuration d'une société débitrice qui n'a pas déposé de proposition est impossible, une liquidation visant à protéger sa valeur d'exploitation et à maintenir ses activités courantes peut devenir l'objectif réparateur principal. En outre, lorsque la restructuration ou la liquidation est terminée et que le tribunal doit décider du sort des actifs résiduels, l'objectif de maximiser le recouvrement des créanciers à partir de ces actifs peut passer au premier plan. Comme nous l'expliquerons, la structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs réparateurs.

[18] Mentionnons que, bien que l'art. 36 codifie désormais le pouvoir du juge surveillant de rendre une ordonnance de vente et de dévolution, et qu'il énonce les facteurs devant orienter l'exercice de son pouvoir discrétionnaire d'accorder une telle ordonnance, il est muet quant aux circonstances dans lesquelles les tribunaux doivent approuver une liquidation sous le régime de la *LACC* plutôt que d'exiger des parties qu'elles procèdent à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI* (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 167-168; A. Nocilla, « Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36 » (2012) 52 *Rev. can. dr. comm.* 226, p. 243-244 et 247). Cette question demeure ouverte et n'a pas été soumise à la Cour dans *Indalex* non plus que dans les présents pourvois.

(2) Le rôle du juge surveillant dans les procédures intentées sous le régime de la *LACC*

[47] Un des principaux moyens par lesquels la *LACC* atteint ses objectifs réside dans le rôle particulier de surveillance qu'elle réserve aux juges (voir Sarra, ***Rescue! The Companies' Creditors Arrangement Act***, p. 18-19). Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant. En raison de ses rapports continus avec les parties, ce dernier acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure.

[48] La *LACC* mise sur la position avantageuse qu'occupe le juge surveillant en lui accordant le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas et de « [s'adapter] aux besoins commerciaux et sociaux contemporains » (*Century Services*, par. 58) en « temps réel » (par. 58, citant R. B. Jones, « The Evolution of Canadian Restructuring: Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484). Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11, qui confère au juge le pouvoir de « rendre toute ordonnance qu'il estime indiquée ». Cette disposition a été décrite comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 10 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la *LACC* n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC*, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l'esprit les trois « considérations de base » (par. 70) qu'il incombe au demandeur de démontrer : (1) que l'ordonnance demandée est indiquée, et (2) qu'il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l'opportunité et la bonne foi, sont largement connues dans le contexte de la *LACC*. Le tribunal « évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi » (par. 70). Par ailleurs, l'exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d'insolvabilité est depuis peu mentionnée de façon expresse à l'art. 18.6 de la *LACC*, qui dispose :

> **Bonne foi**
>
> **18.6 (1)** Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.
>
> **Bonne foi — pouvoirs du tribunal**

> **(2)** S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.
>
> (Voir aussi *LFI*, art. 4.2; *Loi n^{o} 1 d'exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu'on s'y attarde. Conformément au régime de la *LACC* en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), p. 31). La procédure prévue par la *LACC* se fonde sur les négociations et les transactions entre le débiteur et les intéressés, le tout étant supervisé par le juge surveillant et le contrôleur. Il faut donc nécessairement que, dans la mesure du possible, ceux qui participent au processus soient sur un pied d'égalité et aient une compréhension claire de leurs droits respectifs (voir McElcheran, p. 262). La partie qui, dans le cadre d'une procédure fondée sur la *LACC*, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276 par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie).

[52] Nous soulignons que les juges surveillants s'acquittent de leur rôle de supervision avec l'aide d'un contrôleur qui est nommé par le tribunal et dont les compétences et les attributions sont énoncées dans la *LACC* (voir art. 11.7, 11.8 et 23-25). Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] « les yeux et les oreilles du tribunal » tout au long de la procédure (*Essar*, par. 109). Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire (voir *LACC*, al. 23(1)d) et i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 566 et 569).

[…]

[67] Les tribunaux reconnaissent depuis longtemps que le libellé de l'art. 11 de la *LACC* indique que le législateur a sanctionné « l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée

> par la jurisprudence » (*Century Services*, par. 68). L'article 11 est ainsi libellé :
>
> > **Pouvoir général du tribunal**
> >
> > **11** Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.
>
> Selon le libellé clair de la disposition, 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.
>
> [68] Lorsqu'une partie sollicite une ordonnance relativement à une question qui entre dans le champ de compétence du juge surveillant, mais pour laquelle aucune disposition de la *LACC* ne confère plus précisément compétence, l'art. 11 est nécessairement la disposition à laquelle on peut recourir d'emblée pour fonder la compétence du tribunal. Comme l'a dit le juge Blair dans l'arrêt *Stelco*, l'art. 11 [TRADUCTION] « fait en sorte que la plupart du temps, il est inutile de recourir à la compétence inhérente » dans le contexte de la *LACC* (par. 36).
>
> (le Tribunal souligne)

[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.

[54] La présente affaire en est un très bel exemple.

3. DÉCISION DU TRIBUNAL

[55] À la lumière du rapport du contrôleur PricewaterhouseCoopers inc. (le «**Contrôleur**»), intitulé «Tenth Monitor's Report on the Approval of the Proposed Transaction» et daté du 10 septembre 2020 (le «**Rapport**»)[19], de larges extraits étant

[19] Pièce P-7.

reproduits ci-après, et à la lumière des témoignages de Jacques Mallette, Thomas Bachand et Christian Bourque, le Tribunal ne peut que conclure que les Débitrices ont agi de bonne foi et avec la diligence voulue, et que l'ordonnance de dévolution inversée demandée par la Demande pour ODI est indiquée dans les circonstances.

[56] Le Tribunal ne retient pas les motifs avancés par le Créancier Cantore, certains étant énumérés ci-après, afin de tenter de le convaincre de rejeter la Demande pour ODI, d'autant plus que les autres choix sont (i) la réalisation des sûretés détenues par Orion, laquelle patiente déjà depuis plusieurs mois, (ii) la «mise en veilleuse» des Débitrices pour éventuellement refaire un SISP, dans quelques mois, et ce, à un coût très élevé et dans un marché qui a déjà été analysé sous toutes ses coutures, fort incertain et risqué, ou (iii) la faillite des Débitrices, des choix catastrophiques pour tous, employés, créanciers, incluant le Créancier Cantore, fournisseurs, la Communauté Cree et, de façon générale, pour les économies des régions affectées.

[57] C'est dans un cas comme celui-ci, alors que le Tribunal est satisfait que les facteurs à prendre en considération aux termes de l'article 36 *LACC* sont rencontrés et que les avantages sont, dans les circonstances, évidents, que le juge qui supervise la restructuration et qui a ainsi une vue d'ensemble du dossier et des intérêts de tous, doit exercer son pouvoir discrétionnaire à bon escient et permettre que la solution proposée, peu importe son degré d'innovation et créativité, soit autorisée et entérinée, car elle assure définitivement un meilleur résultat que les autres choix, et ce, pour tous.

[58] D'ailleurs, devant l'opposition insistante du Créancier Cantore, et ce, malgré les conséquences désastreuses des autres choix, le Tribunal a demandé à son procureur, dans l'éventualité où le prétendu Droit réel *sui generis* Cantore était réglé à sa satisfaction et le règlement convenu alors incorporé dans l'Offre Orion/IQ/Pallinghurst pour approbation par le Tribunal, s'il maintiendrait ses motifs d'opposition à la Demande pour ODI, et sa réponse fut : NON.

[59] C'est tout dire quant à la légitimité de ses motifs d'opposition à la Demande pour ODI, certains annoncés comme étant «fondamentaux».

4. RAPPORT DU CONTRÔLEUR SUR LES SOUMISSIONS REÇUES

[60] Tel que mentionné précédemment, le 29 janvier 2020, suite à l'audition non contestée de l'«Amended Application to Approve a Claims Process and a Sale or Investor Solicitation Process» présentée par les Débitrices et visant leurs actifs et entreprises, le Tribunal a rendu l'Ordonnance SISP.

