Court File No. CL-00000219-0000

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 NUNAVUT IRON ORE, INC., BAFFINLAND IRON MINES CORPORATION AND 12334992 CANADA INC.

BOOK OF AUTHORITIES OF OAKTREE CAPITAL MANAGEMENT, L.P AND HARTREE PARTNERS, LP

June 9, 2026

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Court File No. CL-00000219-0000

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 NUNAVUT IRON ORE, INC., BAFFINLAND IRON MINES CORPORATION AND 12334992 CANADA INC.

BOOK OF AUTHORITIES OF
OAKTREE CAPITAL MANAGEMENT, L.P AND HARTREE PARTNERS, LP

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TAB 1

CITATION: Essar Steel Algoma Inc. et al Re, 2017 ONSC 3331
COURT FILE NO.: CV-15-11169-00CL
DATE: 20170530

SUPERIOR COURT OF JUSTICE – ONTARIO
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 ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY, AND ESSAR STEEL ALGOMA INC. USA

BEFORE: Newbould J.

COUNSEL: *Ashley Taylor and Lee Nicholson*, for the Applicants

Clifton Prophet and Nicholas Kluge, for the Monitor

Max Starnino and Debra McKenna, for USW and its Local 2724

Lou Brzezinski and Alexandra Teodorescu, for USW Local 2251

Susan Ursel, for the Retirees

Peter Griffin, for GIP Primus, LP and Brightwood Loan Services LLC

L. Joseph Latham, for the Ad Hoc Committee of Essar Algoma Noteholders

John MacDonald, for the Term and DIP Lenders

Tony Reys, for the board of directors of Essar Steel Algoma Inc.

Jeremy Nemers, for the City of Sault Ste. Marie

D. Magisano, ICICI Bank Canada

HEARD: May 23, 2017

ENDORSEMENT

[1] The Applicants ("Algoma") move (i) for the approval of a DIP extension agreement with the current DIP lenders for a DIP loan that expired on April 30, 2017 and (ii) for the appointment of a restructuring committee. The motions are supported by the Monitor, the ad hoc committee of the Algoma noteholders and the DIP lenders. They are opposed by the USW and its locals, the retirees and GIP.

DIP motion

[2] The original DIP facility provided for in the Initial Order provided a US$200 million loan from some of Algoma's prepetition term lenders (the "DIP lenders"). The DIP facility was secured by a charge of most of Algoma's property ranking third after the Administration charge and a critical suppliers charge. All of the charges ordered in the Initial Order rank ahead of all other secured charges.

[3] The Applicants developed a two phase sale and investment solicitation process to solicit interest in a sale, restructuring or recapitalization of their business. At the Phase II bid deadline, a bid between certain of the applicants' prepetition term lenders (the "Term Lenders") and KPS Capital Partners, LP was the only bid received. However, on July 13, 2016, Algoma was advised by the Term Lenders that KPS and the Term Lenders had agreed to terminate the Consortium Agreement governing the terms of their bid.

[4] On September 15, 2016, approximately 77.4% of the Term Lenders and approximately 72.6% of the beneficial holders of Algoma's outstanding 9.5% Senior Notes (together, the "Participating Lenders") entered into a Restructuring Support Agreement pursuant to which they agreed to complete the sale transaction, which contemplates an equity injection of up to US$200 million, an exit term loan facility of US$100 million and a third party ABL facility of US$125 million or greater. The DIP lenders are comprised of a number of financial institutions or hedge funds. Many are also Term Lenders. While the exact identity and make-up of the Term Lenders and of the DIP lenders has not been disclosed in the record, it is generally accepted that a substantial number of the DIP lenders are also Term Lenders to Algoma.

[5] The DIP facility was to mature on September 30, 2016. Algoma was unable to complete a restructuring prior to the maturity date of the DIP facility and accordingly entered into an amendment to the DIP facility, which was approved by the Court, to obtain a net increase in the amount of funding available to the Applicants of US$20 million to extend the maturity date to January 31, 2017. The increase in funding was necessary as Algoma needs to accumulate inventory in the fall of each year to ensure it has sufficient inventory levels to sustain operations for the months of January to March the following year, which process is known as the winter build. Algoma subsequently obtained a Court approved further extension of the maturity date of the DIP facility to March 31, 2017, that was later extended to April 30, 2017 on consent of the DIP lenders.

[6] Prior to the maturity of the DIP facility on April 30, 2017, Algoma, with the assistance of Evercore and under the supervision of the Monitor, commenced a DIP solicitation process. Algoma received three DIP financing proposals following the solicitation, including an initial proposal from the DIP lenders. One potential lender chose not to pursue its proposal further once Algoma indicated that certain terms of their DIP financing proposal were unacceptable. That left two proposals for the new DIP, one from the existing DIP lenders and one from an alternative source.

[7] On April 28, 2017, I made an endorsement requiring the Monitor and Algoma to file a confidential report on the status of the DIP solicitation process. On May 1, 2017, an oral report from the Monitor and Algoma was made and a further endorsement was made stating that Algoma was not to sign any DIP financing agreement pending further direction of the Court.

[8] I have received a confidential report from the Monitor setting out the two DIP proposals, one from the current DIP lenders whose loan expired on April 30, 2017 and one from a new alternative DIP lender. A copy of the confidential report has been made available to any party who has signed a confidentiality agreement. Counsel for the USW has in that way obtained a copy of the confidential report.

[9] After evaluating the proposals received, Algoma, in consultation with the CRA, Evercore, and the Monitor, made a determination that the proposal of the current DIP lenders was the superior proposal. This proposal, which would constitute the fourth DIP amendment, provides for an

extension of the maturity date of the DIP loan to August 30, 2017, with a further automatic extension to September 29, 2017 if certain repayments are made.

[10] Section 11.2(1) of the CCAA provides a court with the jurisdiction to order a DIP loan secured by the debtor's property. Section 11.2(4) directs a court to consider, among other things, a number of factors.

[11] It is acknowledged by Algoma and the Monitor that the decision as to the competing DIP proposals was not an easy one. It is clear that there are pluses and minuses of each.

[12] The current DIP lenders proposal is for a short period of time. It will extend the maturity of the DIP loan, currently at approximately $164 million, to August 31, 2017 with an automatic extension to September 30, 2017 if Algoma makes cumulative principal prepayments equal to or greater than US$35 million between May 1, 2017 and August 31, 2017, or if otherwise consented to by 60% of the DIP Lenders. The alternative DIP proposal is for a term loan of up to $175 million with a maturity date of January 31, 2017.

[13] The current DIP lenders proposal calls for substantially less fees than the alternative proposal.

[14] The current DIP lenders proposal removes the milestone that required Algoma to achieve annualized costs savings that were expected to result from reduced compensation terms for Algoma's unionized employees and removes the weekly cash sweep following repayments of the DIP loan of US$40 million.

[15] The alternative DIP proposal contains a condition that only a minimal amount will be released to Algoma with the balance to be placed in trust to be released after the appeal period for the DIP expires.

[16] Mr. Strek of the CRA says that the most significant advantages of the DIP arrangements set out in the current DIP lenders proposal, as compared to the arrangements proposed by the alternative DIP loan, relate to the lower transaction fees required under the current DIP lenders

proposal and the avoidance of the uncertainty created by the refusal of the alternative DIP lender to fully fund DIP advances to Algoma until after the expiry of relevant appeal periods.

[17] In connection with the latter issue, Mr. Strek in his affidavit said that the Applicants were concerned regarding the direction the CCAA proceedings might take if the alternative DIP proposal were selected. The Applicants were concerned that the DIP Lenders would oppose any replacement DIP financing that primed their prepetition term loans.

[18] This issue arises because the DIP lenders are comprised of various financial institutions or hedge funds that are also Term Lenders to Algoma. The exact make-up of the DIP lenders and the Term Lenders has never been revealed, but it is believed that a large percentage of each are common. In this regard, there is no basis for the identity of the DIP lenders and the Term Lenders being kept from the parties and an order I make is that the identity of the DIP and Term Lenders and their percentage of the DIP and Term Loans be disclosed to the Monitor and, subject to any proper reason for their not being disclosed, be disclosed to those on the service list who request the information.

[19] I have concerns that the DIP lenders are imposing terms to assist their position as Term Lenders who are party to the Restructuring Agreement. Possible litigation has been discussed with counsel for Algoma by counsel for the DIP lenders and Term Lenders, and Mr. Macdonald candidly said during argument that it is not surprising to anyone that the Term Lenders would not "roll over" with another DIP lender. Whether it can be said that the DIP lenders and the Term Lenders are in conflict, I am concerned in this proceeding that their interests are now too closely aligned with what has been proposed and that the provision of DIP lending is now being too negatively affected.

[20] The problem with acceding to this litigation threat is that the current DIP lenders are agreeable to extending the DIP facility only to the end of August or September of this year. That means that the funding for the winter material build-up that will be necessary before the northern freeze would have to be financed by a further DIP loan. I have considerable concern that the current DIP lenders would have material leverage to exact large fees for any further extension and an increase of their DIP loan and the current lower fee proposed by them might be short lived. The

current DIP lenders have not shied in the past from extracting heavy fees, even for short extensions of their DIP loan. No doubt the appearance of a competing DIP proposal has affected their extension fee attached to their proposal, but there is no assurance at all that in September a competing proposal for a DIP loan will be forthcoming. Counsel for Algoma said that it is hoped that with a smaller DIP loan of say $125 million that other DIP lenders will be interested, but there is no evidence before me that such a hope is or is not realistic.

[21] I also have a concern that the Term Lenders in September will have the same reason to threaten or bring litigation if another DIP lender is chosen as they now claim to have to threaten such action. Mr. Starnino asserted in argument that the litigation concern will still be there in September and it is better to deal with it now than when the winter build-up becomes crucial. I think there is much in that.

[22] I frankly do not see litigation risk at this stage to be all that great to accede to the threat of the Term Lenders /DIP lenders and accept their short term DIP extension proposal. Leave to appeal must be quickly sought from the Court of Appeal and without in any way assuming what the Court of Appeal would do, it is well known that leave to appeal from a discretionary decision of a CCAA judge is not an easy matter. So far as the alternative DIP proposal is concerned, I think the litigation risk has been given too much prominence. Even if leave to appeal were granted, it is difficult to think that any decision of an appellate court to reverse a decision to approve their DIP proposal would not include an order that any replacement DIP lender would have to reimburse the alternative DIP lender for their advances on the DIP loan.

[23] Now that the Restructuring Support Agreement has been reached, what has prevented a successful conclusion of the proceeding is a failure of the Participating Lenders, the buyers, and the USW to come to an agreement on labour terms and conditions in spite of the appointment of the Honourable Warren Winkler as a mediator. No doubt each side would say the other is to blame. It is argued that the short term for the extension proposed by the current DIP lenders is motivated by a need to have this CCAA proceeding end as soon as possible. If what is meant by this statement is that the short term will put pressure on the parties to come to an agreement on labour terms and conditions, that has not worked to date. There have been earlier short term extensions of the DIP loan that has not resulted in a settlement of labour issues.

[24] In all of the circumstances, and taking into account the factors in section 11.2(4) of the CCAA, I am not prepared to approve the proposed extension of the current DIP loan. I am not at all satisfied that the proposed extension would enhance the prospects of a viable and reasonable outcome of this CCAA proceeding. I have not overlooked the support for this motion by the Monitor, the CRA, Evercore and the ad hoc committee of the Algoma noteholders. The motion to approve the proposed DIP extension with its terms is dismissed. Any attempts by the current DIP lenders to take steps under their DIP security is of course stayed pending any further order of this Court.

Appointment of Restructuring Committee

[25] The Applicants have also brought a motion to appoint a Restructuring Committee to oversee and direct Algoma's restructuring efforts. In its factum, Algoma says that the Restructuring Committee would act as its independent guiding mind. It is proposed that the members of the Restructuring Committee will be Kalyan Ghosh, the CEO of Algoma, and two independent members being Andrew Schultz and Courtney Pratt. These two independent members have extensive experience in restructuring and turnaround situations and in acting as independent directors of corporations.

[26] The motion is supported by the Monitor. It is also supported by the Term Lenders and the DIP lenders, although their interest in the motion is not apparent. The motion is opposed by the USW and its two locals and by the Retirees.

[27] Due to a prior order in this CCAA proceeding made on July 19, 2016, no confidential information is being given to the special committee of the board of directors of Algoma. Since then, no meetings of the audit committee have been held. Algoma also decided to cease holding board meetings or meetings of the special committee and to stop paying fees to the members.

[28] Algoma is not proposing to appoint the members of the Restructuring Committee to its board of directors. Thus they will have no governance authority. It is said however that the establishment of the Restructuring Committee would restore a more typical governance structure

to Algoma's decision making process to ensure that informed and prudent decisions are being made by Algoma through this part of the CCAA proceedings.

