

**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

**COMPENDIUM OF THE APPLICANTS
(SISP APPROVAL MOTION)**

October 9, 2026

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SISP Approval

***The Court has Jurisdiction
to Approve the SISP***



CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to September 21, 2026

À jour au 21 septembre 2026

Last amended on June 20, 2026

Dernière modification le 20 juin 2026

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

- (a)** a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b)** a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c)** copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

- a)** d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;
- b)** d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;
- c)** d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente

notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut,

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

2005, c. 47, s. 131; 2007, c. 29, s. 109, c. 36, ss. 77, 112; 2012, c. 31, s. 421.

Obligations and Prohibitions

Obligation to provide assistance

35 (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

Obligation to duties set out in section 158 of the *Bankruptcy and Insolvency Act*

(2) A debtor company shall perform the duties set out in section 158 of the *Bankruptcy and Insolvency Act* that are appropriate and applicable in the circumstances.

2005, c. 47, s. 131.

Restriction on disposition of business assets

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

Notice to creditors

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

Factors to be considered

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

- (a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b)** whether the monitor approved the process leading to the proposed sale or disposition;
- (c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

Rang

(11) Il ne peut être rendu, au titre de la présente loi, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

2005, ch. 47, art. 131; 2007, ch. 29, art. 109, ch. 36, art. 77 et 112; 2012, ch. 31, art. 421.

Obligations et interdiction

Assistance

35 (1) La compagnie débitrice est tenue d'aider le contrôleur à remplir adéquatement ses fonctions.

Obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité*

(2) Elle est également tenue de satisfaire aux obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité* selon ce qui est indiqué et applicable dans les circonstances.

2005, ch. 47, art. 131.

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

- a)** la justification des circonstances ayant mené au projet de disposition;
- b)** l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;
- c)** le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

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

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

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

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

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

Restriction — employers

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

- (d) la suffisance des consultations menées auprès des créanciers;
- (e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;
- (f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

- (a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;
- (b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

- (a) le dirigeant ou l'administrateur de celle-ci;
- (b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;
- (c) la personne liée à toute personne visée aux alinéas a) ou b).

Autorisation de disposer des actifs en les libérant de restrictions

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(5)a) et (6)a) s'il avait homologué la transaction ou l'arrangement.

COURT FILE NO.: 09-8482-00CL

DATE: 20091218

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

See ¶1-7, 13-17
and 21

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 BRAINHUNTER INC., BRAINHUNTER
CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC
EMPLOYMENT SERVICES LTD., TREKLOGIC INC.

APPLICANTS

BEFORE: MORAWETZ J.

COUNSEL: Jay Swartz and Jim Bunting, for the Applicants

G. Moffat, for Deloitte & Touche Inc., Monitor

Joseph Bellissimo, for Roynat Capital Inc.

Peter J. Osborne, for R. N. Singh and Purchaser

Edmond Lamek, for the Toronto-Dominion Bank

D. Dowdall, for Noteholders

D. Ullmann, for Procom Consultants Group Inc.

HEARD &
DECIDED: DECEMBER 11, 2009

ENDORSEMENT

[1] At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

[13] The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp.* [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the “Nortel Criteria”) the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole “economic community”?
- (c) Do any of the debtors’ creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?

[14] The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

[15] Section 36 of the CCAA expressly permits the sale of substantially all of the debtors’ assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

[16] Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

[17] I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[18] In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants’ process.

[19] In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the “economic community”. I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

[20] With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue

***The SISP Should be
Approved***

Committee with a recommendation on ultimate decision-making authority, which is the one issue that is not settled. I address this issue in greater detail later in my Affidavit. First, I describe the terms of the SISP and its key milestones. For clarity, the version of the SISP described in detail below provides that all decision-making authority in respect of the SISP remains with the Debtors, consistent with the CRO Mandate.

B. THE SISP

(i) Key Milestones

35. Pursuant to the terms of the SISP being proposed by the Debtors, the CRO will solicit 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. 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. Parties who wish to have their bids or proposals considered, including existing stakeholders of the Debtors, are required to participate in the SISP.

36. By way of overview, the SISP includes an initial marketing and solicitation process and two phases to evaluate proposals from qualified bidders, as depicted in the following summary table:

Event	Timing
Preparation of Marketing Materials CRO and the Transaction Advisor, under the supervision and oversight of the Monitor, to prepare marketing materials and a process letter (the " Process Letter ") containing, among other things, the key milestones under the SISP.	This process is underway

Event	Timing
NDA Solicitation CRO and the Transaction Advisor, under the supervision and oversight of the Monitor, to solicit interest from parties to enter into NDAs	This process is underway
Access to Virtual Data Rooms (“VDR”) The CRO and the Transaction Advisor, under the supervision and oversight of the Monitor, to prepare and provide applicable parties with access to one or more VDRs	VDRs to be populated following granting of the SISP Approval Order; access granted only following execution of an NDA
LOI Bid Deadline Deadline for parties to submit initial non-binding letters of intent	A date to be identified 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
Invitation to Participate in Phase 2 The CRO and the Transaction Advisor, under the supervision and oversight of the Monitor, to invite one or more qualified parties from Phase 1 to conduct detailed due diligence	Following the LOI Bid Deadline
Qualified Bid Deadline Deadline for Phase 2 Parties to submit a Qualified Bid	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)
Finalization of Definitive Agreements The Debtors, in consultation with the CRO and with the assistance of the Transaction Advisor and other advisors, to finalize any necessary definitive agreement(s) with respect to the Successful Bid(s) or Back-Up Bid	Following selection of a Successful Bid
Transaction Approval Order The Debtors to apply to the Court for an order approving a Successful Bid	Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized

(ii) Marketing and Due Diligence

37. Under the proposed SISP, the CRO and the Transaction Advisor, under the supervision and oversight of the Monitor, will:

contact any of the foregoing parties to discuss its proposed bid, the CRO shall inform the Monitor of the granting of such consent.

53. Finally, the proposed SISP provides that any party holding valid security in the Debtors' assets may submit a credit bid as part of the SISP. If, following the Qualified Bid Deadline, no bid would result in repayment in full in cash of all of the secured debt obligations held by each of the Debtors' secured lenders and/or noteholders, they are permitted to submit a credit bid in respect of their secured obligations, provided that party has advised the CRO of its intention to credit bid within a prescribed timeframe.

C. DECISION-MAKING AUTHORITY IN RESPECT OF THE SISP

54. All parties agree that the SISP will be conducted by the CRO, in consultation with the Debtors, with the assistance of the Transaction Advisor and under the supervision and oversight of the Monitor. I understand that there may be a point of divergence with certain lenders on whether the Debtors' existing corporate governance structure of decision-making through the Operating Committee should be supplanted by the CRO for key decisions to be made in the SISP, including waiving bidding criteria, the identification of successful bids and the finalization and implementation of any resulting transaction.

55. For clarity, the chart below sets out the only provisions of the SISP that could potentially be impacted by this point of divergence:

Section in the SISP	Topic	Language from the SISP
7	Waiving Compliance with Qualified Bid Requirements	The Debtors, in consultation with the CRO , 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;
8	Determining the Successful Bid	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

	Terminating the SISP	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, the Transaction Advisor, 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	Negotiating and Finalizing a Transaction	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, Debtors, in consultation with the CRO, may apply to the Court for an order approving such Successful Bid and authorizing the Debtors, in consultation with the CRO, 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.
17	Credit Bids	[...] For certainty, a credit bid shall provide written evidence acceptable to the Debtors, in consultation with 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.
18	Credit Bids	[...] 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 with the consent of the Monitor and the DIP Lender 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 the deposit requirements set forth in paragraph 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.

(i) No Change of Circumstances Has Occurred to Justify a Change to the CRO Mandate

56. As described more fully in the First van Tonder Affidavit, through a series of agreements, the decision-making authority of NIO and Baffinland has been delegated to an operating committee whose members are appointed by ArcelorMittal Canada Inc. (“**AM**”) and funds managed by affiliates of The Energy & Minerals Group (“**EMG**”), each of which are shareholders of NIO.

57. Baffinland is party to a first amended and restated operating services agreement dated May 6, 2015, as amended on December 6, 2016, with NIO, AM, ArcelorMittal Mines Mary River Operating Inc. and the Operator (which, as described in the Overview, is MRP OP, LP).

58. The Operating Committee is composed of appointees of EMG and AM based on their respective equity ownership: EMG has appointed five members – three representatives of EMG, together with myself and Bruce Walter (the “**Operator Appointees**”) – and AM has appointed two members.

decisions she makes in her capacity as an Independent Member. I understand that AM, in consultation with its legal counsel Bennett Jones LLP, selected Ms. Gleich Primoff in light of her experience in complex restructurings, including CCAA proceedings, that have included sale and investment solicitation processes. A copy of the AM Engagement Letter is attached as **Exhibit “O”** to this Affidavit.

78. The Operator Appointees, being myself and Mr. Walter, selected Mr. Gula as our Independent Member. A copy of Mr. Gula’s engagement letter dated September 14, 2026 (the **“Operator Engagement Letter”**) is attached as **Exhibit “P”** to this Affidavit. As set out in the Operator Engagement Letter, Mr. Gula has confirmed that he is independent within the meaning of the Independence Mandate. Mr. Gula has also confirmed his understanding of the nature and scope of his engagement by the Operator Appointees, and Mr. Gula’s compensation is in no way conditional on any decisions he makes in his capacity as an Independent Member.

(iii) The SISP Itself Contains Robust Safeguards

79. Even apart from the Independence Mandate, the SISP provides multiple layers of oversight and consultation that ensure the SISP will proceed fairly and in the best interests of the Debtors and their stakeholders. These include the Monitor’s ongoing supervision of the process, the requirement that all communications with bidders be directed through the CRO, the Transaction Advisor, or the Monitor, and the requirement that any material amendment to the SISP be approved by this Court.

80. Critically, every decision exercised by the Debtors under the SISP must be made in consultation with the CRO, and in most cases, also in consultation with the Transaction Advisor and the Monitor. The Debtors cannot terminate the SISP without the consent of both the Monitor and the DIP Lender.

SALE AND INVESTMENT SOLICITATION PROCESS

1. On October 9, 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;
 - (iv) 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);
 - (v) 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**”);

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

- (vi) 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;
 - (vii) 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
 - (viii) 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 construction of a railway from the Mine south to the Steensby Inlet (the **“Steensby Component”**) and bidders may propose any alternative operating plan they consider achievable and commercially viable;
- (x) 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;
- (xi) Qikiqtani Inuit Association (“QIA”). 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, the Commercial Lease for Inuit Owned Lands No. Q13C301, the Water Compensation Agreement dated May 3, 2013, and their associated embedded agreements as unaffected;
- (xii) Nunavut Tunngavik Inc (“NTI”). For any mineral tenures within NTI-owned subsurface lands that are included in the bid, it treats any royalties payable by Baffinland in connection with those mineral tenures as unaffected.
- (xiii) 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;

- (xiv) 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;
 - (xv) Treatment of Employees, Contracts, Etc. It provides a description of the bidder's intentions for the Mine, including as it relates to the Steensby Component, the engagement of employees both at the Mine and head office, contractors, customers, contracts and vendors under the proposed bid;
 - (xvi) 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
 - (xvii) 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 Sections 6(xi) or 6(xii);
 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 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 email).
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 Sections 6(xi) and 6(xii).

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 infeasible 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 Sections 6(xi) and 6(xii) 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

Sections 6(xi) and 6(xii) 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(xiv) 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.
24. 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.
25. 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.

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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***DIP Facility Agreement –
Qualified Consent***

**Sattva Capital Corporation (formerly
Sattva Capital Inc.)** *Appellant*

v.

**Creston Moly Corporation (formerly
Georgia Ventures Inc.)** *Respondent*

and

**Attorney General of British Columbia and
BCICAC Foundation** *Interveners*

**INDEXED AS: SATTVA CAPITAL CORP. v. CRESTON
MOLY CORP.**

2014 SCC 53

File No.: 35026.

2013: December 12; 2014: August 1.

Present: McLachlin C.J. and LeBel, Abella, Rothstein,
Moldaver, Karakatsanis and Wagner JJ.

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

Arbitration — Appeals — Commercial arbitration awards — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price shares for payment of finder's fee and entering into arbitration — Leave to appeal arbitral award sought pursuant to s. 31(2) of the Arbitration Act — Leave to appeal denied but granted on appeal to Court of Appeal — Appeal of award dismissed but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in granting leave to appeal — What is appropriate standard of review to be applied to commercial arbitral decisions made under Arbitration Act — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31(2).

Contracts — Interpretation — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price the shares for payment of finder's fee and entering into arbitration — Whether arbitrator reasonably construed contract

**Sattva Capital Corporation (anciennement
Sattva Capital Inc.)** *Appelante*

c.

**Creston Moly Corporation (anciennement
Georgia Ventures Inc.)** *Intimée*

et

**Procureur général de la
Colombie-Britannique et
BCICAC Foundation** *Intervenants*

**RÉPERTORIÉ : SATTVA CAPITAL CORP. c. CRESTON
MOLY CORP.**

2014 CSC 53

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1^{er} août.

Présents : La juge en chef McLachlin et les juges LeBel,
Abella, Rothstein, Moldaver, Karakatsanis et Wagner.

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

Arbitrage — Appels — Sentences arbitrales commerciales — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation et recours à l'arbitrage — Autorisation d'appel de la sentence arbitrale demandée en application de l'art. 31(2) de l'Arbitration Act — Rejet initial de la demande d'autorisation d'appel, qui est accueillie à l'issue d'un appel devant la Cour d'appel — Rejet de l'appel interjeté de la sentence infirmé par la Cour d'appel — La Cour d'appel a-t-elle accordé à tort l'autorisation d'appel? — Quelle est la norme de contrôle applicable aux sentences arbitrales commerciales rendues sous le régime de l'Arbitration Act? — Arbitration Act, R.S.B.C. 1996, ch. 55, art. 31(2).

Contrats — Interprétation — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation

See ¶47

— often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26 and 31-36.

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine “the intent of the parties and the scope of their understanding” (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum; there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc.*

souvent le fondement factuel — dans l’interprétation d’un contrat écrit (Hall, p. 13, 21-25 et 127; J. D. McCamus, *The Law of Contracts* (2^e éd. 2012), p. 749-751). Le deuxième découle des explications formulées dans les arrêts *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35, et *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26 et 31-36, sur ce qui distingue la question de droit de la question mixte de fait et de droit.

[47] Relativement au premier changement, l’interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d’interprétation. La question prédominante consiste à discerner « l’intention des parties et la portée de l’entente » (*Jesuit Fathers of Upper Canada c. Cie d’assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744, par. 27, le juge LeBel; voir aussi *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69, par. 64-65, le juge Cromwell). Pour ce faire, le décideur doit interpréter le contrat dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s’harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat. Par l’examen des circonstances, on reconnaît qu’il peut être difficile de déterminer l’intention contractuelle à partir des seuls mots, car les mots en soi n’ont pas un sens immuable ou absolu :

[TRADUCTION] Aucun contrat n’est conclu dans l’abstrait : les contrats s’inscrivent toujours dans un contexte. [. . .] Lorsqu’un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d’autre part une connaissance de l’origine de l’opération, de l’historique, du contexte, du marché dans lequel les parties exercent leurs activités.

(*Reardon Smith Line*, p. 574, le lord Wilberforce)

[48] Le sens des mots est souvent déterminé par un certain nombre de facteurs contextuels, y compris l’objet de l’entente et la nature des rapports créés par celle-ci (voir *Moore Realty Inc. c. Manitoba*

DIP FACILITY LOAN AGREEMENT

DATED AS OF JUNE 3, 2026

**Exhibit "C" to Second
Waheed Affidavit****See s. 15-16, 27**

WHEREAS Baffinland Iron Mines Corporation and Baffinland Iron Mines LP (collectively, the "**Borrowers**") have requested the DIP Lender (defined below) to provide funding, in connection with the Borrowers' proceedings under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") commenced before the Ontario Superior Court of Justice – Commercial List (the "**Court**"), in accordance with the terms and conditions set out herein (the "**CCAA Proceeding**");

AND WHEREAS FTI Consulting Canada Inc. has been appointed as monitor of the Borrowers and the Guarantors (in such capacity, the "**Monitor**") pursuant to the Initial Order.

AND WHEREAS Export Development Canada ("**EDC**") is party to a Credit Agreement with the Borrowers dated as of October 7, 2022, as amended from time to time, pursuant to which EDC provided a secured credit facility to the Borrowers on the terms set out therein (the "**Pre-Filing Facility**").

AND WHEREAS the DIP Lender has agreed to provide the DIP Facility (defined below) in accordance with the terms and conditions set out below.

NOW THEREFORE, in consideration of the foregoing and their respective representations, warranties, covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the parties hereby agree as follows:

1. **Defined Terms:** A capitalized term not defined in the body of this Agreement has the meaning ascribed to it in the Definitions section below.
2. **Interpretation:** In this Agreement, words signifying the singular number include the plural and *vice versa*, and words signifying gender include all genders. Every use of the word "including" in this Agreement is to be construed as meaning "including, without limitation".

The division of this Agreement into Sections and the insertion of headings are for convenience of reference only and do not affect the construction or interpretation of this Agreement.

References in this Agreement to Sections or Schedules are to be construed as references to a Section or Schedule of or to this Agreement unless the context requires otherwise.
3. **Currency:** Unless otherwise stated, all monetary denominations shall be in lawful currency of the United States of America.
4. **Borrowers:** Baffinland Iron Mines Corporation ("**BIM Corp**") and Baffinland Iron Mines LP ("**Baffin LP**").
5. **Guarantors:** Nunavut Iron Ore, Inc. and 12334992 Canada Inc. (collectively, the "**Guarantors**" and collectively with the Borrowers, the "**Obligors**").

Finished Product Credit Support is no longer necessary, then the Facility Amount will remain a maximum principal amount of US\$400,000,000.

For the purposes of this Agreement, the Approved Cash Flow shall include all supporting documentation provided in respect thereof to the DIP Lender.