[61] L'Ordonnance SISP a donc établi les Procédures SISP applicables à toutes les soumissions, lesquelles furent analysées par les Débitrices et le Contrôleur dans ce cadre bien défini.

[62] Le Rapport du Contrôleur donne un compte rendu des diverses étapes, le tout menant à sa recommandation à l'effet que la Demande pour ODI soit accueillie par le Tribunal.

[63] D'entrée de jeu, le Contrôleur précise que le Rapport a pour but :

> «[…] to provide a complete overview of the Sale and Investor Solicitation Process (the «**SISP**») leading to the acceptance of the sale proposal submitted by (i) Investissement Québec («**IQ**»), (ii) The Pallinghurst Group (acting through Quebec Lithium Partners (UK) Limited («**QLP**») («**Pallinghurst**», and together with IQ, the «**Sponsors**»), (iii) OMF Fund II (K) Ltd. and OMF Fund II (N) Ltd. (together «**Orion**») and (iv) OMF (Cayman) Co-VII Ltd. («**OMF Cayman**», collectively with the Sponsors and Orion, the «**Bid Group**») (the «**Accepted Bid**» or «**Proposed Transaction**»). The Monitor's report will also provide information on the other bids received as part of the SISP and on the Proposed Transaction.»[20]

[64] Le Rapport revoit ainsi tout le processus suivi par les Débitrices afin de disposer de leurs actifs et entreprises, par vente ou investissement, à la lumière de l'Ordonnance SISP et des Procédures SISP, et le Tribunal retient, entre autres, les commentaires et constatations suivants du Contrôleur, lesquels furent répétés lors du témoignage de Christian Bourque, responsable du dossier des Débitrices auprès du Contrôleur et corroborés, quant à certains aspects, par Jacques Mallette, président du Conseil d'administration de Nemaska Lithium inc. et par Thomas Bachand de FBN:

> […]
>
> **C. OVERVIEW OF THE SISP LEADING TO THE PROPOSED TRANSACTION**
>
> […]
>
> 21. The Monitor is of the opinion that the SISP process that led to the Accepted Bid was conducted in a transparent and fair manner.
>
> […]
>
> **E. STRUCTURE OF THE PROPOSED TRANSACTION**
>
> 26. The transactions contemplated by the Accepted Bid (collectively, the «**RVO Transaction**») are achieved through a corporate structure consistent with a reverse vesting order («**RVO**») and provide for a reorganization of Nemaska Lithium and its subsidiaries (the «**Nemaska Entities**»).
>
> 27. The RVO Transaction provides for the acquisition by the Sponsors of the Nemaska Entities' business and assets (other than certain excluded assets and excluded liabilities), by way of a RVO to be sought from the Court, the culmination of which will result in the

[20] Rapport, p. 2, parag. 2.

Sponsors acquiring, on a 50-50 basis, all of the issued and outstanding shares of an entity resulting from the amalgamation of the Nemaska Entities («**AmalCo2**»), which will itself emerge from the CCAA proceedings and subsequently be amalgamated with Orion to form the entity that will operate the business of the Debtors («**AmalCo3**», referred to as «**New Nemaska Lithium**»).

28. As mentioned above, the Bid Group consists of the IQ, Pallinghurst, Orion and OMF Cayman.

29. The RVO Transaction will also involve: (i) the incorporation of a new entity («**New ParentCo**») to ultimately hold those liabilities that are designated by the Sponsors not to be assumed by New Nemaska Lithium (the «**Excluded Liabilities**»); (ii) the incorporation by New ParentCo of a wholly-owned subsidiary («**ResidualCo**» and collectively with New ParentCo, «**Residual Nemaska Lithium**») which will ultimately hold certain excluded assets (i.e., those assets of the Nemaska Entities that are designed by the Sponsors not to be kept by New Nemaska Lithium) (the «**Excluded Assets**»); and (iii) the exchange of the shares of Nemaska Lithium for common shares of Residual Nemaska Lithium, resulting in Residual Nemaska Lithium becoming a successor reporting issuer.

30. New Nemaska Lithium will be a private company and will not be a reporting issuer under applicable Canadian securities laws.

31. The RVO structure will not require the reissuance or transfer of the Nemaska Entities' mining lease, mining claims or environmental permits, which will ensure that the business can be developed on an expedited timeline by New Nemaska Lithium. It allows for all of the permits to stay in place.

32. Pursuant to the Accepted Bid, substantially all of the current employees of the Nemaska Entities will be retained by New Nemaska Lithium in their current roles and responsibilities in all material respects.

33. The RVO Transaction is not subject to significant closing conditions, other than (i) the issuance of the RVO and (ii) the completion of required steps provided for under the *Competition Act* (Canada).

34. The Sponsors intend to invest, from and after closing of the RVO Transaction and subject to the fulfillment of certain conditions and receipt of appropriate approvals, up to $600,000,000 in New Nemaska Lithium (inclusive of amounts paid to OMF Cayman in connection with the transaction) for the financing of the project, comprised of the mine and the electrochemical plant.

F. THE ACCEPTED BID [l'Offre Orion/IQ/Pallinghurst]

[…]

36. The Accepted Bid is submitted as a credit bid and the full amount of the Orion Secured Claim is used as such by the Bid Group as consideration.

37. The consideration offered under the Accepted Bid includes (i) the assumption by New Nemaska Lithium of the Orion Secured Claim ($134,500,000); (ii) the assumption by New Nemaska Lithium of the Johnson Matthey Battery Materials Ltd. («**JMBM**») secured claim ($12,000,000); (iii) the assumption of various liabilities and obligation (including the Livent obligations and all of the Debtors' obligations under the Chinuchi Agreement from the closing onwards) and (iv) the transfer to Residual Nemaska Lithium of Nemaska Lithium's cash on hand on closing, subject to certain adjustments (the «**Residual Cash**») and any Excluded Assets.

38. The Residual Cash is comprised of: (i) the cash still on hand as at the closing date (to be determined and subject to adjustments), the amount of US$7M from the US$20M escrowed funds held in respect of the Livent litigation (plus accrued interest on US$20M), an amount under the Directors and Officers (the «**D&O**») trust of approximately $2M, less (ii) the sum of $12M to be retained by New Nemaska Lithium to cover its assumption of the secured claim of JMBM.

39. The Excluded Liabilities include, without limiting the liabilities forming part of the Excluded Liabilities, any claim on the part of construction suppliers and sub traders holding a valid legal hypothec against the Debtors' assets.

40. With respect to JMBM, as a result of the issuance of the RVO and the implementation of the RVO Transaction, the JMBM's secured claim shall be secured only by the movable and immovable assets of Nemaska Lithium P1P Inc. as such assets exist immediately prior to the implementation of the RVO Transaction (including assets in replacement of such assets, as applicable), and only to the same extent that such assets are secured as at that time, with any other encumbrances over assets of the Nemaska Entities, other than the assets of Nemaska Lithium P1P Inc., to be discharged as a result of the RVO Transaction.

41. The RVO Transaction contemplates that the rights of the Cree parties pursuant to the Chinuchi Agreement will not be affected.

42. The Accepted Bid specifically provides that the Debtors and the Monitor shall use their commercially reasonable efforts to obtain the RVO and therein a declaration that the Whabouchi mine is conveyed free and clear of all encumbrances, including the alleged

claims and rights of Victor Cantore, except for certain permitted encumbrances.

G. BENEFITS OF THE PROPOSED TRANSACTION FOR STAKEHOLDERS

43. After submission by the Bid Group of their initial Qualified Bid, the Debtors successfully negotiated a higher consideration that eventually led to the Accepted Bid.