[29] I have considerable difficulty with the request for a Restructuring Committee. Algoma has had a Chief Restructuring Advisor, CDG Group, from the outset of this CCAA proceeding. Mr. Strek was the person from CDG that fulfilled that role until last month when on April 17, 2017 Robert Del Genio, the managing member of CDG, was added to the team and the CDG monthly fees were increased from US$125,000 to US$200,000.

[30] There would be considerable overlap of the duties of the Chief Restructuring Advisor and the Restructuring Committee. Included in the proposed duties of the Restructuring Committee are (i) analyzing and considering all alternatives that may be available to Algoma to successfully complete the restructuring and emerge from the CCAA proceedings as a going concern; (ii) establishing and overseeing such processes and work plans as it considers appropriate to effect the restructuring; and (iii) overseeing discussions and negotiations with Algoma's creditors, unions, retirees and other stakeholders.

[31] A restructuring advisor is to advise on restructuring. The responsibilities of the Chief Restructuring Advisor in this case include the obligation to work collaboratively with the senior management and other Algoma professionals in evaluating and implementing strategic and tactical options through the restructuring process and to perform a number of management services including performing due diligence on Algoma, assist Algoma's management with any reporting to or negotiations with stakeholders, including the unions, customers, suppliers and the court approved representative counsel for the retirees.

[32] I do not see how the proposed Restructuring Committee will alleviate work of management, particularly as Mr. Ghosh, the CEO of Algoma, will be on the committee. A Restructuring Committee will just add another layer of advisors that would be in a position to second guess the Chief Restructuring Advisor without any responsibilities or powers of a board of directors. It makes little or no sense to create another body of restructuring advisors that will likely create disruption.

[33] The problems at Algoma with the restructuring are mainly the inability of the Participating Lenders under the Restructuring Support Agreement to come to terms with the USW and local 2251. Why that has occurred is something the Court is not privy to. I fail to see, however, that adding another layer of restructuring advisors will do much to resolve the labour negotiations. The resolution lies in the hands of the Participating Lenders, working with management of Algoma, and the USW and its local 2251.

[34] In the circumstances, the motion to appoint a Restructuring Committee is dismissed.

Newbould J.

Date: May 30, 2017

TAB 2

CITATION: Hudson's Bay Company, Re, 2025 ONSC 1897
COURT FILE NO.: CV-25-00738613-00CL
DATE: 20250329

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 **HUDSON'S BAY COMPANY** ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC., Applicants

BEFORE: Peter J. Osborne J.

COUNSEL: *Ashley Taylor, Elizabeth Pillon, Maria Konyukhova, Britnney Ketwaroo, Philip Yang and Nick Avis*, for the Applicants
Davis Bish, for Cadillac Fairview
Evan Cobb, for Bank of America
Linc Rogers and Caitlin McIntyre for Restore Capital LLC
Chad Kopach, for EY in the Receivership of Woodbine Mall Holdings Inc.
Lou Brzezinski, Alexandra Teodorescu and Nadav Amar, for TK Elevator (Canada) Ltd.
Haddon Murray, for Cominar Real Estate Investment Trust & Chanel ULC
Matthew Gottlieb, Andrew Winton and Annecy Pang, for KingSett Capital Inc.
Sean Zweig, Michael Shakra and Thomas Gray, for the Court-appointed Monitor
Trevor Courtis and Heather Meredith, for Bank of Montreal and Desjardins Financial Security Life Assurance Company
Gilles Benchaya and Mandy Wu, for Restore Capital LLC and Bank of America
James D. Bunting, for Ivanhoe Cambridge Inc.
Robert J. Chadwick, Joseph Pasquariello and Andrew Harmes, for RioCan Real Estate Investment Trust
Tushara Weerasooriya, Jeffrey Levine and Guneev Bhinder, for B.H. Multi Com Corporation, B.H. Multi Color Corporation & Richline Group Canada Inc.
Gregg Galardi, US Counsel for File Agent (Restore Capital LLC) as DIP Lender
Isaac Belland, for LVMH Moet Hennessy Louis Vuitton SA
Jake Harris, for the DIP Lenders
Matthew Cressatti, for the Trustees of the Congregation of Knox's Church, Toronto

D.J. Miller and Andrew Nesbitt, for Oxford Properties Group, OMERS Realty Management Corporation, Yorkdale Shopping Centre Holdings Inc., Scarborough Town Centre Holdings Inc., Montez Hillcrest Inc., Hillcrest Holdings Inc., Kingsway Garden Holdings Inc. Oxford Properties Retail Holdings Inc., Oxford Properties Retail Holdings II Inc., OMERS Realty Corporation, Oxford Properties Retail Limited Partnership, CPPIB Upper Canada Mall Inc., CPP Investment Board Read Estate Holdings Inc.
Calvin Horsten, for Toronto-Dominion Bank
Stuart Brotman and Jennifer L. Caruso, for Royal Bank of Canada
George Benchetrit, for Nike Retail Services Inc. and PVH Canada Inc.
Linda Galessiere, for Ivanhoe Cambridge II Inc./Jones Lang LaSalle Incorporation, Morguard Investments Limited and Salthill Property Managements Inc.
Steven Weisz and Dilina Lallani, for Ferragamo Canada Inc.
David Ullman and Brendan Jones, for Bentall Green Oak, Primaris REIT, Quadreal Property Group
David Preger and Stephen Posen, for 100 Metropolitan Portfolio, Mantella & Sons
Shayne Kukulowicz and Monique Sassi, for the Proposed Liquidator
Andrew J. Hatnay, Robert Drake and Abir Shamim, for certain HBC Employees and Retirees
Ken Rosenberg, Max Starnino, Emily Lawrence and Evan Snyder, for The Financial Services Regulatory Authority of Ontario
Sam Rogers, for Investment Management Corporation of Ontario
Kelly Smith Wayland, for the Department of Justice (Canada)
Blake Scott, for UNIFOR Local 240 & 40
Howard Manis for Villeroy & Boch Tableware Ltd.
Mitch Koczerginski for Cherry Lane Shopping Centre Holdings Inc. and TBC Nominee Inc.
Lindsay Miller, for West Edmonton Mall Property
Yiwei Jin, for United Food & Commercial Workers, Int'l Union Local 1006A
David Rosenblat, for Pathlight
Pavle Masic, for Samsonite Canada
Sarah Pinsonnault, for Québec Revenue Agency

HEARD: March 26 & 27, 2025

ENDORSEMENT

OSBORNE J.

1. At the hearing in this matter on March 21, 2025, the Applicants sought approval of a Restructuring Support Agreement ("RSS") between and among the Loan Parties, the ABL Agent, the FILO Agent and the Term Loan Agent. Numerous stakeholders, and particularly various

landlords with which the Company has leases, advised that they intended to oppose the RSS but requested an adjournment of the motion.

2. Since the draft RSS had been served on the Service List just prior to the commencement of the hearing, stakeholders had not had any reasonable opportunity to review it and consider their position, with the result that I adjourned the approval motion until Wednesday of this week.

3. As set out in the Affidavit of Philip Yang sworn March 26, 2025 on which the Applicants rely, the Applicants had engaged with their pre-filing lenders (the "Lenders") and landlords in the intervening period in an attempt to find common ground.

4. The Applicants, the ABL Agent, the FILO Agent and the Term Loan Agent entered into a restructuring framework agreement on March 25, 2025 (the "RFA"), which is effectively an updated and amended version of the RSS which the Applicants hoped would address many of the concerns expressed by stakeholders.

5. On this motion, the Applicants seek approval of the RFA. That position is strongly supported by the Pre-Filing Lenders (and particularly Restore Capital, LLC, the FILO Agent, and Pathlight) and is recommended by the Monitor. Approval is still opposed, however, by a number of stakeholders and principally the landlords.

6. As I observed in my Endorsement dated March 26, 2025, the Applicants submit that the RFA will allow the Company to continue to use its cash and inventory which is subject to the security of the Lenders. Distilled to its core, the argument is that the collateral for the indebtedness owing to the secured lenders is the very inventory now being sold to generate liquidity. While that liquidity is accretive to a successful restructuring, it results from the corresponding erosion of the security for the outstanding secured debt of the Company.

7. However, the landlords submit that there are no benefits to the Applicants derived from the RFA, and particularly no benefits that justify the onerous terms and obligations of the Applicants in the RFA given that DIP financing is no longer required.

8. The motion was heard on Wednesday and Thursday of this week. In the circumstances, it is critical that this decision be released as soon as possible and accordingly, it is somewhat summary in nature.

9. Defined terms in this Endorsement have the meaning given to them in my earlier Endorsements made in this proceeding, the motion materials and/or the Reports of the Monitor, unless otherwise stated.

10. For the reasons that follow, I decline to approve the RFA and the motion is dismissed.

11. The RFA has been provided in full and unredacted form to stakeholders, and is in the motion record. Accordingly, I need not summarize the entire RFA here.

12. In the main, it provides that the Lenders, who assert that they have priority ranking security interests in the merchandise in inventory at Hudson's Bay, will consent to the continued sale of that merchandise, but only in accordance with the terms of the RFA.

13. The Applicants, the Lenders and the Monitor candidly acknowledge that the RFA is "not perfect" and represents a negotiated solution to a significant disagreement about an important issue (the sale of merchandise that constitutes collateral to the Lenders).

14. They submit that it avoids ongoing conflict with those Lenders and this in turn will increase much-needed stability and predictability during a crucial period of this restructuring. They characterize the RFA as a positive step because it permits the ongoing liquidation sale that I approved last week to continue, but imposes various "guardrails" within which the Company must operate if it is to have the confidence of the Lenders.

15. I accept that there are positive attributes to the proposed RFA. It would require Hudson's Bay to comply with an agreed-upon Budget, subject to Permitted Variances (effectively a tolerance of up to 15%). Compliance with the Budget would, the Lenders submit, "ensure that funds are spent in a responsible manner, cognizant of all the circumstances of the case", and approval of the RFA would avoid "uncertainty, instability, cost and value destruction inherent in a contested *CCAA* process."

16. I also acknowledge that counsel for the Lenders confirmed on the second day of the hearing of these motions that in response to concerns expressed by the Court, the Lenders were agreed that section 12 of the proposed RFA should be amended to further extend the deadline by which, if the Loan Parties have not received a firm commitment in respect of a Permitted Restructuring Transaction in connection with the Excluded Stores from April 7 to April 30. That would align the dates with the deadlines provided in the SISP Order.

17. However, in my view, on balance, the RFA is neither necessary nor appropriate at this time for a number of reasons, including these:

a. as submitted by a number of the landlords, and as acknowledged in candour by the Lenders, the object and structure of the proposed RFA generally are consistent with what would typically accompany a DIP financing commitment.

   With the relatively modest interim DIP Facility approved in the Initial Order now having been repaid, and in the absence of any further commitment by the Lenders to provide DIP financing on terms agreed by the Applicants, I am not persuaded that it is appropriate in the circumstances of this case to grant these rights and protections to the Lenders, and to the exclusion of other stakeholders;

b. I acknowledge that, as submitted by the Lenders, the Company requires the continued use of collateral to pursue the ongoing liquidation sales and to permit the possibility of a restructuring transaction, including by way of the SISP and Lease Monetization Process.

However, it is not unusual in CCAA proceedings that assets of the debtor, including assets in which secured creditors assert a security interest and even a first ranking security interest, may, as appropriate in the particular circumstances of any given case and under the auspices of the Court-appointed Monitor and pursuant to Court order, sell, dispose of or encumber those assets.

Those secured creditors are not automatically entitled to a veto over the sale of such collateralized assets, and nor are they entitled to unilaterally impose terms on the sale of such assets. Such terms may be imposed if the Court considers that they are necessary and appropriate. I am not so persuaded here;

c. the proposed RFA would provide that the Company shall use its cash solely for the list of enumerated purposes and in the enumerated sequence set out in the RFA.

It would also provide that weekly variance reporting is required to be made by the Company to the Lenders (through their agent) as well as to the Monitor, essentially comparing actual receipts and disbursements as against the Budget (see more on the Budget below) and setting out all variances "on a line-item and aggregate basis in comparison to the [corresponding] amounts in the Budget; each such variance report to be promptly discussed with the [lenders] and each such variance report to include reasonably detailed explanations for any material variances".

In my view, it is the role of the Monitor, and one I expect the Monitor here to fulfil, to ensure that cash and other liquid assets of the Company are used only for appropriate purposes, in a manner accretive to the maximization of value in the *CCAA* proceeding, and in accordance with the terms of any relevant Court orders.

In this case, and at this time, that should be sufficient to give the Lenders comfort about the manner in which assets, including assets pledged as collateral for their secured loans, are dealt with.