For greater certainty, any finished product arrangements with a Finished Product Funder entered into after the date hereof must be in form and substance acceptable to the DIP Lender in its sole discretion; provided, for clarity, that terms that are in aggregate at least as favourable to the Borrowers as the existing arrangement with the Finished Product Funder shall be acceptable to the DIP Lender.

14A **Permitted
Variances**

The obligations herein requiring the Obligors to comply with or act in accordance with the Approved Cash Flow are subject to any Permitted Variances that arise from either (i) non-forecasted reductions in cash inflows; (ii) disbursements for non-forecasted and non-discretionary expenditures; or (iii) non-forecasted disbursements required to obtain continued supply for essential suppliers.

15. **Conditions
Precedent to
the Initial
Advance**

The DIP Lender's obligation to make the Initial Advance hereunder from the Loan Amount is subject to and conditional upon, the satisfaction of all of the following conditions precedent (the "**Initial Advance Conditions**"):

- (a) The Obligors shall have executed and delivered this Agreement;
- (b) the Court shall have issued the Second Amended and Restated Initial Order in form and substance satisfactory to the DIP Lender, acting reasonably, among other things:
 - (i) authorizing and approving this Agreement;
 - (ii) granting the DIP Charge and the priority of the DIP Charge contemplated in this Agreement;
 - (iii) granting a stay of proceedings until a date that is at least nine (9) weeks after the date of the Second Amended and Restated Initial Order; and
 - (iv) providing for provisional execution, or other satisfactory protection, in respect of any and all Advances made and/or Liens and/or charges granted for the DIP Loans, including the DIP Charge;

and the operation and effect of such order shall not have been stayed, amended, modified, reversed, waived, dismissed or appealed (or any such appeal shall have been dismissed with no further appeal therefrom or the applicable appeal periods shall have expired), unless otherwise agreed by the DIP Lender, in its reasonable discretion;

- (c) no Default or Event of Default shall have occurred and be continuing or will occur as a result of the Initial Advance;

- (d) The DIP Lender shall have received an Advance Confirmation Certificate in accordance with the terms hereof; and
- (e) there shall be no Encumbrances on the Collateral ranking in priority to or *pari passu* with the DIP Charge other than as expressly permitted by the terms hereof.

16.

**Conditions
Precedent to
Advances of
the Facility
Amount:**

The DIP Lender's agreement to make any Advances available from the Facility Amount (other than the Initial Advance) is subject to, and conditional upon, the satisfaction of all of the following conditions precedent (the "**Advance Conditions**"), each of which is for the benefit of the DIP Lender and may be waived by the DIP Lender in its sole discretion:

- (a) the Second Amended and Restated Initial Order shall not have been stayed, amended, modified, reversed, waived, dismissed or appealed (or any such appeal shall have been dismissed with no further appeal therefrom or the applicable appeal periods shall have expired), unless otherwise agreed by the DIP Lender, in its reasonable discretion;
- (b) The DIP Lender shall have received an Advance Confirmation Certificate in accordance with the terms hereof;
- (c) Subject to Section 8, all reasonable and documented third-party out-of-pocket expenses payable to the DIP Lender hereunder have been paid or will be paid from the proceeds of the requested Advance on the date of the applicable Advance;
- (d) There shall be no Encumbrances on the Collateral ranking in priority to or *pari passu* with the DIP Charge other than as expressly permitted by the terms hereof;
- (e) No Default or Event of Default shall have occurred and be continuing or will occur as a result of the requested Advance; and
- (f) The requested Advance shall be in accordance with an Approved Cash Flow (excluding for greater certainty any Excess Exploration and Expansion Expenses) that is effective at the time of such Advance.

17.

DIP Charge:

All of the obligations of the Obligors under or in connection with the DIP Facility, including without limitation, all principal, interest, fees, Finished Product Credit Support, and amounts owing in respect of reasonable and documented third-party out-of-pocket expenses of the DIP Lender and the indemnification obligations owed to the DIP Lender hereunder (collectively, the "**DIP Obligations**"), shall be secured by a Court-ordered charge on the Collateral in favour of the DIP Lender (the "**DIP Charge**").

The DIP Charge shall rank ahead of any and all Encumbrances on the Collateral other than (i) the administration charge not exceeding US\$5,000,000, (ii) the directors and officers charge not exceeding US\$20,400,000, and (iii) in respect of the Cash Collateral (as defined in

- (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;

DATE: 20010201
DOCKET: C31817

COURT OF APPEAL FOR ONTARIO

See ¶44, 50-51, 67

DOHERTY, MOLDAVER AND MACPHERSON JJ.A.

BETWEEN:

WELCH FOODS INC.,
A COOPERATIVE

Plaintiff/Defendant by
Counterclaim (Appellant)

- and -

CADBURY BEVERAGES CANADA
INC.

Defendant/Plaintiff by
Counterclaim (Respondent)

)
)
) *Joel Richler and*
) *Theresa L. Howarth*
) *for the appellant*
)

)
) *John F. Rook, Q.C. and*
) *John Cotter*
) *for the respondent*
)

)
) HEARD: December 14 and 15,
2000

On appeal from the judgment of Justice Romain Pitt dated February 26,
1999.

MACPHERSON J.A.:

A. INTRODUCTION

[1] In 1945 C.B. Powell started a food brokerage business in St. Catharines. By the late 1940s he was acting as a food broker for a large international company, the Welch Grape Juice Company. After acquiring a plant in St. Catharines in 1954, Powell Foods Company undertook the manufacturing of Welch products in Canada. In 1969, Schweppes acquired a majority interest in the Powell company

conditions which were quickly met by Cadbury) to the Cadbury-Imperial agreement on January 30, 1996. Welch's role in the process and its formal consent are explicitly reflected in the Cadbury-Imperial Co-packing agreement:

Cadbury hereby represents and warrants to Imperial that under its agreement with Welch Foods Inc. ("Welch") Cadbury has authority to enter into co-packing agreements with others with the consent of Welch, and further represents and warrants to Imperial that Welch has provided its consent to the arrangements set forth in this letter agreement.

[41] Welch's role and consent were also acknowledged shortly thereafter in its internal *January Monthly Report* dated February 5, 1996:

Cadbury/Mott's Canada – The license holder for Welch products in Canada requested that they be allowed to pack frozen concentrates at a co-packer. QA conducted a quality audit of Imperial Flavours in Toronto. With several specific items that need to be addressed, Imperial Flavours was approved to co-pack Welch concentrates for Cadbury/Mott's Canada.

[42] In summary, the trial judge held that the co-packing issue was governed by articles 5.05 and 6.02 of the licensing agreement. It is clear that when they addressed the co-packing issue in early 1996, both companies, through their senior officers and their legal advisers, shared the trial judge's view. Later, when co-operation turned to conflict and litigation, both parties resiled from their shared interpretation of the licensing agreement. Cadbury took the position that it could co-pack without Welch's consent. Welch argued that co-packing was impossible under the 1972 licensing agreement.

[43] The trial judge held that the wording of the licensing agreement and the conduct of the parties precluded the adoption of either of these extreme positions. In my view, the trial judge's interpretation of the agreement was correct. As he concluded: "In a word Cadbury could co-pack but only with Welch's consent, such consent not to be unreasonably withheld".

(2) The consent issue

[44] The consent issue is anchored in article 6.02 of the 1972 licensing agreement which, for convenience, I set out again:

6.02 Any approval or consent required of either party hereunder shall be in writing signed by an executive

officer or by an agent designated in writing for that purpose by an executive officer. Both parties agree that no such approval or consent will be unreasonably withheld, consistent with the tenor and purpose of this Agreement.

[45] On January 30, 1996, Welch formally consented to the interim Cadbury-Imperial co-packing agreement. In the summer and fall of 1996, Welch refused to consent to a long term co-packing agreement. The trial judge concluded that Welch's refusal to consent was unreasonable and violated article 6.02. In reaching this conclusion, the trial judge reviewed a great deal of evidence and made clear findings with respect to it.

[46] Welch's counsel candidly admits that on the consent issue he is seeking to overturn the trial judge's factual finding that Welch withheld its consent unreasonably. As Welch's counsel acknowledged, this is a steep hill for Welch to climb. The test for reversal is that the trial judge committed a palpable and overriding error in his assessment of the facts. This test was enunciated by the Supreme Court of Canada in *Stein v. The Ship 'Kathy K'*, [1976] 2 S.C.R. 802. I think it instructive to set out the entire passage where the test is established because it speaks not only to the test, but also to the appellate court's role in its application. Ritchie J. said at p. 808:

These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at trial.

[47] I agree with Welch's submission that Cadbury had an onus to show that Welch's withholding of consent was unreasonable and that the test for determining this question is objective, referable to the circumstances known to Welch when it withheld its consent: see *BRS Northern Ltd. v. Templeheights Ltd.*, [1998] 2 E.G.L.R. 182 (Ch.D.) and *British Bakeries (Midlands) Ltd. v. Michael Testler & Co. Ltd.*, [1986] 1 E.G.L.R. 64 (Ch.D.).

[48] Welch submits that the trial judge erroneously preferred his own beliefs and opinions as to the commercial reasonableness of withholding consent over those of Welch executives. I disagree. The trial judge carefully considered

Welch's conduct leading up to its decision to withhold consent in the context of the express words of article 6.02, namely whether the decision was "consistent with the tenor and purpose of this Agreement".

[49] It should be recalled that the licensing agreement, which structured a relationship that had begun in the late 1940s and was scheduled to continue until 2025, provided benefits to both companies: namely, access to Welch products for Cadbury and royalties for Welch. Both companies had an obligation to respect the integrity of the licensing agreement; at a minimum, neither could take deliberate steps to undermine it during its life. This obligation applied to Welch's decision whether to withhold its consent to Cadbury's request; the decision could not be exercised "to achieve some collateral purpose wholly unconnected with the terms of the [agreement]" : see *Bromley Park Estates v. Moss*, [1982] 1 W.L.R. 1019 at 1033 (Eng. C.A.) and *Dominion Stores Ltd. v. Bramalea Ltd.* (1985), 38 R.P.R. (2d) 12 at 23 (Ont. Dist. Ct.).

[50] The trial judge carefully reviewed the evidence and held, in effect, that Welch had refused its consent for an improper and collateral purpose, namely "to appropriate the benefits of the license which Cadbury and its predecessors had enjoyed since 1954". In other words, Welch withheld its consent to force Cadbury to default on the licensing agreement, or alternatively, to compel Cadbury to enter into a different relationship that would be more profitable for Welch.

[51] The record abundantly supports the trial judge's conclusion. Indeed, far from being a palpable and overriding error, the trial judge's conclusion was, in my view, correct.

[52] Welch approved Cadbury's co-packing proposal on January 30, 1996. From that date to April 18 there was not a whisper from Welch about dissatisfaction with, or even concern about, the Cadbury-Imperial arrangement.

[53] On April 18, Cadbury announced the closing of its St. Catharines plant. An internal meeting of senior Welch personnel took place on May 1. One of the discussion topics for this meeting was:

How shall Welch's balance the eventual *possibility* of re-acquiring the Brand license in Canada versus the potential damage to Welch's current royalty (\$460 M) if reacquisition is *not possible*? [Emphasis in original.]

In other words, almost immediately Welch was thinking in terms of the possibility of using Cadbury's decision to close the St. Catharines plant as a vehicle for reacquiring its brand licence in Canada, a licence which Cadbury had held for almost 50 years.

by Mr. Hewins, Welch's Vice-President (International) with responsibility for Canada.

[65] In its factum, Welch also submits:

The trial judge also ignored a key distinguishing feature of the Cadbury proposal: that if accepted, there would for the first time in North America be a copacking relationship between a Welch licensee and a third party copacker, as opposed to a direct relationship between brand owner and manufacturer, whether licensee or copacker.

[66] My observation about this submission is that if this untrodden path was of real concern to Welch, why did Welch permit the interim co-packing agreement to proceed in February 1996? Welch started down this path with its eyes wide open in February and made no complaints about the voyage before April 18. Moreover, a particularly important provision of the interim co-packing agreement, to which Welch agreed, contemplated a formal co-packing agreement if the test run were successful. This course of conduct completely undercuts its submission grounded in the uniqueness of the co-packing route.

[67] In summary, in my view the Cadbury-Imperial co-packing agreement was a small and non-controversial matter for Welch until April 18, 1996. After that date, it became a major weapon for Welch as it moved quickly and aggressively to, in the trial judge's words, "appropriate the benefits of the licence which Cadbury and its predecessors had enjoyed since 1954". This course of conduct led Welch to withhold its consent to a continuation of the co-packing arrangement. This decision was made for a collateral and impermissible purpose. It was, therefore, not a reasonable withholding of consent within the meaning of article 6.02. On the contrary, the withholding of consent was not, in the words of that article "consistent with the tenor and purpose of the Agreement".

(3) The damages award issue

[68] In disposing of Cadbury's claim for damages for unreasonable refusal of consent to co-pack, the trial judge accepted the evidence of Cadbury's expert witness, Stephen Cole, that the increased cost of production at Cadbury's St. Catharines plant compared to production at Imperial was \$465,000 from August 12, 1996, the date of Welch's formal refusal, to December 31, 1998. The trial judge also held that damages should continue to accrue until Welch either consented to or was made to consent to the use of Imperial or some other copacker, but not beyond December 31, 1999 without court approval.

[69] Welch does not challenge the dates chosen by the trial judge as the basis for calculating damages. Moreover, the parties agree that if the \$465,000 award is

Quickie Convenience Stores Corp. v. Parkland Fuel Corporation
 [Indexed as: **Quickie Convenience Stores Corp. v. Parkland Fuel Corp.**]

Ontario Reports

Court of Appeal for Ontario

Feldman, Fairburn and Nordheimer JJ.A.

July 10, 2020

See ¶1-2, 35-36, 40,
43-44

151 O.R. (3d) 778 | 2020 ONCA 453

Case Summary

Conflict of laws — Choice of law — Contracts — Parties having lease agreements regarding fuel stations in Ontario and Quebec — Appellant seeking to sell stations — Application judge finding respondent unreasonably withheld consent, but dismissing application for declaratory relief based on choice of law and forum selection terms — Judge erred in at least not granting partial relief and in failing to apply strong cause test to forum selection clause — Appeal allowed.

Conflict of laws — Forum selection clause — Parties having lease agreements regarding fuel stations in Ontario and Quebec — Appellant seeking to sell stations — Application judge finding respondent unreasonably withheld consent, but dismissing application for declaratory relief based on choice of law and forum selection terms — Judge erred in at least not granting partial relief and in failing to apply strong cause test to forum selection clause — Appeal allowed.

Contracts — Duty of good faith — Parties having lease agreements and credit/debit card agreements regarding fuel stations in Ontario and Quebec — Appellant seeking to sell stations — Application judge finding respondent unreasonably withheld consent for lease agreements, but dismissing application for declaratory relief based on choice of law and forum selection terms — Judge making no separate finding regarding credit/debit card agreements — Requirement of consent for assignment carried implied understanding that consent would not be unreasonably withheld — Appeal allowed.

The appellant owned and operated a chain of convenience stores, several of which included gasoline service stations. Fifteen of those stations received their fuel from the respondent, a large fuel supply company. The stations and their fuel supply were governed by various lease and sublease agreements. The appellant and respondent were also parties to 14 credit/debit card agreements. The appellant sought to sell eight of its Ontario stations and seven of its Quebec stations, which required assigning the leases and, in some cases, the credit/debit card agreements. The leases contained an assignment clause and, in most instances, both a forum selection clause and a choice of law clause. When informed of the potential sale, the respondent expressed a willingness to waive its rights of first offer to purchase and consent to the

[1] Quickie Convenience Store Corp. appeals from the dismissal of its application for declaratory relief arising out of a proposed commercial transaction. The proposed commercial transaction involved several contracts, including leases and credit/debit card agreements, all relating to fuel stations in Ontario and Quebec. The appellant had put those fuel stations up for sale. Completion of the sale required that the appellant be able to assign these contracts. Parkland Fuel Corporation, the respondent, refused to consent to the assignments. The appellant sought a declaration that the respondent had refused its consent unreasonably. The application judge dismissed the application.

[2] For the following reasons, I would allow the appeal, set aside the order below, and substitute an order granting the declaratory relief.

B. Background

[3] It is not necessary to go into every detail concerning the dealings and relationships between the appellant and the respondent. The basic facts are that the appellant is an Ontario corporation that owns and operates a chain of 52 convenience stores located in Ontario and Quebec. Gasoline service stations are located at 22 of these stores. At issue in this proceeding are 15 of those gasoline service stations which receive their fuel from the respondent. The respondent is a large fuel supply company. [page 781]

[4] Of these 15 stations, eight are located in Ontario and seven are located in Quebec. For 12 of the 15 stations, the appellant owns the fee simple interest in the land. For the other three stations, the appellant has a leasehold interest on the land.

[5] The stations and their fuel supply are governed by various lease and sublease agreements. Typically, the appellant's interest in the land is leased to the respondent, and then sub-leased back to the appellant. In addition to these leases, the appellant and the respondent are also parties to 14 credit/debit card agreements.

[6] As already mentioned, the appellant is seeking to sell these 15 stations. To do so, it needs to assign the leases and, in some cases, the credit/debit card agreements.

[7] The leases contain certain terms that are relevant to the relief sought. Specifically, the leases contain an assignment clause, and, in most instances, both a forum selection clause and a choice of law clause. Many of these terms are identical, or substantially similar, in wording. In all but one case, the leases require the respondent's prior written consent in order to be assigned. In the case of 12 of the 15 sites, the leases provide that the appellant "shall not assign [the] lease without the prior written consent" of the respondent and "cannot assign [the] sublease nor sub-sublet the Leased Premises" without the respondent's "prior written consent". In one instance, the lease expressly provides that consent to the assignment "may not be unreasonably withheld".