44. The RVO Transaction should enable the restart of the project and, therefore, the completion of the Whabouchi mine. By doing so, many creditors will benefit from conducting business with New Nemaska Lithium for the finalization of the mine.

45. Also, the RVO Transaction should allow the retention of substantially all of the current employees.

46. Finally, the RVO Transaction will enable Residual Nemaska Lithium to submit a plan of compromise and arrangement (the «**Plan**») to the Debtors' remaining creditors, excluding claims assumed by New Nemaska Lithium, which will account for the payment in full of the secured claims and will provide a cash pool for the unsecured creditors.

47. The Monitor has considered whether the Accepted Bid would be more beneficial to the Debtors stakeholders than a sale or disposition of assets under a bankruptcy.

48. Given the SISP and the value of the Debtors' assets, the Monitor is of the view that a sale or disposition of assets under a bankruptcy would not result in a better outcome for the Debtors' stakeholders.

49. The estimated amount to be distributed to the unsecured creditors can be illustrated as follows:
[…]
[between] $14 240 000 [and] $6 240 000
[…]

H. CONCLUSION AND RECOMMANDATIONS

50. The Monitor is of the view that the Debtors have canvased [sic] the market since the beginning of 2019, including through the SISP, and that the Proposed Transaction is the best option available in the circumstances. The monitor is also of the view that:

    i. The aggregate consideration provided under the Proposal Transaction is fair and reasonable in the circumstances; and

> ii. There is no evidence to suggest that any viable alternative exists that would allow a better recovery for the Debtors' stakeholders.
>
> 51. Accordingly, the Monitor recommends the approval by the Court of the Accepted Bid and the RVO Transaction.

[65] À la lecture du Rapport, et constatant qu'aucune preuve n'a été présentée pour contredire son contenu, le Tribunal est d'avis, tel que mentionné précédemment, que tous les facteurs prévus à l'article 36(3) *LACC* sont rencontrés à sa satisfaction.

[66] Tous les efforts raisonnables ont été déployés afin de trouver la meilleure offre dans les circonstances, la seule encore sur la table, et cela fut fait suivant un processus rigoureux, efficace, juste, équitable et transparent, en conformité avec l'Ordonnance SISP et les Procédures SISP.

[67] Tel qu'expliqué ci-haut, les autres choix seraient catastrophiques, pour tous, y inclus le Créancier Cantore.

5. MOTIFS D'OPPOSITION DU CRÉANCIER CANTORE

[68] Le Créancier Cantore a soulevé plusieurs motifs pour tenter de convaincre le Tribunal qu'il ne devrait pas autoriser l'Offre Orion/IQ/Pallinghurst et que le Tribunal devrait donc refuser la Demande pour ODI.

[69] Par contre, tel que déjà mentionné, si le prétendu Droit réel *sui generis* Cantore était réglé à la satisfaction du Créancier Cantore et le règlement convenu incorporé dans l'Offre Orion/IQ/Pallinghurst soumise pour l'approbation du Tribunal aux termes de la Demande pour ODI, alors le Créancier Cantore ne maintiendrait plus ses motifs d'opposition.

[70] Nonobstant cela, le Tribunal revoit et commente ci-après, quoique brièvement, certains de ces motifs, lesquels sont inclus, soit dans l'«Objecting Party's Argument Brief» du 6 octobre 2020, soit dans la «Re-Modified and Restated Contestation of Nemaska's Approval Application» du 30 septembre 2020.

5.1 There is no authority to grant a vesting order in respect of anything other than a sale or disposition of assets

[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.

[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.»[21]

[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[22], 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.

[77] La vente n'est pas la structure proposée dans l'Offre Orion/IQ/Pallinghurst, elle prévoit plutôt une structure de «dévolution inversée», laquelle doit, soit être approuvée telle que soumise, soit être refusée par le Tribunal, chacun devant tirer ses propres conclusions de la décision à venir et en assumer les conséquences.

[78] Parallèlement, la purge des droits réels prévue à l'article 36(6) *LACC* aide à la mise en œuvre d'une solution envisagée et autorisée aux termes des articles 36(1) et (3) *LACC*, autrement, les détenteurs de droits réels bénéficieraient d'un droit de veto sur toute telle solution, ce qui serait inacceptable, et ce, même lorsque des actifs ne sont pas effectivement transférés à l'extérieur du patrimoine d'une compagnie débitrice, comme dans la présente affaire.

[79] Dans la mesure où la solution envisagée permet un meilleur résultat pour tous, et même l'améliore, il n'y a pas de raison pour que la purge des droits réels prévue à l'article 36(6) LACC ne puisse s'appliquer.

5.2 The Proposed Transaction and RVO are impermissible under the CCAA because they permit the Debtor Entities to emerge from CCAA protection outside the confines of a plan of arrangement

[21] *Supra*, note 16, paragr. [67]
[22] Pièce P-8A Y.

[80] Le Tribunal est d'avis qu'un recul s'impose lors de l'analyse d'une transaction comportant une structure de «dévolution inversée», telle que celle de l'Offre Orion/IQ/Pallinghurst, afin de la considérer dans son ensemble (*the global picture*).

[81] Il ne faut pas chercher à décortiquer et analyser chacune des étapes et composantes d'une telle transaction afin d'y trouver, pour chacune d'elles, une assise légale aux termes de la *LACC*, tel que le fait le Créancier Cantore.

[82] Procéder ainsi ne fait que restreindre sérieusement, et à mauvais escient, l'éventail de solutions innovatrices permettant de faire face aux problèmes commerciaux et sociaux contemporains, de plus en plus complexes.

[83] Cet exercice requiert une grande flexibilité et, plus souvent que jamais, il permet d'accroître les bénéfices pour les parties intéressées, alors qu'un formalisme rigide devient un carcan qui limite sérieusement les choix et, plus souvent que jamais, au détriment des parties intéressées.

[84] À preuve, refuser la seule offre sur la table suite au SISP, soit l'Offre Orion/IQ/Pallinghurst, et ce, après plus de 18 mois au total de démarchage, signifierait, tel que déjà mentionné, (i) la réalisation des sûretés détenues par Orion, (ii) la «mise en veilleuse» des Débitrices à un coût très élevé et sans aucune assurance qu'une meilleure offre puisse être obtenue dans plusieurs mois d'ici, surtout pas dans le contexte économique actuel, fort incertain et risqué, ou (iii) la faillite des Débitrices, entraînant, dans tous les cas, des conséquences catastrophiques pour les créanciers, les employés, les fournisseurs, la Communauté Cree et les régions affectées.

[85] Par ailleurs, les créanciers des Débitrices n'ont pas à voter sur une demande aux termes de l'article 36 *LACC*, laquelle n'est soumise qu'à l'approbation du Tribunal, qui prend alors en considération, entre autres, les facteurs énumérés à l'article 36(3) *LACC*.

[86] Tel que déjà mentionné, l'Offre Orion/IQ/Pallinghurst ne constitue pas un plan d'arrangement soumis au vote des créanciers des Débitrices.

[87] En temps et lieu, fort probablement une fois que les Étapes de la transaction proposée aux termes de l'Offre Orion/IQ/Pallinghurst auront été complétées, New ParentCo et ResidualCo seront alors en mesure de soumettre un plan d'arrangement aux créanciers restants des Débitrices, et ils voteront à ce moment-là sur ce qui leur sera proposé.

5.3 The Proposed Transaction contravenes the SISP Order on the basis that it is neither a Sale Proposal nor an Investment Proposal pursuant to the terms of the SISP Order

[88] L'Offre Orion/IQ/Pallinghurst est une proposition de transaction «hybride» et, aux termes de l'Ordonnance SISP et des Procédures SISP, les Débitrices et le Contrôleur

bénéficiaient de la latitude nécessaire[23] afin de considérer et prévoir des modifications appropriées aux circonstances, d'autant plus qu'il n'y avait plus qu'une seule offre sur la table, le tout sujet à l'autorisation ultime du Tribunal, d'où la Demande pour ODI.