It follows from this that if, for example, the Company sought to utilize cash on hand for a purpose inconsistent with the maximization of value in this proceeding, or in breach of the terms of any relevant Court orders, or in any other manner that the Monitor determined was not appropriate, I would expect the Monitor to seek the advice and directions of this Court with respect to those issues, and any proposed expenditure of cash by the Company that the Monitor felt was inappropriate, including but not limited to expenditures that would constitute material variances or a material adverse change in the Company's projected cash flow or financial circumstances (see s. 23(1)(d) of the *CCAA*).

It further follows that I do not think it appropriate to grant the control and veto rights to the Lenders contemplated by the RFA, particularly in circumstances where, as here, the security review of the loan and security documents underpinning the security interests of the Lenders remains ongoing by the Monitor (even

recognizing, as I do, that there is no basis before the Court at the present time to inform a reasonable belief that the security is not valid);

d. I am reinforced in the above-noted point by the fact that the RFA would permit the use of cash, intercompany advances, distributions or other payments only in accordance with a defined Budget attached to the RFA as Schedule "C".

   However, the Budget is not attached to the version of the RFA filed in the materials. It has not been shared with other stakeholders or the Court. For this reason alone, I would be reluctant to approve the RFA given its significant and substantial dependence on the Budget without having had the opportunity to review the Budget.

   While I accept the submission of the Lenders, the Applicants and the Monitor that the Budget is generally consistent with the cash flow projection appended to the Supplement to the Monitor's First Report, and while I understand the commercial sensitivity and potential risk to the ongoing SISP and Lease Monetization Process, the concern remains;

e. I am reinforced further still in the above point by the fact that, as highlighted for the parties during the hearing of this motion, the ARIO provides a "comeback" right pursuant to which any party may seek the advice and directions of this Court on seven days' notice.

   Moreover, the Commercial List routinely accommodates urgent motions or case conferences in ongoing *CCAA* proceedings on much shorter notice than that, where circumstances so require. This proceeding has already proven to be such an example;

f. the RFA would specify that all proceeds of Collateral must be applied in accordance with the priority waterfall set out at Schedule "D". Notwithstanding that the revised version of the RFA would make such distribution subject to further order of the Court, I see no reason to impose a mandatory distribution waterfall at this time. As and when a distribution is sought, all stakeholders will have the ability to make submissions with respect to any appropriate waterfall of such distributions;

g. the proposed RFA would provide that in the event the Company has Excess Cash (defined as cash from sales in excess of $15 million), it must be deposited with the Monitor and may be advanced to the Lenders to satisfy post-filing payment obligations incurred in accordance with the Budget. The submission was that cash on hand in excess of $35 million would be paid over.

   In my view, that is not appropriate or necessary at this time. Again, where a distribution is sought, the party seeking such distribution can bring a motion for such relief and the Court can make such directions are appropriate, having heard from the Monitor and other stakeholders;

h. the RFA would further provide that Excess Cash should be used, within three weeks of the date of the approval of the RFA, to cash collateralize all letter of credit obligations in an amount equal to 104% of the face amounts thereof, together with other related terms. Again, in my view, it is not appropriate to grant such prospective relief at this time, so early in the Liquidation Sale and SISP, and while events remain so fluid;

i. the RFA would impose numerous defined Negative Covenants on the Company setting out various things it would be prohibited from doing without the consent of the Lenders. Among the most problematic of these Negative Covenants is 14(k), which would prohibit and prevent the Company from seeking to obtain, or failing to oppose, any motion for approval by this Court of any Restructuring Transaction other than a Permitted Restructuring Transaction.

   The practical effect of that Negative Covenant would be contrary to the purpose and objective of the ongoing SISP, among other things, and would unduly restrict the Company from supporting (or failing to oppose) any proposed transaction that will be subject to Court approval on notice to all stakeholders anyway. In my view, it is inappropriate to place such a restriction on the Company now, in the context of an ongoing SISP, and in respect of a hypothetical, future, and as-yet unknown possible transaction.

   My concern with respect to this point is materially increased by the fact that the definition of "Permitted Restructuring Transaction" means a transaction that provides for repayment in full, in cash on closing, of all outstanding indebtedness to the Lenders. This would mean that the Company could not even bring forward for consideration by the Court and other stakeholders any possible transaction that did not provide for repayment in full of all prefiling secured debt.

   Evaluation and consideration of any proposed transaction is for another day: that is the whole point of the SISP - to generate any and all offers and fully canvass the market as to possible opportunities for Hudson's Bay. I am uncomfortable restricting the market intended to be created by the SISP and effectively pre-judge the creativity and ingenuity of participants in that process;

j. the RFA requires the Company to meet certain Milestones set out on Schedule "D", the failure of which would give certain rights to the Lenders. Those Milestones include the fact that the Court shall have made a distribution order by May, 15, 2025 and the distribution shall be completed within two days thereafter. I am not prepared to pre-determine today whether such an order will be appropriate or reasonable at a future date; and

k. finally, the RFA would provide for various Events of Default, the occurrence of which would give the Lenders various enumerated Remedies. In my view, it is not appropriate to "pre-authorize" such Remedies. If the Lenders are of the view that

> additional Remedies are appropriate and should be ordered by this Court, I am quite confident that they will move for such relief promptly.
>
> Indeed, if ironically, one of the Remedies would be the ability for the Lenders to apply to the Court for the appointment of a Receiver over the Company or the Collateral. I say "ironically" because during the hearing of this motion, the Lenders submitted that if this Court declined to approve the RFA, the Lenders would do just that - promptly seek the appointment of a Receiver.

18. I need not make any determination as to whether such a statement referred to in the last point immediately above was, in the submission of the landlords and others, in the nature of a threat, or whether it was, in the submission of the Lenders, merely an information point for the consideration of the Court. It does not matter. For all of the above reasons, in my view, approval of the RFA at this time is not appropriate. If the Lenders or any other party bring a motion in this proceeding, the Court will consider it at that time, based on the evidence in the record.

19. I recognize the submission of the Lenders that the obligations imposed on the Company by the RFA are, at least in some respects, not overly onerous, and that they are appropriate. The Lenders submit that they will be the fulcrum creditors in this proceeding, and subject to the completion of the security review now ongoing by the Monitor will be the first ranking secured creditors in any event. The protections are appropriate, they argue, given that the practical if unfortunate reality is that they are the creditors most economically affected by the success or failure of this *CCAA* proceeding, and in particular the SISP and the Lease Monetization Process already approved.

20. However, and as stated above, the controls already in place, the obligations on the Applicants as parties to this proceeding, and the oversight of the Court-appointed Monitor, are sufficient to protect the interests of the Lenders while balancing those interests against the rights of other stakeholders during this interim period when so many factors remain at play, significant unknowns remain, and the SISP and Lease Monetization Process are ongoing.

Result and Disposition

21. For all of the above reasons, I decline to approve the RFA. The motion is dismissed.

22. For greater certainty and clarity, I further order and direct (to the extent necessary) that:

a. pursuant to section 23(1)(b) of the *CCAA* and the direction of this Court, the Monitor shall continue to review on an ongoing basis the Company's cash-flow statement(s) as to their reasonableness and report to the Court with respect thereto. This applies to current and future cash flow statements, including but not limited to the cash flow statement at Appendix "E" to the Supplement to the First Report of the Monitor dated March 21, 2025 (the "Current Cash Flow Forecast");

b. the Court recognizes that it is usual and expected that that cash flow statements are updated from time to time as an insolvency proceeding progresses. The Monitor

shall advise the Court by way of a Report or Supplement, on notice to the Service List, of updated cash flow statements or material variances from existing cash flow statements, in the usual course and on a timely basis as appropriate;

c. in addition, and without in any way restricting the above, the Monitor will advise the Court, on notice to the Service List, if at any time (whether an updated cash flow statement has been prepared by the Company or not) if, in the professional opinion of the Monitor, actual results vary from the then Current Cash Flow Forecast by 15% or more;

d. in further addition, the Company shall not, without the consent of the Monitor, who shall, where appropriate, seek the advice and direction of this Court on notice to the Service List, and except in accordance with Orders of this Court already made in this proceeding, make any investments or acquisitions of any kind, direct or indirect, in any other business or otherwise. The Monitor may, as is usual, consult with stakeholders, as appropriate. This specifically includes the Lenders; and

e. the Monitor shall continue, among its other duties and responsibilities, to monitor cash receipts and disbursements by the Company. The Company should not make any disbursements other than those that are necessary and appropriate. These would include, in particular, any expenditure of cash or commitment to spend by the Company that is not contemplated by the Liquidation Sale Order, the Lease Monetization Order or the SISP already made in this proceeding, or as may be otherwise ordered by the Court on notice to the Service List.

23. Order to go to give effect to these reasons.

Osborne J.

TAB 3

CITATION: 1843208 Ontario Inc. v. Baffinland Iron Mines Corporation, 2023 ONSC 4906
COURT FILE NO.: CV-11-00009222-00CL
DATE: 20230829

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION BY 1843208 ONTARIO INC. TO DETERMINE THE FAIR VALUE FOR THE SHARES OF BAFFINLAND IRON MINES CORPORATION AS AT MARCH 21, 2011

APPLICATION UNDER THE BUSINESS CORPORATIONS ACT, R.S.O. 1990, C. 8.16, S. 185, AS AMENDED, AND RULES 14.05(2) AND 14.05(3) OF THE RULES OF CIVIL PROCEDURE

RE: 1843208 Ontario Inc., Applicant

AND:

Baffinland Iron Mines Corporation, Respondent

BEFORE: Peter J. Osborne J.

COUNSEL: *Steve Tenai, Miranda Spence and Adam West*, for the Applicant

Dimitri Lascaris and Ashley Seely, for the Respondent, Dissenting Shareholders of Baffinland Iron Mines Corporation

HEARD: June 9, 2023

ENDORSEMENT

[1] This is an Application to fix the fair value of the shares held by shareholders who dissented from a plan of arrangement.

[2] The Applicant, 1843208 Ontario Inc. ("208" or the "Applicant"), seeks an order fixing the fair value for the common shares of any dissenting shareholder of Baffinland Iron Mines Corporation ("Baffinland") as at March 21, 2011 at $1.50 per share.

[3] The Dissent Group, on the other hand, submits that this court should fix the fair value at $8.91 per share.

Background and Context

[4] 208 acquired control of Baffinland in 2011 following a contested takeover bid. The remaining shares of Baffinland were acquired by 208 pursuant to a plan of arrangement approved by this court on March 25, 2011 (the "Plan of Arrangement" or the "Plan"). The Plan provided, as

is required by subsection 185(1) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*"), for dissent rights.

[5] This Application is brought pursuant to subsection 185(4) of the *OBCA*. This subsection provides that any dissenting shareholder is entitled, when the action approved by the resolution from which the shareholder dissents becomes effective, to be paid by the corporation the fair value of the shares, determined as of the close of business on the day before the resolution was adopted.

[6] The applicable procedure is set out in the *OBCA*.

[7] A dissenting shareholder must be given notice that the resolution has been adopted, and the notice shall set out the rights of the dissenting shareholder and the procedures to be followed to exercise those rights. Pursuant to subsection 185(10), a dissenting shareholder entitled to receive that notice must send to the corporation a written notice containing the number and class of shares in respect of which the shareholder dissents, and a demand for payment of the fair value thereof.

[8] Pursuant to subsection 185(15), the corporation shall then send to each dissenting shareholder who has sent such notice, a written offer to pay for the dissenting shareholder's shares in an amount considered by the directors of the corporation to be the fair value thereof, accompanied by a statement showing how the fair value was determined.

[9] Pursuant to subsection 185(18), if a corporation fails to make an offer, or if a dissenting shareholder fails to accept an offer, the corporation may apply to the court to fix a fair value for the shares of any dissenting shareholder. It is this application that is now before me.

[10] The Respondents on this Application (collectively, the "Dissent Group") are a group of 57 shareholders who dissented on the resolution to approve the Plan of Arrangement and who seek to be paid fair value for the 2,586,176 shares they owned in the aggregate. Those shares represented 0.68% of the total issued and outstanding shares of Baffinland.

[11] 208 made an offer to the Dissent Group for their shares, and that offer was rejected, with the result that 208 brought this Application.

The Issue and the Position of the Parties

[12] Accordingly, the issue on this Application is the fair value of the Baffinland shares, as at the Valuation Date of March 25, 2011. The delta between the parties is significant, as noted above. The value submitted by the Dissent Group is more than six times the value submitted by the Applicant.

[13] 208 takes the position that the fair value per Baffinland share is $1.50, the price at which the takeover bid process was ultimately consummated, and the value supported by the Applicant's expert, Alan Lee of Duff & Phelps ("Lee").