[8] Schedule A to these reasons outlines the forum selection and choice of law clauses for the 15 stations. In summary, 11 leases stipulate that the governing law shall be Ontario, two stipulate that the governing law shall be Quebec, and two contain no stipulation. Similarly, 11 leases have a forum selection clause naming Toronto, two name Montreal, and two contain no stipulation. It should be noted that the two leases that do not contain a choice of law clause are

issue of whether the respondent unreasonably withheld [page 788] consent to an assignment of the credit/debit card agreements was squarely before the application judge. The fact that the appellant invokes different authority now, than it did before the application judge, does not offend the principle: *R. v. Sweeney* (2000), 50 O.R. (3d) 321 (C.A.), at para. 32.

[39] In considering the issue, the application judge was obliged to apply any law that was applicable and binding on him. On that point, the principles in *Bhasin* were directly before the application judge. I would note that it was the respondent who drew the application judge's attention to that case, albeit for a different purpose. I would not give effect to the respondent's procedural objection.

[40] The question then is whether an agreement that requires consent to be assigned carries with it an implicit understanding that consent to an assignment will not be withheld unreasonably. I agree with the appellant on this point. I conclude that a provision in a contract that requires one party to consent to the assignment of the contract by the other party, has implicit in it the requirement that the party, whose consent is necessary, will not withhold that consent for an improper or ulterior purpose. In my view, the imposition of a good faith obligation, on the decision whether or not to consent, is consistent with the approach to be taken to contracts generally, as enunciated in *Bhasin*.

[41] In *Bhasin*, Cromwell J. outlined the organizing principle of good faith that applies to all contracts. It requires that parties to a contract act honestly in the performance of their obligations. In that decision, Cromwell J. established certain duties that rest on parties to a contract. These include

- (i) parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily; and
- (ii) a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner: *Bhasin*, at paras. 63 and 65.

[42] The application judge found that the respondent's refusal to consent to the assignment of the leases was "a prohibited attempt to obtain benefits exceeding its rights in those contracts". More specifically, the respondent was attempting to leverage its refusal to consent to force the appellant to agree to a five-year extension of their contractual arrangements.

[43] The application judge did not make any separate finding regarding the respondent's reason for refusing to consent to the assignment of the credit/debit card agreements, but it follows that the same conclusion regarding the respondent's motive, that he found regarding the leases, would apply. The parties were not [page 789] drawing any distinctions between these agreements when it came to the issue of assignment. All of the agreements between the parties were the subject of the appellant's proposed sale. They were all to be assigned to the prospective purchaser as part of the sale transaction. The respondent's objective in withholding its consent was the same regardless of whether we are speaking about the leases or about the credit/debit card agreements. Its objective was to extract an extension of the existing contractual arrangements, something to which it was not otherwise entitled. The same conduct that underpins the trial judge's findings about the respondent's dealings in relation to the leases

applies to its dealings in respect of the credit/debit card agreements. It reflected bad faith dealing. It is not unlike the conduct in which the defendants engaged in *Bhasin*.

[44] The respondent's refusal to consent to the assignment of the credit/debit card agreements was as unreasonable or improper as was its refusal to consent to the assignment of the leases. It was inconsistent with the duty of good faith that the respondent owed to the appellant. It was also inconsistent with giving appropriate regard to the legitimate contractual interests of the appellant, that is, the appellant's legitimate interest in wishing to sell these gas stations. The appellant was entitled to expect that the respondent would act fairly and honourably in deciding whether to consent to the assignment of these agreements as part of a sale of the appellant's businesses to a third party. On that point, there was no evidence that the prospective purchaser's performance of the leases and the credit/debit card agreements would pose any financial or other risk to the respondent.

[45] There was no principled basis for the respondent's refusal to consent to the assignment of the credit/debit card agreements. I would also observe that there would be a measure of inconsistency in a conclusion that the respondent had unreasonably withheld its consent to the assignment of the leases but not to the assignment of the credit/debit card agreements.

E. Conclusion

[46] I would allow the appeal, set aside the order below and, in its place, grant an order providing the appellant with the declaratory relief that it sought in its notice of application.

[47] The appellant is entitled to its costs of the appeal fixed in the agreed amount of \$35,000, inclusive of disbursements and HST. It would seem that the appellant ought to be entitled to its costs of the original application as well but if the parties cannot agree on that point, they may make written submissions. The appellant's submissions shall be delivered within ten days of the date [page 790] of these reasons and the respondent's submissions shall be delivered within ten days thereafter. Each party's submissions shall be limited to three pages.

Appeal allowed.

SCHEDULE A

History of this Proceeding

CITATION: Target Canada Co. (Re), 2016 ONSC 316

COURT FILE NO.: CV-15-10832-00CL

DATE: 2016-01-15

SUPERIOR COURT OF JUSTICE - ONTARIO

See ¶81

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 TARGET CANADA CO., TARGET CANADA
HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA
PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO)
CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA
PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, Shawn Irving and Tracy Sandler* for Target Canada Co., Target
Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy
(BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy
Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
(the "Applicants")

Linda Galessiere and Gus Camelino for 20 VIC Management Inc. (on behalf of
various landlords), Morguard Investments Limited (on behalf of various
landlords), Calloway Real Estate Investment Trust (on behalf of Calloway REIT
(Hopedale) Inc.), Calloway REIT (Laurentian Inc.), Crombie REIT, Triovest
Realty Advisors Inc. (on behalf of various landlords), Brad-Lea Meadows Limited
and Blackwood Partners Management Corporation (on behalf of Surrey CC
Properties Inc.)

Laura M. Wagner and Mathew P. Gottlieb for KingSett Capital Inc.

Yannick Katirai and Daniel Hamson for Eleven Points Logistics Inc.

Daniel Walker for M.E.T.R.O. (Manufacture, Export, Trade, Research Office)
Incorporated / Kerson Invested Limited

Jay A. Schwartz, Robin Schwill for Target Corporation

Miranda Spence for CREIT

Jay Carfagnini, Jesse Mighton, Alan Mark and Melaney Wagner for Alvarez &
Marsal Canada Inc. in its capacity as Monitor

James Harnum for Employee Representative Counsel

any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

[81] The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

[82] The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

[83] A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

[84] In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

[85] It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

[86] Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be

The DIP Facility

D. THE DIP FACILITY
See ¶50(d), 83

48. The Debtors are asking this Court to approve the EDC Proposal as the DIP Facility to allow the Debtors to meet their cash flow requirements during the CCAA proceeding.

49. The primary terms of the term sheet of the selected DIP Facility (*i.e.*, the EDC Proposal) are summarized immediately below:

Summary of Key Terms of EDC Proposal	
DIP Lender	His Majesty in Right of Canada, as represented by EDC
Maximum DIP Facility Amount	\$400M revolving facility, upsized to \$475M if an offtake agreement is not in place for 2026/2027
Interest and Fees	Citibank prime rate + 4.75% per annum (currently approximately 11.5% in aggregate) Upfront fee of 2% of the total Facility Amount Commitment Fee of 1.5% payable on the average Unused Commitment, which does not include the additional \$75M of availability unless or to the extent the DIP Facility is upsized
Security/ Charge	DIP Facility and Obligor indemnification obligations to be included in the DIP Charge which will have priority over all encumbrances other than the Administration Charge, the D&O Charge and cash collateral posted as security for letters of credit
Permitted Variance	Variances of not more than 10% from the aggregate net cash flow covered by the then current Approved Cash Flow on a cumulative basis
Maturity	1 year after the Second ARIO, with a six-month extension if a Restructuring Transaction has been approved by the court in exchange for a fee of 1% of the Facility Amount
Other Material Provisions	Option to use up to \$75M of the upsized availability to provide credit support to a potential offtaker if necessary to maintain or replace offtake arrangements. \$110M bridge available for the first 4 weeks following the date of the Second ARIO. Only interest and out of pocket legal expenses of the DIP Lenders are payable in connection with the Bridge Advance if it is refinanced within 4 weeks

50. As explained in greater detail below, the DIP Facility that the Debtors ask the Court to approve is the EDC Proposal (as defined below). The Debtors selected the EDC Proposal for the following principal reasons:

- (a) The EDC Proposal secures a highly credible, well-capitalized lending partner whose reputation is expected to instil confidence among stakeholders. Critically, EDC's interests are fundamentally aligned with those of the Debtors and their broader stakeholder community, ensuring that the restructuring process is driven toward an outcome that maximizes value for all parties rather than serving the narrow objectives of any single constituency.
- (b) The EDC Proposal provides far greater funding certainty relative to the next most viable proposal and does not impose an unreasonable set of covenants and controls which would result in a significant risk of non-compliance by the Debtors.
- (c) The EDC Proposal allows management to focus on operating the business and advancing a SISP and does not impair the Debtors' operational flexibility during the CCAA proceeding nearly to the same extent as the next most viable proposal.
- (d) The EDC Proposal does not provide the DIP Lender with a disproportionate amount of control over the CCAA proceeding and SISP. Moreover, the DIP Lender is aligned with the Debtors' objectives of maximizing value for the benefit of all stakeholders. It is manifestly not a strategic party in the Debtors' CCAA proceeding.
- (e) The EDC Proposal provides \$110 million in immediate bridge financing to allow the Debtors to meet their immediate cash needs without any exit or commitment fee. This feature of the EDC Proposal ensures that to the extent there is a dispute about whether EDC should prevail as the ultimate DIP lender, the parties opposed to the EDC Proposal can adjudicate their concerns without causing undue prejudice to any party.

(b) Ability to Operate the Business and Maximize Value for Stakeholders

83. The EDC Proposal is also preferable in light of the less onerous representations, covenants, and events of default demanded by the proposed DIP Lender. Taken together, the overall effect of these terms in the EDC Proposal provides the proposed DIP Lender with some but not a disproportionate level of control over the CCAA Proceedings, the SISP, and the operations of the business. The Mine's operations, including its procurement and sealift activities, are highly technical and specialized in nature. The EDC Proposal preserves the Debtors' ability to manage and operate the business by drawing on their institutional knowledge and expertise. In the aggregate, the Debtors assessed that there was a significantly lower risk of the Debtors being unable to comply with the terms of the EDC Proposal as compared to the Oaktree Proposal.

84. Although both the EDC and Oaktree Proposals allow the loan facility to be used only in accordance with the "Approved Cash Flow" subject to "Permitted Variances", the definition of "Permitted Variances" is markedly more flexible under the EDC Proposal. The Debtors will be more capable of complying with these funding requirements, thereby reducing the compliance burden on the business. The Debtors anticipate that this flexibility will allow management to focus on operating the business rather than being distracted by repeated requests to their lenders for waivers, or worse, being in default. The importance of flexible variance thresholds is heightened by the Debtors' significant exposure to commodity price risk. Key inputs and outputs of the Mine's operations are subject to commodity price fluctuations. These fluctuations could easily produce meaningful variances between the Approved Cash Flow projections and actual results, even where management has operated the business prudently, in the ordinary course, and in accordance with the approved budget. A more restrictive definition of Permitted Variances would expose the Debtors to the risk of technical non-compliance driven not by mismanagement or unusual operations, but rather by exogenous market movements beyond their control.

*See ¶50, 51, 71, 87(c) and
(g), 88, 94*

Court File No. CL-26-00000219-0000

**Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation
and 12334992 Canada Inc.**

SECOND REPORT OF THE MONITOR

June 4, 2026

84. Based on the information available, the Monitor has compared the cost of the DIP Facility to that of other approved interim financings of a similar size. As illustrated in the chart below, the cost of the DIP Facility appears to be within the range of costs, in terms of annualized interest and fees, for interim financings of similar size approved in other CCAA proceedings:

DIP Facility Summary

DIP Financing facilities greater than USD \$35 million

	DIP Size (\$ USD million)	Interest (%)	Fee(s) as % of DIP Facility
Average	99.3	9.4%	2.3%
Minimum	39.9	4.5%	0.5%
Maximum	445.7	13.0%	5.0%

85. Based on the foregoing, the Monitor is of the view that the terms of the DIP Financing Agreement are within market parameters in respect of interest and fees.

The Monitor's Recommendation

86. As noted earlier in this Second Report, three Final DIP Proposals resulted from the DIP Solicitation Process. The proposals received from EDC and the Ad Hoc DIP Group were viable proposals. The proposal received from IRH was not.
87. **The Monitor's view is as follows:**
- (a) The interest rates and fees contained in the two viable proposals were generally competitive;
 - (b) The EDC Final DIP Proposal provided additional funding of up to \$75 million in the event of a Finished Product Non-Funding Scenario, providing additional operational certainty for the Debtors;
 - (c) **Although both viable proposals contained restrictive covenants, the EDC Final DIP Proposal provided additional flexibility for the Debtors in the operation of their business;**

- (d) EDC is an existing secured creditor of the Debtors and is familiar with their business and operations;
 - (e) The Monitor recognizes that the proposed DIP Charge would prime creditors holding a significant amount of the Debtors' secured debt. However, as set out above, the Monitor is of the view that any prejudice is outweighed by the benefits of the DIP Facility;
 - (f) Further, in the near term, any prejudice caused to other secured creditors by being primed by the DIP Facility and DIP Charge is ameliorated by the concept of the Bridge Period and the "without prejudice" nature of any Court approval of the DIP Facility; and
 - (g) The Debtors require the stability provided by the DIP Facility and the ability to draw on the Bridge Advances while litigation is pursued with respect to the DIP Facility.
88. Based on the foregoing, the Monitor respectfully recommends that the Court grant the Debtors' request for approval of the DIP Financing Agreement and the granting of the DIP Charge, recognizing that a process will be put in place to litigate issues relating to the DIP Facility.

PAYMENTS TO CRITICAL SUPPLIERS

89. In the SARIO, the Applicants are seeking the authority (but not the requirement) to pay certain pre-filing amounts with the consent of the Monitor.

90. The Monitor is of the view that such relief is reasonable and appropriate in the circumstances to ensure the continued operation of the Debtors' business, to avoid disruption with critical suppliers and contractors, and to maximize recoveries during the CCAA Proceedings. There are a number of time-sensitive payments for goods that need to be made in the lead up to the upcoming Sealift Season that are necessary for the Debtors to continue going concern operations. If these goods are not procured in a timely manner, including in certain circumstances through the payment of certain pre-filing arrears, the opportunity to deliver these goods during the Sealift Season will be lost. The SARIO provides that pre-filing amounts will only be paid to these parties with the consent of the Monitor.

EXTENSION OF STAY PERIOD

91. The Stay Period currently expires on June 5, 2026. Additional time is required for the Debtors to proceed with finalizing a viable plan to address their financial difficulties, litigate issues related to the DIP Facility and commence a SISF. An extension of the Stay Period is necessary to provide the stability required during that time. Accordingly, the Debtors now seeks an extension of the Stay Period to August 28, 2026.
92. The June Forecast attached as Appendix C demonstrates that the Debtors should have sufficient liquidity to fund the CCAA Proceedings during the requested extension of the Stay Period, assuming that DIP financing is available.
93. Based on the information currently available, the Monitor believes that circumstances exist that make the proposed extension of the Stay Period appropriate and that creditors of the Debtors would not be materially prejudiced by the proposed extension of the Stay Period.
94. The Monitor also believes that the Debtors have acted, and are acting, in good faith and with due diligence.

DIP Settlement

Court File No. CL-26-00000219-0000

See ¶19-20

**Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation
and 12334992 Canada Inc.**

**SECOND SUPPLEMENT TO THE SECOND REPORT OF THE
MONITOR**

June 29, 2026

19. The Monitor is pleased with the cooperation by the Debtors, the DIP Lender and the Senior Secured Lenders in reaching a settlement that the Monitor believes is in the best interests of all stakeholders and that eliminates the need for the continuation of costly and distracting litigation in respect of the EDC DIP Facility. The Monitor is of the view that the DIP Settlement Agreement follows the spirit of the June 11 Endorsement, strikes an appropriate balance between the Litigation Parties, and provides appropriate consent, participation and information rights to the Senior Secured Lenders. It also clearly delineates next steps in determining an appropriate Transaction Advisor and Chief Restructuring Officer and provides for the payment of reasonable fees and disbursements.
20. The Monitor supports the approval by the Court of (i) the EDC DIP Facility on a final basis, and (ii) the DIP Settlement Agreement, as together they provide the Debtors with certainty and finality in respect of the EDC DIP Facility, and convey stability to the Debtors' employees, suppliers, customers and other stakeholders in preparation for the Sealift Season.
21. The Monitor is focused on assisting the Debtors and their stakeholders on next steps for the business and in the CCAA Proceedings, including: (i) assisting the Debtors with supplier engagement in preparation for the critical Sealift Season; (ii) engaging in preparations to launch a SISP in respect of the Debtors; (iii) participating in the identification of an appropriate Transaction Advisor to assist with the SISP; (iv) participating in the identification of an appropriate experienced Chief Restructuring Officer for the Debtors; and (v) assisting the Debtors in finalizing and seeking court approval of a Key Employee Retention Plan.

Court File No. CL-00000219-0000

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

***Exhibit F to the
Second Waheed
Affidavit***

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

See ¶4, 17, 18

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
NUNAVUT IRON ORE, INC., BAFFINLAND IRON MINES CORPORATION AND
12334992 CANADA INC.**

**JOINT AIDE MEMOIRE OF
THE SENIOR SECURED LENDERS, EDC AND THE DEBTORS
(Motion Returnable June 30, 2026)**

June 28, 2026

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Endorsement") shall be superseded in its entirety by the DIP Resolution Order and the Second Amended and Restated Initial Order granted in these CCAA proceedings on June 11, 2026 (the "**Second ARIO**").

3. The DIP Resolution is supported by the Court-appointed monitor of the Debtors, FTI Consulting Canada Inc. (in such capacity, the "**Monitor**").

4. The DIP Resolution provides the Senior Secured Lenders with certain consent, collaboration, information, and participation rights that, taken together, appropriately safeguard the interests of the Debtors' secured creditors while permitting the EDC DIP to proceed and the Debtors' restructuring in this proceeding to advance expeditiously. As set out below, the DIP Resolution satisfies the criteria for Court approval of settlements in *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended ("**CCAA**") proceedings and should be approved.