[89] L'Ordonnance SISP et les Procédures SISP accordent ainsi la flexibilité nécessaire afin de trouver des solutions innovatrices à des problèmes sociaux et économiques contemporains, tel que discuté précédemment.

[90] Il n'était pas nécessaire que les Débitrices et le Contrôleur s'adressent au Tribunal à chaque fois qu'une modification aux termes et conditions des Procédures SISP était envisagée et, dans les circonstances, il était préférable que cela soit fait à l'étape de la Demande pour ODI.

5.4 The Proposed Transaction and RVO contravenes applicable securities laws

[91] Le procureur du Créancier Cantore a fait grand état du fait que la transaction proposée par l'Offre Orion/IQ/Pallinghurst ne respecterait pas certaines des dispositions du *Règlement 61-101 sur les mesures de protection des porteurs minoritaires lors d'opérations particulières* de la *Loi sur les valeurs mobilières*[24], ce que contestent vigoureusement les Débitrices.

[92] À tout événement, le Tribunal ne croit pas approprié d'élaborer sur ce sujet, surtout à la lumière du courriel[25] reçu le 7 octobre 2020 15 :15 par Me Patrick Boucher de M. Patrick Théorêt de l'Autorité des Marchés Financiers, à l'effet suifant :

> «[…]
> Je te confirme que nous n'avons pas d'objection avec votre interprétation du Règlement 61-101 dans le contexte de l'opération projetée. Nous n'interviendrons pas à la Cour sur ce point.
>
> Nous comprenons par ailleurs que la demande de dispense des obligations d'information continue de NMX Debtor (tel que ce terme est défini dans le projet du «vesting order» déposé en Cour) faite à la Cour sera retirée du paragraphe 44 de la procédure.
> […]«

5.5 New ParentCo and ResidualCo cannot avail themselves of the CCAA

[93] Le Créancier Cantore met énormément d'emphase sur le moment précis où les deux filiales nouvellement créées par la débitrice Nemaska Lithium inc., soit New

[23] Pièce P-1, voir, entre autres, les paragr. 1.5, 6.6, 11.2, 12.4. 12.9 et 17.2 des «SISP Procedures» jointes à titre de d'Annexe A à l'Ordonnance SISP.
[24] RLRQ, c. V-1.1, art. 331.1, r. 33.
[25] Pièce P-14.

ParentCo et ResidualCo, deviendront insolvables et pourront alors bénéficier du régime de la *LACC*, soit à l'intérieur des quelques jours que durera la séance de clôture de la transaction résultant de l'Offre Orion/IQ/Pallinghurst, et donc après l'obtention de l'ODI du Tribunal.

[94] Évidemment, tout ne peut pas être fait en même temps et, avant de débuter la séance de clôture de l'Offre Orion/IQ/Pallinghurst, encore faut-il que le Tribunal l'ait autorisée.

[95] Tel que mentionné précédemment, un recul s'impose afin de considérer la transaction dans son ensemble (*the global picture*), en ayant toujours à l'esprit la Toile de fond, et ne pas chercher à analyser une étape précise, séparément des autres, aux fins d'identifier une assise légale la justifiant aux termes de la *LACC*.

[96] À tout événement, le recours à la *LACC* est permis lorsqu'une insolvabilité est imminente[26], ce qui est définitivement le cas pour ces deux filiales, New ParentCo et ResidualCo, et ce, à la lumière de la vue d'ensemble des Étapes de la transaction projetée.

5.6 The Proposed transaction is an impermissible disguised substantive consolidation of the estates of the Debtors

[97] Le Créancier Cantore a longtemps argumenté que les Débitrices n'avaient pas obtenu l'autorisation préalable du Tribunal pour présenter un plan «consolidé».

[98] Or, la Demande pour ODI ne constitue nullement une demande d'approbation d'un plan «consolidé», mais constitue plutôt une demande d'approbation de l'Offre Orion/IQ/Pallinghurst, laquelle fut retenue par les Débitrices suite à l'obtention de l'Ordonnance SISP, incluant les Procédures SISP, et suivant le cadre et les instructions qui y sont inclus.

[99] Tel que mentionné précédemment, l'Ordonnance SISP et les Procédures SISP visaient tous les actifs des Débitrices, sans distinction, dans un tout ou séparément, et permettaient donc aux soumissionnaires de présenter des offres comprenant tous les actifs des Débitrices, ou une partie seulement.

5.7 The release in favour of the directors and officers of the Debtors pursuant to the Proposed Transaction should not be authorized

[100] L'Offre Orion/IQ/Pallinghurst comprend une quittance générale au bénéfice, entre autres, des administrateurs et dirigeants des Débitrices.

[26] *Stelco Inc., Re*, 2004 CanLII 24933 (ON SC), paragr. 21, 25 et 26, Farley J. (permission d'en appeler à la CA refusée, 2004 CarswellOnt 2936 et permission d'en appeler à la CSC refusée, 2004 CarswellOnt 5200; voir aussi art. 3 *LACC*.

[101] Le Créancier Cantore, aussi actionnaire de la débitrice Nemaska Lithium inc., et l'actionnaire Brian Shenker se sont opposés à ce qu'une telle quittance soit autorisée par le Tribunal à ce stade-ci, et ils ont demandé que le débat sur ce sujet soit reporté au jour du dépôt du plan d'arrangement à venir.

[102] Essentiellement, ces actionnaires ont l'intention de poursuivre, entre autres, les administrateurs et dirigeants des Débitrices au motif de leur comportement relié à certains événements.

[103] Cette quittance générale demandée fait partie de l'Offre Orion/IQ/Pallinghurst et les Offrants l'ont incluse pour leurs propres raisons.

[104] Il ne revient pas au Tribunal de leur ordonner de l'exclure, mais le Tribunal ne peut que constater qu'ils ont effectivement prévu une exception, reproduite dans le projet d'ODI soumis au Tribunal, soit :

> «[41] […] provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim against the Directors (as this term is defined in the Initial Order) of the Debtors that is not permitted to be released pursuant to section 5.1(2) of the CCAA.»

[105] Or, l'article 5.1(2) *LACC* est à l'effet suivant :

> La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

[106] Le Tribunal est d'avis que cette exception protège adéquatement les actionnaires à l'égard des administrateurs et dirigeants des Débitrices et il n'y a pas lieu d'élaborer davantage sur ce sujet.

5.8 The Court should not authorize the transfer of the Excluded Liabilities, the Agreement and/or the NSR Royalty to New ParentCo

[107] Ce transfert fait partie de l'Offre Orion/IQ/Pallinghurst et de l'ensemble de la transaction projetée, et il n'y a pas lieu de l'analyser isolement, afin d'en décortiquer toutes les facettes.

[108] À tout événement, dans le cadre d'une demande telle que celle de la Demande pour ODI, le Tribunal a le pouvoir nécessaire, après s'être satisfait que les critères de l'article 36(3) sont respectés, d'ordonner que ce transfert soit effectué, sans le consentement du Créancier Cantore, ou de tout autre créancier relativement à un contrat à être transféré, autrement le créancier concerné bénéficierait d'un droit de veto sur la transaction projetée, ce qui serait inacceptable.

[109] Dans le cadre de l'insolvabilité des Débitrices, le résultat global de la transaction projetée avec les Offrants est à l'avantage de tous, comparativement aux conséquences des autres choix mentionnés précédemment.

[110] Certes, le Créancier Cantore souhaiterait que l'Entente prévoyant le paiement de la Royauté NSR soit entièrement protégée, sans aucune conséquence négative pour lui, mais le Tribunal ne peut pas accepter qu'il en soit ainsi, car cela signifierait l'échec de la transaction prévue dans l'Offre Orion/IQ/Pallinghurst.