[14] The Dissent Group submits that only the individuals on whose evidence the Dissent Group relies had the knowledge, qualifications and experience necessary to assess the scope and quality of the iron ore deposits in the one project that effectively drove the value of the Baffinland shares, with the result that the Applicant materially undervalues that project and therefore the shares. The

Dissent Group relies principally on a discounted cash flow ("DCF") analysis of its expert, James Canessa of Forensic Economics, to support its proposed value.

[15] Finally, the Dissent Group seeks interest on the value of the shares from the Valuation Date to the date of payment, while 208 submits that the delay in determination was caused by the Dissent Group with the result that no interest ought to be payable.

Fair Value: The Test to be Applied

[16] The *OBCA* does not set out the test for determining the fair value of shares. Nor do the similar provisions found in the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. There is no statutory definition of "fair value". The courts have, however, considered the factors to be applied in such a determination, and the parties to this Application generally agree on those factors and on the key authorities from which they emerge.

[17] The required analysis is necessarily fact-specific, but it is clear from the jurisprudence that there is no standard approach that a court must apply in determining fair value. Factors critical in one case may be of lesser importance in another.

[18] The British Columbia Court of Appeal provided a helpful analysis in *Cyprus Anvil Mining Corp. v. Dickson* (1986), 8 B.C.L.R. (2d) 145 ("*Cyprus*"), a decision on which both parties in the present case rely. That analysis was provided in the context, similar to that here, of a takeover of one mining company by another and the subsequent consideration of the fair value of the shares held by dissenting shareholders.

[19] I observe that the record in *Cyprus* included, as here, the principal fact witnesses involved in the relevant transactions; expert evidence as to the valuation of the key iron ore deposits that were the drivers of the value of the corporation's shares; reports issued by the Applicant in connection with the acquisition of the ore deposits; annual reports; and reports prepared after the corporation undertook a redrilling program containing a plan that was ultimately adopted by the directors of the corporation.

[20] The court in *Cyprus* observed that perhaps the best starting point is the recognition of the fact that there are at least four ways of valuing shares in a company:

a. market value, using quotes from the stock exchange;

b. net asset value, taking into account the current value of the company's assets and not just the book value;

c. investment value relating to the earning capacity of the company;

d. a combination of the preceding three.[1]

[1] *Cyprus*, at para. 49, citing with approval *Neonex Int. Ltd. v Kolasa* (1978), 84 D.L.R. (3d) 446 (B.C.S.C.), at p. 453 and *Domglas Inc. v. Jarislowsky*, [1980] 13 B.L.R. 135 (Q.C.C.S.), at p. 192, aff'd (1982) 138 D.L.R. (3d) 521 (Q.C.C.A.).

[21] The court then went on to describe, following a review of the jurisprudence, the proper approach to value in this way, with which I agree:

> It is not necessary for me to analyze those cases or to quote from them. The point that they emphasize is that the problem of finding fair value of stock is a special problem in every particular instance. It defies being reduced to a set of rules for selecting a method of valuation, or to a formula or equation to produce an answer with the illusion of mathematical certainty. Each case must be examined on its own facts, and each presents its own difficulties. Factors which may be critically important in one case may be meaningless in another. Calculations which may be accurate guides for one stock may be entirely flawed when applied to another stock.
>
> **The one true rule is to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to exercise the best judgment that can be brought to bear on all the evidence and all the factors. I emphasize: it is a question of judgment. No apology need be offered for that. Parliament has decreed that fair value be determined by the courts and not by a formula that can be stated in the legislation**.
>
> Where Parliament has called for judgment, and where judgment is being exercised, the scope of the judgment should not be obscured. If the judgment is about which formula to adopt, then that should be made clear; if the judgment is about the assumptions to which the formula is to be applied, then that also should be made clear; and if the judgment is about the final result, with the formula being treated only as an aid, then that should be apparent.
>
> …
>
> In summary, it is my opinion that no method of determining value which might provide guidance should be rejected. Each formula that might prove useful should be worked out, using evidence, mathematics, assessment, judgment or whatever is required. But when all that has been done, the judge is still left only with a mixture of raw material and processed material on which he must exercise his judgment to determine fair value.[2] [Emphasis added.]

[22] This approach is consistent with the approach taken by D.M. Brown J. (now Brown J.A.) in *Glass v. 618717 Ontario Inc.*, 2012 ONSC 535, O.J. No. 225 ("*Glass*"), following a quote with approval from *Cyprus* as above:

> [246] A helpful summary of the particulars underlying the application of the "one true rule" can be found in the article by Hunter and Pearce, *"Fair Value" – A Common Issue with Surprisingly Sparse Canadian Authority*:

[2] *Cyprus*, at paras. 50 – 54.

The following basic principles appear to be well-established by the authorities:

1. **Valuation of shares pursuant to a legislative appraisal remedy is a fact-based assessment, which requires "an important element of judgment" by the court.**

2. **In exercising its judgment, "a court is advised to be prudent - to proceed not on the basis of the most optimistic approach…" Dissenting shareholders are not entitled to a better value than other shareholders simply because they are dissenting. The appraisal remedy is a "safeguard, not a bonus."**

3. Neither party bears the burden of proving the fair value of the shares. Although each party who asserts a proposition must prove it on the balance of probabilities, by a preponderance of the evidence, it is the court that must ultimately make the assessment of fair value. **While expert evidence is commonly put forward to assist in establishing fair value, the court is not obliged to accept it.**

4. Complicating the court's task is the frequently expressed admonition that judges should exercise caution in attempting to mix and match portions of competing expert reports and thereby cast themselves in the role of performing their own valuation. **As the trial judge put it in the *Brant Investments* case**:

> **In arriving at my valuation I do not propose to go through the valuation exercise followed by the experts, substituting my own conclusion as to the basic ingredients for theirs. The wide disparity exhibited by them in the application of their technique does not inspire me with any confidence in the result which I would achieve as an amateur in its application**.

5. Market value "is the highest price expressed in money obtainable in an open and unrestricted market between knowledgeable, prudent, and willing parties dealing at arm's length, who are fully informed and under no compulsion to transact". However, "market value" is not equivalent to "fair value", although…fair market value can be an important part of the fair value determinate depending on the circumstances.

> 6. Fair value is a value that is "just and equitable" – one which provides "adequate compensation (indemnity), consistent with the requirements of justice and equity." One important implication of the distinction between market and fair value is that, in general, no minority discount can be applied in determining "fair value"…
>
> 7. Generally, neither the parties nor the court may rely on hindsight evidence. Events that were not known as of the valuation date are not relevant to determination of fair value on the valuation date. However, while hindsight is generally excluded, there are some limited but potentially significant exceptions to this principle…
>
> Now, while the authors discussed those principles in the context of statutory appraisal remedies, for the most part they apply with equal force to the task of fixing the fair value of shares when ordering a buy-out of securities under the oppression remedy. [Emphasis added.]

[23] The excerpt from the decision in *Cyprus* emphasized above was also quoted with approval by the Divisional Court in *Aquam Corporation v. Coffey*, 2019 ONSC 7218, O.J. No. 6288, where Myers J., writing for the court, further observed: "I bear in mind that in fixing a value of the corporation in this case, the experienced application judge was exercising his judgement to essentially find a hypothetical value based on often hypothetical facts and scenarios. While the task remains one to be performed judicially and is subject to review on the regular standards of review, making these kinds of judgement calls is often as much art as science.": at para. 13.

[24] As is clear from the statements above concerning the applicability of factors to a specific fair value determination, a value established by the market is generally evidence of the fair value that is preferable to an estimated or hypothetical determination, absent special circumstances which would distort the market. It is one indicia of value that is actual and not estimated: *Ultramar Canada Inc. v. Montreal Pipe Line Ltd*. (1990), 74 O.R. (2d) 136 (H.C.J.) ("*Ultramar*").

[25] Evidence surrounding an acquiror's purchase of the target company supports the transaction price as the fair value: *Carlock v. ExxonMobil Canada Holdings ULC*, 2020 YKCA 4, Y.J. No. 8 ("*Carlock*"), at paras 16 – 21 & 84 – 93; *Bamrah v. Waterton Precious Metals Bid Corp.*, 2020 BCCA 122, 35 B.C.L.R (6th) 215, at paras. 40 & 44 -56.

[26] In my view, the statements of the Yukon Court of Appeal in *Carlock* are particularly applicable here:

> [16] … **Where the evidence supports the conclusion that the market is efficient, consisting of multiple informed participants capable of acting in their own self-interest, and there are no material market failures, the result of the market is likely the best and most objective evidence of value. It is rooted in reality and not based on assumptions, theory or predictions**.

…

> [19] Commonly, the determination of fair value in the reported cases occurs where there is no broadly based open market transaction because, for example, the transaction might not involve a disposition of shares or is not arms-length. … **Where, however, there is an open market for shares or other evidence indicative of arms-length conduct of numerous market participants acting in their own self-interest and settling on a price, such evidence is particularly reliable as an indicator of fair value, as I have already explained. Objective market evidence, in the absence of evidence of market failure, is more reliable than theoretical analysis that attempts to derive a value based on assumptions about what a real market would disclose, if there were one. The behaviour of a real market is better evidence of value than a theoretical market.**
>
> …
>
> [21] Theoretical analysis is often suspect because it is vulnerable to the assumptions on which it is based. This does not render such evidence irrelevant. It is commonly used to analyze values and prospective transactions. … Nonetheless, as pointed out in the majority judgment in in *Cyprus Anvil* at para. 73:
>
> > [73] … **But the discounted net cash flow method must always be viewed with care where there is no historical cash flow to use as the basis of the calculation, and the cash flow itself must be derived from a series of assumptions about gross receipts in a projected market for the product and hypothetical costs of production. A minor variation in assumptions about future metal prices, tonnage, metallurgy, mining plans or discount rates becomes magnified through the calculation into a gross distortion of the fair value**. [Emphasis added]

[27] In short, it seems to me that the task before me can be fairly summarized as follows:

a. it is a matter of judgment, specifically reserved by the legislature to the judge hearing the matter;

b. it is not the application of a fixed formula or calculation;

c. neither the list of factors to be applied nor the relative weight of those factors are fixed, and both necessarily vary from case to case;

d. all relevant evidence should be considered, but the court is not obliged to accept any or all expert evidence tendered;

e. evidence of an efficient, open market, consisting of multiple informed participants, is likely the best and most objective evidence of value and is more reliable than theoretical analysis based on assumptions about what a real market might do;

f. the court must be conscious of the difference between market value and fair value, the latter of which is generally not subject to any minority discount;

g. the court should be prudent, particularly when considering hypothetical values. The exercise is a safeguard, not a bonus; and

h. the reasons should inform the parties as to how the court arrived at the result, including the evidence relied upon, any assumptions applied and, in sum, how the value determined is fair in all the circumstances of that particular case.

The Evidence and Application of the Test

[28] 208 relies on Application materials comprising almost 8500 pages including the following:

a. the Affidavit and Supplemental Affidavit of Bruce Walter ("Walter") sworn February 10, 2020 and October 13, 2021 respectively, together with exhibits to both affidavits. Those exhibits include technical reports and feasibility studies, among other things. Walter was a director of Baffinland;

b. the Affidavit of Brent Walker of Morrison Park Advisors ("Walker") sworn October 13, 2021, together with Exhibit "A" thereto, which consists of his expert report. He was retained by 208 to address whether the option process for Baffinland was prematurely terminated by virtue of the Joint Bid discussed below;

c. the Affidavit and Supplementary Affidavit of Alan Lee of Duff & Phelps Canada Limited sworn January 30, 2020 and October 14, 2021 respectively, together with exhibits to both affidavits. Lee is a chartered business valuator, and the principal exhibits to his affidavits consist of his two valuation reports;

d. the Affidavit and Supplemental Affidavit of Stephan Altmann of Morrison Park Advisors ("Altmann") sworn October 14, 2021 and April 7, 2022 respectively, together with exhibits to both affidavits. Altmann was retained by 208 to offer an opinion on the significance to a potential buyer of one of the studies relied upon. The principal exhibits to his affidavits consist of his expert reports;

e. the Affidavit of Linh Nguyen sworn April 8, 2022, which summarizes recorded climate information, among other material; and

f. transcripts of cross examinations, exhibits and answers to undertakings.

[29] The Dissent Group relies upon a responding record of just over 2000 pages in length (regrettably not hyperlinked) including:

a. the Affidavit and Supplementary Affidavit of Gordon McCreary ("McCreary") affirmed April 5, 2021 and February 8, 2022 respectively, together with exhibits to each. McCreary was previously a director and the President and CEO of Baffinland;

b. the Affidavit of Richard McCloskey ("McCloskey") affirmed April 8, 2021, together with exhibits thereto. McCloskey was previously a director and the Chairman of Baffinland, as well as interim President and CEO;

c. the Affidavit of Peter Neumann affirmed April 13, 2021, together with exhibits thereto. Neumann is one of the Dissenting Shareholders;

d. the Affidavit of James Canessa of Forensic Economics Inc. ("Canessa") sworn April 9, 2021, together with exhibits thereto, the principal exhibit of which consists of his expert report;

e. the Report (without Affidavit) of Kenneth Kuchling dated April 10, 2021. Kuchling runs his own mining consulting firm; and

f. the Affidavit of Ashley Seely sworn February 8, 2022, under cover of which are filed certain securities documents largely downloaded from SEDAR.

