

Court File No. CL-26-00000219-0000

**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.

COMPENDIUM OF EXPORT DEVELOPMENT CANADA

October 8, 2026

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TO: **THE SERVICE LIST**

**ONTARIO
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SALE AND INVESTMENT SOLICITATION PROCESS

1. On September 24, 2026, the Ontario Superior Court of Justice (the “**Court**”) granted the SISP Order that, among other things, authorized Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation, 12334992 Canada Inc. and Baffinland Iron Mines LP (each a “**Debtor**” and collectively, the “**Debtors**”) to implement a sale and investment solicitation process (the “**SISP**”) in accordance with the terms hereof.
2. This SISP sets out the manner in which (i) bids for a broad range of executable transaction alternatives involving the business and assets or shares of the Debtors, whether *en bloc* or any portion(s) thereof, including for greater certainty, recapitalization transaction alternatives, will be solicited from interested parties, (ii) any bids received will be addressed, (iii) any Successful Bid will be selected, and (iv) the Court’s approval of any Successful Bid(s) will be sought.¹ Such transaction alternatives may include, among other things, a sale of some or all of the Debtors’ shares, assets and/or business and/or an investment in a Debtor or the Debtors, each of which shall be subject to all terms set forth in this SISP.
3. The SISP shall be conducted by the Chief Restructuring Officer (the “**CRO**”) of the Debtors in consultation with the Debtors, with the assistance of Morgan Stanley Canada Limited (the “**Transaction Advisor**”) and under the supervision and oversight of FTI Consulting Canada Inc. in its capacity as Court-appointed monitor of the Debtors (the “**Monitor**”).
4. Parties who wish to have their bids and/or proposals considered shall be required to participate in this SISP.
5. The SISP will be conducted such that the CRO ~~and the Transaction Advisor~~ will, under the supervision and oversight of the Monitor:

(i) Together with the Transaction Advisor:

- ~~(i)~~(a) prepare marketing materials and a process letter (the “**Process Letter**”) containing, among other things, the key milestones under the SISP;
- ~~(ii)~~(b) prepare and provide applicable parties with access to one or more virtual data rooms (“**VDR**”) containing, among other things, diligence information;
- ~~(c)~~ ~~(iii)~~ facilitate a due diligence process including management presentations and customary financial and operational due diligence, in each case with the assistance of management personnel;
- ~~(iii)~~(d) solicit interest from parties to enter into non-disclosure agreements (“**NDA**”) (and parties shall obtain access to the VDRs and be permitted to participate in the SISP only if they have executed an NDA, in form and substance satisfactory to the CRO);

¹ To the extent any dates fall on a non-business day, such date shall be the first business day thereafter.

~~(iv)~~(e) request that such parties submit initial non-binding letters of intent (“LOIs”) on a date to be communicated to parties in the Process Letter, which date may be extended by ~~the Transaction Advisor and~~ the CRO, with the consent of the Monitor and the DIP Lender (the “**LOI Bid Deadline**”);

~~(v)~~(ii) select from parties that submitted an LOI by the LOI Bid Deadline the parties invited to enter into the second phase of the SISP (the “**Phase 2 Parties**”) to conduct detailed due diligence;

~~(vi)~~(iii) together with the Transaction Advisor, request that Phase 2 Parties submit binding offers together with a duly executed proposed transaction document(s) (the “**Qualified Bid**”) by 11:59 p.m. prevailing Eastern Time on a date to be determined by ~~Transaction Advisor and~~ the CRO, in consultation with the Transaction Advisor and with the consent of the Monitor and the DIP Lender, as may be extended by the ~~Transaction Advisor and the~~ CRO and with the consent of the Monitor and the DIP Lender or further order of the Court (the “**Qualified Bid Deadline**”); and

~~(vii)~~(iv) together with the Transaction Advisor, communicate any extensions of the LOI Bid Deadline and Qualified Bid Deadline to parties that have executed an NDA.

6. In order to constitute a Qualified Bid, a bid must comply with the following:

- (i) Value and Consideration. It provides a detailed sources and uses schedule that identifies, with specificity, the amount of cash consideration and any assumptions or proposed adjustments that could reduce the net consideration payable thereunder;
- (ii) Modified Transaction Agreement. It contains a duly executed binding transaction document(s) together with all completed schedules thereto and the detailed terms and conditions of the proposed transaction, and, if applicable, a redline to the form of transaction document (s) provided as part of this SISP;
- (iii) Identification of Bidder. It contains the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, the name(s) of its sponsors and controlling equityholder(s) and disclosure of any connections, agreements or other arrangements with the Debtors or any of their affiliates, or any known, potential or prospective bidder, or any officer, manager, director, or known equity security holder of the Debtors or any creditors, customers or debt holders of the Debtors;
- (iv) No Contingencies. It is not conditional on obtaining financing, any board of director or similar governing body or equity holder approval or on the outcome or review of due diligence;
- (v) Required Approvals. It specifies any government, regulatory or other third-party approvals required to complete the transaction, including but not limited to competition, foreign investment and national security interest approvals, with the anticipated strategy, timeframe and potential impediments for obtaining such approvals set forth in detail, such that the CRO, in consultation with the

SISP, or any information provided in connection therewith, (c) agrees that the transaction that is the subject of the bid shall be on an “as is, where is” basis and without surviving representations, warranties, covenants or indemnities of any kind, nature or description by the Debtors, the CRO, the Transaction Advisor or the Monitor, or their respective employees, officers, directors, agents, advisors and other representatives, except to the extent set forth in a written agreement as between the bidder and the Debtors, (d) agrees its bid shall serve as Back-Up Bid, if its bid is selected as the next-highest or otherwise best Qualified Bid as compared to the Successful Bid, (e) has not engaged in any collusion with respect to the submission of its bid, and (f) agrees to be bound by the terms of the SISP;

- (xii) Costs and Expenses. It contains a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) and the costs of obtaining any regulatory approvals in connection with the proposed transaction and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis;
- (xiii) Treatment of Employees, Contracts, Etc. It provides a description of the bidder’s intentions for the Mine, including as it relates to Steensby Expansion, the engagement of employees both at the Mine and head office, contractors, customers, contracts [\(including offtake, fuel, royalty and other commercial agreements\)](#) and vendors under the proposed bid;
- (xiv) Deposit. It is accompanied by a cash deposit (the “**Deposit**”) of **[5%]** of the total consideration payable contemplated by such bid, which shall be paid to the Monitor by wire transfer (to a bank account specified by the Monitor) and held in trust by the Monitor in accordance with this SISP (for the avoidance of doubt, a Deposit shall be required with respect to that is **[5%]** of the cash component of any credit bid pursuant to Section 18); and
- (xv) Deadline. It is received by the Qualified Bid Deadline (as may be extended in accordance with Section 5 above).

- 7. ~~The Debtors, in consultation with~~ the CRO, in consultation with the Monitor and the Transaction Advisor may waive compliance with any one or more of the requirements specified in Section 6 above and deem a non-compliant bid to be a Qualified Bid, provided that ~~the Debtors~~CRO may not waive compliance with Section 6(x);
- 8. Following the Qualified Bid Deadline, the ~~Debtors may, in consultation with the~~CRO, in consultation with the Monitor and the Transaction Advisor, may determine to (i) continue negotiations with one or more bidders that have submitted Qualified Bids, to the exclusion of others, with a view to selecting one or more non-overlapping Qualified Bids or credit bid as the successful bid(s) (the “**Successful Bid(s)**”) or Back-Up Bid, taking into account the overall value of each such bid in the judgment of ~~the Debtors after consultation with~~ the CRO, in consultation with the Transaction Advisor and the Monitor, and applicable conditions to completion, among other factors, (ii) proceed with an auction to determine the Successful Bid(s) or Back-Up Bid, which auction shall be administered in accordance with auction procedures to be determined by the CRO ~~and the Transaction Advisor~~, in consultation with the Monitor and the Transaction Advisor, and provided to all bidders that have submitted a Qualified Bid at least two business days prior to the auction, and (iii) take such steps as are necessary to finalize

and consummate the Successful Bid(s). The ~~Debtors-CRO~~ has no obligation to conclude a sale or other transaction arising out of this SISP and the ~~CRO-Debtors~~, in consultation with the CRO-Monitor and the Transaction Advisor, reserves the right to reject any bid (including any Qualified Bid) or to terminate the SISP, in each case with the consent of the Monitor and the DIP Lender.

9. Following selection of a Successful Bid, if applicable, the ~~Debtors-CRO~~, in consultation with the CRO-Monitor, with the assistance of the Transaction Advisor and other advisors, as needed, shall seek to finalize any necessary definitive agreement(s) with respect to the Successful Bid(s) or Back-Up Bid(s). Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, the CRO may cause the Debtors may-to apply to the Court for an order approving such Successful Bid and authorizing the Debtors or the CRO, as appropriate, to (i) enter into any and all necessary agreements and related documentation with respect to the Successful Bid, (ii) undertake such other actions as may be necessary to give effect to such Successful Bid, and (iii) implement the transaction(s) contemplated in such Successful Bid (a "**Transaction Approval Order**"). If the Successful Bid is not consummated in accordance with its terms, the ~~Debtors, in consultation with the~~ CRO, shall be authorized, but not required, in consultation with the Transaction Advisor, and with the consent of the Monitor, to designate the Back-Up Bid (if any) as the Successful Bid and seek a Transaction Approval Order with respect thereto.
10. All Deposits shall be retained by the Monitor in an interest-bearing trust account. If a Successful Bid is selected and a Transaction Approval Order is granted in connection therewith, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the purchase price to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit (with interest earned, if any) delivered with a Qualified Bid that is not selected as a Successful Bid or Back-Up Bid, will be returned to the applicable bidder within ten business days of the date upon which the Successful Bid is approved pursuant to a Transaction Approval Order or such earlier date as may be determined by the CRO, in consultation with the Monitor and the Transaction Advisor. The Deposit in respect of the Back-Up Bid (if any) shall be returned to the applicable bidder within ten business days after the closing of the Successful Bid or such earlier date as may be determined by the CRO, in consultation with the Monitor and the Transaction Advisor. If a bidder breaches its obligations under the terms of the SISP or the definitive transaction document(s), its Deposit (if any) shall be forfeited as liquidated damages and not as a penalty, without limiting any other claims or actions that the Debtors may have against such bidder and/or its affiliates, including as set out in the definitive agreement(s).
11. At any time after a prospective bidder executes an NDA, the ~~Transaction Advisor and~~ the CRO, in consultation with the Monitor, shall be authorized, but not required, to permit certain parties to attend site visits. In determining whether to permit a party to attend a site visit, the CRO, in consultation with the Monitor and the Transaction Advisor shall consider various factors, including: (i) the identity of the party and the prospect of it submitting a Qualified Bid, (ii) the costs associated with the site visit, (iii) whether the party has attended a site visit previously, (iv) the number of parties that have attended site visits or are seeking to attend site visits, (v) the nature of the site visit, and (vi) whether the site visit is reasonably expected to materially increase the likelihood of the culmination of a Successful Bid. Site visits shall be made available

CITATION: PCAS Patient Care Automation Services Inc. (Re), 2012 ONSC 2840
COURT FILE NO.: CV-12-9656-00CL
DATE: 20120514

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985,
c. C-36, as amended;

AND IN THE MATTER OF a plan of compromise or arrangement of PCAS
Patient Care Automation Services Inc. and 2163279 Ontario Inc., Applicants

BEFORE: D. M. Brown J.