[111] Par ailleurs, le Créancier Cantore fait un parallèle entre le traitement qui lui est réservé et celui prévu par les Offrants pour le créancier garanti Johnson Matthew Battery Materials Ltd., et il voudrait qu'il en soit ainsi pour lui.

[112] Les Offrants ont leurs propres raisons commerciales pour qu'il en soit ainsi avec ce créancier garanti et il ne revient pas au Tribunal à faire en sorte que tous les créanciers des Débitrices soient traités également dans l'Offre Orion/IQ/Pallinghurst.

[113] Tel qu'expliqué précédemment, le Créancier Cantore est amplement protégé par ce qui a été convenu avec les Offrants quant au débat à venir sur son prétendu Droit réel *sui generis* Cantore.

[114] S'il réussit à établir la validité de ce droit, alors certains des actifs acquis par les Offrants seront sujets à ce droit, et s'il ne réussit pas, il bénéficiera alors d'un droit personnel, lequel sera traité par les Débitrices comme tout autre droit personnel d'un créancier ordinaire des Débitrices non retenu par les Offrants dans le cadre de l'Offre Orion/IQ/Pallinghurst.

5.9 The Proposed transaction is not fair and reasonable

[115] Tel qu'abordé à plusieurs occasions ci-haut, il ne fait aucun doute pour le Tribunal que l'Offre Orion/IQ/Pallinghurst est juste et raisonnable et qu'elle doit être acceptée telle que déposée, et ce, dans les meilleurs délais.

[116] Depuis plusieurs mois, le Tribunal a été à même de constater tous les efforts déployés par les Débitrices afin de sauver leurs entreprises et, après de sérieuses démarches et un SISP mis en œuvre rigoureusement et en conformité avec l'Ordonnance SISP et les Procédures SISP, l'Offre Orion/IQ/Pallinghurst est la seule sur la table, et elle permet de redémarrer les opérations «épurées» des Débitrices, avec tout ce que cela comporte de positif au plan économique.

[117] La refuser serait catastrophique!

5.10 The Monitor's commitment to use «commercially reasonable efforts to obtain the RVO» and other stipulations of the successful bid compromise the integrity of the SISP

[118] À plusieurs égards, le Créancier Cantore a mis en doute l'intégrité et l'impartialité du Contrôleur.

[119] Le Tribunal rejette toutes les allégations à cet égard du Créancier Cantore, lesquelles sont totalement non fondées.

[120] Il s'agit ici aussi d'une autre démonstration que le Créancier Cantore fait flèche de tout bois en référant à certains termes utilisés et à certains engagements pris par le Contrôleur dans le cadre des négociations avec les Offrants, ou autrement, afin d'amener le Tribunal à conclure comme il le souhaiterait.

[121] Le Tribunal a eu plusieurs occasions de constater le haut professionnalisme du Contrôleur, sa rigueur et sa diligence. Le Tribunal était périodiquement tenu au courant de l'évolution du dossier, et le Contrôleur a toujours clairement répondu aux questions que le Tribunal pouvait lui poser de temps en temps.

[122] Aucun événement, aucun fait, aucun geste ne permet au Tribunal de conclure qu'il n'en a pas été ainsi. Le Contrôleur s'est très bien déchargé de ses responsabilités dans le cadre de l'Ordonnance SISP et des Procédures SISP.

[123] De plus, vu sa connaissance approfondie du dossier, il est définitivement approprié que le Contrôleur puisse jouer un rôle actif dans la mise en œuvre de certaines des étapes de la transaction prévue dans l'offre Orion/IQ/Pallinghurst.

[124] Cela facilitera et permettra un dénouement plus rapide, et le Tribunal l'approuve.

6. CONCLUSION ET JUGEMENT EXÉCUTOIRE NONBSTANT APPEL

[125] Le Tribunal accueillera donc la Demande pour ODI suivant ses conclusions et suivant le projet qui lui a été soumis à cette fin.

[126] Aussi, et tel que mentionné à plusieurs reprises ci-haut, il est urgent que l'Offre Orion/IQ/Pallinghurst soit approuvée et mise en œuvre dans les meilleurs délais, les Offrants n'ayant pas à subir davantage des délais que le Tribunal considère injustifiés dans les présentes circonstances.

[127] En plus de nuire aux Offrants, tout délai additionnel nuit aux Débitrices, à leurs employés et fournisseurs, à leurs créanciers, à la Communauté Cree et aux économies des régions affectés par cette situation.

[128] Par conséquent, le présent jugement et l'ordonnance de «dévolution inversée» qui y est jointe seront exécutoires immédiatement nonobstant appel et sans qu'il soit nécessaire de fournir quelque caution que ce soit.

POUR CES MOTIFS, LE TRIBUNAL :

[129] **ACCUEILLE** l'«Application Seeking Leave to Enter into the Orion/IQ/Pallinghurst Transaction with Issuance of an Approval and Vesting Order and Ancillary Relief» des Débitrices;

[130] **REJETTE** la «Re-Modified and Restated Contestation of Nemaska's Approval Application» du Créancier Cantore;

[131] **REND** l'ordonnance de «dévolution inversée» jointe au présent jugement et intitulée «Approval and Vesting Order»;

[132] **DÉCLARE** le présent jugement et ladite ordonnance de «dévolution inversée» sont exécutoires immédiatement nonobstant appel et sans qu'il soit nécessaire de fournir quelque caution que ce soit;

[133] **LE TOUT** avec les frais de justice.

_____

LOUIS J. GOUIN, J.C.S.

Mes Patrick Boucher, Gabriel Faure, Gabrielle Groulx-Maurer, Karine Joizil, Pascale Klees-Themens, Alain Tardif et François Alexandre Toupin
McCarthy Tétrault
Procureurs des Débitrices

Mes Jean Fontaine et Nathalie Nouvet
Stikeman Elliott
Procureurs du Contrôleur

Me Dimitri Maniatis
Accent Legal inc.
Procureur de Victor Cantore

Mes David Bish, Marie-Ève Gingras et Christopher Richter
Torys
Procureurs de Orion

Me Luc Morin
Norton Rose Fulbright
Procureurs de Investissement Québec

Mes Denis Ferland et Hannah Toledano
Davies Ward Phillips & Vineberg
Procureurs de Pallinghurst

500-11-057716-199

Mes François D. Gagnon et Kevin Mailloux
Borden Ladner Gervais
Procureurs de FMC Lithium USA Corp.

Mes Puya Fesharaki et Robert Thornton
TGF
Procureurs de Brian Shenker

Dates d’audition : 21, 24, 25 et 28 septembre et 1, 2, 6, 7 et 8 octobre 2020

C A N A D A
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-11-057716-199

S U P E R I O R C O U R T
C O M M E R C I A L D I V I S I O N

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT OF:

NEMASKA LITHIUM INC.

NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC.

NEMASKA LITHIUM P1P INC.

NEMASKA LITHIUM WHABOUCHI MINE INC.

NEMASKA LITHIUM INNOVATION INC.

Debtors

and

PRICEWATERHOUSECOOPERS INC.

Monitor

and

VICTOR CANTORE

Objecting Party

RE-MODIFIED AND RESTATED CONTESTATION

OF NEMASKA'S APPROVAL APPLICATION

TO THE HONOURABLE LOUIS J. GOUIN OF THE SUPERIOR COURT OF QUEBEC, SITTING IN COMMERCIAL DIVISION IN THE DISTRICT OF MONTREAL, OBJECTING PARTY RESPECTFULLY SUBMITS THE FOLLOWING:

1. By the present contestation, Objecting Party (sometimes "**Cantore**") seeks an order dismissing Debtors' Application Seeking Leave to Enter into the Orion/IQ/Pallinghurst Transaction with Issuance of an Approval and Vesting Order and Ancillary Relief dated September 9, 2020 (the "**Approval Application**"), or subsidiarily, denying certain orders and relief sought by Debtors in the reverse vesting order, Exhibit P-3 ("**RVO**").

2. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in Cantore's Real Rights Application dated September 3, 2020 (the "**Real Rights Application**"), the Approval Application, (for greater certainty including the Successful Bid (including the Presentation Letter and the Disclosure Letter (Exhibit P-2 and P-2A)), the Plan Approval Application, the Initial Order, the Claims Procedure Order, and the SISP Order, as applicable.

THE OBJECTING PARTY

3. Objecting Party is a significant stakeholder in the present matter.

4. More specifically:

   a. Objecting Party is the holder of the NSR Royalty, which is and confers upon Cantore a limited and qualified direct real right of enjoyment of the Cantore Property, as asserted by Objecting Party in his Real Rights Application.

   b. Objecting Party delivered the following Proofs of Claim to the Monitor in accordance with the Claims Procedure Order, the whole without prejudice or admission of any kind:

      i. A Proof of Claim against Nemaska Lithium Inc. ("**Nemaska**") in the revised amount of $103,995,846 ("**Proof of Claim No. 1**");

      ii. A Proof of Claim against Nemaska Lithium Whabouchi Mine Inc. ("**Nemaska Whabouchi**") in the amount of $103,995,846 ("**Proof of Claim No. 2**");

      iii. A Proof of Claim in respect of a Restructuring Claim against Nemaska in the amount of $86,298,627 ("**Proof of Claim No. 3**");

      iv. A Proof of Claim in respect of a Restructuring Claim against Nemaska Whabouchi in the amount of $86,298,627 ("**Proof of Claim No. 4**"); and

      v. A Proof of Claim against the Directors and Officers in the amount of $86,298,627 ("**Proof of Claim No. 5**");

      (collectively the "**Proofs of Claim**").

   c. Cantore is a shareholder of Nemaska, holding approximately two million common shares thereof.

5. Accordingly, whether through real right(s) in the Cantore Property, a surviving royalty, substantial claims against Nemaska, Nemaska Whabouchi and against the Directors and Officers, or his shareholding in Nemaska, Objecting Party's interests are materially engaged in this matter in a significant way.

6. Moreover, without diminishing the interests and importance of other stakeholders, Objecting Party's interests and claims remain significant from a relative or comparative perspective, as appears from the Monitor's Ninth Report dated August 25, 2020 (the "**Ninth Report**").

7. For instance, while the Claims Process has not been completed, Objecting Party's Proof of Claim in the amount of $103,995,846 represents almost 20% of all creditor claims considered on a consolidated basis, including secured creditor claims, as well as approximately 27% of unsecured creditor claims, as appears from the information set out in page 9 of the Monitor's Ninth Report.

OVERVIEW OF GROUNDS FOR OBJECTION

8. Objecting Party seeks an order dismissing the Approval Application on the basis that the Successful Bid, the Proposed Transaction and/or the RVO, or essential features thereof taken individually or as a whole, *inter alia*:

   a. Contravene, fail to comply with and/or are impermissible under applicable law and court orders, including the SISP Order, the *Companies' Creditors Arrangement Act* ("**CCAA**") and securities legislation;

   b. Are unfair and materially prejudice Objecting Party by reason that, *inter alia*, the Proposed Transaction and RVO purport to effectively terminate the NSR Royalty without any court scrutiny under s. 32 CCAA, purge Objecting Party's real rights, potentially release his claims against the Directors and Officers, release his rights and claims against, and contracts with, Nemaska and Nemaska Whabouchi, including the Agreement and the NSR Royalty, and transfer them to a third party without his consent, and deprive him of the right to vote on a plan of arrangement or compromise in relation to any the foregoing.

   c. Should not be approved under section 36 CCAA (if and to the extent applicable), or otherwise, for such reasons and other grounds more fully set out herein.

9. Indeed, the structure contemplated by the Proposed Transaction implemented through a reverse vesting order is novel, having only been used on a handful of occasions recently, and has not been the subject of any substantive judicial scrutiny as to its compliance with law.

10. Subsidiarily, Objecting Party contests the relief sought by Debtors in specific sections or paragraphs of the RVO identified herein on the basis that such relief contravenes or fails to comply with applicable law or should not otherwise be granted in the circumstances.

DETAILED GROUNDS FOR OBJECTION[1]

The Proposed Transaction and RVO are impermissible under the CCAA

11. The Proposed Transaction is structured in a manner which allows the Debtor entities to emerge from CCAA protection free and clear of their pre-filing obligations and claims without a plan providing for the compromise of such claims being voted on and approved by the requisite majorities of creditors and then sanctioned by the court.

12. This core feature of the Proposed Transaction and RVO deprives creditors of their rights under the CCAA and is legally impermissible thereunder.

13. Under the CCAA, companies cannot, and should not be permitted to, emerge from CCAA protection without a plan in their respect being accepted by creditors and sanctioned by the court.

The Proposed Transaction contravenes the SISP Order

14. The Successful Bid was not, at the time it was made by the Bidders or accepted by Nemaska, and is not, a Sale Proposal contemplated in the SISP Order, nor is it an Investment Proposal.

15. Accordingly, the delivery of the Successful Bid to Nemaska, its qualification as a Qualified Bid, and its acceptance materially contravene the SISP Order, and compromise the integrity of the SISP itself.

The Proposed Transaction and RVO contravene applicable securities laws

16. NMX is reporting issuer in each of the provinces and territories of Canada and its principal regulator is the Autorité des marches financiers.

17. The Proposed Transaction contemplated by the Successful Bid contravenes applicable Canadian securities laws.

18. Section 15.4 of the SISP Order expressly provides as follows:

> For the avoidance of doubt, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the CCAA or any other statute or as otherwise required at law in order to implement a Successful Bid.

19. While the Court can issue orders to fill in gaps in the CCAA, it cannot issue orders which contravene or purport to permit non-compliance with applicable legislation,

[1] Given the applicable litigation schedule in respect of Nemaska's Approval Application, the Plan Approval Application and prevailing and related circumstances, it was impossible for Objecting Party to more fully articulate these grounds herein. Objecting Party reserves the right to elaborate on, supplement or modify these grounds as may be possible and/or warranted.

unless specifically authorised by law to do so.

The releases in favour of the present and former directors and officers of the Debtors pursuant to the Proposed Transaction should not be authorized

20. The Proposed Transaction seeks to grant broad releases in favour of the present and former directors, officers, employees, legal counsel and advisors of the Debtors as appears from, *inter alia*, paragraph 38 of the RVO.

21. Generally, releases are a feature of approved plans of compromise and arrangement under the CCAA and are governed by the terms set out in s. 5.1(1) CCAA.

22. The Proposed Transaction envisions granting releases which are broader than what would be available through a plan (in accordance with s. 5.1(1) CCAA) and moreover purports to grants these releases before a plan of compromise or arrangement is proposed.

23. This approach usurps the key exercise of the right to vote belonging to the creditors under the CCAA and deprives creditors of the opportunity to negotiate and potentially obtain consideration in exchange for these broad releases.

24. In the absence of a plan and seeing as the creditors receive nothing in exchange for the releases, the Court should refuse to sanction the release of the Debtors' directors and officers as part of the RVO, which are unnecessary and unfair and seek to improperly shield the Directors and Officers from liability.

25. Moreover, Objecting Party has asserted claims against the Directors and Officers, has provided notice thereof to all or certain of their liability insurers and such claims should not be released or impaired, particularly in the present context, including where, inter alia, Objecting Party has a pending application before the Court (the "**Application to Vary the Bond Settlement Order**") to access documentation which has been shielded from scrutiny and which is reasonably believed to relate to the acts, omissions and conduct of the Directors and Officers relevant to Objecting Party's claims against them.