[30] I have reviewed all of this material, with particular emphasis, given the volume of the record, on that material principally relied upon by the parties in their oral and written submissions.

[31] For the reasons below, I fix the fair value as at the Valuation Date at $1.50 per share.

Baffinland's Business and Deposits

[32] Baffinland's principal and indeed only business is the exploration and development of iron ore deposits in North Baffin, Baffin Island, Nunavut (the "Mary River Project"). The Mary River Project had not reached production as at the Valuation Date, at which point it remained in the exploration stage.

[33] The Mary River Project includes deposits of iron ore within a 30 km² area. Three of these deposits, known as Deposit Nos. 1, 2 and 3, are deposits within which significant quantities of mineral reserves and mineral resources had been identified.

[34] It is important to distinguish between mineral resources and mineral reserves. All mineral reserves are mineral resources, but not all mineral resources are mineral reserves.

[35] Mineral reserves are resources in respect of which economically viable development has been established through feasibility studies. Mineral reserves are either probable or proven, depending upon the level and reliability of geological knowledge and confidence in the deposit. There may be mineral resources that are not reserves where there are potential deposits, but their economic viability has not been demonstrated through feasibility studies. Mineral resources may be inferred, indicated or measured, again depending upon the level of geological knowledge and competence.

[36] The Distinction is reflected this way in the Canadian Institute of Mining, Metallurgy and Petroleum ("CIM") Definition Standards for Mineral Resources and Mineral Reserves (relied upon by Walter):

> Due to the uncertainty that may be attached to Inferred Mineral Resources, it cannot be assumed that all or any part of an Inferred Mineral Resource will be upgraded to an Indicated or Measured Mineral Resources as a result of continued exploration. … Inferred Resources must be excluded from estimates forming the basis of feasibility or other economic studies.

[37] As further discussed below, this CIM definition standard tracks through *National Instrument 43 – 101 – Standards of Disclosure for Mineral Projects* relied upon by the Ontario Securities Commission.

[38] As at the Valuation Date, the iron ore reserves (i.e., the resources for which economic viability had been demonstrated) were 365 million tonnes, largely located in Deposit No. 1.

[39] The Mary River Project on Baffin Island is one of the northernmost mines in the world. This is relevant because of the significant challenges that the geographic location, remoteness and extreme weather conditions bring. These include significant capital cost requirements, further increased operating costs throughout the life of the mine, and the absence of basic infrastructure for both the mining operations and the personnel who must first build that facility and then operate the mine.

[40] Baffinland is an exploration stage company. There were no earnings or profitability history to inform the question of value as at the Valuation Date. Accordingly, the analysis necessarily involves a consideration of assumptions, projections and estimates. This complexity is, in large part, the reason that the record before me is so voluminous and comprises over 10,000 pages of material, and it is also the principal reason for the delta between the value estimates of the parties.

Feasibility and Forecasting: Studies Undertaken and the Expert Evidence

[41] Since the Mary River Project remained in the exploration stage at the Valuation Date, economic viability could be demonstrated only by feasibility studies, rather than historical operations and actual cash flows achieved. Only two such studies had been undertaken as at the Valuation Date.

The First Feasibility Study: the 18 MTPA Rail Development Scenario

[42] The first of these two studies was based on an assumption that Baffinland would ship 18 million tonnes per annum ("MTPA") of iron ore from the Mary River Project site to Europe for markets there, for a period of 21 years (this study is referred to as the "18 MTPA Rail Development"). That 18 MTPA Definitive Feasibility Study was prepared by Aker Kvaerner E & C Solutions ("Aker") and commissioned by Baffinland in March 2007.

[43] The 18 MTPA Rail Development estimated that, based on the assumed annual shipment of 18 metric tonnes of ore, the proven and probable reserves of 365 metric tonnes of iron ore would yield a mine life of over 20 years (hence the 21-year model).

[44] The shipping required in this feasibility scenario was complicated. It involved transporting the iron ore by rail from the mine site to Steensby Inlet on Baffin Island for year-round shipping from that port to Europe for markets there. The Applicants emphasize that achieving even the 18

MTPA required the following, all of which was subject to the high costs and weather-related risks that significant infrastructure projects in the Arctic involve:

a. construction of a 150 km railway, built over permafrost and requiring 30 bridges and two tunnels, requiring a construction force of more than 1000 workers to be recruited, retained, housed and maintained over an estimated four-year construction period;

b. facilities and infrastructure to maintain a skilled labour force, following construction, to operate the project;

c. machinery and equipment capable of withstanding the harsh Arctic weather; and

d. a fleet of icebreaking oceangoing carriers to ship the iron ore 3100 nautical miles to the European market.

[45] The capital cost of the 18 MTPA Rail Development was estimated to exceed $4 billion.[3]

[46] The 18 MTPA Rail Development was filed on SEDAR (and was therefore available to the public) on March 5, 2008.

The Second Feasibility Study: the 3 MTPA Road Haulage Scenario

[47] The second of these two studies was commissioned by Baffinland to AMEC Americas Limited. The mandate was to complete a feasibility study of what was being considered as a temporary or interim solution based on the assumption that Baffinland would use trucks to haul 3 MTPA of iron ore by road from the Mary River Project site to a seasonal port as a means of achieving early-stage production while the company continued to pursue the larger, year-round haulage option that was the subject of the 18 MTPA Rail Development study.

[48] This road haulage feasibility study ("RHFS") was filed on SEDAR on February 28, 2011 following a press release from Baffinland dated January 13, 2011, by which the company announced the results of the RHFS and disclosed a summary of the economics in the report.

Conceptual Scoping Study

[49] Baffinland (or, more accurately, Aker on behalf of Baffinland) also undertook, in late 2008, a conceptual scoping level study to consider the potential expansion of the production rate of the Mary River Project from 18 MTPA to 30 MTPA based on the assumption that Baffinland would develop a second open pit mine and produce an additional 12 MTPA from Deposit Nos. 2 and 3.

[50] This scoping study relied on inferred mineral resources, rather than proven reserves. However, given the material increase in the production estimate it represented, reliance on this study would drive higher values. As a result, it is, not surprisingly, a point of contention between

[3] A few years later, in September 2010, the global engineering and development consulting firm Hatch was retained by AM (defined below) to conduct due diligence on the Mary River Project. Hatch estimated capital costs for the 18 MTPA Rail Development to have risen to a range of $4.628 billion - $5.496 billion.

the parties. This is further discussed below in the section on the DCF analyses of the respective experts relied upon by the parties.

The Market Speaks

[51] In this case, the evidence of the value placed on the shares by the market is significant. There was an actual transaction, at a value of $1.50 per share. The issue is whether that transaction value represents a fair value.

[52] The parties to this Application largely accept the validity and relevancy of market transactions as indicia of fair value, consistent with the authorities referred to above, and in particular *Cyprus*, *Carlock* and *Ultramar*. I observe that the valuation expert relied upon by the Dissent Group, James Canessa, specifically accepts this also (Report, para. 111).

[53] However, the conclusions of the parties here differ because Canessa opines, and the Dissent Group submits, that just as contemplated in *Ultramar*, the transaction price that ordinarily might be instructive does not assist here since there were special circumstances that distorted the market, with the result that the transaction price should be discarded.

[54] For that reason, Canessa places no weight on the transaction price since in his opinion, the Joint Bid (defined below) truncated the bidding war, with the result that that process "failed to provide complete price discovery".

[55] I reject this argument in the circumstances of this case. A review of all of the events that occurred prior to the Valuation Date supports my conclusion that there was ample market exposure and no market distortion. That review is set out below.

Events Before the Valuation Date

[56] I have not summarized here all of the evidence concerning the capital cost required to develop the Mary River Project. It is common ground that Baffinland lacked the capital resources to develop it. The company represented a classic case of an entity that was "land rich and cash poor". It therefore set about to explore strategic options and alternatives.

[57] Baffinland retained CIBC World Markets and Citigroup Global Markets in January 2008 to assist it in a search for a strategic partner to develop the Mary River Project. During the same period in which those two firms were exploring possibilities, the company itself continued to explore alternatives.

[58] As is clear from the affidavits and cross-examination transcripts of the key fact witnesses of both sides (Walter, McCreary and McCloskey), in 2008 and 2009, over 20 potential partners, including leading global steel and mining companies, were contacted. Confidentiality agreements were signed and data room access provided to ten of those potential partners. Management presentations and site visits were arranged for others. Entities that attended site visits included representatives of Canada's major banks, major commercial banks from the United States, Australia and Europe, as well as government entities such as the Business Development Bank of Canada and the Chinese state-owned entity, China Minmetals Corporation ("Minmetals").

[59] I pause to observe that in May 2009, McCreary (one of the members of the Dissent Group) himself signed a non-binding memorandum of understanding with the Chinese entity that included, among other things, the proposal that Minmetals purchase 50 million shares of Baffinland at $0.70 per share.

[60] By this time, however, no clear economic path forward had emerged for development of the Mary River Project. CIBC was engaged again, and the Board of Directors appointed a strategic committee to explore alternatives for the company. Discussions that had started in 2008, but not advanced very far, with ArcelorMittal S.A. ("AM") were renewed.

ArcelorMittal Joint Venture Proposal

[61] In August - September 2010, Baffinland and AM reached agreement on the principal terms of a proposed joint venture. AM would acquire a 50.1% interest in the Project and a 9.9% interest in Baffinland. AM had commissioned Hatch Management Consulting to undertake a comprehensive due diligence review of the Mary River Project. Hatch delivered its final report (the "Hatch Report") in September 2010. It concluded that estimated capital costs had risen to a range of $4.628 billion to $5.496 billion, not including the capital cost of the dedicated oceangoing iron ore carriers.

[62] The summary of terms was expressly conditional upon the negotiation and execution of definitive agreements. Those definitive agreements were never reached before negotiations were overtaken by events, and in particular, a hostile takeover bid from Nunavut Iron Ore Acquisition Inc. ("Nunavut").

The Hostile Takeover Bid: The Nunavut Offer

[63] On September 22, 2010, Baffinland received a hostile takeover bid of $0.80 per share from Nunavut Iron Ore Acquisition Inc. (the "Nunavut Offer"). The bid was for all of the outstanding shares of Baffinland, and it brought an abrupt end to negotiations with AM.

[64] A special committee was immediately struck to evaluate the Nunavut Offer and consider any alternative options. The special committee retained CIBC World Markets as its financial advisor. Baffinland declined to waive a previously approved shareholder rights (or "poison pill") plan and recommended to its shareholders that they not tender to the unsolicited Nunavut Offer.

[65] CIBC estimated the value per share of the AM joint venture at between $0.82 and $1.58. CIBC also contacted approximately 45 potential buyers or potential joint venture partners to gauge their level of interest. Confidentiality agreements were entered into with ten of those potential partners.

[66] On October 7, 2010, the Baffinland Board of Directors recommended that shareholders reject the Nunavut Offer. During the same period, however, none of the 45 other potential buyers or partners contacted by CIBC submitted any bids whatsoever.

The Support Agreement with AM and Subsequent Bidding

[67] On November 8, 2010, Baffinland entered into a support agreement with AM (the "Support Agreement"). In exchange for support from the company, AM agreed to offer to acquire all of the common shares for consideration of $1.10 per share in cash. CIBC delivered a fairness opinion to the Board supportive of the proposed transaction. The Board of Directors of Baffinland recommended that all shareholders tender their shares to AM.

[68] I pause to observe that at least as of November 8, 2010, the Board of Baffinland, with all of its intimate knowledge and experience with the Mary River Project, and supported by the CIBC fairness opinion, was of the view that $1.10 per share represented a fair value for the shares.

[69] As contemplated in the Support Agreement, on November 12, 2010, AM made a friendly offer to purchase all of the issued and outstanding common shares of Baffinland at a price of $1.10 per share.

[70] This offer triggered several rounds of bids from AM and from Nunavut, ultimately culminating in a joint bid from the two of them together. Before that joint bid, however, there was much "back-and-forth". Over the course of the two months following AM's friendly offer at $1.10 per share, AM ultimately bid as high as $1.40 per share. Nunavut bid $1.45 per share, although not for all of the issued and outstanding shares, but rather only for 60%, slightly over the level required for control of the company.

[71] I note that one of the analyst firms that covered Baffinland, Jennings Capital, also recommended to shareholders that they tender to the AM bid of $1.40 per share, concluding that the current offers were "well above average [$0.88 to $1.14 per share] and have therefore become expensive by this definition".