Background and Path to Resolution

5. Following a DIP solicitation process conducted by the Debtors and the Monitor, the Debtors elected to proceed with the EDC DIP, which was approved on an interim basis on June 10, 2026. The June 11 Endorsement also directed certain consent, consultation, and information rights, and expense payments in favour of the Senior Secured Lenders (the "**Secured Creditor Protections**"). The interim approval of the EDC DIP was intended to satisfy funding requirements only until a *de novo* determination of the appropriate DIP financing facility at the hearing scheduled for June 30, 2026.

6. Following the June 10, 2026, hearing, the parties agreed to and set out on a labour and cost-intensive litigation schedule on the issue of the ultimate approval of a DIP financing facility.

and efficient basis.² In determining whether to approve a proposed settlement, CCAA courts consider the following three factors: (a) whether the settlement is fair and reasonable; (b) whether the settlement will benefit the debtor and its stakeholders generally; and (c) whether the settlement is consistent with the purpose and spirit of the CCAA.³

16. In determining whether a settlement is fair and reasonable, the Court must consider whether the proposed settlement properly balances the interests of all parties and treats all parties equitably.⁴

17. The Senior Secured Lenders, EDC, and the Debtors respectfully submit that the DIP Resolution satisfies the test for Court approval. The DIP Resolution represents a fair and reasonable resolution of the disputes concerning the appropriate provider of DIP financing. It properly balances the interests of all parties by permitting the EDC DIP to proceed – ensuring that the Debtors have access to necessary DIP financing while affording the Senior Secured Lenders protections that are similar to the Secured Creditor Protections previously approved by this Court in the June 11 Endorsement. The DIP Resolution is the product of good faith, arm's length negotiations amongst the representatives of the secured creditor constituencies and the Debtors, with the support of the Monitor.

18. After careful consideration, the Debtors determined that the DIP Resolution is in the best interests of their stakeholders in the circumstances. In addition to ending the immediate value-destructive DIP litigation, it creates a framework for cooperation between the Debtors and their secured creditors on issues that are central to value preservation and realization.

² *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at para. 22; *Nortel Networks Corporation (Re)*, 2010 ONSC 1708 at para. 71 ("*Nortel*"); *The Cannabist Company Holdings Inc. et al. (Re)*, Endorsement of Justice J. Dietrich dated June 22, 2026, at para. 9 ("*Cannabist*"); *1057863 B.C. Ltd. (Re)*, 2024 BCSC 1111 at para. 14.

³ *Cannabist* at para. 9; *The Cash Store Financial Services Inc. (Re)*, 2015 ONSC 7538 at para. 14.

⁴ *Nortel* at para. 73.

including the identification of an appropriate transaction advisor and CRO, and development of the SISP. The DIP Resolution benefits non-party creditors by reducing future litigation costs, promoting efficient stakeholder engagement, and reducing the risk that major restructuring decisions will be revisited through repeated contested motions.

19. For the foregoing reasons, the Senior Secured Lenders, EDC and the Debtors submit that the DIP Resolution is squarely in-line with the spirit and purpose of the CCAA, is in the best interests of all stakeholders, and should be approved by this Court.

The Side Letter and Confidential Materials Should be Sealed

20. The Senior Secured Lenders, EDC and the Debtors adopt and rely on the Debtors' submissions at paragraphs 65-71 in their factum filed on June 4, 2026, with respect to the law on sealing and justification for sealing the Side Letter.

21. The Side Letter similarly contains confidential and commercially sensitive information that could negatively impact the process of selecting a CRO and transaction advisor, and as a matter of proportionality, the benefits of sealing the requested information outweigh its negative effects.

22. The Senior Secured Lenders, EDC, and the Debtors also continue to rely on the Debtors' submissions at paragraphs 65-71 in their factum filed on June 4, 2026, with respect to the law on sealing and justification for sealing the confidential materials related to the June 30, 2026, motion. The confidential materials contain commercially sensitive information that could be prejudicial to the SISP for the reasons explained in the Debtors factum and as explained therein, the benefits of sealing the information outweigh its negative effects.



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

**Steele J.
Decision Re DIP
Settlement
See ¶7**

COURT FILE NO.: CL-26-00000219-0000

DATE: **June 30, 2026**

NO. ON LIST: 1

TITLE OF PROCEEDING: Nunavut Iron Ore, Inc.; Baffinland Iron Mines Corporation; 12334992 Canada Inc. v. CANADIAN IMPERIAL BANK OF COMMERCE; Qikiqtaaluk Corporation; Qikiqtani Industry Ltd.; THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; IRH Global Trading Ltd.; Macquarie Equipment Finance Ltd.; Centaurus Capital LP; The Workers Safety & Compensation Commission; Glencore AG; Bondyn Products Inc.; Ad Hoc Committee of Senior Secured Noteholders; The Energy & Minerals Group; Oaktree Capital Management, L.P.; Hartree Partners, LP

BEFORE: JUSTICE Jana Steele

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Natalie Renner, Derek Ricci	Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation, 12334992 Canada Inc.	nrenner@dwpv.com, rschwill@dwpv.com, dricci@dwpv.com, rnicholls@dwpv.com

For the Monitor (FTI Consulting Canada Inc.):

Name of Person Appearing	Name of Party	Contact Info
Marc Wasserman, Jeremy Dacks Michael De Lellis Sierra Farr	Counsel to the Monitor	mwasserman@osler.com jdacks@osler.com mdelellis@osler.com sfarr@osler.com

Christopher Besant Michael Lauricella Rob Winterstein	Counsel from Gardiner Roberts LLP for Qikiqtani Inuit Association (QIA) and Nunavut Tunngavik Inc. (NTI)	cbesant@grllp.com mlauricella@grllp.com rwinterstein@grllp.com
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ENDORSEMENT OF JUSTICE STEELE:

- [1] The Applicants and Baffinland Iron Mines LP (together, the “Debtors”), Export Development Canada, Oaktree Capital Management, L.P. and Hartree Partners, LP, and the ad hoc committee of the 8.750% senior secured notes due 2026 seek an order (i) approving the EDC DIP; (ii) approving the Settlement Agreement and the Side Letter; and (iii) sealing the Side Letter and certain other confidential documents.
- [2] Capitalized terms used in this endorsement that are not defined herein have the meaning set out in the Joint Aide Memoire of the Senior Secured Lenders, EDC and the Debtors.
- [3] No one opposes the relief sought.
- [4] I am satisfied that the requested Order should be granted.
- [5] In my endorsement dated June 11, 2026, I approved the EDC DIP on an interim basis: *Nunavut Iron Ore (Re)*, 2026 ONSC 3467 (the “June 11 Endorsement”). Since the EDC DIP was approved on an interim basis and permitted the Debtors to draw only up to US\$110 million and provided for certain Secured Creditor Protections on an interim basis, it should be superseded in its entirety by the terms of the DIP Resolution Order and the Second ARIO.
- [6] CCAA courts have the jurisdiction to approve settlement agreements that are reached during the course of CCAA proceedings where a settlement avoids complex and costly legal contests and contributes to advancing the restructuring on an efficient basis: *Robertson v. ProQuest Information and Learning Company*, 2011 ONSC 1647, at para. 22. In determining whether to approve a settlement in a CCAA proceeding, the Court will consider the following factors: (i) whether the settlement is fair and reasonable; (ii) whether the settlement will benefit the debtor and its stakeholders generally; and (iii) whether the settlement is consistent with the purpose and spirit of the CCAA: *The Cash Store Financial Services Inc. (Re)*, 2015 ONSC 7538, at para. 14.
- [7] The proposed settlement satisfies the above three factors. The DIP Resolution, which was reached following good faith, arm’s length negotiations, is a fair and reasonable resolution of the dispute regarding the appropriate provider of the DIP financing to the Debtors. The resolution permits the EDC DIP to proceed, ensuring that the Debtors have the necessary DIP financing. At the same time, it affords the Senior Secured Lenders protections similar to those that I approved in the June 11 Endorsement. I agree with the Debtors that the DIP Resolution is in the best interests of their stakeholders. The resolution puts an end to the time consuming, costly litigation regarding the DIP financing. In addition, it creates a framework for cooperation between the Debtors and their secured creditors. The resolution benefits all stakeholders by putting an immediate end to the value-destroying litigation and promoting efficient stakeholder engagement. Finally, the settlement is clearly consistent with the purpose and spirit of the CCAA. The remedial purpose of the

***Appointment of Chief
Restructuring Officer***



July 23, 2026

Baffinland Iron Mines LP
360 Oakville Pl Dr
Ste 300
Oakville, ON L6H 6K8

Attention: Mark O'Brien

This letter agreement (“**Agreement**”) sets out the terms and conditions upon Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation, 12334992 Canada Inc. and Baffinland Iron Mines LP (collectively, the “**Baffinland Group**”) hereby engages BlueTree Advisors Inc. (“**BlueTree**”) as an independent contractor to fulfill the mandate attached as Schedule “A” (the “**Mandate**”) for the Baffinland Group.

BlueTree agrees that the Mandate will be led by William E. Aziz (“**Aziz**”) personally. BlueTree represents and warrants that Aziz has the capacity to spend the time required to effectively discharge the Mandate, acting as the Chief Restructuring Officer for the Baffinland Group during the term of this Agreement.

Representations and Warranties

Information. The Baffinland Group represents and warrants to BlueTree, and will use its reasonable best efforts to ensure that all information (the “**Information**”) provided to BlueTree, directly or indirectly, orally or in writing, in connection with the BlueTree engagement hereunder will be accurate and complete in all material respects, will not be misleading in any material way and will not omit to state any fact or information which might reasonably be considered material to BlueTree performing its services hereunder. BlueTree will have no liability for acting in reliance upon the Information without verifying independently, the accuracy or completeness of the Information provided to or otherwise obtained by it. BlueTree shall also have no liability for any failure to determine whether there have been any changes in such information or to investigate any change in such information occurring after the date any of the same were provided to or obtained by BlueTree.

Competence. BlueTree represents and warrants that Aziz has the necessary knowledge, experience and skill to carry out all contractual obligations under this Agreement and that it and Aziz shall do so honestly, in good faith and in a professional, competent and diligent manner.

In addition to the foregoing, the Baffinland Group shall reimburse BlueTree for its reasonable out-of-pocket expenses incurred in connection with the Mandate including, but not limited to, legal fees, travel and communications expenses, courier charges and accommodation expenses. Such reimbursable expenses will be payable within five (5) business days of receipt of BlueTree's invoices by the Baffinland Group.

The Baffinland Group shall pay all amounts due in respect of fees and taxes thereon to BlueTree in United States Dollars and all amounts due in respect of expenses and taxes thereon in either United States Dollars or Canadian Dollars as applicable, each by wire transfer to BlueTree's bank accounts, after receipt by the Baffinland Group of a written invoice.

All or part of the foregoing may be subject to federal Goods and Services Tax, Harmonized Sales Tax or other taxes ("GST/HST"). Where such tax is applicable, an additional amount equal to the amount of tax owing thereon will be charged to and payable by the Baffinland Group, in addition to the fees and expenses of BlueTree. BlueTree will provide its GST/HST registration number to the Baffinland Group upon execution of the agreement. BlueTree shall ensure that such taxes are detailed separately from the Work Fee and/or expenses on any invoices.

Other Mandate

If BlueTree is required to perform services in addition to the Mandate or to provide services of other individuals aside from Aziz, then the terms and conditions relating to such services will be outlined in a separate agreement and the fees for such services will be in addition to the fees payable hereunder and will be negotiated separately and in good faith.

Indemnity

The Baffinland Group has represented that it has officer insurance coverage and has provided a copy of same to Aziz. The Baffinland Group will maintain, to the extent possible or practicable, the officer insurance coverage that was in place as at the date of execution of this Agreement, or coverage substantially comparable to that insurance that includes confirmation, in writing, from the underwriters that Aziz is fully covered by the insurance as an officer of the Baffinland Group.

Subject to section 136 of the Ontario *Business Corporations Act* and the regulations thereunder), the Baffinland Group shall indemnify BlueTree and Aziz (the "**Blue Tree Group**"), and the heirs and legal representatives of such Blue Tree Group member, against all costs, charges and expenses, including any amount paid to settle an action or satisfy a judgment, reasonably incurred by such Blue Tree Group member in respect of any civil, criminal or administrative proceeding to which such Blue Tree Group member is made a party by reason of being or having been an officer of any member of the Baffinland Group or Another Body Corporate for which such Blue Tree Group member acted as an officer or in a similar capacity at the request of the Baffinland Group, as the case may be, if: (a) such Blue Tree Group member acted honestly and in good faith with a view to the best interests of the Baffinland Group or Another Body Corporate, for which such Blue Tree Group member acted as an officer or in a similar capacity at the request of the Baffinland Group, as the case may be; and (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, such Blue Tree Group member had reasonable grounds for believing that the conduct was lawful.

SCHEDULE "A"
MANDATE**SUMMARY OF CRO DUTIES**

The CRO's duties shall be as follows:

- a) providing input, recommendations, and assistance to the Operator and the Debtors, as necessary, in connection with operational decisions that can reasonably be expected to have an impact on the Debtors' restructuring activities and the CCAA Proceeding; and, specifically with respect to current, new, or potential off-take parties, fuel suppliers, and other contracts identified by the CRO, participating in negotiations and communications with such off-take parties, fuel suppliers, and other counterparties concerning new or alternative arrangements;
- b) advising and providing recommendations to the Operating Committee and attending meetings of the Operating Committee in respect of the Debtors' restructuring activities and CCAA Proceeding, including in respect of the items listed below:
 - a. the disclaimer of agreements;
 - b. matters affecting key stakeholder groups;
 - c. the development of a sale and investment solicitation process in respect of the Debtors and its business and assets (a "SISP");
 - d. updates regarding material developments in the SISP;
 - e. the development of a restructuring plan or plans of the Debtors and/or its business and assets for presentation to creditors and other stakeholders;
 - f. potential strategic options and financial restructuring alternatives; and
 - g. any key employee retention plan being proposed;
- c) providing input, recommendations and assistance to the Debtors in connection with each of the matters enumerated in (b) above;
- d) assisting the Monitor with the review of any pre-filing transactions, if requested by the Monitor;
- e) assisting with the negotiation of, and executing, NDAs in preparation for or in connection with any SISP;
- f) assisting with the negotiation of, and executing, the engagement letter for the financial advisor responsible for conducting the SISP;

- g) coordinating with the SISP financial advisor and others on the resources and information needed to effect the SISP;
- h) managing negotiations and communications involving the Debtors' creditors and other stakeholders with respect to matters arising in connection with the CCAA Proceeding, as deemed necessary by the CRO;
- i) working with the Debtors, as deemed necessary by the CRO, to manage all processes related to the conduct of the CCAA Proceeding and developing a work plan for the CCAA Proceeding;
- j) assisting the Debtors in the preparation and review of CCAA cash flow modeling (including identifying and recommending any cost rationalization measures to be undertaken) and with compliance of the Debtors' reporting obligations (both financial and non-financial) to the DIP Lender and the Senior Secured Lenders, including under the EDC DIP Facility and the Settlement of DIP Financing Litigation;
- k) attending court hearings and assisting the Debtors with the preparation of Court materials and providing affidavits, each as appropriate, in the CCAA Proceeding;
- l) attending any meetings with the NTI/QIA and the Company, as deemed appropriate by the CRO in consultation with Monitor and the Debtors;
- m) working with the Monitor to coordinate the foregoing restructuring activities;
- n) communicating with and providing information to the Monitor and the Debtors' stakeholders, with respect to matters relating to the Debtors' restructuring activities and CCAA Proceeding; and
- o) providing such other services as may be needed in respect of the Debtors' restructuring and CCAA Proceeding, as determined by the CRO, in consultation with the Monitor and the Operating Committee.



**Steele J. Decision Re
CRO Appointment
See ¶5, 11, 16**

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CL-26-00000219-0000

DATE: **July 29, 2026**

NO. ON LIST: 3

TITLE OF PROCEEDING: NUNAVUT IRON ORE, INC et al v. CANADIAN IMPERIAL BANK OF COMMERCE et al

BEFORE: **JUSTICE STEELE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Patrick Corney	Qikiqtaaluk Corporation Qikiqtani Industry Ltd.	pcorney@millerthomson.com
Ken Rosenberg	The International Union Of Operating Engineers, Local 793	ken.rosenberg@paliareroland.com
Natalie Levine Alan Merskey	Ad Hoc Committee Of Senior Noteholders	nlevine@cassels.com amerskey@cassels.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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Marc Wasserman Michael De Lellis Jeremy Dacks Sierra Farr	Counsel to the Monitor	mwasserman@osler.com mdelellis@osler.com jdacks@osler.com sfarr@osler.com
Maria Konyukhova Philip Yang	First Secured Lenders (Oaktree and Hartree)	mkonyukhova@stikeman.com pyang@stikeman.com
Jeffrey Rosenberg Greg Watson	FTI - Monitor	Jeffrey.rosenberg@fticonsulting.com Greg.watson@fticonsulting.com
Shawn Kirkman	Arcelor Mittal	kirkmans@bennettjones.com
Kenneth Kraft	Wilmington Trust, National Association	kraft@dentons.com
Julien Sicco	Counsel To Wanxiang America Corporation	jsicco@litigate.com
Natasha MacParland	Counsel For Proposed CRO	natasha.macparland@dentons.com
Jeniffer Linde Caroline Descours	Counsel for the Government of Canada	jlinde@goodmans.ca cdescours@goodmans.ca
Jonathan Schnell	The Logic Factory	jonathan.schnell@thelogicfactory.com
Hilary Gilroy	Counsel to Nunavut Department of Community and Government Services	hilary.gilroy@mcinnescooper.com
Asim Iqbal	Counsel to The Energy & Minerals Group LP and affiliates	asim.iqbal@gowlingwlg.com
Rob Winterstein	Counsel for QIA	rwinterstein@grllp.com
Kevin Wu	Counsel for Centaurus Capital LP	kevin.wu@blakes.com

ENDORSEMENT OF JUSTICE STEELE:

- [1] The applicant brings a motion for the granting of an order, among other things, approving the CRO Engagement Letter to engage Mr. Aziz as the Chief Restructuring Officer (“CRO”), and the proposed CRO fees and charges.
- [2] No one objects to the order sought.
- [3] Capitalized terms used in this endorsement that are not defined herein have the meaning set out in the applicants’ factum.
- [4] I am satisfied that the relief sought should be granted.
- [5] **The secured creditors, the Debtors, the DIP Lender, and the Monitor all support the proposed CRO appointment.** The proposed CRO was selected following a process conducted by the Monitor that had been agreed upon by the Debtors, EDC and the Senior Secured Lenders. The Monitor confirms that the process for the CRO selection was fair and reasonable.
- [6] Under section 11 of the CCAA, the Court has jurisdiction to make such an order and has on numerous prior occasions: See for example, *Boreal Capital Partners Ltd et al (Re)*, 2021 ONSC 7802, *JTI-Macdonald Corp., Re*, 2019 ONSC 1625, and *The Cannabist Company Holdings Inc. et al*, 2026 ONSC 2063, at paras. 17-21.