COUNSEL: S. Babe, for the Applicants

M. Wasserman, for the Monitor, Pricewaterhouse Coopers Inc.

R. Thornton and A. Shepherd, for 2320714 Ontario Inc., the DIP Lender

D. Bulas, for Castcan Investments

R. M. Slattery, for Royal Bank of Canada

HEARD: May 14, 2012

REASONS FOR DECISION

I. Request for increase in DIP Lending Facility and approval of a Sale and Investor Solicitation Process

[1] PCAS Patient Care Automation Services Inc. and 2163279 Ontario Inc. move under the *Companies' Creditors Arrangement Act* for an increase in the DIP Lending Facility and the approval of a Sale and Investor Solicitation Process ("SISP"). At the hearing I granted and signed the order sought, subject to a few modifications. These are my reasons for so doing.

II. Background to this motion

[2] The history of this matter is set out my Reasons of April 20, 2012 (2012 ONSC 2423), May 5, 2012 (2012 ONSC 2714) and May 8, 2012 (2012 ONSC 2778).

E. Analysis

[17] In *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750, I attempted to summarize the jurisprudence on the approval of sales and investment solicitation processes as follows:

[6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

- (i) the fairness, transparency and integrity of the proposed process;
- (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
- (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.

[8] Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.

COURT FILE NO.: 03-CL-5145

DATE: 20040610

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

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

*AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF IVACO INC. AND THE APPLICANTS
LISTED IN SCHEDULE "A"*

BEFORE: CUMMING J.

COUNSEL: *M. P. Gottlieb, for the Applicants*
Michael E. Barrack and Geoff R. Hall, for QIT
E. Lamek, for the National Bank of Canada
Peter Howard, for the Monitor, Ernst & Young Inc.
D. V. MacDonald, for Bank of Nova Scotia
J. T. Porter, for UBS
Ken Rosenberg, for United Steel Workers of Canada

Heard: June 9, 2004

ENDORSEMENT

The Motion

[1] The moving party Applicants, Ivaco Rolling Mills Limited Partnership, comprising some eight affiliated corporations ("IRM"), seek directions from the Court in respect of the sales process for its business under the *Companies' Creditors Arrangement Act* ("CCAA"). The motion raises an important issue relating to the respective roles of the Monitor and Chief Restructuring Officer in that process. The Court provided a decision at the conclusion of the hearing, with reasons to follow.

Background

[2] IRM is engaged in the steel manufacturing and processing business in Canada. QIT-Fer Et Titane Inc. ("QIT") is a major supplier to IRM of steel billets pursuant to a long-standing supply agreement. QIT is also a major unsecured creditor of IRM, being owed some \$62 million.

[3] The Applicants obtained an Initial Order under the CCAA September 16, 2003. A Chief Restructuring Officer ("CRO") was appointed October 24, 2003.

unsecured creditors all took the position that the CRO should be part of the sales process. Only QIT, supported by the United Steel Workers of Canada, took the contrary view.

[12] The only support for QIT came from the United Steel Workers of Canada, being the Union representing the workers of IRM through a collective bargaining agreement. The position expressed by counsel for the Union was that the continuity of IRM's business is critical to the direct welfare of its employees and is of indirect benefit to the community at large. There is a clear public interest in the welfare of the workers. Undoubtedly, that is a correct, and important observation.

[13] Thus, counsel for the Union argued further, the Court should accede to the position of QIT even though it might result in a failure to maximize the value of the IRM assets through the CAA proceeding. In my view, the Union's quite proper concern for the welfare of the workers cannot justify trumping the concern of creditors that they be treated fairly. Nor would it ever be in the broader notion of the public interest to allow a sales process perceived to be unfair to go forward. The public policy underlying the CCAA and its objectives would be undermined. Indeed, it might well be that any proposed sale would not then garner the requisite support of creditors required for approval under the CCAA. It might be that the business of IRM is more likely to fail, to the ultimate disadvantage of its workers, through a compromise to the integrity of the sales process. In any event, the Court could not sanction a proposed plan of compromise that was the result of an unfair process.

[14] QIT professes that if the CRO takes part in the negotiations between the bidders and QIT that this will necessarily inhibit the sales process. QIT claims this will be so because bidders will be reluctant to provide confidential information to QIT, and vice-versa, while recognizing that the CRO may then use that information to enhance an alternative stand-alone restructuring plan and consequentially advise against acceptance of the bidder's proposal.

Disposition

[15] There are certain fundamentals to a CCAA proceeding relevant to a determination of the issue at hand. First, there cannot be a sales process whereby one unsecured creditor secures a secret benefit or advantage over the other unsecured creditors. Such a result would be the equivalent of providing a preference for that creditor. Fairness to all the creditors is a prerequisite to a satisfactory sales process. Second, the sales process must be seen to be fair. That is, there must be transparency.

[16] Third, the sales process is to be determined by the Court after considering the advice of the Monitor and the position of the Applicants and their creditors. The sales process is not dictated by a supplier *qua* supplier. It may be the supplier does not wish to participate in the sales process given the nature of the process. That is for the supplier to determine in its own self-interest. In the situation at hand, QIT conceivably might say that it would rather lose its supplier relationship with IRM or a successor, to its apparent significant economic detriment, than proceed in the sales process.

[17] The CRO's attendance and participation in the sales process is critical because he is the independent party who must understand all the various bids and weigh each against the possibility of a stand-alone restructuring. He must ultimately make recommendations that engender confidence as being advanced on the best information and advice possible. The CRO is an active part of the negotiations in the sales process. He is not involved as a relatively passive observer in the manner of the Monitor.

[18] The sales process has been determined by the Applicants with the approval of the Court. The CRO represents the Applicants in that process. The intended sales process is one of trilateral negotiations. If QIT, IRM or any bidder wishes to discontinue such negotiations at any time that is, of course, that party's right. It is in the obvious self-interest of IRM, QIT, and any bidder to maintain the existing QIT to IRM (or successor) supply relationship. It would seem to be a win - win - win situation to come to a tripartite agreement. While no one can be ordered to enter into any new agreement every participant is required to engage in a sales process that is fair and is seen to be fair. The CRO is involved with the purpose of achieving the best result for the Applicants and a result which will be approved by the requisite number of creditors.

[19] Turning to the instant situation, there are a number of Applicants with different unsecured creditors for different Applicants. It is necessary that any negotiated sale (or restructuring) take into account such complexities so that fairness is achieved for all the creditors (and is seen to be achieved.)

[20] QIT proposed that the CRO would be excluded from the negotiations unless his presence was requested by either a bidder or by QIT. I disagree. In my view, the CRO has the right to attend and participate throughout the entirety of the negotiations in the sales process. In the event that a discrete issue arises in the context of a particular bidder's negotiations with QIT, such that there is disagreement as to whether the Monitor or CRO should be absent, then the further direction of the Court can be sought in the context of that specific issue. This will allow for QIT's expressed concerns for bidders in the negotiation process to be taken into account, should this be necessary. It is noted incidentally that no bidder has come forward in the hearing at hand to support QIT in respect of its expressed concerns about the sales process.

[21] Absent some compelling, exceptional factor to the contrary (not seen here), in my view, the Court should accept an applicant's proposed sales process under the CCAA, when it has been recommended by the Monitor and is supported by the disinterested major creditors. The Court has the discretion to stipulate a variation to such a proposed sales process plan. However, the exercising of such discretion would seem appropriate in only very exceptional circumstances.

[22] An Order will issue in the form attached hereto as Annex "A". There are no costs granted to any party.

Stelco Inc. (Bankruptcy), Re, 2005 CanLII 8671 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2005-03-31
File number:	M32289
Other citations:	75 OR (3d) 5 — 253 DLR (4th) 109 — 138 ACWS (3d) 222 — 196 OAC 142 — 2 BLR (4th) 238 — 9 CBR (5th) 135 — [2005] OJ No 1171 (QL)
Citation:	Stelco Inc. (Bankruptcy), Re, 2005 CanLII 8671 (ON CA), < https://canlii.ca/t/1k1rp >, retrieved on 2026-10-07

**In the Matter of the [Companies' Creditors Arrangement Act](#),
R.S.C. 1985, c. C-36, as amended and in the Matter of a
Proposed Plan of Compromise or Arrangement with respect to
Stelco Inc., and other Applicants listed in Schedule "A"
Application under the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36 as amended
[Indexed as: Stelco Inc. (Re)]
[Editor's note: Schedule "A" was not attached to
the copy received from the Court and therefore is not
included in the judgment.]**

**75 O.R. (3d) 5
[2005] O.J. No. 1171
Docket: M32289**

**Court of Appeal for Ontario,
Goudge, Feldman and Blair JJ.A.
March 31, 2005**

Corporations -- Directors -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under [Companies' Creditors Arrangement Act](#) -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation -- In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not

which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

[45] With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

[46] I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corp. Ltd. v. Banking Service Corp. Ltd.*, 1922 CanLII 530 (ON SCHCD), [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); *Stephenson v. Vokes*, [1896] O.J. No. 191, 27 O.R. 691 (H.C.J.). The authority to remove must therefore be found in statute law.

[47] In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: [page22] CBCA, ss. 106(3) and 111 [See Note 4 at the end of the document]. The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court -- where it finds that oppression as therein defined exists -- to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, 2004 CanLII 40665 (ON SC), [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.).

[48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, supra, at p. 480 S.C.R.; *Royal Oak Mines Inc. (Re)*, supra; and *Richtree Inc. (Re)*, supra.

[49] At para. 7 of his reasons, the motion judge said:

The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem. The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.

(Emphasis added)

[50] Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

[51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in [page23] the exercise of their business judgment when

In the Court of Appeal of Alberta

Citation: Angus A2A GP Inc v Alvarez & Marsal Canada Inc, 2026 ABCA 156

Date: 20260511

Docket: 2401-0350AC;

2401-0352AC;

2501-0050AC;

2501-0053AC

Registry: Calgary

Docket: 2401-0350AC

Between:

**Angus A2A GP Inc., Angus Manor Park A2A GP Inc.,
Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc.,
Hills of Windridge A2A GP Inc., Fossil Creek A2A GP Inc., Fossil Creek A2A,
A2A Developments Inc., Serene Country Homes (Canada) Inc. and
A2A Capital Services Canada Inc.**

Appellants

- and -

**Alvarez & Marsal Canada Inc.
in its capacity as Court-Appointed Monitor of the Appellants**

Respondent

Docket: 2401-0352AC

And Between:

**Fossil Creek A2A Developments, LLC and
Windridge A2A Developments, LLC**

Appellants

- and -

Alvarez & Marsal Canada Inc.