[72] Still, Baffinland was unable to generate another bid from any of the 45 other potential bidders contacted by CIBC.

Proceeding before the Ontario Securities Commission

[73] On November 18, 2010, the Ontario Securities Commission ("OSC") conducted a hearing in the proceeding to determine whether the company's rights plan ought to be ceased-traded. In reasons released December 3, 2010, the OSC did cease-trade the rights plan and determined the following, among other things:

a. the Nunavut Offer had been outstanding for 57 days and had resulted in a higher-price competing offer being made by AM;

b. accordingly, it was not necessary for the rights plan to remain in place in order to facilitate an auction; there were now two competing bids on the table. "[T]he most important consideration in these circumstances is that Baffinland has agreed in the Support Agreement not to solicit further offers and, accordingly, it needs no further time to do so. That suggests that the auction process is coming to an end. It seems unlikely that the Rights Plan will achieve more for shareholders in terms of inducing a further offer from a new bidder".

The AM - Nunavut Joint Bid, Acceptance and Dissent Bid

[74] On or around January 14, 2011, AM and Nunavut entered into an agreement by which AM would increase its offer up to $1.50 per share. For its part, Nunavut agreed to partially finance that acquisition of Baffinland by AM in exchange for 30% of the acquiror entity that would become the Applicant in this proceeding, 208 (the "Joint Bid").

[75] The Board of Directors of Baffinland recommended that shareholders tender their shares to the Joint Bid. That recommendation was overwhelmingly accepted. Beyond the shares already owned by Nunavut, 93% of the outstanding shares of Baffinland were tendered to the joint bid by February 17, 2011, the date on which the Joint Bid expired. Those included the shares owned by Baffinland's largest shareholder, Resource Capital Funds.

[76] On March 22, 2011, Baffinland shareholders approved the plan of arrangement pursuant to which AM and Nunavut acquired all outstanding Baffinland securities (i.e., the balance of the outstanding shares). That acquisition was completed on March 25, 2011.

The Chronology Demonstrates No Market Distortion

[77] I do not accept Canessa's ultimate opinion that the company's unaffected stock price should be accorded no weight in the determination of value, in light of the above chronological series of events.

[78] First, I do not accept the overarching proposition that in any case where two potential acquirors have been bidding against one another, and then determine, each acting in its own self-interest, to submit a joint bid according to agreed-upon terms, the fact of such a joint bid necessarily represents a premature and artificial end to a free-market auction. On the contrary, it represents the culmination of a market process: market participants, acting in an economically rational manner in submitting a bid at a value that they are prepared to pay for the shares.

[79] I do not accept the general proposition that, at law, a joint bid is automatically a distortion of normal market conditions. It may well be so, but absent some special circumstances, as were referred to in *Ultramar*, resulting in evidence of a distortion of the market, such is not a foregone conclusion.

[80] Nor do I accept the submission that the Joint Bid in the particular circumstances of this case represented a market distortion.

[81] To conclude otherwise is to assume, without evidence, that had those two independent parties (the parties to the Joint Bid) elected (again in their respective self-interests), to not submit a joint bid but rather carry on independently, then the ultimate price offered by the higher bidding party would be higher than the price reflected in the Joint Bid.

[82] I cannot conclude that either party to the Joint Bid would have submitted a higher bid if those two parties had not submitted a bid together. Nor can I conclude that any other party would have submitted a higher bid. It did not occur.

[83] The evidence of Walter was to the effect that Nunavut lacked the financial resources to match let alone better a bid for all of the shares of Baffinland if AM had raised its previous bid to $1.50. For his part, McCreary conceded that his conclusion that more rounds of competitive bidding would have been pursued but for the Joint Bid was speculation.

[84] I am reinforced in my conclusion that the Joint Bid is a useful indicator of fair value in the present circumstances by the complete lack of any other competing (and higher) offers. If other sophisticated and knowledgeable parties thought that the Joint Bid reflected a value that was below that which was fair, it is reasonable in the circumstances of this case that they would have submitted a higher offer, and that did not occur.

[85] Even more compelling, in my view, is the fact that there was no offer even remotely close to the $8.91 value per share that the Dissent Group submits should be determined to be the fair value. The highest offer generated in the market was the $1.50 per share offer reflected in the Joint Bid. There was no offer generated by the market at $8.91 per share. Nor was there any offer generated *at any price in the extremely broad range* between $8.91 and $1.50 per share.

[86] I am satisfied that the market, which in the circumstances of this case was a relatively small, highly sophisticated market of potential bidders, was well aware of the opportunity, the material relevant information and the ability to submit a higher bid.

[87] Moreover, since Baffinland was not an operating entity but was at that time an exploration stage company, much (indeed almost all) of the due diligence would be conducted by review of the documents in the virtual data room, which would be much more informative than would be a physical site visit. In other words, the remoteness of the mine site did not in my view contribute in any material way to the ability of the sophisticated market participants to obtain and analyze the relevant information.

[88] In the four-month period during which Baffinland was “in play” and bids were actively being received and considered, not a single party other than the two parties to the Joint Bid – Nunavut and AM - put forward a competing bid at all, let alone at a higher price. During that “auction” period, 80 bids were made over 117 dates, representing a premium of 87.5% between the Nunavut Offer and the Joint Bid.

[89] The increments of the bids continually decreased as the bidding process proceeded, and even then with Nunavut making bids for only some but not all of the shares. Again, while not determinative, these facts are consistent with the likelihood that the bidding process was reaching its natural market conclusion, and that it did so when the Joint Bid was submitted.

[90] In this regard, I accept the evidence of Walker to the effect that the auction process was not terminated prematurely by the Joint Bid and that bidders would be reluctant to work together during an auction for numerous reasons, including that consortia or joint bids are difficult to manage, and a bidder would not wish to expose the fact that it was reaching the limit of its own financial resources to a competing bidder who could exploit that information.

[91] It is also relevant that even prior to the Joint Bid being made, and as set out above, the company had actively solicited, both directly and indirectly through its financial advisors CIBC,

expressions of interest for participation in any form (joint venture, acquisition or strategic partner) from both private and public sector participants for a period of approximately two years.

[92] Within the auction process itself, fully eight bids were received over a period of approximately four months. The result represented a premium of 87.5% measured as between the original Nunavut Offer and the Joint Bid.

[93] In short, this is not a case where the market was caught by surprise or had only a limited or insufficient opportunity to participate by making a bid. I am satisfied that the market was aware of the opportunity to acquire an interest in the Mary River Project. The opportunity to invest was well known and had been known for a considerable period of time. The shares traded on the TSX with the requisite disclosure requirements. This is not a case where the subject company was private or very closely held such that there was very limited exposure to, or knowledge within, the market of the opportunity.

[94] I also reject the conclusion of Canessa, who bases his conclusion that there was not sufficient time for the market to properly absorb and consider the opportunity on the argument that only the 10-day period between the date on which the Joint Bid was made and when it was initially set to expire should be considered. In my view, it is artificial to ignore the preceding four-month period within which any interested party could have submitted a bid. Even that ignores the period of approximately two years during which the company was effectively being "shopped".

[95] The objective fact is that all of these potential bidders evaluated the opportunity and considered the advantages of the opportunity as against the disadvantages in the form of the significant operating environment challenges and associated costs to be confronted in the course of successfully exploiting and monetizing the iron ore deposits.

[96] Moreover, Canessa relies in his report upon the affidavit evidence of McCreary. McCreary's affidavit contains lengthy summaries of his efforts to attempt to generate higher bids. In particular, he states that when he learned of the Joint Bid, he "was incensed, … and pressed on, now even more motivated than before to try to find a more equitable deal for Baffinland's shareholders".

[97] McCreary continues in his affidavit to refer, in particular, to active discussions with two Chinese companies, Minmetals and Wuhan Iron and Steel Corporation ("WISCO"). With respect to Minmetals, he refers to a lunch meeting with the Assistant President, at which he impressed upon his counterpart "that, with the Joint Bid now having been submitted, the time for alternative bids was running out." They specifically discussed the RHFS, its updated iron ore price projections, and McCreary's view (as an informed participant, to put it mildly) that those iron ore forecasts were the most accurate and realistic price forecasts available at the time.

[98] According to McCreary, the Minmetals Assistant President advised him that one of the primary critics of the Mary River Project was the individual who led the company's iron ore trading arm. That criticism was based upon concerns regarding "the long period of time it would take to achieve cash flows under the production scenario in the 2008 DFS." McCreary's evidence was to the effect that the then "newly-announced road haulage option presented an expedited, less costly and lower risk option for the stage development of the Mary River".

[99] Again, however, the objective fact is that even armed with that endorsement from McCreary, based on what was then extremely current information from a knowledgeable individual, Minmetals did not submit a bid at any price.

[100] McCreary continues in his affidavit to state that in the same meeting, he introduced the possibility of opening a dialogue between Minmetals and WISCO, since WISCO might be better suited to make a bid for Baffinland because, as the result of an unrelated transaction, WISCO had recently received a windfall of approximately $900 million and had cash resources available to fund an acquisition. However, the Assistant President of Minmetals advised McCreary (according to McCreary himself) that he believed that WISCO was likely to deploy much of its new cash windfall into another development project.

[101] McCreary's evidence is to the effect that a representative of WISCO (through its American subsidiary) sought to set up a meeting. McCreary was actively leveraging all resources at his disposal, including the liaison efforts of Canadian diplomatic personalities including former Prime Minister Jean Chretien and former Premier Brian Tobin, among others.

[102] In my view, however, none of this particularly assists the Dissent Group, since by McCreary's own admission, WISCO ultimately also decided not to submit any bid.

[103] McCreary goes on to describe his efforts to persuade the Ontario Securities Commission to take steps to trigger a fresh 35-day window for the Joint Bid to remain open, but the Commission declined to do so.

[104] McCreary states that subsequently, the pause in business caused by the Chinese New Year further challenged his efforts to persuade either of these two Chinese entities to put in a new bid. That may or may not be accurate. There may have been other factors affecting the decision of WISCO and Minmetals not to submit a bid.

[105] In any event, again, there is no evidence that either of these two Chinese entities (or any other entity) was not aware of the applicable timelines and of the fact that if they wished to submit a bid, they needed to do so promptly. Neither entity did so.

[106] The Dissent Group also attacks the Support Agreement entered into by the Company in respect of the Joint Bid as another indication of possible market distortion. While I recognize that both McCreary and McCloskey gave evidence to the effect that support agreements typically include a term prohibiting joint bids between competing bidders, each of them conceded that neither had seen the Support Agreement entered into by the parties here before swearing or affirming their respective affidavits.

[107] The Applicant, 208, takes the position that neither of these two individuals are qualified to provide such an opinion in any event. The Applicant relies on the evidence of Walker, who reviewed various support agreements over a 10-year period that preceded the transaction at issue. Walker concluded that none of those agreements included a term expressly prohibiting a bidder from collaborating with another bidder, all of which was consistent with his 30 years of investment banking experience that support agreements do not typically prevent joint bids that increase the offer price.

[108] Having considered all of the evidence about the exposure of the opportunity to the market, and the possibility of market distortion, I am satisfied that there was no market distortion. On the particular facts of this case, the Joint Bid, made in an efficient market comprised of sophisticated parties, represents the best objective evidence of value to inform a determination of fair value.

[109] I have noted above the very significant range between the two values urged upon the court by the parties. It seems to me that determining whether market value is an accurate and reliable indicator of fair value might have been more challenging if the competing share values endorsed by the parties were much closer to one another (i.e., between $1.50 and $1.70 per share, for example). However, in the present case the Dissent Group submits not only that there was market distortion, but that an undistorted market would yield a per-share value of almost six times the objective evidence of the market transaction. In my view, that is not reasonable and is not supported by the evidence.

[110] I am satisfied that in the particular circumstances of this case, market price is an important and accurate indicator of fair value and that considering market price in the particular circumstances of this case and particularly the chronology summarized above, the fair value is $1.50 per share.

An Alternative to Market Evidence: The Discounted Cash Flow Analyses

[111] Separate and apart from the competing views as to the accuracy and reliability of the market to inform fair value, both parties also conducted DCF analyses to arrive at an estimate of fair value by an alternative methodology.

[112] Rather than considering what the market is prepared to pay per share, a DCF analysis considers projected cash flow over the life of the Mary River Project, and then applies the discount rate to arrive at a present value of that future cash flow as a proxy for value.

[113] Alan Lee of Duff & Phelps, whose report is relied upon by 208, based his DCF analysis on the 18 MTPA Rail Development, the first and higher of the two feasibility studies. That yielded, in his opinion, a value of between $0.80 and $1.20 per share, with a midpoint of $1.00 per share, well below the value attributed to the shares by the market of $1.50 as discussed above.