The Court should not authorize the transfer of the Excluded Liabilities, the Agreement and/or the NSR Royalty to New ParentCo

26. A component of the Proposed Transaction to be implemented in whole or in part through the RVO is or entails the transfer of, *inter alia*, all Excluded Liabilities to New ParentCo, and the release from such Excluded Liabilities of each of the amalgamated Nemaska Entities.

27. The legal mechanism therefor involves novation, and Nemaska seeks by way of the RVO a declaration and order that "the Excluded Liabilities shall be novated in each case and become obligations of New ParentCo and not obligations of AmalCo2," as more fully appears from paragraph 34(d) of the RVO, Exhibit P-3.

28. However, novation cannot legally be undertaken without creditor consent and Objecting Party respectfully submits that the court does not have the power to order or declare such novation in the absence of a plan duly accepted by creditors and sanctioned by the court, or such consent having otherwise been given by creditors.

29. Objecting Party does not consent to the transfer or novation of the Agreement, the NSR Royalty or any of his claims to New ParentCo, and the consent of other creditors does not appear to have been obtained by Nemaska, which, instead, seeks to simply have the court substitute its authorization to the consent of creditors, in disregard of applicable law.

30. Moreover, it would be otherwise inappropriate to transfer Nemaska and Nemaska Whabouchi's obligations under the Agreement and the NSR Royalty to New ParentCo in the following circumstances:

    a. Debtors originally sought to disclaimer the NSR Royalty pursuant to section 32 CCAA, thereby engaging the Court's oversight in respect of whether the disclaimer should be permitted, only to withdraw their disclaimer notices before such oversight could be undertaken, and presently seek to effectuate substantially the same practical outcome through the Proposed Transaction and the RVO outside of the purview of section 32 CCAA oversight by the Court.

    b. Objecting Party does not consent to the transfer the Agreement and the NSR Royalty to New ParentCo.

    c. New ParentCo will not be able to perform the obligations under the Agreement and the NSR Royalty.

    d. The transfer of the Agreement and the NSR Royalty to New ParentCo is being sought by Debtors before and outside the context of a Plan on which Objecting Party could vote and, if warranted, give consent.

31. Accordingly, the Court should not authorize the transfer of Nemaska and Nemaska Whabouchi's obligations under the Agreement and the NSR Royalty to New ParentCo.

New ParentCo and ResidualCo cannot, at the time they become CCAA parties, avail themselves of the CCAA

32. The Proposed Transaction and RVO require and permit New ParentCo and ResidualCo to obtain CCAA protection.

33. However, at the time thereof, New ParentCo and ResidualCo are shell companies without assets or liabilities.

34. As a result, CCAA protection is not available to them.

The Proposed Transaction is an impermissible disguised substantive consolidation of the estates of the Debtors

35. Independently, and/or considered together with the Plan, the Proposed Transaction operates a substantive consolidation of proceedings and estates among the Nemaska Entities in that, without limitation:

    a. The amalgamation of Debtors to form AmalCo 1, and then to AmalCo 2, while under CCAA protection, effectively consolidates the assets and liabilities of the Nemaska Entities into one corporate patrimony, being that of AmalCo 2.

    b. The Excluded Liabilities and the Excluded Cash, being all of the liabilities and assets of the different Nemaska Entities that are not designated to be assumed by the Purchased Entity, are transferred to a single corporate patrimony, being that of New ParentCo.

    c. Similarly, all the Excluded Assets of the Nemaska Entities are transferred to a single corporation, being ResidualCo.

36. While it is provided that the Excluded Liabilities shall be transferred to New ParentCo "with the same attributes and rights resulting from existing defaults of [Debtors]"[2], this is intended to preserve certain priorities among creditor classes, such as between secured and unsecured creditors, but does not preserve the rights of creditors in respect of distinct Debtor estates against which Claims are asserted pursuant to the Claims Procedure Order, which did not contemplate consolidation and in fact required independent Claims to be filed against each Nemaska Entity.

37. Debtors have not sought or obtained any substantive consolidation order from this Court and have not provided any record justifying same.

38. Moreover, even if the Court were to issue a substantive consolidation order, such consolidation would permit the filing of a consolidated plan by Debtors, not the aggregation of assets and liabilities which the Proposed Transaction effectuates independently of the Plan.

39. Additionally, given that the Secured Claim of Johnson Mathey against Nemaska P1P will be paid from cash on hand belonging to other Nemaska Entities, and over which Johnson Mathey has no security, Objecting Party respectfully submits that this is prejudicial and impermissible and should not be approved in the absence of a substantive consolidation order and a plan in respect of the Debtors that has been accepted by the requisite majority of creditors and sanctioned by the court.

[2] Please see paragraph 34(d) RVO, Exhibit P-3.

There is no authority to grant a vesting order in respect of anything other than a sale or disposition of assets

40. Objecting Party respectfully submits that the Court cannot and should not issue a vesting order or declaration in respect of the assets of AmalCo 1, AmalCo 2 or AmalCo 3, the ownership of which is not being conveyed by the Proposed Transaction.

41. To the extent applicable, s. 36(6) CCAA permits the court to authorize a "sale or disposition" of assets "free and clear of any security, charge or restriction", however, pursuant to the Proposed Transaction, the assets which are subject to the NSR Royalty, being the Cantore Property, are not sold or disposed of and as such a vesting order or declaration in respect of such assets is unavailable under applicable law.

The Proposed Transaction is not fair and reasonable

42. Given the alternatives, Objecting Party respectfully submits that the Proposed Transaction is not in the best interests of Debtors' stakeholders and should not be approved at the present time considering the following circumstances, among others:

    a. The SISP was conducted during lockdown necessitated by the Covid-19 pandemic and at a time when market conditions were not favourable.

    b. Market conditions, which are presently improving, can have a significant impact on financing and other transactions in the mining industry.

    c. […]

    d. A transaction at the present time is not essential. There is sufficient liquidity available to Nemaska to remain on care and maintenance for the foreseeable future and the Proposed Transaction has an Outside Closing Date of December 31, 2020, which itself is an artificial date that can be extended by consent.

    e. The Bidders have not committed to restarting the Project and have no concrete plans to do so.

    f. The Bidders do not appear to be paying any consideration for the tax attributes which they are attempting to acquire through the Proposed Transaction.

Applicant's innominate real right in the Cantore Property cannot or, subsidiarily, should not be extinguished by way of the RVO

43. Objecting Party's real right is a *sui generis* dismemberment of the right of ownership, being a principal real right and not an accessory real right.

44. Objecting Party respectfully submit that the characteristics and attributes of Objecting

Party's rights are such that the Court does not have the power to purge or extinguish such rights.

45. Subsidiarily, even if the Court has the power to purge Objecting Party's real rights in the Cantore Property, it would be unfair and inappropriate to do so when consideration is given to, among other things, the following factors and circumstances:

a. The nature of Objecting Party's rights, titles and interests;

b. Objecting Party does not consent to the extinction of his rights, titles and interests;

c. There is no specific consideration offered to Objecting Party in respect of his rights, titles and interest;

d. The priority and value of Objecting Party's claims and creditor classification is presently undetermined and as such his ultimate treatment unclear and unknown;

e. The meagre dividend distribution which will possibly be made to unsecured creditors will provide inadequate and unreasonable compensation to Objecting Party, to the extent he is treated as an unsecured creditor, despite having valuable real property rights in respect of the NSR Royalty;

f. Under the transaction structure of the Proposed Transaction, ownership of the Cantore Property is not actually conveyed or transferred.

g. The significant prejudice which would be caused to Objecting Party and his family;

h. The negligible impact of the NSR Royalty on the economics of the Project, the valuation thereof and the prospects of a viable compromise being made in respect of Debtors;

i. […] The Proposed Transaction is not conditional on the extinction of Objecting Party's rights, titles and interests in respect of the NSR Royalty. The purging of his real rights is entirely unnecessary and would only benefit Bidders and would not provide any benefit to Debtor's stakeholders, or, if any financial benefit exists, which is denied, it is *de minimis* or far outweighed by the serious prejudice caused to Objecting Party.[3]

[3] The Court has denied Objecting Party's requests to obtain disclosure of the unredacted Successful Bid (Exhibit P-2) and Disclosure Letter (P-2A) and as such the amount of the Litigation Funds remains unknown to Objecting Party. As a result, Objecting Party is unable to know or make evidence of the extent of any prejudice which may be caused to Nemaska's creditors if the Court does not purge or otherwise extinguish the NSR Royalty. This coupled with the fact that Nemaska has produced into evidence an unredacted

j. The conduct of Debtors in respect of Objecting Party and his NSR Royalty; and

k. The factors and circumstances set out elsewhere herein.