58–59, 62; **1057863 BC Ltd (Re)**, 2024 BCSC 1111 at paras 33–34, 46–50. While the reasons in these cases are not extensive, the courts clearly regarded 3(1) as a trigger to the application of the CCAA, not as a limit on the scope of their authority under it.

[130] Adopting the Texas LLCs’ interpretation of s 3(1) would require recharacterizing most of the decisions mentioned as resting on the courts’ inherent jurisdiction rather than on statutory authority. Some cases, such as **Bloom Lake** and **1057863 BC Ltd (Re)**, resist that kind of recharacterization because the courts went beyond granting a stay of proceedings and appointed a monitor with varying powers over non-debtor companies. On the Texas LLCs’ argument, the courts would have exceeded their inherent jurisdiction — and their lawful authority — by doing so. In our view, there is no compelling reason to reinterpret the cases in this way. Their outcomes and reasoning are supported by a textually grounded interpretation of s 3(1) as a trigger, not a limit, on the courts’ statutory authority. Recasting some cases as exercises of inherent jurisdiction would also conflict with the principle that courts should, where possible, ground their authority in the CCAA itself rather than in inherent jurisdiction. As explained above, s 11 is broad enough to authorize orders binding non-debtor companies.

c. Authority under s 11 to appoint a “super-monitor” over non-debtor companies

[131] The Texas LLCs also argue that courts in CCAA proceedings lack any authority — statutory or inherent — to grant a monitor powers of management and control (so-called “super-monitor” powers) over non-debtor companies.

[132] There are several cases in which courts have exercised statutory authority to appoint monitors with “ordinary” investigative and reporting powers in relation to non-debtor companies¹³ and at least one case, **Bloom Lake**, where the Court granted the monitor expanded powers to investigate a non-debtor company. There are, however, no reported decisions in which a court granted a monitor powers to manage a non-debtor company’s business and control its assets. Nonetheless, there is no principled basis for drawing a sharp distinction between the court’s authority to appoint an “ordinary” monitor and a “super-monitor” over non-debtor companies.

[133] Courts undoubtedly have statutory authority to grant monitor powers to manage and control debtor companies, and the most plausible source of that authority is s 11 of the CCAA: Vern W DaRe & Alfonso Nocilla, “Bestriding the Narrow World: Is It Time to Bifurcate the Role of the CCAA Monitor?” (2020) 18 Annual Rev Insolvency L 224 at 236–239; **Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)**, 2020 QCCA 659 at para 68; **Mantle Materials Group, Ltd (Re)**, 2024 ABKB 19 at para 66. As explained in the previous section, the

¹³ Unreported orders include: (1) **Re Sandvine Corporation** (15 November 2024), ONSC CV-24-00730836-00CL (Order of Osborne J); (2) **Re Peavy Industries General Partner Ltd** (6 February 2024), Calgary, ABKB 2501-01350 at para 4 (Order of Johnston J); (3) **Re Just Energy Group Inc** (19 March 2021), ONSC CV-21-00658423-00CL (Order of Koehnen J); (4) **Re Hudson’s Bay Company ULC Compagnie de la Baie D’Hudson SRI** (7 March 2025), ONSC CV-25-00738613-00CL at para 3 (Order of Osborne J).

courts' authority under s 11 is not limited to making orders against debtor companies, so their authority to appoint "super monitors" is not limited in that way either.

[134] The Texas LLCs rely on the Ontario Court of Appeal's decision in ***Stelco Inc (Re)***, 2005 CanLII 8671 (ONCA) [***Stelco ONCA***] to support the proposition that courts lack authority to grant a monitor powers of management and control over non-debtor companies. In our view, that decision is distinguishable. ***Stelco ONCA*** did not address the alleged difference between the courts' authority over debtor companies and non-debtor companies. Rather, the Court held that s 11 does not grant courts authority in CCAA proceedings to remove directors from a debtor company because the *Canada Business Corporations Act*, RSC 1985, c C-44 prescribes a process for their removal: ***Stelco ONCA*** at paras 47–50. Its core holding is that s 11 does not authorize the court to make orders where a specific statutory scheme otherwise exists: ***Stelco ONCA*** at para 48.

[135] That issue does not arise in the present appeals. Here, the Initial Order did not remove the directors of the Texas LLCs — it removed some of their powers of management and control and granted them to the Monitor, an issue not addressed by ***Stelco ONCA***. Insofar as ***Stelco ONCA*** may be read as doubting the courts' statutory authority to grant such powers to a monitor, it has been overtaken by later developments. It predates the more frequent use of use of "super-monitors" and the 2009 amendments to the CCAA, which expanded monitors' functions and duties.

d. Summary

[136] In summary, the courts below had statutory authority under s 11 of the CCAA to subject the Texas LLCs to the Initial Order (including provisions granting enhanced monitor powers), even though the Texas LLCs were not debtor companies at the time.

[137] The fact that the courts have authority to make orders against non-debtor companies, particularly foreign incorporated companies, does not mean that it is always appropriate to exercise it. These appeals did not raise the tricky issue of which factors or principles should structure the exercise of the court's authority.¹⁴ At a minimum, the non-debtor company must be integrally and closely related to the debtor companies' business such that the order is necessary to achieve the purposes of the proceedings. Further obstacles arise when a court is asked to grant a monitor powers to manage a foreign incorporated company, such as the monitor's capacity to comply with the corporate law of another country. Since these issues were not raised in the appeals, we refrain from commenting on them.

[138] Finally, we note the Texas LLCs' brief argument that the courts below erred in granting a stay of proceedings against them. They submit the stay did nothing to further the purposes of these

¹⁴The Texas LLCs' factum argued that the courts below erred in granting the Monitor powers to manage and control their business by failing to apply the law on interim injunctions. However, counsel clarified at the hearing that the argument assumed that the courts lacked statutory authority to grant these powers to the Monitor. As we have explained in the text, the courts had the statutory authority to do so.

**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.**

Applicants

**REPLY FACTUM OF THE APPLICANTS / DEBTORS
(SISP approval motion returnable October 9, 2026)**

October 5, 2026

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Lawyers for the Applicants and
Baffinland Iron Mines LP

TO: The Service List

its comment on *Stelco* must be read in light of its highly unusual facts, which are absent here. In *Angus*, investors in a failed real estate development sought enhanced Monitor powers because of a “total lack of communication” from the debtors, an “apparent abdication of duty by management” and the need to “ensure assets are protected for the benefit of stakeholders” ahead of a contemplated disposition. In contrast to the case at bar, management had provided no updates to investors for at least six years, produced no financial statements, and had not accounted for investor funds at all.¹⁹

9. The lenders also assert that it is “routine” or a matter of “common practice” for this Court to transfer authority over a restructuring to a CRO or the Monitor.²⁰ With respect, that is incorrect, and the lenders cite no authority for it. As explained above, such orders are made only in extraordinary circumstances. There are none here.

10. Notably, the lenders have not identified a single case in which a debtor, over its objection and without extraordinary circumstances, was stripped of control over a SISF:

- (a) The lenders do not rely on reasoned judicial decisions. Instead, they rely on SISF Orders that gave authority over the SISF to the CRO, the Monitor or some combination of them. In two cases, that authority went to the debtor itself.²¹ As the chart at Schedule “C” shows, the **debtor(s) supported** the proposed SISF and its allocation of authority in every case except one. That one exception was a creditor-led CCAA proceeding where the Initial Order had already granted the Monitor enhanced powers.²² Each of these Orders depends on its own facts, and none of them is authority that this Court can safely rely on.
- (b) These Orders do not show that courts “routinely” take authority away from debtors over their objection. They show only that (i) CCAA proceedings respect the fundamental tenets of corporate law, and (ii) whether a debtor cedes control of its sale

¹⁹ [Affidavit of Michael Edwards](#) (filed in *Angus* and dated November 12, 2024), ¶¶9, 97, 109.

²⁰ DIP Lender Factum, ¶¶33, 48; AHC Factum, ¶¶30.

²¹ DIP Lender Factum, ¶¶33; AHC Factum, ¶¶19. See Schedule “C” appended to this Reply for a chart providing additional information regarding the Orders relied upon by the lenders.

²² See *Chesswood Group Limited et al. (Re)*, [Initial Order](#), ¶¶11.

process, and how much, depends on the circumstances of each case.

- (c) The reasoned decisions the lenders cite support the Debtors' position that directors may be removed, or their powers substantially limited, only in extraordinary circumstances: (i) in *Walter Energy*, a CRO was given control of the SISF only because the directors had resigned, were about to resign, or lacked the requisite skills;²³ (ii) in *PCAS*, the debtors, not a CRO or the Monitor, oversaw the SISF (even though the Monitor had been granted special powers);²⁴ (iii) in *Ivaco*, the CRO's role in the SISF was expressly recommendatory, precisely as proposed by the Debtors in the case at bar;²⁵ (iv) in *Ernst & Young*, the Monitor (*not* the CRO) received super monitor powers to conduct litigation (not a SISF) where management was hopelessly conflicted in respect of that litigation;²⁶ and (v) in *Angus*, the Monitor (not a CRO) received enhanced powers unrelated to any SISF where there was compelling evidence the directors had abdicated their duties.²⁷

11. Finally, contrary to the submissions of the DIP Lender,²⁸ the CRO Mandate does not leave the lenders free to now insist that SISF decision-making power be transferred to the CRO. Properly interpreted, that Mandate reflects the parties' carefully negotiated agreement that decision-making under the SISF would remain with the Operating Committee, with the CRO and the Monitor playing important supervisory roles. The lenders are seeking to re-trade the settled terms of the CRO Mandate, despite their insistence that the prior Orders in this proceeding are fundamental building blocks that should not be undermined.

12. ***The Lenders Seek to Use the DIP Facility to "Bind the Hands" of this Court:*** The Debtors accept that s. 27 of the DIP Facility requires that "[a]ll terms of the SISF...must be

²³ *Walter Energy Canada Holdings, Inc.*, [2016 BCSC 107](#) ¶¶19, 25-31 – cited in DIP Lender Factum ¶¶33-34 and AHC Factum ¶¶30.

²⁴ *PCAS Patient Care Autom'n Svces Inc. (Re)*, [2012 ONSC 2840](#) ¶¶1, 7-8, 14-16 – cited in DIP Lender Factum ¶¶33.

²⁵ *Ivaco Inc. (Re)*, [2004 CanLII 34434](#) (ON SC) ¶¶17 – cited in DIP Lender Factum ¶¶34.

²⁶ *Ernst & Young Inc. v. Essar Global Fund*, [2017 ONCA 1014](#) ¶¶122-125 – cited in AHC Factum ¶¶30.

²⁷ *Angus*, *supra*, ¶¶39 – cited in DIP Lender Factum ¶¶48. See the [Affidavit of Michael Edwards](#) (filed in *Angus* and dated November 12, 2024), ¶¶97, 109, noting the "total lack of communication from the A2A Group" and an "apparent abdication of duty by management". See also, ¶¶9 describing the failures of management, including failing to provide updates to investors for at least six years, failing to produce financial statements, and failing to account for funds received from investors, or at all.