[114] James Canessa of Forensic Economics, whose report is relied upon by the Dissent Group, performed a DCF analysis that yielded a value of $8.91 per share. There being no market evidence whatsoever of any price above $1.50, the Dissent Group's submission on this Application that the fair value of the shares should be $8.91 rests entirely on the conclusions of their expert, Canessa.

[115] In the main, the assumptions relied upon by these two experts respectively have two key differences that account for the wide variance in values reflected in their respective conclusions:

a. the applicable long-term iron ore price forecast; and

b. the estimated total production of the Mary River Project.[4]

[116] First, Canessa used a higher long-term iron ore price forecast than did Lee. Second, Canessa based his DCF analysis on a materially higher projected production from the Mary River Project – the 18 MTPA Rail Development relied upon by Lee, plus an additional 12 MTPA of incremental production, for a total of 30 MTPA beginning in 2020 and continuing until 2045. This additional production assumption (i.e., the additional 12 MTPA) is based on the Scoping Study referred to above.

[117] I will first address the difference in the estimated total production between 18 MTPA and 30 MTPA.

[118] As noted, the delta represented by the additional 12 MTPA (for the period from 2020 through to 2045) is based on the Scoping Study referred to above.

[119] The challenge for me with Canessa's reliance upon the Scoping Study is the fact that Baffinland had not established, as at the Valuation Date, the additional 307 million tonnes (or more) of incremental reserves, the assumption of which underlies the projected production expansion to 30 MTPA.

[120] I accept the evidence of Walter to the effect that a scoping study, as opposed to a feasibility study, cannot be used to determine whether the mineral resource (or even a part of it) may be classified as a reserve. As noted above, resources (as opposed to reserves) have not been classified as economically viable. This is clear from the terms of the Scoping Study itself, which sets out a significant and material list of additional studies that are required before it can be relied upon as the basis for any expansion plan.[5]

[121] In addition, and even if the resource could be classified as a reserve (which I am satisfied on the evidence before me it could not, as at the Valuation Date), the Scoping Study itself stated that it included no predictive forecasting of ore prices at the start of 30 MTPA production.

[122] All of that is consistent with the CIM Definition Standards described above which prescribe that Inferred Mineral Resources must be excluded from estimates forming the basis of feasibility or other economic studies.

[123] This is further reinforced by the fact that the Ontario Securities Commission refused to authorize Baffinland to disclose the Scoping Study itself. By OSC Memorandum dated July 16, 2008, the Commission refused a request to exempt the company from the prohibition in *National Instrument 43 – 101 - Standards of Disclosure for Mineral Projects* against making any disclosure of an economic valuation which uses inferred mineral resources.

[124] The OSC Memorandum went on to state that:

[4] Both parties agree that the different outcomes in the DCF analyses of their respective experts are based on these two factors. As stated by the Dissent Group in its factum at para. 67, the different outcomes "result almost entirely" from these two factors.

[5] See, for example, sections 1.23.2 and 24.2.

> [a] preliminary assessment, or scoping study, is intended to be used as a tool for broadly testing "what if" models in the early stages of a project to justify further exploration and engineering and economic studies. … [T]here is no compelling reason to disclose the results of an economic analysis which would include "low confidence" inferred mineral resources.
>
> … Baffinland will complete additional drilling on Deposits Nos. 2 and 3 over a four-year period to upgrade inferred mineral resources and complete a subsequent pre-feasibility study to determine the economic viability of these deposits prior to making a production decision. This is the appropriate course of action … and is consistent with the requirements of NI 43-101. Providing exemptive relief to disclose an economic analysis on Deposits Nos. 2 and 3 before this additional work has been completed is not in the public interest and would effectively undermine the definition of a preliminary assessment as well as the prohibition on using inferred resources in an economic analysis.

[125] The Dissent Group submits that the CIM Definition Standards and disclosure requirements were "ill-suited to an unusual and extraordinary iron ore deposit like Mary River." I disagree. In my view, it is precisely development and exploration stage projects like the Mary River Project to which the CIM Definition Standards and protections in *National Instrument 43-101* are directed.

[126] The Dissent Group argues that the definitions and classifications of mineral rights, such as are expressed in the CIM Definition Standards and *National Instrument 43-101*, are concerned with disclosure to the public, which includes unsophisticated investors, and are not specifically aimed at protecting sophisticated, strategic buyers, such as those who were bidding here, who are in a "better position to assess the potential risks and benefits attached to inferred resources."

[127] Again, the problem with these arguments is that the market evidence was clear. Those very parties whom the Dissent Group argues are in a "better position to assess the potential risks and benefits" did in fact assess them. Having done so, most elected not to submit a bid at all. Those who did elect to submit bids chose not to bid higher than the Joint Bid price of $1.50 per share.

[128] In addition, Management's Discussion and Analysis of Financial Condition (MD&A) for the year ended December 31, 2009 is clear and further reinforces my conclusion here. It includes the following statements:

a. "Few properties that are explored are ultimately developed into producing mines. the Mary River Property is still in the exploration and development stage";

b. "It is impossible to provide any assurance that the exploration programs completed and further planned by the Company will result in a profitable commercial mining operation";

c. "The Company does not currently have sufficient funding to commence or complete the development of the Mary River Property. … [It] has limited financial resources and no current source of recurring revenue"; and

d. "The Mary River Property consists of both mineral resources and mineral reserves. Mineral resources that are not mineral reserves did not have demonstrated economic viability. Due to the uncertainty that may attach to indicated mineral resources, there is no assurance that mineral resources will be upgraded to proven and probable ore reserves. Inferred mineral resources are considered too speculative geologically to have the economic considerations applied to them that would enable them to be categorized as mineral reserves."

[129] These were statements of Baffinland itself, endorsed and authorized by McCloskey and McCreary, each of whom signed off on and authorized that MD&A.

[130] Finally in this regard, even the Scoping Study on which the production assumption of 30 MTPA is based itself that "significant work" would need to be undertaken to drill Deposits Nos. 2 and 3 "in order to develop the geological understanding and dataset" which could take six dedicated drills over four years.

[131] The Scoping Study Report is very clear in this regard: "The Expansion Study is based on predominantly Inferred mineral resources with minor Indicated resources from deposit Nos. 2 and 3…. The resource classification does follow CIM terminology and criteria for classifying mineral resources. As there is insufficient drill density, these deposits cannot be at this time reclassified as reserves…. For Deposit Nos. 2 and 3, no geotechnical work has been carried out".

[132] Hatch concluded in its report that it was "likely uneconomic" to develop the inferred resources from Deposits Nos. 2 and 3 on which the Scoping Study was based. Certainly, there was no marketing analysis as to where, how and to whom this increased production of ore could be sold. Without knowing the destination market, it is difficult to predict an accurate price forecast since shipping costs could vary materially (i.e., as between the European market or the Asia-Pacific market, for example). At the time, there was no ability to ship the additional production capacity to the European market, so other markets would necessarily have had to have been considered.

[133] There is no evidence of any marketing analysis as to how, where, or at what price the increased production could be sold. This is consistent also with the evidence of Walter, whose affidavit evidence (on information and belief) was to the effect that the ability of the company to place between 10 and 12 additional MTPA of lump iron ore would take a matter of years and not be instantaneous.

[134] In addition, the evidence of Altmann was to the effect that most commercial banks and providers of private equity or debt would not place reliance on the Scoping Study to underwrite project financing. Nor, in his opinion, would a strategic buyer of the company attribute material additional value to reflect proposed expanded production based on inferred resources as described in the Scoping Study. As noted above, inferred resources have the lowest level of confidence in the classification or categories of resources.

[135] I recognize that both McCreary and McCloskey gave evidence about the "unique nature" of the iron ore deposits at the Mary River Project. The affidavit evidence of McCloskey was to the effect that the massive expanse of the Mary River resource exists largely at the surface where it is

in plain view, and that "the Company's mining professionals who visited Mary River could see that there was clearly enough iron ore there to mine for well over a century".

[136] However, I prefer the conclusions of Hatch, the CIM Definition Standards, the express limitations and restrictions in the Scoping Study itself (reflected in the MD&A) and the market experience to the observation of McCloskey above.

[137] I am satisfied that there is not sufficient evidence upon which I can conclude that the necessary drilling and other testing for Deposits Nos. 2 and 3 would lead to the required 307 million tonnes necessary to raise production to 30 MTPA by 2020 and sustain it until 2045, such that that additional capacity ought to be taken into account as at the Valuation Date.

[138] This alone (and separate entirely from the long-term iron ore price forecasts discussed below) is sufficient for me to prefer the analysis of Lee over the analysis of Canessa.

[139] Put another way, if the additional 12 MTPA is not taken into account, as I have concluded, there is no basis for the $8.91 per share value urged by the Dissent Group regardless of the accuracy of the price forecasts.

[140] However, I also considered nonetheless the respective analyses of the two experts with respect to the iron ore price forecasts.

[141] Iron ore is priced in cents per dry metric tonne units ("DMTU"), sometimes converted to dollars per tonne. There are different grades of iron ore.

[142] Lee based his analysis on an assumed price range of ₵110 per DMTU to ₵147 per DMTU, using the long-term Brazilian fine price forecasts from seven research analysts for dates close to the Valuation Date, with an average price of ₵110 per DMTU; AM's own price forecasts for Brazilian fines that it used for its due diligence analysis on the Mary River Project; and price forecasts from Baffinland itself for fines and lumps applied for internal planning purposes in June 2010.

[143] Lee rejected the price forecasts from the RHFS on the basis that they were "anomalous and higher than projected long-term prices [that Duff & Phelps] considered reasonable". He included, however, a forecast from UBS which was materially less than the other six price forecasts. Canessa is critical of this, suggesting that Lee rejected a "high outlier" but included a "low outlier".

[144] Canessa's own, materially higher, forecasted iron ore prices were based on forecasts also prepared by Baffinland for its 2010 RHFS (the road haulage feasibility study), for 2017, 2018, 2019 and 2020+. Those iron ore prices were in turn based on forecasts from AME Economics and CRU International Limited. Canessa maintains that those forecasts are appropriate; the Applicant argues that his selection underscores a bias towards prices at the upper end of the range rather than an average, as compared to the estimates considered by Lee.

[145] CRU price forecasts were for a lower grade fine iron ore (Itabira), as opposed to the Carajas iron ore price forecasts for the European market (the intended market for ore from the Mary River Project). This in turn necessitated, according to Lee, an upward adjustment to the CRU Itabira

price forecast to make it comparable to the Baffinland pricing model, which was based on the European market Carajas iron ore pricing.

[146] Canessa's forecast has no adjustment whatsoever, while Lee's forecast price is reduced by six dollars per tonne to reflect shipping costs from Baffin Island to Rotterdam in Europe (based on the Hatch Report).

[147] In addition, the differential between the forecasted iron ore prices for each of Carajas and Itabira depends on the source of the forecasts - AME or CRU. The Applicant argues that the use of CRU forecasts, which were based on nominal prices, as opposed to the AME forecasts, which were made in dollars, generates a further distortion in that the forecasted price is higher than it would be if real prices were applied since a nominal price reflects an estimated future value without accounting (i.e., a discount) for factors such as inflation.

[148] In my view, for the reasons expressed above (and particularly my conclusions about the reliance on the Scoping Study to justify the 30 MTPA of total production), it is not necessary for me to dissect the respective analyses of the two experts with respect to the price forecasts to reach a disposition of this matter.

[149] Moreover, I do not think it is appropriate for me to do so. Such an analysis would necessarily involve the court substituting its own conclusions for those of the experts in an area that is extremely technical and complex. In my view, to engage in such an exercise would be to act in a manner quite contrary to the cautious approach urged by Brown J. in *Glass*, quoting with approval from *Brant Investments*, excerpted above in these reasons.

[150] In fact, in my view an attempt by the court to surgically or forensically dissect these competing expert reports would run afoul of Brown J.'s caution against judges attempting to "mix and match portions of competing expert reports and thereby cast themselves in the role of performing their own valuation."

[151] My conclusion that such is not appropriate here is further reinforced by what I view as a somewhat limited utility of the exercise in any event. Here, any result would be so speculative as to be of limited value.

[152] As noted above, there were no actual operating results for the Mary River Project as at the Valuation Date, so all of these analyses are based entirely on assumptions and projections. The risk that they may be inaccurate is magnified exponentially by the significant period of time between the Valuation Date and the commencement of the proposed production being estimated. The Valuation Date is March 25, 2011. Not only was production not anticipated to begin shortly thereafter, but it was also not projected to begin for years. Even the forecasts relied on by Canessa do not begin until 2017 and continue through 2020 and beyond.

[153] As noted by the Yukon Court of Appeal in *Carlock* in the excerpt quoted above, even a minor variation in assumptions about future metal prices, tonnage, metallurgy, mining plans or discount rates becomes magnified through the calculation into a gross distortion of the fair value.