46. Accordingly, Objecting Party respectfully submits that the Court should not extinguish or purge Objecting Party's rights and interests in respect of the NSR Royalty, even if the Court determines that it has the power and authority to do so.

It is unnecessary and inappropriate for the Court to declare that the Purchase and Sale Transactions shall be deemed to constitute and shall have the same effect as a sale by judicial authority and a forced sale

47. Paragraph 31 of the RVO would have the Court declare that the Purchase and Sale Transactions shall be deemed to constitute and shall have the same effect as a sale by judicial authority under the CCP and a forced sale as per the CCP.

48. However, the foregoing is only required in appropriate cases when the sale is done by a receiver.

49. Additionally, given that the Purchase and Sale Transactions are not in the nature of a transaction in which the Business or Property of the Nemaska Entities are sold, transferred or conveyed to the Successful Bidder, the framework of a sale by judicial authority and a forced sale cannot and should not be made to apply thereto.

50. Subsidiarily, not all of the Purchase and Sale Transactions should be submitted to the framework governing sales by judicial authority and forced sales, which should be made to apply only to those aspects thereof in which ownership of Property is transferred to the Purchasers, being the sale of the Purchased Shares.

51. In any event, to the extent that Objecting Party is found to have a *sui generis* real right in the Cantore Property, it would be inappropriate to render paragraph 31 given that same might be said to discharge all real rights in the Cantore Property (to the extent paragraph 31 would operate in this manner) to the extent provided for in the CCP, although this is unclear.

52. Innominate dismemberments of ownership are by their nature *sui generis* and as such are not (and could not have been) set out in Article 759 CCP, which means that if the sale were to proceed or be deemed to proceed by judicial authority, Objecting Party's real rights might possibly be purged from title, assuming Objecting Party is found to have real rights which are opposable to third parties.

53. The regime governing sales by judicial authority does not expressly address how such a innominate real rights would be collocated to the proceeds of sale, and neither does the Plan proposed by Nemaska provide for any collocation in favour of the

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version of P-2 and P-2A, despite Objecting Party's objections, impairs Objecting Party's right to make a full and complete defence to the Approval Application.

holder of a *sui generis* real right.

54. This factor, being the treatment of Objecting Party in the context of the purge and extinction of his real rights, should be known and considered by the Court before and in connection with any determination to purge his real rights.

The Successful Bid's requirement that the Debtors and Monitor shall use commercially reasonable efforts to obtain the RVO and therein a declaration that the Whabouchi mine is conveyed free and clear of all encumbrances, including Objecting Party's rights, compromises the integrity of the SISP

55. The Successful Bid specifically provides that the Debtors and the Monitor shall use their commercially reasonable efforts to obtain the RVO and therein a declaration that the Whabouchi mine is conveyed free and clear of all encumbrances, including Objecting Party's claims and rights, as more fully appears from paragraph 42 of the Monitor's Tenth Report and from the Successful Bid, Exhibit P-2.

56. In the context of a court supervised SISP and restructuring under the CCAA, the foregoing requirement, the consequences thereof and related stipulations in the Successful Bid, operate to fatally compromise the Monitor's independence and/or the perception thereof and the SISP and, on their own, require the dismissal of the Approval Application.

The requirement that the Monitor act on behalf and in the name of New ParentCo and ResidualCo is impermissible

57. Similarly, the requirement at paragraph 35(b) of the RVO that the Monitor shall be authorised to act on behalf and in the name of ResidualCo and New ParentCo, while the RVO immunizes the Monitor (and all corporate affiliates of PWC) from any liability, improperly conflates the role of the Monitor with that of the CCAA debtor and should not be authorized.

58. While a trustee in bankruptcy properly acts for bankrupt debtors, the fundamental difference between the insolvency regimes applicable to debtors-in-possession under the CCAA and the bankruptcy regime under the BIA make it such that it is inappropriate for CCAA Monitor's to act for CAA debtors.

The Court cannot or, subsidiarily, should not render the RVO executory notwithstanding appeal

59. Objecting Party respectfully submits that the RVO should not be ordered executory notwithstanding appeal in the prevailing circumstances.

CONCLUSIONS

60. The Proposed Transaction is an extremely complex set of transactions implemented by way of an untested and novel court order which materially impacts the rights and interests of stakeholders.

61. Whatever the perceived advantage for certain parties, the Proposed Transaction and/or the RVO, or essential features thereof taken individually or as a whole, must comply with law and be fair and reasonable in the circumstances for the Court to approve the Proposed Transaction and issue the RVO.

62. Objecting Party respectfully submits that the Proposed Transaction and/or RVO, or essential features thereof taken individually or as a whole, fail to comply with such requirements and are unfair and accordingly, Nemaska's Approval Application should properly be denied.

STIPULATION OF RESPECTFUL OBJECTION AND RESERVATION OF RIGHTS

63. Objecting Party has respectfully objected to and sought a postponement of the hearing schedule determined by the Court and applicable to Nemaska's Approval Application on the grounds that, *inter alia*, the schedule, including the notice of hearing, operate a denial of his fundamental right to a fair hearing before an independent and impartial tribunal.

64. Objecting Party has therefore delivered this Contestation and is otherwise participating in the contestation and hearing of Nemaska's Approval Application and Plan Approval Application under respectful protest and objection and such participation, including the delivery of the present Contestation, and any subsequent proceedings, requests or conduct, should not be construed as a waiver of his continuing objections and requests for a postponement and revision of the schedule, which are hereby reiterated.

65. The foregoing is respectfully submitted for the sole purpose of this Contestation, without prejudice to the rights, recourses and remedies of Objecting Party, and without admission of any kind.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present Contestation;

DISMISS the Debtors' Approval Application;

SUBSIDIARILY DENY the relief set out in the sections or paragraphs of the RVO related to the grounds of opposition set out above.

THE WHOLE WITH COSTS.

Westmount, this 30rd day of September 2020

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N°: 500-11-057716-199

SUPERIOR COURT
COMMERCIAL DIVISION
DISTRICT OF MONTREAL

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT OF:

NEMASKA LITHIUM INC.

NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC.
NEMASKA LITHIUM P1P INC.
NEMASKA LITHIUM WHABOUCHI MINE INC.
NEMASKA LITHIUM INNOVATION INC.
Debtors

and

PRICEWATERHOUSECOOPERS INC.
Monitor

and

VICTOR CANTORE
Objecting Party

RE-MODIFIED AND RESTATED CONTESTATION OF NEMASKA' APPLICATION SEEKING LEAVE TO ENTER INTO THE TRANSACTION WITH ISSUANCE OF AN APPROVAL AND VESTING ORDER AND ANCILLARY RELIEF

ORIGINAL

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🗁:1017-001 BA1425

Court File No. CV-23-00707394-00CL

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 TACORA RESOURCES INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

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