²⁸ DIP Lender Factum, ¶¶70, 83.

Court File No.: CL-26-00000219-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE	)	THURSDAY, THE 24 TH
	)	
MADAM JUSTICE STEELE	)	DAY OF SEPTEMBER, 2026

**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.**

Applicants

SISP ORDER

THIS MOTION, made by Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation, and 12334992 Canada Inc. (collectively, the “**Applicants**” and together with Baffinland Iron Mines LP, the “**Debtors**”) pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) for an order, among other things, approving the sale and investment solicitation process in respect of the Debtors attached hereto as **Schedule “A”** (the “**SISP**”) and granting related relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Jowdat Waheed sworn September 17, 2026 and the exhibits thereto (the “**Second Waheed Affidavit**”), the Fifth Report and the appendices thereto (the “**Fifth Report**”) of FTI Consulting Canada Inc., in its capacity as monitor of

the Applicants (in such capacity, the “**Monitor**”), and on hearing the submissions of counsel for the Debtors, counsel for the Monitor, and such other counsel and parties as listed on the Participant Information Form, with no one else appearing although duly served as appears from the lawyer’s certificate of service, filed:

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that service of the Notice of Motion and the Motion Record in respect of this Motion is hereby abridged and validated, so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Second Amended and Restated Initial Order granted by this Court on June 11, 2026 (as amended by the Order granted by this Court on July 29, 2026 and the Order granted by this Court on August 27, 2026, the “**SARIO**”), or in the Second Waheed Affidavit.

APPROVAL OF THE SISP

3. **THIS COURT ORDERS** that the SISP (subject to any amendments thereto that may be made in accordance therewith and the terms of this Order) be and is hereby approved, and the CRO, in consultation with the Debtors, with the assistance of Morgan Stanley Canada Limited (the “**Transaction Advisor**”), and under the supervision and oversight of the Monitor, is hereby authorized and directed to conduct and implement the SISP pursuant to the terms thereof. The CRO, the Debtors, the Transaction Advisor, and the Monitor are hereby authorized and directed to perform their respective obligations

thereunder and to do all things reasonably necessary to perform their respective obligations thereunder, subject to the prior approval of this Court being obtained before completion of any transaction(s) under the SISP.

4. **THIS COURT ORDERS** that the CRO, the Debtors, the Transaction Advisor, and the Monitor, and their respective affiliates, partners, directors, officers, employees, legal advisors, representatives, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the gross negligence or wilful misconduct of any such person (with respect to such person alone), in performing their obligations under the SISP, as determined by this Court in a final order that is not subject to appeal or other review.

5. **THIS COURT ORDERS** that in conducting, supervising and overseeing the SISP, as applicable, the Debtors, the CRO, the Transaction Advisor and the Monitor shall have all of the benefits and protections granted to them under the CCAA, the SARIO, and any other applicable order of this Court in the within proceedings.

6. **THIS COURT ORDERS** that, pursuant to section 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS), the CRO and the Transaction Advisor, and their respective counsel are hereby authorized and permitted to send, or cause or permit to be sent, commercial electronic messages to an electronic address of prospective bidders or offerors (each a “**SISP Participant**”) and to their advisors, or any interested party that the CRO or the Transaction Advisor considers appropriate, but only

to the extent required to provide information with respect to the SISP in these proceedings, and this Court hereby authorizes and ratifies any such commercial electronic messages sent by the CRO and the Transaction Advisor, and their respective counsel prior to the date of this Order in connection with the SISP.

7. **THIS COURT ORDERS** that notwithstanding anything contained herein or in the SISP, and in no way limiting the protections provided to the Monitor in the SARIO, the CRO, the Transaction Advisor, or the Monitor shall not take possession of any Property or be deemed to take possession of any Property.

PROTECTION OF PERSONAL INFORMATION

8. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Debtors, the CRO, the Transaction Advisor, and the Monitor, and their respective advisors are hereby authorized and permitted to disclose personal information of identifiable individuals ("**Personal Information**") to a SISP Participant and to its advisors, including human resources and payroll information, records pertaining to the Debtors' past and current employees, and information on specific customers, but only to the extent desired or required to negotiate or attempt to complete a transaction in the SISP. Each SISP Participant to whom any Personal Information is disclosed shall maintain and protect the privacy of such Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial legislation. Each SISP Participant to whom any Personal Information

is disclosed shall also limit the use of such Personal Information to its participation in the SISP.

GENERAL

9. **THIS COURT ORDERS** that the Debtors, the Transaction Advisor or the Monitor may, from time to time, apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of their powers and duties under the SISP.

10. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

11. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Debtors, the CRO and the Monitor, and their respective advisors and agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to Debtors, the CRO and the Monitor, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Debtors, the CRO and the Monitor and their respective agents in carrying out the terms of this Order.

12. **THIS COURT ORDERS** that each of the Debtors and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered

to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

13. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Time on the date of this Order without the need for entry and/or filing.

MADAM JUSTICE STEELE

**SCHEDULE “A”
SISP**

[See attached].

SALE AND INVESTMENT SOLICITATION PROCESS

1. On September 24, 2026, the Ontario Superior Court of Justice (the “**Court**”) granted the SISP Order that, among other things, authorized Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation, 12334992 Canada Inc. and Baffinland Iron Mines LP (each a “**Debtor**” and collectively, the “**Debtors**”) to implement a sale and investment solicitation process (the “**SISP**”) in accordance with the terms hereof.
2. This SISP sets out the manner in which (i) bids for a broad range of executable transaction alternatives involving the business and assets or shares of the Debtors, whether *en bloc* or any portion(s) thereof, including for greater certainty, recapitalization transaction alternatives, will be solicited from interested parties, (ii) any bids received will be addressed, (iii) any Successful Bid will be selected, and (iv) the Court’s approval of any Successful Bid(s) will be sought.¹ Such transaction alternatives may include, among other things, a sale of some or all of the Debtors’ shares, assets and/or business and/or an investment in a Debtor or the Debtors, each of which shall be subject to all terms set forth in this SISP.
3. The SISP shall be conducted by the Chief Restructuring Officer (the “**CRO**”) of the Debtors in consultation with the Debtors, with the assistance of Morgan Stanley Canada Limited (the “**Transaction Advisor**”) and under the supervision and oversight of FTI Consulting Canada Inc. in its capacity as Court-appointed monitor of the Debtors (the “**Monitor**”).
4. Parties who wish to have their bids and/or proposals considered shall be required to participate in this SISP.
5. The SISP will be conducted such that the CRO and the Transaction Advisor will, under the supervision and oversight of the Monitor:
 - (i) prepare marketing materials and a process letter (the “**Process Letter**”) containing, among other things, the key milestones under the SISP;
 - (ii) prepare and provide applicable parties with access to one or more virtual data rooms (“**VDR**”) containing, among other things, diligence information;
 - (iii) facilitate a due diligence process including management presentations and customary financial and operational due diligence, in each case with the assistance of management personnel;
 - (iii) solicit interest from parties to enter into non-disclosure agreements (“**NDA**”) (and parties shall obtain access to the VDRs and be permitted to participate in the SISP only if they have executed an NDA, in form and substance satisfactory to the CRO);
 - (iv) request that such parties submit initial non-binding letters of intent (“**LOIs**”) on a date to be communicated to parties in the Process Letter, which date may

¹ To the extent any dates fall on a non-business day, such date shall be the first business day thereafter.

be extended by the Transaction Advisor and the CRO, with the consent of the Monitor and the DIP Lender (the “**LOI Bid Deadline**”);

- (v) select from parties that submitted an LOI by the LOI Bid Deadline the parties invited to enter into the second phase of the SISP (the “**Phase 2 Parties**”) to conduct detailed due diligence;
- (vi) request that Phase 2 Parties submit binding offers together with a duly executed proposed transaction document(s) (the “**Qualified Bid**”) by 11:59 p.m. prevailing Eastern Time on a date to be determined by the Transaction Advisor and the CRO, with the consent of the Monitor and the DIP Lender, as may be extended by the Transaction Advisor and the CRO and with the consent of the Monitor and the DIP Lender or further order of the Court (the “**Qualified Bid Deadline**”); and
- (vii) communicate any extensions of the LOI Bid Deadline and Qualified Bid Deadline to parties that have executed an NDA.

6. In order to constitute a Qualified Bid, a bid must comply with the following:

- (i) Value and Consideration. It provides a detailed sources and uses schedule that identifies, with specificity, the amount of cash consideration and any assumptions or proposed adjustments that could reduce the net consideration payable thereunder;
- (ii) Modified Transaction Agreement. It contains a duly executed binding transaction document(s) together with all completed schedules thereto and the detailed terms and conditions of the proposed transaction, and, if applicable, a redline to the form of transaction document (s) provided as part of this SISP;
- (iii) Identification of Bidder. It contains the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, the name(s) of its sponsors and controlling equityholder(s) and disclosure of any connections, agreements or other arrangements with the Debtors or any of their affiliates, or any known, potential or prospective bidder, or any officer, manager, director, or known equity security holder of the Debtors or any creditors, customers or debt holders of the Debtors;
- (iv) No Contingencies. It is not conditional on obtaining financing, any board of director or similar governing body or equity holder approval or on the outcome or review of due diligence;
- (v) Required Approvals. It specifies any government, regulatory or other third-party approvals required to complete the transaction, including but not limited to competition, foreign investment and national security interest approvals, with the anticipated strategy, timeframe and potential impediments for obtaining such approvals set forth in detail, such that the CRO, in consultation with the Transaction Advisor and the Monitor, can assess the risk to closing associated with any such conditions or approvals;