- [7] In determining whether to approve the appointment of a CRO, Courts have considered numerous factors, including the following:
- (a) The complexity of the debtor's business and of the CCAA proceeding;
 - (b) Whether a CRO would assist the existing management team in operating the debtor's business;
 - (c) Whether the process for selecting the CRO was fair and appropriate;
 - (d) Whether the proposed CRO has industry knowledge, is independent from stakeholders, and has a significant reputation and restructuring expertise;
 - (e) Whether the costs associated with the appointment and work of the proposed CRO are reasonable; and
 - (f) Whether the Monitor supports the appointment.
- [8] As noted in para. 27 of the applicants' factum consideration of the above factors leave no doubt that it is appropriate for the court to approve the appointment of the CRO in the instant case.
- [9] Blue Tree and Mr. Aziz have represented and warranted that they have the necessary knowledge, experience and skill to carry out the CRO Mandate, and that they will act honestly, in good faith and in a professional, competent and diligent manner in fulfilling the CRO Mandate. Mr. Aziz has acted as CRO in numerous CCAA proceedings, including *Walter Energy Canada Holdings Inc.* and *JTI-Macdonald Corp.* (2019). He is highly experienced and well-qualified for the role of CRO.
- [10] The process for selecting the CRO was fair, transparent and led by the Monitor. The Monitor supports the appointment and reports that the terms of the CRO Engagement Letter are otherwise reasonable and consistent with comparable engagements.
- [11] The Debtors' operations are complex and require significant time and expertise to manage effectively. They operate a large-scale remote Arctic mining operation with about 1200 employees and numerous stakeholders. **The Debtors are of the view that a CRO could take on helpful roles in connection with the CCAA proceedings, including engaging with stakeholders, and supporting a SISF, the anticipated next major step in this proceeding.** With the assistance of the CRO, management capacity will be freed up so that the Debtors can focus on their mining operations.
- [12] The compensation for BlueTree consists of: (a) a Work fee of \$100,000 per month; and (b) a Success Fee payable on closing or implementation of a Transaction, comprising a base component of US\$500,000 plus a Tiered Success Fee. BlueTree's fees and disbursements are also secured by two charges: the CRO Fee Charge, which ranks *pari passu* with the Administration Charge, and the CRO Tiered Success Fee Charge, which ranks subordinate to the existing Charges and Encumbrances.
- [13] Pursuant to s. 11.52(1) of the CCAA, on notice to affected secured creditors, "the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of ... any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act". Subsection 11.52(2) of the CCAA permits the Court to order that such a charge rank in priority over the claims of any secured creditor.
- [14] The Court set out the following factors for the Court to consider in determining whether to approve a charge under s. 11.52 of the CCAA in *RE Canwest Publishing Inc.*, 2010 ONSC 222 at para. 54:
- (a) The size and complexity of the business being restructured;
 - (b) The proposed role of the beneficiaries of the charge;

Court File No.: CL-

**Exhibit "G" to the
Second Waheed
Affidavit**

See ¶3-4, 6, 13

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

THE HONOURABLE

)

WEDNESDAY, THE 29TH

MADAM JUSTICE STEELE

)

DAY OF JULY, 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

ORDER

(CRO Appointment)

THIS MOTION, made by Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation, 12334992 Canada Inc., (collectively, the "**Applicants**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order approving the engagement of BlueTree Advisors Inc. to provide the services of William E. Aziz as Chief Restructuring Officer of the Debtors (the "**CRO**") was heard by zoom teleconference.

ON READING the affidavit of Jowdat Waheed sworn July 24, 2026 (the "**Waheed Affidavit**") and the Exhibits thereto, and the Third Report of FTI Consulting Canada Inc. (the "**Monitor**") dated July 26, 2026, and on hearing the submissions of counsel for the Applicants, 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 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 (the "**SARIO**") or in the Waheed Affidavit.

APPOINTMENT OF CHIEF RESTRUCTURING OFFICER

3. **THIS COURT ORDERS** that the agreement dated as of July 23, 2026 pursuant to which the Debtors have engaged BlueTree Advisors Inc. ("**BlueTree**") to provide the services of William E. Aziz to act as Chief Restructuring Officer of the Debtors (the "**CRO**") in accordance with the CRO Mandate described in Schedule "A" attached thereto, a copy of which is attached as **Exhibit "E"** to the Waheed Affidavit (the "**CRO Engagement Letter**"), the execution of the CRO Engagement Letter by the Debtors, *nunc pro tunc*, and the appointment of the CRO pursuant to the terms thereof is hereby approved, with such minor amendments to the CRO Engagement Letter as the Debtors and BlueTree, in consultation with the Senior Secured Lenders and EDC and with the consent of the Monitor, may deem necessary.

4. **THIS COURT ORDERS** that the Debtors shall (i) advise the CRO of all material steps taken by the Debtors in these proceedings, and (ii) cooperate fully with and provide the CRO with the assistance necessary to enable the CRO to exercise its powers and discharge its obligations under the CRO Engagement Letter, the CRO Mandate, this Order and any other orders issued in these proceedings.

5. **THIS COURT ORDERS** that the CRO shall consult with the Monitor regarding all material issues relating to the Business and these proceedings and shall cooperate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions pursuant to the CCAA, the SARIO and any other orders issued in these proceedings.

6. **THIS COURT ORDERS** that none of BlueTree, any of their employees, directors, officers or shareholders, or the CRO, be or be deemed to be a director, *de facto* director, employee or trustee of the Debtors or any of their respective subsidiaries or affiliates, unless consented to in writing by such Person and approved by the Court.

7. **THIS COURT ORDERS** that neither BlueTree nor the CRO shall, as a result of the performance of their respective obligations and duties in accordance with the terms of the CRO Engagement Letter be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation; provided, however, that if BlueTree or the CRO is nevertheless found to be in Possession of any such Property, then BlueTree and/or the CRO, as applicable, shall be entitled to the benefits and protections in relation to the Debtors and such Property as are provided to a monitor under Section 11.8(3) of

CITATION: TNG Acquisition (Re), 2013 ONSC 3098

COURT FILE NO.: 31-OR-207514-T

DATE: 20130528

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

See ¶31

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3,
AS AMENDEDAND IN THE MATTER OF THE *BANKRUPTCY OF TNG ACQUISITIONO INC. OF
THE CITY OF MISSISSAUGA, IN THE PROVINCE OF ONTARIO*

BEFORE: C.L. CAMPBELL J.

COUNSEL: John A. MacDonald, for Tech Data Canada Corporation

David S. Ward, for Trustee, A. Farber & Partners

Michael McGraw, for Prowis Inc.

Robert J. Morris, for R. Holmes

HEARD: March 5, 2013

ENDORSEMENT

[1] The Trustee of Nex (formerly TNG Acquisitions) seeks an Order pursuant to s. 164 of the *BIA* directing the former Chief Restructuring Officer (CRO) of Nex, (Prowis), and the respondent Tech Data (the primary secured creditor of Nex) to produce documents over which Prowis and Tech Data claim privilege.

[2] A factual background is necessary to support the claims of solicitor and client privilege by Prowis and that of litigation privilege by Tech Data in respect of its dealings with Prowis.

[3] The relationship between Tech Data and Prowis to Nex during the months prior to the appointment of the Bankruptcy Trustee is at the heart of this dispute.

[4] Nex initiated the first of its two *CCAA* proceedings on August 10, 2006. In the first Plan was approved and sanctioned by Court Order in December 2006 which, among other things, provided for Tech Data to operate various business functions of Nex and to become its operating lender.

[26] In order to better understand the role of Prowis at various times during that period in issue as between it and the Trustee, counsel for Prowis provided a large folder of the representative documents for my review. On review they are in fact between solicitor and client and do relate to issues in respect of the sale of assets to Brains II.

The Tech Data Documents

[27] The second class of documents are those in the possession of Prowis over which Tech Data claims litigation or common interest privilege based on its contractual relationship to Prowis at the time the documents were created. The documents in this category arose during the period before Prowis was appointed CRO.

[28] In this case Prowis was engaged by Tech Data without the opposition of Nex or other creditors to oversee the sale of the assets of Nex on a timely, cost efficient and expeditious basis.

[29] As noted above, prior to its appointment, on October 2, 2007 Prowis acted as a consultant to Tech Data in respect of the latter's role as the most significant creditor of Nex.

[30] On the issuance of the Bankruptcy Order dated April 8, 2008 the CRO was discharged in the CCAA proceeding and its conduct approved.

[31] A CRO is a creature of Court Order, the authority of which derives from the CCAA but the scope of duties and obligations of the CRO are to be found in the Court Order of its appointment.

[32] While there is no precise information before the court, it is reasonable to presume that the demand by Tech Data on its loan and the subsequent action commenced by Nex against Tech Data on September 27, 2007 led to the appointment of Prowis as CRO.

[33] From the information available it would appear that Nex did not take any active steps in advancing the litigation against Tech Data during the currency of Prowis as CRO nor was Prowis authorized to take carriage of the action.

[34] Prowis asserts that the documents to which it objects to produce to the Trustee are either subject to solicitor client privilege or litigation privilege in respect of a potential involvement in litigation between the Trustee and Brains II or are in respect of communications that predate its appointment as CRO when it was a consultant to Tech Data and to which Tech Data also objects to production.

[35] A provision in the Discharge Order provided for Prowis to assist the Trustee during the bankruptcy on the basis that its fees for doing so would be paid by the Trustee.

[36] The Trustee seeks production from Prowis under section 164 (1) of the BIA which reads as follows:

***Appointment of
Transaction Advisor***

See ¶14(a) and (b), 34, 54

Court File No. CL-26-00000219-0000

**Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation
and 12334992 Canada Inc.**

FOURTH REPORT OF THE MONITOR

August 25, 2026

“C”. Capitalized terms not otherwise defined herein have the meanings given to them in the Court Materials, as applicable.

EXECUTIVE SUMMARY

14. The Monitor is of the view that:
- (a) The retention of the Proposed Transaction Advisor as Transaction Advisor of the Debtors is necessary and appropriate in the circumstances and the Transaction Advisor Selection Process followed by the Monitor described herein in accordance with the DIP Settlement Agreement was fair and reasonable;
 - (b) The Monitor supports the retention of the Proposed Transaction Advisor and is of the view that the Proposed Transaction Advisor is well qualified to assist the CRO, the Debtors, the Court and all stakeholders with administering the SISP;
 - (c) The terms of the Transaction Advisor Engagement Letter, including the responsibilities of the Proposed Transaction Advisor set out therein, are reasonable and appropriate, and are appropriately tailored to the circumstances of the CCAA Proceedings;
 - (d) The Advisory Fee is commercially reasonable considering the size and complexity of the Debtors' business and, as a result, the complexity of the CCAA Proceedings;
 - (e) The Transaction Fee and the Announcement Fee are reasonable in the circumstances considering they are only payable on the closing of, or Court approval of, a Transaction (defined below), respectively;

TRANSACTION ADVISOR SELECTION PROCESS

32. As set out in the Third Report, the DIP Settlement Agreement provided that the Monitor would conduct the Transaction Advisor Selection Process and a Transaction Advisor would be selected with the support of the DIP Lender and the Senior Secured Lenders in accordance with the terms set out in the DIP Settlement Agreement.
33. The details of the Transaction Advisor Selection Process conducted by the Monitor prior to the date of the Third Report are set out in the Third Report.
34. Following the date of the Third Report, the Monitor was advised that the DIP Lender and the Senior Secured Lenders had unanimously selected the Proposed Transaction Advisor for the position of Transaction Advisor. The Monitor was also advised that the Operating Committee agreed with the selection of the Proposed Transaction Advisor.
35. Following the selection of the Proposed Transaction Advisor in accordance with the DIP Settlement Agreement, the Monitor facilitated the negotiation of the Transaction Advisor Engagement Letter amongst the Proposed Transaction Advisor, the CRO, the Debtors, the Senior Secured Lenders and the DIP Lender.
36. On August 13, 2026, the CRO and the Proposed Transaction Advisor entered into the Transaction Advisor Engagement Letter.
37. The Monitor is currently engaged in discussions with the CRO, the Proposed Transaction Advisor and a number of stakeholders with respect to the terms of a SISP. It is intended that approval of a SISP will be sought in the near term.

Success Fee Charge. The Transaction Advisor Fee Charge is proposed to rank *pari passu* with the Administration Charge as the Transaction Advisor will similarly be facilitating the CCAA Proceedings.

50. The Monitor understands that the DIP Lender and the Senior Secured Lenders are supportive of the Transaction Advisor Fee Charge and the Transaction Advisor Transaction Fee Charge.

STAY EXTENSION

51. The Stay Period currently expires on August 28, 2026. Additional time is required for the Proposed Transaction Advisor, the CRO and the Monitor to engage in pre-SISP activities; for the Offtake Solicitation Process to be completed; to finalize, seek approval of and commence the SISP; for the CRO and the Debtors to engage with their stakeholders; and for the Debtors to continue the forward progression of the CCAA Proceedings. Accordingly, the Debtors now seek an extension of the Stay Period to December 11, 2026.
52. The August Forecast attached as Appendix “D” demonstrates that the Debtors, with the support of the EDC DIP Facility, should have sufficient liquidity to fund the CCAA Proceedings during the requested extension of the Stay Period.
53. Based on the information currently available, the Monitor believes that circumstances exist that make the proposed extension of the Stay Period appropriate and that creditors of the Debtors would not be materially prejudiced by the proposed extension of the Stay Period.
54. The Monitor also believes that the Debtors have acted, and are acting, in good faith and with due diligence.
55. The Monitor therefore respectfully recommends that this Honourable Court grant the Debtors’ request for an extension of the Stay Period to December 11, 2026.

***No Basis For Interfering
With Debtors' Governance***

***The Operating Committee
Members are the Directors
of the Debtors***

Business Corporations Act

R.S.O. 1990, CHAPTER B.16

CURRENT

Consolidation period: October 1, 2025 - e-Laws currency date (October 2, 2026)

Last amendment: [2024, c. 15, Sched. 1, s. 111](#).

Not-yet-in-force provisions appear in consolidated law as **text with a grey background** and are accompanied by related editorial notes.

Legislative History

("titre de créance")

"Director" means the Director appointed under section 278; ("directeur")

"director" means a person occupying the position of director of a corporation by whatever name called, and "directors" and "board of directors" include a single director; ("administrateur")

"electronic signature" means an identifying mark or process that is,

- (a) created or communicated using telephonic or electronic means,
- (b) attached to or associated with a document or other information, and
- (c) made or adopted by a person to associate the person with the document or other information, as the case may be; ("signature électronique")

"endorse" includes,

- (a) imprinting a stamp on the face of articles or other documents sent to the Director, and
- (b) electronically producing an equivalent to a stamp in respect of articles or other documents sent to the Director; ("produire")

"financial statement" means a financial statement referred to in section 154; ("état financier")

"incorporator" means a person who signs or otherwise authorizes articles of incorporation; ("fondateur")

"individual" means a natural person, but does not include a partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, or a natural person in his or her capacity as trustee, executor, administrator or other legal representative; ("particulier")

"interim financial statement" means a financial statement referred to in section 160; ("état financier périodique")

"liability" includes a debt of a corporation arising under section 36, subsection 185 (29) or clause 248 (3) (f) or (g); ("passif")

"Minister" means the member of the Executive Council to whom responsibility for the administration of this Act is assigned or transferred under the *Executive Council Act*; ("ministre")

Effect of meeting

(3) A meeting called, held and conducted under this section is for all purposes a meeting of shareholders of the corporation duly called, held and conducted. R.S.O. 1990, c. B.16, s. 106 (3).

Determination of controversy

107 (1) A corporation, shareholder or director may apply to the court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation. R.S.O. 1990, c. B.16, s. 107 (1).

Court order

(2) Upon an application under this section, the court may make any order it thinks fit including, without limiting the generality of the foregoing,

- (a) an order restraining a director or auditor whose election or appointment is challenged from acting pending determination of the dispute;
- (b) an order declaring the result of the disputed election or appointment;
- (c) an order requiring a new election or appointment and including in the order directions for the management of the business and affairs of the corporation until a new election is held or appointment made; and
- (d) an order determining the voting rights of shareholders and of persons claiming to own shares. R.S.O. 1990, c. B.16, s. 107 (2).

Agreement between shareholders

108 (1) A written agreement between two or more shareholders may provide that in exercising voting rights the shares held by them shall be voted as therein provided. R.S.O. 1990, c. B.16, s. 108 (1).

Idem

(2) A written agreement among all the shareholders of a corporation or among all the shareholders and one or more persons who are not shareholders may restrict in whole or in part the powers of the directors to manage or supervise the management of the business and affairs of the corporation. R.S.O. 1990, c. B.16, s. 108 (2).

Unanimous shareholder agreement

(3) Where a person who is the registered holder of all the issued shares of a corporation makes a written declaration that restricts in whole or in part the powers of the directors to manage or supervise the management of the business and affairs of a corporation, the declaration shall be deemed to be a unanimous shareholder agreement. R.S.O. 1990, c. B.16, s. 108 (3); 2006, c. 34, Sched. B, s. 16 (1).

Party to unanimous shareholder agreement

(4) A transferee of shares subject to a unanimous shareholder agreement shall be deemed to be a party to the agreement. R.S.O. 1990, c. B.16, s. 108 (4); 2006, c. 8, s. 119 (1).