[154] The result is that such an exercise is not probative in the circumstances.

[155] I am further reinforced in this conclusion by the fact (as observed above in the discussion regarding the market evidence), that the $8.91 per share value yielded by Canessa's DCF analysis is so far removed from the value ascribed by the market. In my view, Canessa's conclusion as to a fair value that is six times the market value represents an overly optimistic, best possible case scenario estimate of value, rather than a prudent, cautious estimate that is preferred in the authorities to which I have referred above.

[156] The observations I made above as to the market evidence apply here also: this exercise might be more challenging if Canessa's DCF analysis yielded an incremental increase in value over the transaction price of, for example, 5% or 10% or 25%. But where it yields a value of some 600% in excess of that attributed to the share price by the market in circumstances where, as I have concluded, the market was sophisticated and well informed, I am inclined to accord it relatively little weight. Nor am I inclined to reduce the fair value below $1.50 by 33% to the midpoint of $1.00 suggested by Lee.

[157] In any event, and whatever the conclusion with respect to price forecasts, the $8.91 per share value depends upon a production estimate of 30 MTPA that I have rejected.

The Role of McCreary and McCloskey: the Dissent Group Evidence of Former Baffinland Executives

[158] It is appropriate to make some additional observations about the respective roles of the two principal fact witnesses on whose evidence the Dissent Group relies: McCreary and McCloskey. As stated above, both were directors of the company, both held the office of President (McCloskey on an interim basis), and McCloskey was also Chair of the Board.

[159] McCreary, who was President and CEO from 2004 to March 2010, and a director from 2004 until November 2010, had been involved with what would become the Mary River Project since the 1970s. In fact, he was one of the co-founders of Baffinland, together with McCloskey. He resigned from the company's board on November 5, 2010 because, in his words, he believed that the bid of AM did not reflect Baffinland's true value and therefore was not in the best interests of its shareholders.

[160] McCloskey was the other co-founder of Baffinland and served as a member of its Board from 2004 until January 2011, also serving as Chair from 2005 until January 2011. His term as interim president and CEO spanned from March 2010 to January 2011. He has approximately 40 years' experience as an executive in the mining industry. He dissented from the approval by the Baffinland Board of Directors of the Joint Bid, apparently being of the view that the share value ought to be far higher.

[161] The Dissent Group urges upon me that I should accept the evidence of these two individuals as being objective, since neither has any economic interest in the outcome of this proceeding and neither is a dissenter himself or is receiving any compensation from the Dissent Group. The Dissent Group also submits that the Applicant has not put forward any fact witness to give evidence to contradict the fact evidence from these two affidavit witnesses.

[162] What the record does have, however, is both the objective evidence of how the market responded, and the actions of these two individuals themselves. The market evidence has already been discussed above.

[163] A challenge for me in accepting the passionately held views expressed in the affidavits of these two individuals is that the objective evidence of their own conduct undermines to some extent their general position that the fair value of the shares should be determined to be $8.91.

[164] That conduct includes, in particular, the following:

a. both McCreary and McCloskey tendered their own shares to the Joint Bid or sold their shares on the market. Neither dissented;

b. McCloskey entered into a lock-up agreement during the bidding process pursuant to which he, then Chair of the Board, had agreed to sell his shares at $1.10, or approximately 73% of the Joint Bid price;

c. McCloskey, in his capacity as Chair of the Board, recommended that Baffinland shareholders tender to bids between $1.10 and $1.50 per share, and suggested that he himself might make a bid for Baffinland up to $1.45 per share. McCloskey owned in his personal capacity 1,576,605 common shares. Millions of additional shares of Baffinland were owned by other public companies which he controlled; and

d. following his resignation from the Board and continuing through to February 4, 2011, McCreary was unable to generate a superior bid for Baffinland from any other party.

[165] I cannot reconcile these actions of these two very experienced mining executives during the auction process culminating in the Joint Bid with their position on this Application that the market, which included the leading mining industry participants from around the world, CIBC in its capacity as financial advisor for Baffinland itself, and the company's largest single shareholder who tendered to the Joint Bid together with the overwhelming majority of other shareholders, all got it wrong.

[166] To accept the position of the Dissent Group, I am required to find that not only did all of those sophisticated market participants get it wrong, but they got it very wrong by an order of magnitude: a multiple of six times. As the British Columbia Court of Appeal concluded in *Carlock*, it is simply unreasonable, given the number of parties interested in a full company transaction, and the number and sophistication of the shareholders of the Company, that such a material amount in value was "left on the table": *Carlock*, at para. 87.

[167] Moreover, and as noted above, the Board recommended acceptance of the Joint Bid to shareholders. If the Board was genuinely of the view that the Joint Bid was unfair, one would have expected that it would fulfil its duties and oppose the Joint Bid. At a minimum, and even if the Board had a contractual duty to support the Joint Bid as a result of the Support Agreement (and leaving aside for a moment why it would have entered into such a support agreement in the first

place), one would expect a notice to shareholders in the circular cautioning shareholders about the fact that what was before them was a joint bid.

Relevant and Corroborative Events Subsequent to the Valuation Date: A Reasonableness Check

[168] While my determination of fair value is based on the above factors, I draw additional comfort from the actual experience subsequent to the Valuation Date. To be clear, I am not relying on subsequent facts or events in arriving at my determination as set out above, other than for the limited purpose (as discussed below) of addressing the claim of the Dissent Group for interest.

[169] Rather, I am observing that my conclusions as to the reasonableness, or lack thereof, of certain assumptions relied upon by the parties and their respective experts appear to be reasonable with the benefit of hindsight based on subsequent events which I naturally recognize was not available to any party or expert as at the Valuation Date.

[170] Generally, hindsight evidence is not admissible for the purposes of determining the fair value of shares as at the Valuation Date, but that is subject to two exceptions.

[171] First, factual hindsight information may be used to compare actual results achieved after a valuation date as against projected or forecasted results said to have been reasonably foreseeable on the Valuation Date. Second, the reasonableness of assumptions made by the valuators may be challenged: *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2000), 48 C.P.C. (4th) 272 (Ont. S.C.) at paras. 5 -6; *Domglas Inc. v. Jarislowsky, Fraser & Co.* (1982), 138 D.L.R. (3d) 521 (Q.C.C.A.) at para. 13; *Nunachiaq Inc. v. Chow* (1993), 8 B.L.R. (2d) 109 (B.C.S.C.) at paras. 19 – 21, quoting with approval from *Cyprus*; and *Hall v. Atto,* [2004] O.T.C. 101 (Ont. S.C.) at para. 23.

[172] This case is somewhat unusual in that there was such a significant period of time between the Valuation Date and the hearing of this Application – 11.5 years. The cause of this delay is, as described below, largely due to the fact that the application was subject to a stay of proceedings pending a determination of a class action arising out of the same takeover transaction.

[173] Since the Valuation Date, the annual production of the Mary River Project has in fact never exceeded 6 MTPA. That is significantly less than the production assumptions of the discounted cash flow analyses of both parties: Supplemental Affidavit of Walter, paras. 229 – 231.

[174] While, naturally, many factors could affect that outcome, the practical reality is that the actual production from the Mary River Project was in fact less than the assumed production on which the position of 208 was based, and very materially less than the assumed production on which the position of the Dissent Group was based.

[175] Again, while I do not rely on actual production results subsequent to the Valuation Date in determining fair value, they do suggest, as contemplated by the exceptions and the caselaw, that my determinations as to the reasonableness of the assumptions made by the valuators and particularly Canessa, are accurate. Simply put, production at the Mary River Project has never been anywhere close to 30 MTPA, nor even 18 MTPA. I put it no higher than that.

The Dissent Group's Claim for Interest

[176] Section 185(27) of the *OBCA* provides that this Court has the discretion to allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective until the date of payment.

[177] As noted, the Dissent Group specifically relies on events subsequent to the Valuation Date in support of their claim for interest. The Dissent Group seeks an award of interest "for the entire period commencing on the Valuation Date up to the date of payment for the Respondents' Shares."

[178] The Applicant, on the other hand, opposes the claim for interest largely on the basis that the significant delay since the commencement of this proceeding was brought about by the Dissent Group, and therefore it should not be entitled to interest as a result.

[179] This Application was originally commenced by Notice of Application issued on May 17, 2011, less than two months after the Valuation Date. The evidence before me is to the effect that a stay of proceedings was imposed in October 2012 by the case management judge supervising a proposed securities class action against Baffinland (and others) arising from the takeover that is the subject of this Application. Originally, the stay was sought to have effect until a determination of the certification motion.

[180] That stay was then extended by the class action case management judge in 2018 at the hearing of the certification motion. The motions judge noted that: "the logistical issues of when and how the valuation proceeding is to be adjudicated can be determined at some later time."

[181] In September 2019, a settlement of the class action was approved by the court, as a term of which the action was dismissed with the result that the stay was of no further force or effect.

[182] Importantly, the evidence before me is to the effect that both the original stay motion, and the stay extension, were actively opposed by 208, and actively supported by the Dissent Group whose counsel appeared to support the stay being granted or continued.

[183] Once this Application was no longer stayed, it proceeded relatively continuously given its complexity, with the exchange of sworn affidavit evidence from fact witnesses, expert reports, supplementary and/or reply evidence from fact witnesses and experts, cross-examinations and preparation for argument.

[184] In short, virtually the entire record on which the Application is based and all significant steps in the proceeding beyond the issuance of the Notice of Application occurred or were developed following the lifting of the stay in September 2019 through to the hearing of this Application.

[185] There is no evidence in the record before me of any delay in the prosecution of this Application by 208 subsequent to the lifting of the stay and none is alleged. In any event, I am satisfied that it proceeded appropriately subsequent to September 2019. It seems to me that the Dissent Group ought to be entitled to interest for that period of time.

[186] As to the period during which the stay of proceedings was in effect, I accept the position of 208 that the stay was actively supported by the Dissent Group. However, it does not follow to my mind that such support for a stay was unreasonable, let alone so unreasonable as to disentitle those parties to interest. The stay and the stay extension evidently were reasonable to the motions judge who granted them.

[187] Moreover, there are numerous reasons why such a stay of this application for a determination of fair value, pending a determination or settlement of the proposed class action attacking the very takeover transaction from which the fair value determination application arose, would be reasonable. Judicial economy would be one such reason.

[188] On the basis of the Record before me, I cannot conclude that the period during which the stay or stay extension were in effect is one during which the conduct of the Dissent Group was unreasonable such as to disentitle them to interest.

[189] Exercising my discretion, however, I think that in all of the circumstances, an award of simple interest on the amount owing to the Dissent Group for the period during which the stay was in effect is reasonable, fair and equitable as between the parties.

[190] That leaves the period between the Valuation Date and the imposition of the stay in first instance: March 21, 2011 to October 2012. There is no basis to disentitle the Dissent Group to interest for this period of time.

[191] Accordingly, the Dissent Group is entitled to interest at the applicable pre-judgment interest rate for the full period they seek: the Valuation Date to the date of payment.

Summary, Result and Disposition

[192] The market evidence supports overwhelmingly, in my view, a determination of fair value at $1.50 for the reasons set out above. If I were to consider market evidence only, I would be compelled to go further and conclude that there is no market evidence whatsoever of a value ascribed to the shares by any party, as at the Valuation Date or indeed on any other date whatsoever, that exceeds $1.50 per share.

[193] Indeed, that is precisely why the Dissent Group relies upon the DCF Analysis of Canessa. That is the only calculation that yields the figure that it submits I should find is the fair value of the shares ($8.91 per share), or any figure remotely close to it. There is a complete absence of any market evidence of a fair value anywhere close to that number or any number in excess of $1.50. Lee's DCF analysis yields only a midpoint value of $1.00 per share.

[194] For all of the above reasons, I determine the fair value of the shares held by the members of the Dissent Group, as at the Valuation Date, pursuant to s. 185 of the *OBCA*, to be $1.50 per share.

[195] Order to go to give effect to that fair value determination and to the payment of interest as set out above. If the parties cannot agree on a form of order to give effect to these reasons, I may be spoken to.

[196] I encourage the parties to agree on the costs of this Application. If they are unable to do so, the Applicant may submit to me in writing within 15 business days a costs outline not to exceed five pages in length together with a bill of costs unless quantum (if not entitlement) is agreed. The Respondents may submit to me in writing within 10 days thereafter a costs outline, also not to exceed five pages, and also to be accompanied by a bill of costs unless quantum is agreed.

[197] I am grateful to counsel for both parties for their helpful written and oral submissions.

Osborne J.

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 NUNAVUT IRON ORE, INC., BAFFINLAND IRON MINES CORPORATION AND 12334992 CANADA INC

Court File No. CL-00000219-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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