- (vi) Other Information. It contains such other information reasonably requested by the CRO, the Debtors, the Transaction Advisor or the Monitor;
- (vii) Irrevocable. It includes a letter stating that the bid is irrevocable until the selection of the Successful Bid and, if such bid is selected as the Successful Bid or as the next-highest or otherwise best Qualified Bid as compared to the Successful Bid (such bid, the “**Back-Up Bid**”), it shall remain irrevocable until the closing of the Successful Bid or the termination of the SISP (whichever occurs first);
- (viii) Proof of Financial Ability to Perform. It provides written evidence of a bidder’s ability to (a) fund and consummate the transaction and satisfy its obligations under the transaction documents, on terms set by the CRO, in consultation with the Transaction Advisor, the Monitor and the DIP Lender including the sources of financing and binding equity/debt commitment letters and/or guarantees covering the full value of all consideration payable, and (b) fund the working capital requirements of the business for a period of not less than 24 months following closing;
- (ix) Operating and Business Plan. It includes a summary of the bidder’s proposed operating and business plan for the Mary River Mine (the “**Mine**”), including (a) the proposed production plan and anticipated throughput capacity, (b) anticipated capital expenditure requirements for any proposed expansion or alternative operational plan, and (c) the anticipated financing or resources to execute such plan. For the avoidance of doubt, the foregoing is not limited to the expansion of a railway from the Mine south to the Steensby Inlet (the “**Steensby Expansion**”) and bidders may propose any alternative operating plan they consider achievable and commercially viable;
- (ix) No Break Fee, Expense Reimbursement. It does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;
- (x) Qikiqtani Inuit Association (“**QIA**”) and Nunavut Tunngavik Inc (“**NTI**”). It treats the amended and restated Inuit Impact and Benefit Agreement dated October 22, 2018 between the Qikiqtani Inuit Association and Baffinland Iron Mines Corporation and the Commercial Lease for Inuit Owned Lands No. Q13C301 and their associated embedded agreements as unaffected;
- (xi) Acknowledgments and Representations. It includes an acknowledgment and representation that, except to the extent set forth in a written agreement as between the bidder and the Debtors, the bidder (a) has had an opportunity to conduct any and all required due diligence prior to making its bid, (b) is not relying upon any written or oral statements, representations, promises, warranties, conditions, or guaranties whatsoever whether express or implied (by operation of law or otherwise), made by any person or party, including the Debtors, the CRO, the Transaction Advisor or the Monitor, or any of their respective employees, officers, directors, agents, advisors and other representatives, regarding the transaction that is the subject of the bid, this SISP, or any information provided in connection therewith, (c) agrees that the transaction that is the subject of the bid shall be on an “as is, where is” basis

and without surviving representations, warranties, covenants or indemnities of any kind, nature or description by the Debtors, the CRO, the Transaction Advisor or the Monitor, or their respective employees, officers, directors, agents, advisors and other representatives, except to the extent set forth in a written agreement as between the bidder and the Debtors, (d) agrees its bid shall serve as Back-Up Bid, if its bid is selected as the next-highest or otherwise best Qualified Bid as compared to the Successful Bid, (e) has not engaged in any collusion with respect to the submission of its bid, and (f) agrees to be bound by the terms of the SISP;

- (xii) Costs and Expenses. It contains a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) and the costs of obtaining any regulatory approvals in connection with the proposed transaction and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis;
 - (xiii) Treatment of Employees, Contracts, Etc. It provides a description of the bidder's intentions for the Mine, including as it relates to Steensby Expansion, the engagement of employees both at the Mine and head office, contractors, customers, contracts and vendors under the proposed bid;
 - (xiv) Deposit. It is accompanied by a cash deposit (the "**Deposit**") of 5% of the total consideration payable contemplated by such bid, which shall be paid to the Monitor by wire transfer (to a bank account specified by the Monitor) and held in trust by the Monitor in accordance with this SISP (for the avoidance of doubt, a Deposit shall be required with respect to that is 5% of the cash component of any credit bid pursuant to Section 18); and
 - (xv) Deadline. It is received by the Qualified Bid Deadline (as may be extended in accordance with Section 5 above).
7. The Debtors, in consultation with the CRO, the Monitor and the Transaction Advisor may waive compliance with any one or more of the requirements specified in Section 6 above and deem a non-compliant bid to be a Qualified Bid, provided that the Debtors may not waive compliance with Section 6(x);
 8. Following the Qualified Bid Deadline, the Debtors may, in consultation with the CRO, the Monitor and the Transaction Advisor determine to (i) continue negotiations with one or more bidders that have submitted Qualified Bids, to the exclusion of others, with a view to selecting one or more non-overlapping Qualified Bids or credit bid as the successful bid(s) (the "**Successful Bid(s)**") or Back-Up Bid, taking into account the overall value of each such bid in the judgment of the Debtors after consultation with the CRO, Transaction Advisor and the Monitor, and applicable conditions to completion, among other factors, (ii) proceed with an auction to determine the Successful Bid(s) or Back-Up Bid, which auction shall be administered in accordance with auction procedures to be determined by the CRO and the Transaction Advisor, in consultation with the Monitor, and provided to all bidders that have submitted a Qualified Bid at least two business days prior to the auction, and (iii) take such steps as are necessary to finalize and consummate the Successful Bid(s). The Debtors have no obligation to conclude a sale or other transaction arising out of this SISP and the Debtors, in consultation with the CRO, reserve the right to reject any bid (including

any Qualified Bid) or to terminate the SISP, in each case with the consent of the Monitor and the DIP Lender.

9. Following selection of a Successful Bid, if applicable, the Debtors, in consultation with the CRO, with the assistance of the Transaction Advisor and other advisors, as needed, shall seek to finalize any necessary definitive agreement(s) with respect to the Successful Bid(s) or Back-Up Bid(s). Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, the Debtors may apply to the Court for an order approving such Successful Bid and authorizing the Debtors or the CRO, as appropriate, to (i) enter into any and all necessary agreements and related documentation with respect to the Successful Bid, (ii) undertake such other actions as may be necessary to give effect to such Successful Bid, and (iii) implement the transaction(s) contemplated in such Successful Bid (a **"Transaction Approval Order"**). If the Successful Bid is not consummated in accordance with its terms, the Debtors, in consultation with the CRO, shall be authorized, but not required, in consultation with the Transaction Advisor, and with the consent of the Monitor, to designate the Back-Up Bid (if any) as the Successful Bid and seek a Transaction Approval Order with respect thereto.
10. All Deposits shall be retained by the Monitor in an interest-bearing trust account. If a Successful Bid is selected and a Transaction Approval Order is granted in connection therewith, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the purchase price to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit (with interest earned, if any) delivered with a Qualified Bid that is not selected as a Successful Bid or Back-Up Bid, will be returned to the applicable bidder within ten business days of the date upon which the Successful Bid is approved pursuant to a Transaction Approval Order or such earlier date as may be determined by the CRO, in consultation with the Monitor and the Transaction Advisor. The Deposit in respect of the Back-Up Bid (if any) shall be returned to the applicable bidder within ten business days after the closing of the Successful Bid or such earlier date as may be determined by the CRO, in consultation with the Monitor and the Transaction Advisor. If a bidder breaches its obligations under the terms of the SISP or the definitive transaction document(s), its Deposit (if any) shall be forfeited as liquidated damages and not as a penalty, without limiting any other claims or actions that the Debtors may have against such bidder and/or its affiliates, including as set out in the definitive agreement(s).
11. At any time after a prospective bidder executes an NDA, the Transaction Advisor and the CRO, in consultation with the Monitor, shall be authorized, but not required, to permit certain parties to attend site visits. In determining whether to permit a party to attend a site visit, the CRO, in consultation with the Monitor and the Transaction Advisor shall consider various factors, including: (i) the identity of the party and the prospect of it submitting a Qualified Bid, (ii) the costs associated with the site visit, (iii) whether the party has attended a site visit previously, (iv) the number of parties that have attended site visits or are seeking to attend site visits, (v) the nature of the site visit, and (vi) whether the site visit is reasonably expected to materially increase the likelihood of the culmination of a Successful Bid. Site visits shall be made available to parties identified by the CRO in accordance with this Section on or prior to

September 30, 2026, provided that parties may visit site after such date as circumstances allow and the CRO and Transaction Advisor, in consultation with the Monitor, deems appropriate.

12. The CRO and the Transaction Advisor, in consultation with the Debtors where appropriate and with the consent of the Monitor, reserve the right to limit access to any confidential information (including any information in any VDR) where, in the opinion of the CRO, the Monitor and the Transaction Advisor, such access could negatively impact the SISP, the ability to maintain the confidentiality of the Debtors' confidential or competitive information, the Debtors' shares, assets and/or business. For the avoidance of doubt, selected due diligence information may be withheld from any party that has executed an NDA if the CRO and the Transaction Advisor and with the consent of the Monitor, determine such information represents proprietary or sensitive competitive information.
13. The Monitor, the CRO and the Transaction Advisor, and their advisors and representatives, make no representation or warranty as to the accuracy or completeness of the information contained in any VDR, or any other information provided throughout the due diligence process.
14. Subject to the terms hereof, and other than as shall be required in connection with the Transaction Approval Order, neither the Debtors, the CRO, the Monitor nor the Transaction Advisor will share (i) the identity of any bidder or potential bidder, or (ii) the terms of any LOIs, Qualified Bids, Successful Bids and/or Back-Up Bid, with any other bidder or potential bidder without the express written consent of such party (which consent may be given by way of e-mail).
15. The CRO, the Monitor and Transaction Advisor will update the Debtors' stakeholders and consult with them, as appropriate, in respect of the SISP, provided that such updates will not be provided to any party unless it is a Non-Participating Party. All such updates or consultation and any information and documents provided in connection therewith are provided to Non-Participating Parties on a strictly confidential basis.
16. A party shall, no later than five days after the granting of order approving the SISP, deliver irrevocable written confirmation to the CRO and the Monitor, with such modifications as the CRO and Monitor consider appropriate in their sole and reasonable discretion, certifying that neither it, its affiliates nor any funds managed by it or its affiliates will participate in the SISP, directly or indirectly, in any capacity (including in a personal capacity), including as: (i) a bidder or prospective bidder; (ii) a direct or indirect shareholder, unitholder, equity holder, holder of a participating interest, director, or officer of a bidder or prospective bidder; (iii) a lender, provider, or arranger of financing or other financial accommodation to or for the benefit of a bidder or prospective bidder; (iv) a partner, co-investor, consultant, or other person acting in concert with a bidder or prospective bidder; or (v) an affiliate, agent, or representative of any of the persons described in paragraphs (i) through (iv) (together with their advisors, the **"Non-Participating Parties"** and each a **"Non-Participating Party"**), except as permitted by Section 18. Notwithstanding this Section 16 a party that has submitted an LOI may become a Non-Participating Party if it delivers irrevocable written confirmation to the CRO and the Monitor that it is withdrawing as a bidder in the SISP and will no longer participate as a bidder in any capacity.