Where shareholder has power, etc., of director

(5) A shareholder who is a party to a unanimous shareholder agreement has all the rights, powers, duties and liabilities of a director of a corporation, whether arising under this Act or otherwise, including any defences available to the directors, to which the agreement relates to the extent that the agreement restricts the discretion or powers of the directors to manage or supervise the management of the business and affairs of the corporation and the directors are relieved of their duties and liabilities, including any liabilities under section 131, to the same extent. 2006, c. 34, Sched. B, s. 16 (2).

Unanimous shareholder agreement

(5.1) Nothing in this section prevents shareholders from fettering their discretion when exercising the powers of directors under a unanimous shareholder agreement. 2006, c. 34, Sched. B, s. 16 (2); 2017, c. 2, Sched. 12, s. 1 (5).

Matter that a unanimous shareholder agreement may provide

(6) A unanimous shareholder agreement may, without restricting the generality of subsection (2), provide that,

- (a) any amendment of the unanimous shareholder agreement may be effected in the manner specified therein; and
- (b) in the event that shareholders who are parties to the unanimous shareholder agreement are unable to agree on or resolve any matter pertaining to the agreement, the matter may be referred to arbitration under such procedures and

26. 123 Canada Inc. is a wholly owned subsidiary of **See ¶27**

prospective mining leases and mineral claims for precious metals and other minerals unrelated to Baffinland's iron ore operations. It is entirely dependent on Baffinland for funding and has no independent source of income to maintain these mineral claims. It does not have any employees.

(ii) Corporate Governance

27. NIO is subject to a unanimous shareholders agreement among NIO¹, its shareholders Arcelor and EMG², BIM Corp. and BIM LP. Under that agreement, all decision-making authority over NIO and Baffinland, whether exercised directly or indirectly, is vested in an operating committee (the "**Operating Committee**"). The Operating Committee is responsible for supervising the management of the business and affairs of NIO and is composed of appointees of EMG and Arcelor based on their respective equity ownership: EMG has appointed five members and Arcelor has appointed two members.

28. Baffinland is also party to a first amended and restated operating services agreement dated May 6, 2015, as amended by an amendment dated December 6, 2016 (the "**Operating Agreement**") with NIO, Arcelor, ArcelorMittal Mines Mary River Operating Inc., and MRP OP, LP (the "**EMG Operator**"). Under the Operating Agreement, Baffinland has delegated power and authority to the EMG Operator to manage the day-to-day operations of the Mine. Key members of the EMG Operator work from Baffinland's office in Toronto, Ontario. The Operating Agreement is attached as **Exhibit "E"** to this Affidavit.

29. The EMG Operator is entitled to a fee under the Operating Agreement equal to 2% of enumerated capital and operating costs incurred by Baffinland in any year. This fee has been

¹ Formerly AM Baffinland ULC and Nunavut Iron Ore, Inc.

² The EMG shareholder includes funds managed by EMG, being EMG Iron Ore HC LLC, EMG Iron Ore Phase 3 (Q4 19) Holdings LLC, EMG Iron Ore Phase 3 Holdings LLC, EMG Iron Ore 2026 Equity, LLC.

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.**

Applicants

AFFIDAVIT OF JOWDAT WAHEED
(sworn September 17, 2026)

I, JOWDAT WAHEED, of the City of Toronto, in the Province of Ontario, **MAKE OATH
AND SAY:**

1. I am the acting Chief Executive Officer of Baffinland Iron Mines Corporation ("**BIM Corp**"), which acts as the general partner of Baffinland Iron Mines LP (together with the Applicants, the "**Debtors**" and each a "**Debtor**"). I assumed this role in July 2024. I concurrently serve as President and Chief Executive Officer of the Applicant, Nunavut Iron Ore, Inc. ("**NIO**"), which is BIM Corp's parent company, and MRP OP, LP (the "**Operator**"), which manages the day-to-day operations of the Mary River mine (the "**Mine**"). I am also the President and Chief Executive Officer of the general partner of the Operator.

2. I am also a member of the operating committee of the Debtors (the "**Operating Committee**"). As explained in greater detail in the Affidavit of Celeste van Tonder sworn May 14, 2026 (the "**First van Tonder Affidavit**"), the Operating Committee is ultimately responsible for supervising the management of the business and affairs of the Debtors.

3. I previously swore an affidavit dated July 24, 2026 in this proceeding in support of the Applicants' request for, among other things, an order approving the engagement of BlueTree

		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.
18	Credit Bids	[...] 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 with the consent of the Monitor and the DIP Lender 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 the deposit requirements set forth in paragraph 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.

(i) ***No Change of Circumstances Has Occurred to Justify a Change to the CRO Mandate***

56. As described more fully in the First van Tonder Affidavit, through a series of agreements, the decision-making authority of NIO and Baffinland has been delegated to an operating committee whose members are appointed by ArcelorMittal Canada Inc. (“AM”) and funds managed by affiliates of The Energy & Minerals Group (“EMG”), each of which are shareholders of NIO.

57. Baffinland is party to a first amended and restated operating services agreement dated May 6, 2015, as amended on December 6, 2016, with NIO, AM, ArcelorMittal Mines Mary River Operating Inc. and the Operator (which, as described in the Overview, is MRP OP, LP).

58. The Operating Committee is composed of appointees of EMG and AM based on their respective equity ownership: EMG has appointed five members – three representatives of EMG, together with myself and Bruce Walter (the “Operator Appointees”) – and AM has appointed two members.



Court File No. CL-26-00000219-0000

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

See ¶16-17

THE HONOURABLE) FRIDAY, THE 15th
)
MADAM JUSTICE CONWAY) DAY OF MAY, 2026

IN THE MATTER OF the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, 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

INITIAL ORDER

THIS APPLICATION, made by the Applicants pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) was heard this day by judicial videoconference.

ON READING the Notice of Application, the affidavit of Celeste van Tonder sworn May 14, 2026 and the Exhibits thereto (the “**Van Tonder Affidavit**”), the pre-filing report of FTI Consulting Canada Inc. (“**FTI**”) as the proposed monitor, the consent of FTI to act as the Court-appointed monitor of the Applicants (in such capacity, the “**Monitor**”) and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants, counsel for FTI as the proposed 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 affidavit of service filed,

restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Debtors, and that the Debtors shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Debtors in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and each of the Debtors and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

15. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Debtors. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST D&O PARTIES

16. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Debtors or against any member of the Operating Committee to the extent such member is or was directly or indirectly exercising the powers of the directors of any of the Debtors (collectively with the directors and officers, the “**D&O Parties**”) with respect to any claim against the D&O

Parties that arose before the date hereof and that relates to any obligations of the Debtors whereby any of the D&O Parties are alleged under any law to be liable in their capacity as directors or officers, or in the case of members of the Operating Committee, in their capacity as persons exercising the powers of directors, directly or indirectly, for the payment or performance of such obligations, until a Plan in respect of the Debtors, if one is filed, is sanctioned by this Court or is refused by the creditors of the Debtors or this Court.

D&O PARTIES' INDEMNIFICATION AND CHARGE

17. **THIS COURT ORDERS** that the Debtors shall indemnify the D&O Parties against obligations and liabilities that they may incur as directors or officers, or in the case of members of the Operating Committee, in their capacity as persons exercising the powers of directors of the Debtors, directly or indirectly, after the commencement of the within proceedings, including with respect to employee vacation pay which may have accrued prior to the commencement of these proceedings but which may become due and payable after the commencement of these proceedings, except to the extent that, with respect to any such D&O Party, the obligation or liability was incurred as a result of the D&O Party's gross negligence or wilful misconduct.

18. **THIS COURT ORDERS** that the D&O Parties shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on the Property, which charge shall not exceed an aggregate amount of US\$14 million, as security for the indemnity provided in paragraph 17 of this Order. The D&O Charge shall have the priority set out in paragraphs 29 and 31 herein.

***No Meaningful Distinction
Between Removing
Directors and Stripping
SISP Powers***

secure committed volumes and vessel capacity. The Debtors currently have secured the fuel required.

Initial Affidavit of Celeste van Tonder, Exhibit "A" to the Second Waheed Affidavit.

See ¶14 and 148

14. In these circumstances, the Debtors require the protection of the CCAA to stabilize their operations, preserve the going-concern value of their business, secure debtor-in-possession financing and pursue a viable restructuring for the benefit of all stakeholders, including pursuing a sale and investment solicitation process. Absent such protection, the Debtors face the risk that creditors will take enforcement action, which would disrupt ongoing operations and diminish the value of their assets. Moreover, a disruption to the Mine would have far-reaching consequences, not only for creditors of the Debtors, but also for Inuit communities, Inuit businesses that provide services to the mine, the approximately 1,200 workers who depend on the continued operation of the mine and the broader Nunavut economy more generally.

15. The remainder of this Affidavit is presented in two parts: Part I sets out the Debtors' financial circumstances, including: (a) an overview of the corporate structure and governance of the Debtors; (b) a description of the Debtors' business and operations, including transportation and shipping constraints and impediments to expansion; (c) the financial position of the Debtors as reflected in their most recent financial statements; (d) the indebtedness of the Debtors, including their secured and unsecured debt obligations, contingent liabilities, and other material agreements; and (e) the source of the Debtors' financial difficulties, the cost-reduction measures undertaken to date, and the urgency of this application. Part II describes the relief sought by the Applicants under the Initial Order and at the Comeback Hearing. A table of contents is set out below.

stakeholders, but also for the Inuit communities, businesses that provide services to the mine and workers who depend on the continued operation of the Mine.

147. For these reasons, creditor protection under the CCAA is required. The Initial Order is necessary to preserve the going-concern value of the Debtors' business, maintain critical supplier and customer relationships, and ensure that stakeholders' interests are protected in an orderly and transparent process supervised by this Court.

148. If the Initial Order is granted, it will provide the Debtors with the stability and breathing room necessary to continue operations on a going-concern basis, procure their annual fuel and supply requirements and allow them the breathing room to pursue a refinancing, recapitalization, restructuring plan, investment, or sale solicitation process (or any combination of the foregoing) designed to maximize value for the benefit of all stakeholders (a "**Strategic Process**").

PART II – RELIEF SOUGHT

A. THE INITIAL ORDER

149. As described in paragraph 4 above, the Applicants seek an Initial Order:

- (a) declaring that the Applicants are debtor companies to which the CCAA applies
- (b) declaring that BIM LP shall be bound by, and entitled to the protections and benefits of, the Initial Order as though it were an Applicant;
- (c) granting a stay of proceedings against the Debtors for an initial period of not more than ten days, subject to further order of this Court;
- (d) appointing FTI Consulting Canada Inc. as Monitor of the Debtors;
- (e) authorizing the Debtors to continue using their existing Cash Management System;

PART I - OVERVIEW¹

1. The ad hoc committee (the “**Ad Hoc Committee**”) represents over 70% of the \$575 million principal amount of 8.750% senior secured notes issued by Baffinland (as defined below). It is the Debtors’ (as defined below) largest pre-filing secured creditor constituency. Its members are significant funds who routinely invest in distressed and non-distressed companies, including acting as debtor in possession (“**DIP**”) lenders to CCAA debtors conducting Court-approved sales and investment solicitation processes (“**SISP**”).
2. The Ad Hoc Committee supports Export Development Canada’s (“**EDC**”, or the “**DIP Lender**”) position and its request for approval of its proposed form of SISP that provides for Court officers as the final decision makers, rather than the Debtors’ proposal that designees of the Operating Committee (the “**Operating Committee**”) (which is conflicted) control the outcome of a key piece of this restructuring.
3. From the perspective of the Ad Hoc Committee, there are three fundamental flaws with the Debtors’ startling proposal:
 - (a) It creates the unnecessary and destabilizing risk of a DIP default because it proposes a SISP that is not reasonably acceptable to EDC as DIP Lender;
 - (b) It violates not only EDC’s contractual rights under the DIP agreement (the “**DIP Agreement**”) that was entered into by the Debtors and approved by the Court, but also violates a key building block of this proceeding, upon which the Ad Hoc Committee has relied – the thoroughly negotiated terms of the DIP Resolution and related orders on which the parties agreed to resolve their disputes; and

¹ Terms not defined herein have the meanings set forth in the Affidavit of Ashley Glen sworn September 21, 2026 [[Glen Affidavit](#)].

FACTUM OF EXPORT DEVELOPMENT CANADA**PART I - INTRODUCTION**

1. Export Development Canada (“**EDC**”) opposes the Debtors’ motion for approval of their proposed Sales and Investment Solicitation Process (“**SISP**”) on one narrow but important issue: who is given decision-making authority over the SISP.

2. EDC’s proposal is that ultimate authority over the SISP should rest with the independent Chief Restructuring Officer or alternatively the Monitor. Put simply, EDC seeks to have a court officer empowered to make the critical decisions on how the SISP should proceed.

3. In contrast, the Debtors seek to have their own Operating Committee – each member of which is a representative of a shareholder - exercise decision-making power in the SISP.

4. The jurisprudence is clear that a SISP must proceed in a manner that is and is seen to be fair, transparent and even-handed. Independent oversight is particularly critical on these facts:

(a) The Debtors have in excess of US\$1.2 billion in secured debt commitments, and the repayment of these obligations is entirely dependent on the outcome of the SISP; and

(b) Equity holders have emphasized their overriding economic interest in this case, stated a desire to retain control of the Debtors, and are incentivized to accept greater transaction risk if it could result in equity recovery.

5. The issue on this motion is critical: who will make decisions about who can be a bidder, how the sales process unfolds, who the Debtors negotiate with and what deal points will be pursued.

***Extraordinary
Circumstances Required
for Removing/Curtailing
Powers of Directors***

See p. 2-3, ¶3 to 10, 22

See also ¶46 and 47, 51,
57-61, 68, 74, 76- 77

In the Matter of the Companies' Creditors Arrangement
R.S.C. 1985, c. C-36, as amended and in the Mat
Proposed Plan of Compromise or Arrangement with
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 by court's authority under s. 11 of Companies' Creditors
Arrangement Act to supervise restructuring -- Companies'
Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor -- Arrangements -- Removal of directors
-- Jurisdiction of court to remove directors -- Restructuring
supervised by court under the 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 by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

On January 29, 2004, Stelco Inc. ("Stelco") obtained protection from creditors under the Companies' Creditors Arrangement Act ("CCAA"). Subsequently, while a restructuring under the CCAA was under way, Clearwater Capital Management Inc. ("Clearwater") and Equilibrium Capital Management Inc. ("Equilibrium") acquired a 20 per cent holding in the outstanding publicly traded common shares of Stelco. Michael Woollcombe and Roland Keiper, who were associated with Clearwater and Equilibrium, asked to be appointed to the Stelco board of directors, which had been depleted as a result of resignations. Their request was supported by other shareholders who, together with Clearwater and Equilibrium, represented about 40 per cent of the common shareholders. On February 18, 2005, the Board acceded to the request and Woollcombe and Keiper were appointed to the Board. On the same day as their appointments, the board of directors began consideration of competing bids that had been received as a result of a court-approved capital raising process that had become the focus of the CCAA restructuring.

The appointment of Woollcombe and Keiper to the Board incensed the employees of Stelco. They applied to the court to have the appointments set aside. The employees argued that there was a reasonable apprehension that Woollcombe [page6] and Keiper would not be able to act in the best interests of Stelco as opposed to their own best interests as shareholders. Purporting to rely on the court's inherent jurisdiction and the discretion provided by the CCAA, on February 25, 2005, Farley J. ordered Woollcombe and Keiper removed from the Board.

Woollcombe and Keiper applied for leave to appeal the order of Farley J. and if leave be granted, that the order be set

aside on the grounds that (a) Farley J. did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test had no application to the removal of directors, (c) he had erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) in any event, the facts did not meet any test that would justify the removal of directors by a court.

Held, leave to appeal should be granted, and the appeal should be allowed.

The appeal involved the scope of a judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process of the CCAA. In particular, it involved the court's power, if any, to make an order removing directors under s. 11 of the CCAA. The order to remove directors could not be founded on inherent jurisdiction. Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, and it permits the court to maintain its authority and to prevent its process from being obstructed and abused. However, inherent jurisdiction does not operate where Parliament or the legislature has acted and, in the CCAA context, the discretion given by s. 11 to stay proceedings against the debtor corporation and the discretion given by s. 6 to approve a plan which appears to be reasonable and fair supplanted the need to resort to inherent jurisdiction. A judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it was designed to supervise the company's process, not the court's process.

The issue then was the nature of the court's power under s. 11 of the CCAA. The s. 11 discretion is not open-ended and unfettered. Its exercise was guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. What the court does under s. 11 is establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of

David R. Byers, for CIT Business Credit, Agent for DIP Lender. [page9]

The judgment of the court was delivered by

BLAIR J.A.: --

Part I -- Introduction

[1] Stelco Inc. and four of its wholly-owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act (the "CCAA") [See Note 1 at the end of the document] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

[2] Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

[3] The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies -- Clearwater Capital Management Inc. and Equilibrium Capital Management Inc. -- which, respectively, hold approximately 20 per cent of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

[4] The Stelco board of directors (the "Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in

being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40 per cent of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.

Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their [page10] experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

[5] On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

[6] The appointments of the appellants to the Board incensed the employee stakeholders of Stelco (the "Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability -- exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as "the bare knuckled arena" of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

[7] The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

[8] The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation -- as opposed to their own best interests as shareholders -- in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as the "Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse. [page11]

[9] On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

[10] For the reasons that follow, I would grant leave to appeal, allow the appeal and order the reinstatement of the applicants to the Board.

that:

- (a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;
- (b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and
- (c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

[21] On the basis of the foregoing -- and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" -- the Board made the appointments on February 18, 2005.

[22] Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but [page14] because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the

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] 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] 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 managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power -- which the courts are disinclined to exercise in any event -- except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

however, and the record would not support a finding of oppression, even if one had been sought.