17. Any party (other than the Non-Participating Parties) holding a valid and enforceable, and properly perfected security interest in the assets or shares may, subject in all respects to such party's compliance with the SISP and the terms hereof, credit bid the amount of debt secured by such lien as part of any transaction contemplated by the SISP; provided that such transaction shall also provide for the indefeasible and irrevocable repayment in full in cash on the date of closing of any transaction of any and all obligations secured by a security interest in the assets or shares that are to be acquired under such transaction that is senior to or *pari passu* with the security interest held in such assets or shares by the party submitting such credit bid (including the Charges, if applicable) unless the holder or indenture trustee or agent of any such security interest, as applicable, otherwise agrees. For certainty, a credit bid shall provide written evidence acceptable to the Debtors, in consultation with the CRO, the Monitor and the Transaction Advisor of all required funding or financing to advance the cash consideration necessary to satisfy such priority payments in full in cash or otherwise assume such obligations in full, and that any such credit bid shall not be conditional upon obtaining financing. To the extent there is any dispute raised regarding the priority or quantum of a secured claim that is the subject of a credit bid, such matter shall be promptly resolved by determination from the Court. Non-Participating Parties may credit bid only in accordance with Section 18. For the avoidance of doubt, a secured lender and/or noteholder submitting a credit bid pursuant to this Section 17 shall be required to comply with all applicable requirements of this SISP, including without limitation Section 6(x).
18. Notwithstanding any other terms hereof, if, following the Qualified Bid Deadline, no Qualified Bid (or combination of Qualified Bids) received would, if consummated, result in the indefeasible and irrevocable repayment in full in cash of all of the secured debt obligations held by each of the secured lenders and/or noteholders to the Debtors (or otherwise provide for the assumption or satisfaction in full of such secured debt obligations on terms acceptable to each such secured lender and/or noteholder), any such secured lender and/or noteholder (or agent at the direction of the requisite secured lenders and/or noteholders, as applicable) shall, notwithstanding its delivery of the irrevocable written confirmation referred to in Section 15, be entitled to submit a credit bid in respect of its secured obligations in accordance with Section 17 (and subject to all of the requirements set forth therein, including the obligation to repay in full all senior-ranking or *pari passu* ranking obligations). Such secured lender and/or noteholder must deliver a written notice to the CRO of its intention to submit a credit bid within 15 days following the Qualified Bid Deadline and may only submit a credit bid in an amount equal to its secured obligations plus an amount to repay in full and discharge all senior-ranking obligations. Following delivery of such notice of intention, such secured lender and/or noteholder must submit its credit bid within 45 days, subject to extension by the Debtors, in consultation with the CRO and with the consent of the Monitor and the DIP Lender (provided that, the DIP Lender shall only have a consent right if the DIP Lender has irrevocably confirmed in writing that it will not submit a credit bid) if the credit bidding party demonstrates it is diligently pursuing completion of the credit bid. For the avoidance of doubt, a secured lender and/or noteholder submitting a credit bid pursuant to this Section 18 shall be required to comply with all applicable requirements of this SISP, including without limitation Section 6(x) and the deposit requirements set forth in Section 6(xiv), and its credit bid shall be evaluated by the Debtors, in consultation with the CRO, the Monitor and the Transaction Advisor, on the same basis as any other Qualified Bid. Such credit bid may be conditional on obtaining any government, regulatory or third-party approvals

required to consummate the transaction, provided that the credit bid specifies a long-stop period within which such approvals must be obtained.

19. With the consent of the DIP Lender, the CRO may at any time and from time to time, on notice to the service list maintained on the Monitor's website, modify, amend, vary or supplement the SISP without the need for obtaining an order of the Court, provided that the Monitor, in consultation with the CRO and the Transaction Advisor, determines that such modification, amendment, variation or supplement is not material to the SISP or will better promote the purpose of the SISP and maximization of the value of the Debtors' assets or shares; provided that any proposed material modification, amendment, variation or supplement (including any dispute regarding materiality raised by a party in interest after notice of any proposed modification, amendment, variation or supplement) shall require an order of the Court. Notwithstanding the foregoing, the requirements set forth in Section 6(x) may not be modified, amended, varied or supplemented without the consent of QIA.
20. All discussions regarding the SISP, a bid, an LOI or Qualified Bid must be directed through the CRO, the Transaction Advisor or the Monitor. Under no circumstances shall any bidder communicate or contact in connection with their proposed bid, directly or indirectly, whether or not initiated by the bidder, with any other party or persons that they know to be (i) a bidder in the SISP, (ii) the management of the Debtors, (iii) the Debtors' creditors or shareholders, (iv) QIA, (v) NTI, (vi) any stakeholder of the Debtors, or (vii) any regulators or governmental authority having oversight in respect of the Debtors or their permits, in each case without the prior written consent of the CRO, in consultation with the Monitor and the Transaction Advisor. For the avoidance of doubt, no bidder shall engage in any collusion or without the prior written consent of the CRO, in consultation with the Monitor and Transaction Advisor, be acting jointly or in concert with any other bidder or person regarding the SISP. Any such unauthorized contact or communication could result in exclusion of the interested party from the SISP. Where the prior consent of the CRO is given to allow a bidder to contact any of the foregoing parties to discuss its proposed bid, the CRO shall inform the Monitor of the granting of such consent.
21. The SISP does not, and will not be interpreted to create any contractual or other legal relationship between any of the Debtors, the Monitor, the CRO, or the Transaction Advisor and any bidder or any other party, other than as specifically set forth in a definitive agreement executed in connection with the SISP.
22. The Debtors, the CRO, the Transaction Advisor and the Monitor shall not have any liability whatsoever to any person or entity, including any bidder or any other creditor or stakeholder, as a result of implementation or otherwise in connection with this SISP (including in relation to any site visits conducted pursuant to Section 11), except to the extent that any such liabilities result from gross negligence or wilful misconduct of the Debtors, the CRO, the Transaction Advisor or the Monitor, as applicable, as determined by a final order of the Court. Further, no person or entity, including any bidder or any other creditor or stakeholder shall have any claim against the Debtors, the CRO, the Transaction Advisor or the Monitor in respect of the SISP for any reason whatsoever, except to the extent that such claim is the result of gross negligence or wilful misconduct by the Debtors, the CRO, the Transaction Advisor or the Monitor, as applicable, as determined by a final order of the Court.

23. For certainty and notwithstanding the generality of Section 6(xii), participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any bid, due diligence activities, and any other negotiations or other action whether or not they lead to the consummation of a transaction.
20. For the avoidance of doubt, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the CCAA or any other statute or as otherwise required at law in order to implement a Successful Bid.
24. All bidders shall be deemed to have attorned to the jurisdiction of the Court in connection with any disputes relating to the SISP, including the qualification of bids, the construction and enforcement of the SISP, and closing, as applicable. In the event that there is disagreement as to the interpretation or application of this SISP, the Court will have the jurisdiction to hear and resolve such dispute.

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Century Services Inc. Appellant

v.

**Attorney General of Canada on behalf
of Her Majesty The Queen in Right of
Canada Respondent**

**INDEXED AS: CENTURY SERVICES INC. v. CANADA
(ATTORNEY GENERAL)**

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,
Fish, Abella, Charron, Rothstein and Cromwell JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. Appelante

c.

**Procureur général du Canada au
nom de Sa Majesté la Reine du chef du
Canada Intimé**

**RÉPERTORIÉ : CENTURY SERVICES INC. c. CANADA
(PROCUREUR GÉNÉRAL)**

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie,
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et
Cromwell.

**EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE**

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the CCAA itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la LACC elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the CCAA will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procèdent d'abord à une interprétation des dispositions de la LACC avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la LACC (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la LACC permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] Having examined the pertinent parts of the CCAA and the recent history of the legislation, I accept that in most instances the issuance of an order during CCAA proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[66] L'examen des parties pertinentes de la LACC et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la LACC relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] The initial grant of authority under the CCAA empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

[67] En vertu du pouvoir conféré initialement par la LACC, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section” (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, “subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances” (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

d’un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l’ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l’espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l’art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu’il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l’interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d’une demande initiale que d’une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu’elle est indiquée et qu’il a agi et continue d’agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n’a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l’opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l’esprit lorsqu’il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l’opportunité de l’ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s’agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l’objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d’une compagnie insolvable. J’ajouterais que le critère de l’opportunité s’applique non seulement à l’objectif de l’ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is “doomed to failure” (see *Chef Ready*, at p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*’s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown’s enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d’une réorganisation sont meilleures lorsque les participants arrivent à s’entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu’il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l’échec » (voir *Chef Ready*, p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l’ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l’habilite à rendre à cette ordonnance.

[72] L’analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l’encontre de la Couronne, une fois qu’il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d’appel, le juge Tysoe a conclu que la *LACC* n’habilitait pas le tribunal à maintenir la suspension des mesures d’exécution de la Couronne à l’égard de la fiducie réputée visant la TPS après l’arrêt des efforts de réorganisation. Selon l’appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l’objectif fondamental de la *LACC* et n’a pas donné à ce texte l’interprétation téléologique et large qu’il convient de lui donner et qui autorise le prononcé d’une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d’autre choix que d’autoriser les mesures d’exécution à l’endroit de la fiducie réputée visant la TPS lorsqu’il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J’ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l’ordonnance était autorisée par la *LACC*.

**SHAREHOLDERS AGREEMENT
of
AM BAFFINLAND ULC**

among

IRON ORE LUX S.À R.L.

EMG IRON ORE HC LUX S.À R.L.

EMG IRON ORE PHASE 3 HOLDINGS LUX S.À R.L.

EMG IRON ORE PHASE 3 (Q4 19) HOLDINGS LUX S.À R.L.

FOUR MILE INVESTMENTS INC.

KILLARNEY VENTURES, INC.

-and-

ARCELORMITTAL CANADA INC.

-and-

AM BAFFINLAND ULC

NUNAVUT IRON ORE, INC.

BAFFINLAND IRON MINES CORPORATION

BAFFINLAND IRON MINES LP

November 2, 2020

to approve resolutions, and shall make such by-laws and otherwise do all that is in its power to:

- (i) give effect to and implement any and all decisions, resolutions or directions approved by the Operating Committee in accordance with this Agreement, except in relation to an Extraordinary Matter that has not been approved by an Extraordinary Resolution;
 - (ii) give effect to and implement any Extraordinary Matter that has been approved by Extraordinary Resolution, in accordance with that approval;
 - (iii) ensure that the appointment or removal of any OC Member by a Shareholder entitled to do so pursuant to this Agreement is duly approved to the extent required in accordance with applicable Laws and the Organizational Documents of the Company; and
 - (iv) give effect to this Agreement.
- (b) Each Shareholder shall indemnify and hold harmless the other Shareholders and their respective Representatives (each, an “Indemnified Party”) for any loss or damage suffered (including any claims of or liability to third parties) arising from a breach of the undertakings in Section 3.1(a) above.
- (c) The Shareholders and the Company agree to restrict in whole the powers of the Directors to manage or supervise the management of the business and affairs of the Company. The power to manage or supervise the management of the business and affairs of the Company shall be exercised by the Operating Committee, subject to and in accordance with this Agreement. The Shareholders intend all decisions relating to the Group to be made or authorized by the Operating Committee and, where required by this Agreement, by Extraordinary Resolution. In (i) exercising any powers of the Directors; (ii) causing its nominees on the Operating Committee to exercise any powers of the Directors; and (iii) exercising any rights as a Shareholder under this Agreement or under applicable Law, each Shareholder may act in its own best interest and approve or disapprove any matter, or authorize or direct its nominees to do so, in its sole discretion, without regard to duties or obligations that otherwise would be applicable. In exercising any powers of the Directors and each OC Member, subject to compliance with this Agreement, act in the best interest of its appointing Shareholder without regard to duties or obligations that would otherwise be applicable. Each Shareholder and the Company irrevocably waives any claims it may have as a result of the foregoing, including a claim for breach of fiduciary duty against each other or against any Director or any OC Member.
- (d) Each Shareholder voluntarily and irrevocably agrees not to exercise any dissent or appraisal rights, any right to pursue an oppression remedy in respect of the Company, any right to bring a derivative action in the name of the Company or any

**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.**

Applicants

**WRITTEN SUBMISSIONS OF THE ENERGY & MINERALS GROUP LP
(Motion Returnable June 10, 2026)**

June 9, 2026

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Lawyers for The Energy & Minerals Group LP

make a fallacy of the Applicants' representation to this Court that EDC is not "entrenched" and can be "replaced by another facility".

4. **Second**, EMG is of the strong view that a transaction to recapitalize and/or restructure the Applicants' business can occur before and independently of a Court-supervised SISP, and that this approach would yield the best results for all stakeholders. A SISP will prevent a transaction through which the Applicants can sustainably carry on business and will add a huge amount of costs in the form of professional and other fees. For that reason, EMG submits that the Applicants should not be required to commence a SISP within 60 days of the approval of the Second Amended and Restated Initial Order (as set out in the EDC DIP Loan Agreement). EMG also intends to oppose any motion for the approval of a SISP order until the Applicants have been given the opportunity to achieve a restructuring or recapitalization independently.

EMG and the Applicants

5. The Energy & Minerals Group LP, along with EMG Fund IV Management, LP and EMG Fund V Management, LP, act as registered investment advisors on behalf of certain funds and co-investment vehicles for which they are designated as manager. These entities are collectively referred to here as "EMG".

6. EMG has invested over \$1.5 billion (USD) in the Applicants and owns, directly or indirectly, 74.8% of the Applicants' equity.² In addition to equity funding, EMG has provided an additional \$275 million (USD) to assist the Applicants in exchange for royalty agreements

² Affidavit of Celeste van Tonder, sworn May 14, 2026 at para 17. Application Record at Tab 2, p 28.

registered on title to the Applicants' mining rights. One of the EMG funds has also invested \$3.9 million in the Applicants' unsecured notes, due in 2029.

7. No other party has contributed anywhere near what EMG has to the development and operation of the Mary River Mine. EMG has an overriding financial interest in the conduct of this proceeding, the terms of the Applicants' DIP financing, and the nature of any steps taken to restructure their business or capital structure.

The DIP Solicitation Process

Expedited Process Led to Inadequate Opportunity to Negotiate DIP Terms

8. The process undertaken by the Applicants to solicit DIP financing is set out in the Second Report of the Monitor. The Monitor sought proposals for DIP financing for a minimum of \$300 million (USD) on May 15, 2026. It received three proposals on May 25, from EDC; a group of noteholders in the Applicants (known as the "**Ad Hoc Group**"); and IRH. The bidders submitted their final offers on May 30, the Applicants signed the DIP financing agreement with EDC on June 3, and they sought approval of the agreement from this Court on June 5.

9. As is clear from the dates set out above, the solicitation, negotiation and approval process for the DIP financing was completed on an exceedingly tight timeline given the size and complexity of the agreement. As explained by the CFO of the Applicants, Celeste van Tondern, on cross-examination, the compressed timing of the process was driven by the Applicants' desire to present an executed DIP agreement to this Court for approval at a June 5 hearing. Ms. van Tondern noted that the "urgency of funds" was an important consideration in the process, and the May 30th date for final offers was "unfortunately" the date the Applicants had to meet to "get us

**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.**

Applicants

**REPLY SUBMISSIONS OF THE ENERGY & MINERALS GROUP LP
(Motion Returnable October 9, 2026)**

October 5, 2026

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C. No Precedent for Imposing CRO Decision-Making Against Debtors' Opposition

8. EDC's reliance on this Court's decision in *Re Ivaco* (at para. 37 of its factum) is misplaced.

In that case, the applicant proposed a SISP order providing for a CRO's participation in the process (as here), due to concerns about interference by one of the unsecured debtors. The SISP order in *Re Ivaco* did not give the CRO ultimate decision-making authority over the entire SISP.¹

9. EDC also cites a number of SISP orders which it says demonstrate that courts "routinely" exercise their discretion "to order that decision-making authority over a SISP rest with someone other than the debtor's board of directors".² However, it appears each of those SISP orders were approved on unopposed motions and should not have any precedential weight on this motion. They stand for the proposition that a CRO or Monitor can assume decision-making control in a proposed SISP when the parties do not oppose that structure, which is not the case here.

D. Responding Parties' SISP Strips Operating Committee of Critical SISP Input

10. At paragraph 48 of its factum, EDC downplays the implications of its position on the Debtors' corporate governance structure, saying it is not seeking to "usurp" the Operating Committee's powers, but simply to manage decision-making under the SISP. Similarly, the Ad Hoc Committee says it "supports the CRO assuming a specific function in the restructuring, and not seeking the replacement of the board or Operating Committee" (para. 30).

11. These submissions ignore the extraordinary effect of the responding parties' preferred SISP: removing the Operating Committee's ability to make decisions in the most critical process of this debtor-led CCAA proceeding. The Debtors are not in receivership. None of the secured

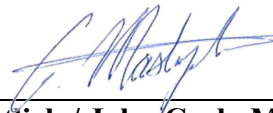
¹ *Re Ivaco Inc.*, [2004 CanLII 34434](#) (Ont. S.C.).

² EDC Factum, dated October 2, 2026, para. 33 and fn. 20.

lenders have asked the Court to appoint a super-monitor with the power to override the Debtors' governance structures. It is improper for them to seek that outcome now through the backdoor, attempting to strip the Operating Committee of its power to make decisions on the disposition of a major business in which EMG and other shareholders have invested billions of dollars.

12. The responding parties' submissions should be rejected and the Debtors' proposed SISP should be approved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of October, 2026.



Matthew P. Gottlieb / John Carlo Mastrangelo
Lawyers for The Energy & Minerals Group LP

- (o) Amend or seek to amend the Second Amended and Restated Initial Order;
- (p) Use the Advances for any purpose other than the purposes permitted hereunder, as set out in the applicable Advance Confirmation Certificate and the Approved Cash Flow (excluding for greater certainty any Excess Exploration and Expansion Expenses), or such other purposes as may be agreed to by the DIP Lender, in writing;
- (q) Disclaim, cancel or terminate any Material Contract, without the prior written consent of the DIP Lender;
- (r) Seek, or consent to the appointment over any of the Obligors of, a receiver or trustee in bankruptcy or any similar official in any jurisdiction;
- (s) Seek or consent to the lifting of the stay of proceedings in the Amended and Restated Initial Order or Second Amended and Restated Initial Order, as applicable, in favour of the Obligors; and
- (t) Enter into any currency, interest rate, commodity or forward, futures, swap, options or other hedging arrangements, other than for ordinary course risk management purposes, without the consent of the DIP Lender.

27. **Sales and Investment Solicitation Process:**

The Borrowers, Guarantors and DIP Lender agree that the Borrowers (in consultation with the Monitor) shall pursue a sale and investment solicitation process (the “**SISP**”) approved pursuant to court order in form and substance acceptable to the DIP Lender (the “**SISP Order**”). The SISP Order shall be granted on or prior to the date that is 60 days following the issuance of the Second Amended and Restated Initial Order (the “**SISP Order Date**”), and for greater certainty the SISP Order shall establish various milestone dates for the SISP (together with the SISP Order Date, the “**Milestones**”). All terms of the SISP, including all Milestones, must be acceptable to the DIP Lender in its reasonable discretion. Forthwith after the date hereof, the Borrowers shall work with the Monitor to commence the process of identifying a financial advisor appropriately experienced and qualified to conduct the SISP. The financial advisor, its scope of services and compensation must be acceptable to the DIP Lender in its reasonable discretion.

28. **Events of Default:**

The occurrence of any one or more of the following events shall constitute an event of default (each, an “**Event of Default**”) under this Agreement:

- (a) Any Court order to the extent relating to the DIP Facility or any other matter that affects the DIP Lender adversely in any material respect, is issued, dismissed, stayed, reversed, vacated, amended or restated and such issuance, dismissal, stay, reversal, vacating, amendment or restatement is not in form and substance acceptable to the DIP Lender, including the issuance of a Court order:
 - (i) appointing a receiver and manager, receiver, interim receiver or similar official in respect of an Obligor;

Wastech Services Ltd. *Appellant*

v.

**Greater Vancouver Sewerage and
Drainage District** *Respondent*

and

**Attorney General of British Columbia
and Canadian Chamber of Commerce**
Interveners

**INDEXED AS: WASTECH SERVICES LTD. v.
GREATER VANCOUVER SEWERAGE AND
DRAINAGE DISTRICT**

2021 SCC 7

File No.: 38601.

2019: December 6; 2021: February 5.

Present: Wagner C.J. and Abella, Moldaver,
Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer
JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Contracts — Breach — Performance — Duty to exercise contractual discretion in good faith — Waste removal contract providing municipal district with absolute discretion to allocate waste to various disposal facilities — Municipal district's reallocation of waste resulting in reduction of waste company's profit — Waste company alleging breach of contract due to reallocation of waste depriving it of possibility of achieving target profit — Whether reallocation of waste constitutes breach of duty to exercise contractual discretion in good faith.

Wastech, a waste transportation and disposal company, and Metro, a statutory corporation responsible for the administration of waste disposal for the Metro Vancouver Regional District, had a long-standing contractual relationship which contemplated the removal and transportation of waste by Wastech to three disposal facilities. Wastech was to be paid at a differing rate depending on which disposal

Wastech Services Ltd. *Appelante*

c.

**Greater Vancouver Sewerage and
Drainage District** *Intimée*

et

**Procureur général de la Colombie-
Britannique et Chambre de commerce du
Canada** *Intervenants*

**RÉPERTORIÉ : WASTECH SERVICES LTD.
c. GREATER VANCOUVER SEWERAGE AND
DRAINAGE DISTRICT**

2021 CSC 7

N° du greffe : 38601.

2019 : 6 décembre; 2021 : 5 février.

Présents : Le juge en chef Wagner et les juges Abella,
Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et
Kasirer.

**EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE**

Contrats — Violation — Exécution — Obligation d'exercer un pouvoir discrétionnaire contractuel de bonne foi — Contrat d'enlèvement de déchets conférant au district municipal le pouvoir discrétionnaire absolu concernant la répartition des déchets entre diverses installations d'élimination — Nouvelle répartition des déchets par le district municipal donnant lieu à une réduction du profit de l'entreprise de transport des déchets — Entreprise de transport des déchets alléguant une violation de contrat en raison de la nouvelle répartition des déchets la privant de la possibilité d'atteindre son profit cible — La nouvelle répartition des déchets constitue-t-elle une violation de l'obligation d'exercer le pouvoir discrétionnaire contractuel de bonne foi?

Wastech, une entreprise qui s'occupe du transport et de l'élimination des déchets, et Metro, une société constituée en vertu d'une loi et chargée de gérer l'élimination des déchets dans le district régional du Grand Vancouver, entretiennent depuis longtemps une relation contractuelle visant l'enlèvement et le transport des déchets par Wastech vers trois installations d'élimination des déchets. Wastech

e.g., *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (C.A.), at para. 22; *Klewchuk v. Switzer*, 2003 ABCA 187, 330 A.R. 40, at para. 33; G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at p. 530).

[81] Wastech submits that the arbitrator’s conclusions as to the nature of the impact on Wastech of Metro’s exercise of discretion amount to a finding of “nullification” or “evisceration”. In particular, Wastech points to the arbitrator’s findings that Metro’s exercise of discretion made it “impossible” for Wastech to achieve the Target OR, and that having the opportunity to achieve the Target OR in every year of the Contract was “the fundamental benefit for which Wastech bargained” (Award, at para. 94). Metro answers that the arbitrator made no finding of “substantial nullification” or “evisceration”, nor was such a finding open to him on the facts (R.F., at paras. 73 and 75; Transcript, at p. 93).