[57] Everyone accepts that there is no evidence the appellants have conducted themselves, as directors -- in which capacity they participated over two days in the bid consideration exercise -- in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk -- a reasonable apprehension -- that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future. [page25]

[58] The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium -- the shareholders represented by the appellants on the Board -- had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

[59] Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They

are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, at paras. 42-49.

[60] In *Peoples* the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well -- in the context of "the shifting interest and incentives of shareholders and creditors" -- the court stated (para. 47):

In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in [page26]its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

[61] In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs. Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

court adopted the following statement by the trial judge, Anderson J.:

Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority. [See Note 6 at the end of the document]

[67] McKinlay J.A. then went on to say [at p. 320 O.R.]:

There can be no doubt that on an application under s. 234 [See Note 7 at the end of the document] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not mean that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

[68] Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, supra; *Sammi Atlas Inc. (Re)*, [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); *Olympia & York Developments Ltd. (Re)*, supra; *Re Alberta Pacific Terminals Ltd.*, [1991] B.C.J. No. 1065, 8 C.B.R. (4th) 99 (S.C.). **The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.**

[69] Here, the motion judge was alive to the "business

responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40 per cent of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

[74] In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

[75] Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably [page30] prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

[76] If the respondents are correct, and reasonable

apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V -- Disposition

[77] For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

[78] I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

[79] Counsel have agreed that there shall be no costs of the appeal.

Order accordingly.

[page31]

Notes

CITATION: Re Crystallex International Corporation, 2011 ONSC 7701
COURT FILE NO.: CV-11-9532-00CL
DATE: 20111228

**SUPERIOR COURT OF JUSTICE - ONTARIO
 COMMERCIAL LIST**

See ¶28

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
 CRYSTALLEX INTERNATIONAL CORPORATION

(the "Applicant")

BEFORE: Newbould J.

COUNSEL: Markus Koehnen, Andrew J.F. Kent and Jeffrey Levine, for the Applicant

Richard Swan, S. Richard Orzy and Emrys Davis, for Computershare Trust
 Company of Canada

Alex L. MacFarlane, for Tenor Capital Management

David R. Byers, for Ernst & Young Inc. as proposed Monitor

HEARD: December 23, 2011

Newbould J.

[1] This is a contest between two competing CCAA applications. One is proposed by the debtor Crystallex International Corporation ("Crystallex") and one is proposed by Crystallex's principal creditor, the noteholders under a 2004 Trust indenture (the "Noteholders") who are represented by the trustee Computershare Trust Company of Canada. Both Crystallex and the Noteholders agree that a CCAA application is appropriate. They disagree over which application should proceed.

meeting on December 1, 2011, the arbitration tribunal in the claim by Crystallex against Venezuela established Washington D.C. as the seat of the arbitration proceeding and established a timetable for the arbitration which requires Crystallex to submit its witness statements, supporting documents and written argument in February 2012. The hearing of the arbitration is scheduled for November 2013.

[26] In my view, what the Noteholders propose at this stage, including the cancellation of the common shares held by the shareholders of Crystallex, is not a fair balancing of the interests of all stakeholders. To say that they will never vote in favour of any plan unless they are paid out immediately or the current management and board of Crystallex is removed is not reflective of the purposes of the CCAA at this stage.

[27] The application of Crystallex and the terms of its Initial Order are not prejudicial to the legitimate interests of the Noteholders. The Noteholders are entitled to submit any proposal they wish to the board of Crystallex who will be obliged to consider it along with any other proposals obtained. The board of directors of Crystallex has a continuing duty to balance stakeholder interests. If the Crystallex board does not choose their proposal, the Noteholders would have their remedies, if appropriate, in the CCAA process. What the Noteholders have sought in their CCAA application is to effectively prevent Crystallex from taking steps under the CCAA to attempt to obtain a resolution for all stakeholders without the benefit of seeing what Crystallex may be able to achieve. It cannot be said at this stage that the efforts of Crystallex are doomed to fail.

[28] The Noteholders contend that their Plan is reasonable as it permits investors to invest in new shares of Crystallex and gives Crystallex the ability to determine if the market thinks that the arbitration claim is worth at least \$100 million, the amount required by the Noteholders' Plan to permit the issuance of the new shares. There is no evidence, however, that the attempt to raise funds in a tight timetable as set out in the Noteholders' Plan by means of issuance of new common shares is the best or the only possible means of raising money, or a true test of the market's view of the value of the arbitration claim, and for a court at this stage to require that to

be done would in my view be impermissibly usurping the power of the board of directors of Crystallex in its restructuring efforts. See *Re Stelco* [2005] O.J. No. 4733 (C.A.) at para. 26.

[29] In the circumstances, I am not prepared to act on the Noteholders' Plan or to issue an Initial Order as proposed by them. In my view, the Crystallex proposal in its proposed Initial Order is in keeping with the objectives of the CCAA and will permit a fair and balanced process at this initial stage.

[30] Mr. Swan said that with respect to the Crystallex application, the most significant concern of the Noteholders is that the DIP financing may be used as a long-term financing vehicle for months and years without presenting a real refinancing plan, and that to provide security would change the status quo. It seems to me that this concern is somewhat premature, as it is not known what financing, DIP or otherwise, will be achieved and proposed for approval by the Court.

[31] Crystallex proposes a Directors' and Officers' charge of \$10 million to secure the indemnity provided to them in the Initial Order. In its proposed Initial Order, the Noteholders proposed an indemnification secured by a charge of \$100,000. In argument, Mr. Swan contended that \$500,000 to \$1 million was more typical and that \$10 million was wholly excessive. It must be remembered that the charge only applies to liabilities in excess of the D&O insurance coverage that the directors and officers have, which is \$20 million and in place until September 2012. It is not known whether the policy can be renewed in September 2012 at a reasonable cost. It may be that the charge may never be needed, in which case the Noteholders should have no concern about the size of it. If it is needed, however, I would not at this stage limit it to the amount suggested by the Noteholders. There has already been extensive litigation involving Crystallex and the directors and officers understandably need assurances of the kind normally provided in CCAA proceedings. To lose the senior officers and directors of Crystallex at this stage would undoubtedly have a negative impact on the preparation and prosecution of the arbitration claim. Mr. Byers on behalf of Ernst & Young Inc., the proposed Monitor, stated that the Monitor would be prepared to look at the quantum of the charge. In the circumstances, I

CITATION: Victorian Order of Nurses for Canada (Re), 2016 ONSC 5540

COURT FILE NO.: CV-15-11192-00CL

DATE: 20160906

SUPERIOR COURT OF JUSTICE – ONTARIO

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

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990
c. C-43 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF NURSES FOR
CANADA - EASTERN REGION, AND VICTORIAN ORDER OF NURSES FOR CANADA -
WESTERN REGION

BEFORE: Penny J.**COUNSEL:** Evan Cobb for the Applicants

Clifton Prophet and Frank Lamie for the Ontario Nurses Association

Darrell Brown for the United Nurses of Alberta

Jessica Spence and Deborah McPhail for the Superintendent of Financial
Services

James Harnum for OPSEU et al.

Mark Laugesen for Collins Barrow Toronto Limited (Monitor)

Kenneth Kraft for the Board of Directors of the Applicants

Sam Rappos for IBM

HEARD: August 30, 2016**ENDORSEMENT****The Motion**

[1] This is a motion by the Ontario Nurses Association seeking an order under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as am., directing VON Canada to restructure its pension plan. The requested order would initiate a process by which all of the assets and liabilities of the pension plan attributable to VON Ontario's present and former

[37] I also agree with VON Canada that the ONA proposal represents an improper attempt to compel VON Canada to implement a material, controversial commercial step in a circumstance where the considered judgment of the VON Canada board is not to take that step.

[38] The business judgment rule recognizes that many decisions made in the course of business affairs, although they turn out to be wrong or unsuccessful, were reasonable and defensible at the time and under the circumstances in which they were made.

[39] Courts are ill-suited to exercise and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision-making, *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, at para. 67.

[40] While the court will not defer to a decision that is found to be wholly unreasonable, it will respect a business decision made (i) independently and without a conflict of interest, (ii) in good faith, (iii) on a reasonably informed basis, (iv) based on information available at the time, and (v) where the decision falls within a reasonable range of options available at the time.

[41] The business judgment rule applies in the context of CCAA proceedings. Courts supervising a debtor company's attempts to affect a going concern restructuring are generally very hesitant to second-guess the business judgment of the incumbent board and management, *Stelco Inc. (Re)* (2015), 75 O.R. (3d) 5. The discretion afforded by s. 11 of the CCAA does not permit the court simply to direct the commercial steps a debtor company must take and to impose the court's business judgment in replacement for that of the board of the debtor company, *Re Stelco*, supra, para. 44, and see *Crystallex International Corp. (Re)*, [2012] ONSC 2125 at para. 112.

[42] In this case, VON Canada's board, with the assistance of competent professional advisors, carefully considered whether to proceed to restructure the VON pension plan and decided not to do so. There is no suggestion that the board had a conflict of interest or acted negligently or in bad faith. The ONA transfer proposal is, in substance, analogous to the VON Canada partial windup proposal, subject to many of the same litigation risks and pitfalls. The board's decision not to pursue pension plan restructuring, in my view, falls within a range of reasonable alternatives clearly available to the VON Canada board.

[43] I conclude, therefore, that the ONA motion is, in substance, an attempt to invoke the discretion of the court under s. 11 of the CCAA to affect a result which is:

- (a) not consistent with the policy objectives of the CCAA, i.e., will not foster going concern restructuring or tend to avoid the economic and social cost of liquidation; and
- (b) contrary to the business judgment rule, as the VON Canada board has already given careful consideration to the pension plan restructuring option and rejected it.

CITATION: *In Re Hudson's Bay Company*, 2025 ONSC 5998

COURT FILE NO.: CV-25-00738613-00CL

DATE: 20251024

See ¶217-220

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC
CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC
BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC
CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP
INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.,
Applicants

BEFORE: *Peter J. Osborne J.*

COUNSEL:

Maria Konyukhova, Elizabeth Pillon, Sinziana Henning, Philip Yang and Brittney Ketwaroo for
the Applicants

Graham Phoenix and Jayson Thomas for Ruby Liu Commercial Investment Corp.

Jeremy Dacks, Marc Wasserman and David Rosenblatt for Pathlight Capital LP

Matthew Lerner, Brian Kolenda, Christopher Yung and Julien Sicco for ReStore Capital LLC,
the FILO Agent

Jeremy Opolsky, David Bish, Alec Angle and Alina Butt for The Cadillac Fairview Corporation

Matthew Gottlieb, Andrew Winton and Annecy Pang for KingSett Capital Inc.

217. In my view, it is also not appropriate at this time to grant an order expanding the powers of the Monitor to act as a “super-monitor” and replace management of the Applicants in respect of all of their affairs and operations.
218. Indeed, and while the FILO Agent does not seek the appointment of a receiver or the removal of the directors, it does seek an order granting expanded powers to the Monitor so that “it is capable of assuming all the functions currently performed by HBC’s management and board”. It submits that it is not seeking the removal of the directors who are not being paid in any event.
219. However, the relief being sought would have practically the same effect as the removal of directors since the directors would remain in office but have no powers. Section 11.5(1) of the CCAA permits the court to remove any director where the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made, or is acting or is likely to act inappropriately as a director in the circumstances. I am not satisfied that any director has so acted here.
220. Such relief is extraordinary, and while it can be appropriate in certain cases, in my view, it is neither necessary nor appropriate at this time. While super-monitor powers have been granted in numerous cases, they remain the exception and not the rule, and the determination of whether or not such relief is appropriate in any particular case is inherently fact specific.
221. While the FILO Agent is vigorously opposed, and has for some time voiced its opposition, to approval of the Central Walk Transaction, I am not persuaded that the Applicants have acted or are not acting in good faith, either generally or specifically in their efforts to pursue the Transaction.
222. The fact that I have declined to approve the Transaction does not mean that there was bad faith in bringing it forward. The Court-appointed Monitor submits that, while it is prepared to assume and fulfil any role ordered by the court, it does not believe that such super-monitor powers are necessary at this time. I agree. I would add that expanding the powers of the Monitor as requested is unlikely to resolve what are in many respects inter-creditor disputes between the FILO Agent and Pathlight, particularly since the FILO Agent is already critical of the Monitor whose powers it now seeks to expand.
223. I also observe that the situation here is further complicated by the fact that the FILO Agent or affiliated entities under common ownership and control have been involved since before the commencement of the CCAA proceedings and within these proceedings have acted in several capacities, including the following: pre-filing secured lender and agent; provider and financier of consignment goods (both pre-and post-filing); DIP Lender; inventory appraiser on behalf of the lenders; and the lead liquidator in the joint venture forming the Liquidation Consultant.

Bluberi Gaming Technologies Inc./Bluberi jeux et technologies inc. (Arrangement relatif à)

2015 QCCS 5373

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

See ¶30-31

N°: 500-11-049737-154

DATE : **November 18, 2015**

IN THE PRESENCE OF: THE HONOURABLE **JEAN-FRANÇOIS MICHAUD, J.S.C.**

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

BLUBERI GAMING TECHNOLOGIES INC./
BLUBERI JEUX ET TECHNOLOGIES INC.

- and -

BLUBERI GROUP INC.

- and -

BLUBERI USA, INC.

Petitioners

v.

ERNST & YOUNG INC.

Monitor

JUDGMENT (Amended and Restated Initial Order)

[1] A Petition for the Issuance of an Initial Order under the *Companies' Creditors Arrangement Act* (**Petition**) was filed on November 11, 2015 by Mr. Gérald Duhamel on behalf of Bluberi Gaming Technologies Inc./Bluberi Jeux et Technologies Inc. (**Gaming**), Bluberi Group Inc. (**Group**) and Bluberi USA, Inc. (**USA**). In an Affidavit

[25] At this point in time, the Court does not have sufficient evidence to draw such a conclusion. It's clear that this serious dispute opposing the parties lead them to take strategic measures but the Court is more concerned with by the impact of that dispute on the operations of Petitioners. There are other stakeholders, namely the employees, the trade creditors, the gaming regulators and the clients who are affected by the dispute.

[26] The Court is of the view that it is appropriate that the Petitioners benefit from the protection requested to avoid social and economic losses. It will:

- provide the Petitioners with a reasonable period of time in which to address liquidity issues, collect payments of amounts owing to them, seek alternate sources of financing and or potential partners;
- ensure that all stakeholders are treated fairly and equitably; and
- ensure that the value of the Petitioners' assets is maximized.

[27] For the purpose of issuing an Initial Order these objectives constitute sufficient grounds.

[28] Even if Callidus states very clearly that its relationship with Mr. Duhamel is completely broken and that there is no trust, it still appears appropriate to issue an Initial Order to provide the parties with a breathing space.

[29] Also, the Monitor will have a better understanding of the situation and will report accordingly. His contribution will most likely be helpful to determine the future actions.

4. The removal of Mr. Duhamel and the appointment of a Chief Restructuring Officer (CRO)

[30] Invoking Section 11.5 CCAA, Callidus is asking this Court to remove Mr. Duhamel as a director of Gaming. Section 11.5 provides the following:

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

(this Court's emphasis)

[31] Based on the allegations of the parties and the exhibits, the Court cannot conclude that Mr. Duhamel is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement. Although the dispute between him

and Callidus is serious, to say the less, it remains that Mr. Duhamel is the founder, the sole shareholder and a key figure of the Petitioners. It would be unwise to remove Mr. Duhamel on the basis of contradictory Affidavits without having the benefit of the examination and cross-examination of Mr. Duhamel and other relevant witnesses.

[32] We are at an initial stage and that demand appears premature. The appointment of a CRO is also premature. The Monitor will continue his work and will be in a better position to assess the situation and make the appropriate recommendations. There is no need to have another professional involved at this time.

5. Last comment

[33] As stated by the Court during the hearing, the resolution of the conflict between Callidus and Mr. Duhamel is likely to be the best alternative for all stakeholders. The Court reiterates its offer to refer this matter to another judge who would preside a settlement conference at a time convenient for all.

FOR THESE REASONS, THE COURT:

[34] **ISSUES** this amended and restated initial order pursuant to the CCAA, together with the order issued on November 12, 2015, and extended for one day on November 17, 2015 (**Order**), divided under the following headings:

- Service
- Application of the CCAA
- Effective Time
- Plan of Arrangement
- Stay of Proceedings against the Petitioners and the Property
- Stay of Proceedings against the Directors and Officers
- Possession of Property and Operations
- No Exercise of Rights or Remedies;
- No Interference with Rights
- Continuation of Services
- Non-Derogation of Rights
- Restructuring
- Powers of the Monitor
- Priorities and General Provisions Relating to CCAA Charges
- Confidentiality
- General

Service

[35] **DECLARES** that sufficient prior notice of the presentation of the Petition has been given by the Petitioners to interested parties, including the secured creditors who are likely to be affected by the charge created herein;

Unofficial English Translation

Pascan Aviation inc. (Arrangement relatif à)

2015 QCCS 4227

SUPERIOR COURT

See ¶1-5, 57-60,
71-72, 77, 79-80,

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-049320-159

DATE: **SEPTEMBER 14, 2015**

THE HONOURABLE **MARTIN CASTONGUAY, J.S.C., PRESIDING**

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

PASCAN AVIATION INC., a legal person having its principal
place of business at 6200 route de l'Aéroport, Longueuil
(Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

LES STRUCTURES & COMPOSANTES

AVTECH INC., a legal person having its principal
place of business at 6200 route de l'Aéroport, Longueuil
(Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

3939421 CANADA INC., a legal person having its principal
place of business at 6200 route de l'Aéroport, Longueuil
(Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

[TRANSLATION]

Appointment of the CRO

129. The Petitioners propose that the Court appoint Dominic Deveau to act as Chief Restructuring Officer of the Pascan Group;

130. The appointment of the CRO is necessary because the Petitioners have lost confidence in the current management and administration of the Pascan Group;

131. The appointment of the CRO is an essential condition for granting the interim financing offered by the Petitioners;

132. The CRO is already familiar with the operations of the Pascan Group given his involvement in recent months, and he, along with the key employees of the Pascan Group, will make it possible to continue its operations.