[82] Respectfully stated, I am of the view that requiring “substantial nullification” — that is to say, the evisceration by one party of the better part of the benefit of the contract of the other — is not the appropriate standard for concluding a breach of the duty to exercise discretionary power in good faith.

[83] The fact that a party’s exercise of discretion causes its contracting partner to lose some or even all of its anticipated benefit under the contract should not be regarded as dispositive, in itself, as to whether the discretion was exercised in good faith (Burton, at pp. 384-85). As authors A. Swan, J. Adamski, and A. Y. Na explain, the mere fact that a party is deprived of substantially the whole benefit of a contract is not sufficient, absent proof of the discretion-exercising party’s fault or default, to make out a claim for breach of the contract (see *Canadian Contract Law* (4th ed. 2018), at §7.73). In other words, absent some

adoptée et appliquée par plusieurs cours d’appel canadiennes et approuvée par certains universitaires (voir, p. ex., *Mesa Operating Limited Partnership c. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (C.A.), par. 22; *Klewchuk c. Switzer*, 2003 ABCA 187, 330 A.R. 40, par. 33; G. H. L. Fridman, *The Law of Contract in Canada* (6^e éd. 2011), p. 530).

[81] Wastech soutient que les conclusions de l’arbitre concernant la nature des répercussions qu’a eues sur elle l’exercice du pouvoir discrétionnaire de Metro équivalent à une conclusion [TRADUCTION] « [d’]annulation » ou de « perte de sens ». Plus particulièrement, Wastech attire l’attention sur la conclusion de l’arbitre portant que l’exercice du pouvoir discrétionnaire de Metro a rendu « impossible » pour Wastech d’atteindre le RE cible, et sur celle portant que le fait d’avoir la possibilité d’atteindre le RE cible chaque année du contrat était [TRADUCTION] « l’avantage fondamental que Wastech avait négocié » (sentence arbitrale, par. 94). Metro répond que l’arbitre n’a pas tiré de conclusion [TRADUCTION] « [d’]annulation substantielle » ou de « perte de sens » et que, de toute façon, il ne pouvait pas tirer une telle conclusion au vu des faits (m.i., par. 73 et 75; transcription, p. 93).

[82] Soit dit en tout respect, je suis d’avis qu’exiger « l’annulation substantielle » — c’est-à-dire, le fait pour une partie de vider de son sens une grande partie de l’avantage obtenu par l’autre partie dans le cadre du contrat — n’est pas la norme qui convient pour conclure à un manquement à l’obligation d’exercer son pouvoir discrétionnaire contractuel de bonne foi.

[83] Le fait que l’exercice par une partie de son pouvoir discrétionnaire fasse perdre à son partenaire contractuel une partie ou la totalité de son avantage prévu au contrat ne devrait pas être considéré comme un élément déterminant, en soi, permettant de répondre à la question de savoir si le pouvoir discrétionnaire a été exercé de bonne foi (Burton, p. 384-385). Comme l’expliquent les auteurs A. Swan, J. Adamski et A. Y. Na, le simple fait qu’une partie soit privée de la quasi-totalité de l’avantage d’un contrat ne suffit pas, s’il n’y a aucune preuve que la partie ayant exercé son pouvoir discrétionnaire

infringement of the non-exercising party's rights, there is no actionable wrong for the law to correct.

[84] For these reasons, I conclude that the “substantial nullification” or “evisceration” of the benefit of a contract is not a necessary prerequisite to finding that a party breached the duty to exercise contractual discretionary powers in good faith. However, the fact that an exercise of discretion substantially nullifies or eviscerates the benefit of the contract could well be relevant to show that discretion had been exercised in a manner unconnected to the relevant contractual purposes.

[85] The parties also submit that the good faith duty at issue does not permit a party to exercise its discretion capriciously or arbitrarily. In support, Wastech and Metro both point to the organizing principle recognized in *Bhasin* — which states that parties generally must perform their contractual duties “honestly and reasonably and not capriciously or arbitrarily” (*Bhasin*, at para. 63) — and to a line of decided cases, which they say confirm the existence of such constraints on the exercise of contractual discretionary powers.

[86] I agree with the parties that the jurisprudence supports a conclusion that the good faith duty at issue does not permit a party to exercise its discretion capriciously or arbitrarily. In *Greenberg*, at p. 763, the Court of Appeal for Ontario noted that the discretionary provision in question had to be “exercised in a reasonable way, not arbitrarily or capriciously”. Similarly, the Supreme Court of the United Kingdom affirmed the existence of these constraints in English law in *British Telecommunications plc v. Telefónica O2 UK Ltd.*, [2014] UKSC 42, [2014] 4 All E.R. 907, at para. 37: “. . . it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good

a commis une faute ou un manquement, pour étayer une allégation de violation de contrat (voir *Canadian Contract Law* (4^e éd. 2018), §7.73). Autrement dit, s’il n’y a pas d’atteinte aux droits de la partie qui n’exerce pas un pouvoir discrétionnaire, il n’y a pas de faute donnant ouverture à un droit d’action que les règles de droit peuvent corriger.

[84] Pour ces motifs, je conclus que l’« annulation substantielle » ou la « perte de sens » de l’avantage d’un contrat n’est pas une condition préalable pour conclure qu’une partie a manqué à l’obligation d’exercer les pouvoirs discrétionnaires contractuels de bonne foi. Cependant, le fait que l’exercice d’un pouvoir discrétionnaire annule substantiellement l’avantage d’un contrat ou lui fait perdre son sens pourrait fort bien s’avérer utile pour démontrer que ce pouvoir discrétionnaire a été exercé d’une manière étrangère aux objectifs contractuels pertinents.

[85] Les parties font également valoir que l’obligation d’agir de bonne foi en cause ne permet pas à une partie d’exercer son pouvoir discrétionnaire de manière abusive ou arbitraire. Pour appuyer leurs arguments, Wastech et Metro attirent toutes les deux l’attention sur le principe directeur reconnu dans l’arrêt *Bhasin* — qui prévoit que les parties doivent généralement exécuter leurs obligations contractuelles « de manière honnête et raisonnable, et non de façon abusive ou arbitraire » (*Bhasin*, par. 63) — ainsi que sur un courant jurisprudentiel qui, selon elles, confirme l’existence de telles contraintes à l’égard de l’exercice des pouvoirs discrétionnaires contractuels.

[86] Je suis d’accord avec les parties pour dire que la jurisprudence étaye la conclusion selon laquelle l’obligation de bonne foi en cause ne permet pas à une partie d’exercer son pouvoir discrétionnaire de façon abusive ou arbitraire. Dans l’arrêt *Greenberg*, à la p. 763, la Cour d’appel de l’Ontario a souligné que le pouvoir discrétionnaire en question devait être [TRADUCTION] « exercé d’une façon raisonnable, et non de manière abusive ou arbitraire ». De même, dans l’arrêt *British Telecommunications plc c. Telefónica O2 UK Ltd.*, [2014] UKSC 42, [2014] 4 All. E.R. 907, la Cour suprême du Royaume-Uni a confirmé l’existence de ces contraintes dans le droit anglais, au par. 37 : [TRADUCTION] « . . . il est bien

faith and not arbitrarily or capriciously This will normally mean that it must be exercised consistently with its contractual purpose”.

[87] Although capriciousness and arbitrariness have sometimes been referred to independently of improper purpose, I agree with the Supreme Court in *Telefónica* that a capricious or arbitrary exercise of a discretionary power is an example of such a power being exercised contrary to that standard. When seeking to demonstrate that discretion was exercised capriciously or arbitrarily, one necessarily considers contractual purposes by showing that discretion was exercised in a manner unconnected to the underlying contractual purposes for which the power was conferred.

[88] In sum, then, the duty to exercise discretion in good faith will be breached where the exercise of discretion is unreasonable, in the sense that it is unconnected to the purposes for which the discretion was granted. This will notably be the case where the exercise of discretion is capricious or arbitrary in light of those purposes because that exercise has fallen outside the range of behaviour contemplated by the parties. The fact that the exercise substantially nullifies or eviscerates the fundamental contractual benefit may be relevant but is not a necessary prerequisite to establishing a breach.

(b) *Source of the Duty*

[89] Having determined the content of the duty, I turn now to consider its source so as to ascertain whether it arises on the facts of this case.

[90] I acknowledge that there is some debate as to the source of this duty. The arbitrator held that the requirements of the officious bystander test for implying a term in fact did not need to be met in order for the good faith duty at issue to apply. Similarly, Wastech submits that the good faith duty at issue

établi qu’en l’absence d’un libellé très clair à l’effet contraire, un pouvoir discrétionnaire doit être exercé de bonne foi et non de façon arbitraire ou abusive [. . .]. Cela veut habituellement dire qu’il doit être exercé en conformité avec l’objectif du contrat ».

[87] Bien qu’il ait parfois été question de l’exercice abusif et arbitraire indépendamment de l’exercice en vue d’un objectif inapproprié, je souscris à la conclusion de la Cour suprême du Royaume-Uni dans l’arrêt *Telefónica* selon laquelle l’exercice abusif ou arbitraire d’un pouvoir discrétionnaire est un exemple d’exercice d’un tel pouvoir contraire à cette norme. Lorsqu’on cherche à prouver que le pouvoir discrétionnaire a été exercé de manière abusive ou arbitraire, on examine nécessairement les objectifs contractuels pour évaluer la conduite en démontrant que le pouvoir discrétionnaire a été exercé d’une façon étrangère aux objectifs contractuels sous-jacents pour lesquelles le pouvoir a été conféré.

[88] En résumé, donc, il y a manquement à l’obligation d’exercer le pouvoir discrétionnaire de bonne foi lorsque l’exercice de ce pouvoir est déraisonnable, en ce sens qu’il est étranger aux objectifs pour lesquels le pouvoir discrétionnaire a été conféré. Ce sera notamment le cas lorsque l’exercice du pouvoir discrétionnaire est abusif ou arbitraire compte tenu de ces objectifs, parce que cet exercice n’appartient pas à la gamme des comportements envisagés par les parties. Le fait que l’exercice annule substantiellement l’avantage fondamental du contrat ou lui fasse perdre son sens peut s’avérer pertinent, mais ce n’est pas une condition préalable nécessaire pour établir qu’il y a eu manquement.

b) *Source de l’obligation*

[89] Ayant établi la teneur de l’obligation, j’examinerai maintenant sa source pour établir si l’obligation existe au vu des faits de l’espèce.

[90] Je reconnais qu’il existe un certain débat quant à la source de cette obligation. L’arbitre a conclu qu’il n’était pas nécessaire que les exigences du critère de l’observateur objectif permettant de conclure à l’existence d’une condition implicite soient satisfaites pour que l’obligation d’agir de bonne foi en

IN THE MATTER OF A PLAN OF COMPROMISE OR
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Applicants

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