133. The Petitioners therefore request that the CRO be appointed by the Court to act as Chief Restructuring Officer of the Pascan Group under the terms of an offer of management services made to the Pascan Group and filed as Exhibit **R-24**;

134. The Petitioners further propose that the CRO have all the powers described in the draft initial order and that he enjoy the protections required to maintain the operations of the Pascan Group;

[4] As is usual for such a motion in view of an initial order, a draft order was attached, providing, *inter alia*, the following concerning the powers of the CRO:

[TRANSLATION]

30. - Declares that the CRO may exercise, without the intervention of the directors, all the powers described in the service proposal that are not incompatible with the following powers.

[5] The service proposal was the one prepared by Deveau.² In addition to his emoluments, set at \$40,000.00 a month, this document set out the powers and objectives of the CRO. The Court sees fit to reproduce them in their entirety.

[TRANSLATION]

POWERS

In the context of his role referred to hereinabove and in view of promoting the achievement of the objectives described hereinbelow, the Manager shall have all the powers necessary to:

- Conduct, manage, operate and oversee the company, commercial operations and financial affairs of the CLIENT and perform any and all acts in this regard or in connection with the restructuring of the CLIENT.
- Take all measures to maintain control over the receipts and disbursements of the CLIENT including, without limiting the generality of the foregoing, all measures to control and use all the bank accounts of the CLIENT.
- Maintain or terminate, dismiss or lay off, temporarily or permanently, the employees of the CLIENT or of its agents or consultants and take any and all other measures for human resources management and any other administrative decision related thereto.
- Represent the CLIENT in all negotiations with any person whomsoever.
- Communicate with and provide information to the Monitor concerning the business of the CLIENT.
- Take any and all measures, sign any and all documents or agreements and incur any and all expenses and obligations necessary or incident to the powers of the Manager.

OBJECTIVES

The strategic objectives pursued by the Manager are as follows:

1. Financial restructuring

- a. File and obtain approval of a plan of arrangement under the *Companies' Creditors Arrangement Act* for the unsecured creditors of the CLIENT.

2. Operating performance

- a. Improve the financial performance and profitability of the CLIENT so that the CLIENT can meet its current obligations, provide for the engine reserve and investments in maintenance required for the operating fleet and pay the interest specified in the loan agreements.
- b. Set up a management team to reduce and eventually terminate the Manager's mandate on a monthly basis.

3. Sale/recapitalization of operating entities

[50] The Court must make a short digression here. Despite the law, we are all human.

[51] Clearly there is no trust between Charest, who represents the Pascan Group, and Couillard, who acts on behalf of the Petitioners.

[52] Charest has testified twice before the Court. He is an intelligent and accomplished businessman but, above all, he has a strong character.

[53] As a result, chances are that his choice of candidates for the CRO position are people over whom, rightly or wrongly, he thinks he could wield some influence.

[54] On the other hand, the Petitioners are attempting to avoid this problem by asking that the Court confer on the CRO powers that are exceptional for such a position.

[55] Indeed, a spade is a spade even if you call it a pitchfork. The scope of the powers sought by the Petitioners for the CRO is more like the powers of a receiver than those normally vested in a CRO.

[56] Before tackling the profile of the best candidate for the CRO position, it is important to review the Court's basic guiding principles.

[57] The author Janis Sarra perfectly summarizes the circumstances that lead to the appointment of a CRO:

In the past two decades, there has been the growing use of chief restructuring officers (CRO) in CCAA workouts, frequently appointed in the initial stay order. This development is a governance response to creditor concerns that directors and officers that may have skills appropriate to oversight of financially healthy corporations may not have the skills or expertise to deal with a turnaround situation.

[58] This is the most important criterion that should guide the Court. The existing directors, who are quite knowledgeable about their industry, are normally the best qualified to carry out the restructuring. That being said, however, even the best directors can be overwhelmed by a crisis situation.

[59] In the present case, although Charron and Charest knew how to run their business during the profitable years, the evidence shows that they lost control in a crisis situation. The following points demonstrate this:

- Five unsold airplanes even though they had been declared surplus since January 2014
- Cannibalization of certain aircraft.

- Lack of engine reserve.

[60] Nevertheless, the directors of the Pascan Group showed that with adequate guidance, they were able to make good decisions.

[61] In this particular case, the appointment of a CRO, uncontested the Pascan Group, is advisable.

[62] A court-appointed CRO for a restructuring under the Act is nothing new in law.

[63] It is necessary, however, to recall, if not define the objectives sought when a court-appointed CRO is required.

[64] It goes without saying that the situation or powers of a CRO when a company is being wound up are quite different from those of a CRO who will be involved in working out a plan of arrangement.⁹

[65] In the present case, representations were made to the Court that a plan of arrangement would in fact ultimately be filed, with the result that negotiations have already been initiated with certain creditors.

[66] In such a case, to fulfil his or her mandate, the CRO must identify the action to be taken for the financial turnaround of the company; namely the disposal of assets or the creation of a new business plan, or both. The CRO must then, together with the Monitor and the Board of Directors, prepare a viable plan of arrangement that will be acceptable to all the parties involved, whether they are shareholders or secured or unsecured creditors, and ultimately see to its implementation and completion. Moreover, since the CRO is court-appointed, he or she must report to the Court.

[67] Even though the appointment of a CRO can be reassuring to all stakeholders, the aim of such an appointment is not to look out for the interests of a single category of stakeholders.

[68] Certain qualities are therefore required, including independence vis-à-vis these same parties, in addition to a solid reputation and expertise in the civil aviation industry as well as in restructuring.

[69] Selecting the best possible CRO is vital to a company's restructuring process. When a CRO is court-appointed because of differences between the parties, the guiding criteria are the following:

- A good knowledge of the industry in which the company operates so that the CRO's presence is reassuring to all the industry stakeholders, namely, the creditors, clients and competent authorities.

- Independence.¹⁰
- Experience in restructuring.
- Reasonable cost.

[70] These criteria are not cumulative, but their analysis can lead to the identification of the ideal candidate from among those proposed.

[71] Now that the selection criteria have been established, what should be determined with respect to the powers requested by the Petitioners?

[72] To justify the powers requested, the Petitioners refer to the breach of trust without taking into consideration that a Monitor has already been appointed.

[73] The Petitioners also cite the order issued by Schrager J. of the Quebec Superior Court, as he then was, in *Aveos Fleet Performance*,¹¹ by which all the powers of administration were conferred on the CRO, to the exclusion of the existing directors.

[74] There are no reasons provided for this order, as is generally the case for emergency orders issued under the Act.

[75] Counsel for the Pascan Group, judicial officers well informed about the Aveos case, told the Court that the scope of powers conferred on the CRO was prompted by the resignation or absence of Aveos directors.

[76] This same order specifies the degree of collaboration to be shown by shareholders and directors. The Court deems it useful to reproduce it here.

ORDER that the Petitioners and their shareholders, direct and indirect subsidiaries, former and current officers, directors, employees, servants, agents and representatives (the “**Company Persons**”) shall cooperate fully with the CRO in the exercise of his powers and the discharge of his obligations. Without limiting the generality of the foregoing, the Company Persons shall provide the CRO with such access to the Petitioners’ and their direct and indirect subsidiaries’ books, records, assets and premise as the CRO requires to exercise his powers and perform his obligations under this Order.

[77] The Court is of the opinion that, at this stage, collaboration is required, not coercion, especially since the Court will ensure the independence of the candidate selected.

[78] The Court does not challenge the Petitioners' decision to use the mechanisms provided by the Act, especially since the Petitioners firmly believe in the Pascan Group's capacity for financial rehabilitation.

[79] This being the case, the Petitioners must live with the consequences of their choices; stripping the directors of their powers in favour of a CRO, however, is not the standard applied by the courts.

[80] This decision is not set in stone and may be reviewed by the Court if it becomes obvious that the directors are not cooperating with the CRO. In such a scenario, the Court would not hesitate to consent to increased powers for the CRO, as in the form used by Schrager J. in *Aveos*.

[81] Let us now look at the candidates. Each one has filed a résumé, and Messrs. Deveaux, Nice and Simard have testified about their past experiences.

[82] The Court would like to point out that this exercise does not make a value judgment with regard to the candidates not selected but rather consists of the application of the criteria presented earlier.

[83] Deveaux has a great deal of experience in restructuring, but none in the civil aviation industry.

[84] Moreover, his "Memorandum" dated July 19, 2015, which was transmitted to the Petitioners, PwC and counsel for the Petitioners while his fees were being paid by the Pascan Group, raises questions for the Court about his independence. In addition, as a result of the animosity which ensued, the relationship between Deveaux and the directors of the Pascan Group would be dysfunctional.

[85] Therefore, Deveaux cannot be considered for the appointment.

[86] Zakaib also cannot be considered for the position.

[87] Despite impressive academic credentials and a remarkable professional career, Zakaib has no knowledge of the aviation industry and her knowledge of restructuring is quite limited.

[88] Simard's application will also be rejected.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: **Quest University Canada (Re),
2020 BCSC 318**

See ¶60, 64-65. 67-69

Date: 20200306
Docket: S200586
Registry: Vancouver

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

- and -

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

- and -

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

Petitioner

Before: **The Honourable Madam Justice Fitzpatrick**

Reasons for Judgment

Counsel for the Petitioner:	J.R. Sandrelli V.L. Cross
Counsel for the Monitor PricewaterhouseCoopers Inc.:	V.L. Tickle
Counsel for Capilano University:	K. Mak
Counsel for SESA-BC Holding Ltd. and RCM Capital Management Ltd.:	K.M. Jackson
Counsel for Vanchorverve Foundation:	W.W. MacLeod
Counsel for Bank of Montreal:	S.A. Poisson
Counsel for The Toronto Dominion Bank:	B. Dumanowski, A/S

[58] Since the CCAA filing, the Board has also formed a Restructuring Committee (the “RC”) to bring considerable focus to the need to move expeditiously in these proceedings toward a resolution. The RC is tasked with evaluating proposals, working with Halladay, soliciting interest for the development lands and making recommendations to the Board regarding its decisions in these proceedings. Members of that Committee include Mr. Rinfret, who VF seeks to remove.

[59] Section 11.5 of the CCAA has received little judicial attention.

[60] In *Unique Broadband Systems Inc. (Re)* (25 January 2012), Toronto CV-11-9283-00CL (O.N.S.C.), Justice Wilton-Siegel considered this provision. At para. 32, he held that the wording of s. 11.5 suggests that the proponent must meet a “significant threshold” before it is entitled to relief.

[61] Further, Wilton-Siegel J. stated:

[33] A determination as to whether conduct is impairing, or is likely to impair, a restructuring requires a careful examination of the actions of the directors in the context of the particular restructuring proceedings, the interests of the stakeholders and the feasible options available to the debtor. ... I note, in particular, that given this language, the fact that a shareholder or creditor may not agree with a decision of a director is far from being a sufficient ground for the director’s removal. As a related matter, there is nothing in s. 11.5 that evidences an intention to displace the “business judgment rule”.

[34] Further, the language of s. 11.5 expressly requires that the actions of a director “unreasonably” impair, or are likely to “unreasonably” impair, a viable restructuring ...

[35] In addition, two other considerations also argue in favour of a significant threshold, although they may also be relevant to a determination regarding the exercise of judicial discretion where the necessary factual determinations have been made.

[36] First, removing and replacing directors of a corporation, even a debtor corporation, subject to the CCAA, is an extreme form of judicial intervention in the business and affairs of the corporation. The shareholders have elected the directors and remain entitled to bring their own action to remove or replace directors under the applicable corporate legislation. At a minimum, in determining whether it should exercise its discretion, the court can take into consideration the absence of any such action by the other shareholders.

[37] Similarly, in a CCAA restructuring, the Monitor performs a supervisory function that provides a form of protection to the corporation’s stakeholders. In determining whether to exercise its discretion in s. 11.5(1), a court would

ordinarily take into consideration the presence or absence of any recommendation from the Monitor.

[Emphasis added.]

[62] I would adopt the reasoning of the court in *Unique Broadband* as applicable here. While there are no shareholders *per se* to take action to remove the governors, Quest's Bylaw 2.10 provides that the Board may remove a governor before his or her term with a 2/3 majority vote. No such action has been taken by the Board.

[63] The only other decision brought to my attention on this issue was *Crystallex International Corp. (Re)*, 2012 ONSC 2125, where Justice Newbould was similarly considering competing financing offers. His only comment on s. 11.5 is found at para. 71, where the court emphasized that the remedy exists and must be considered in the context of all the circumstances and with the objectives of the CCAA in mind.

[64] Having considered the entirety of the evidence, I do not consider that VF has met its burden in establishing, on a balance of probabilities, that Quest's Board is unreasonably impairing the possibility of achieving a successful restructuring in this proceeding. At bottom, VF points to the ongoing deficits which the Board has made good faith efforts to address over the years. The fact that the governors have not yet been successful does not mean that they are incompetent; nor does it translate into a finding that they are now unreasonably impairing the restructuring efforts. Indeed, Mr. Bromley himself was part of those efforts in years past, when some of those unsuccessful efforts were made.

[65] In addition, reading between the lines, VF's main complaint is that the Board disagrees with its vision as to how Quest's financial difficulties may be solved. This disagreement is not a basis upon which to overhaul the Board's composition under s. 11.5 so as to give VF control of it: *Unique Broadband* at para. 33.

[66] The governors have been duly appointed under Quest's Bylaws. Their business judgment is to be considered and is to be afforded, where appropriate, considerable deference: *Unique Broadband* at para. 33, 36; *Crystallex* at para. 33;

and, *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459 at para. 186. If the governors have conflicts arising in their duties, as VF now suggests, Quest's internal procedures under its Conflict of Interest Policy are in place to address any issues, just as those procedures were employed when Mr. Bromley was on the Board.

[67] This is not a situation where Quest's Board will be taking steps on its own in this restructuring without significant input and oversight. The Initial Order granted and the ARIO sought impose certain restrictions on the decisions to be made by Quest in the future. In addition, the Monitor is specifically tasked to monitor the restructuring efforts and assist and advise Quest in those efforts. To this point in time, the Monitor fully supports the ongoing efforts of all members on Quest's Board, including those of Ms. Larson, Chief Harry, Mr. Louie and Mr. Rinfret: *Unique Broadband* at para. 37.

[68] Finally, the Court retains an overall supervisory function to address any steps taken by Quest that are not appropriate in the circumstances. That may include a reconsideration of an application under s. 11.5 if circumstances change.

[69] In summary, I do not consider that VF's concerns regarding Quest's Board are proven or justified under the s. 11.2(4) factors. Also, I do not find that VF has met the significant threshold under s. 11.5. Certainly, VF has not established any basis upon which to justify the removal of Ms. Larson, Chief Harry, Mr. Louie and Mr. Rinfret from the Board under s. 11.5 so that the majority of the Board can be populated by persons under the control of VF/Burley.

[70] As I will discuss below, there are also significant concerns arising with respect to VF's true intentions in putting forward Burley's financing proposal. These concerns arise in the context of Burley's lack of independence from Mr. Bromley/VF and the control provisions that are found in Burley's proposal, both of which may affect the course of this restructuring proceeding.

2008 ANNREVINSOLV 1

Annual Review of Insolvency Law
Editor: Janis P. Sarra

**Applicants' Book of
Authorities, Tab 2**

1 — Directors' Charges Under the CCAA: Where are We Going and Why?

Directors' Charges Under the CCAA: Where are We Going and Why?

By Fred Myers* and Peter Kolla**

I. — Introduction

On September 29, 2008, the S&P 500 suffered its largest one day drop since 1987, while the intraday point decline of the Dow Jones industrial average was the largest ever.³ Though the Dow Jones surged on October 13th to post its biggest one day point gain ever, those gains were preceded by a week where it lost 18 percent of its value.⁴ In Canada, during the last two weeks of September and the first week of October of 2008, the S&P/TSX Composite Index lost 6.1 percent, 10.9 percent, and 16.1 percent, of its value respectively.⁵ Such calamity does not bode well for the financial health of companies in North America, especially when the failure of financial institutions around the globe — Lehman Brothers' petition for Chapter 11 protection being only the most sensational example — could potentially cause a “full-blown credit crunch.”⁶

Unfortunately it appears inevitable that due to these events and the struggles that businesses face every day, companies that are viable, but lack liquidity, will soon become insolvent and will seek to be restructured. The question of how to keep the members of a company's board of directors from resigning before a restructuring process begins is an important and perennial issue. With the collapse in credit markets and the related tumble in the stock markets in September and October 2008, it is an especially topical one.

During the restructuring of a company, amidst the myriad of challenges, the company greatly benefits from the leadership by a board of directors that is committed to the success of the business and is knowledgeable about how to achieve that success. But it is difficult for companies to retain the services of the incumbent board of directors during a restructuring because the individual board members can face personal liability as a result of circumstances that may be beyond their control. In some cases, this liability can occur without the directors committing personal wrongs. Yet, experience shows that absent fraud or other types of misfeasance on the part of board members, keeping the board of directors in place during a restructuring can be a crucial element to successfully restructuring insolvent companies. The directors' charge is one tool to induce incumbent directors to retain their positions during a restructuring so that they can lead the efforts to rehabilitate a company's fortunes. The directors' charge can be defined as a court ordered super-priority security interest against the debtor's assets that can be created in an initial order made under the *Companies' Creditors Arrangement Act* (the CCAA).⁷

The directors' charge is an important topic, due in part to the recently proposed statutory amendments to the CCAA, some of which concern directors' charges.⁸ Practically, there are many considerations that should go into a court's discretionary decision of whether to grant a directors' charge and these considerations often do not get the attention they deserve in the tumultuous times that surround the filing of an application under the CCAA. These considerations include concerns over the scope of a directors' charge, such as how the charge compliments directors' insurance coverage and whether the directors' charge should cover liabilities incurred prior to the CCAA restructuring process. Because the directors' charge interferes with existing rights of other stakeholders, another important consideration is the scope of interfering with these rights while allowing the CCAA to continue. Given the fact-driven nature of CCAA restructurings, there are no correct answers to these questions. However, there

the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see for example, *Elan Corp. v. Comiskey (Trustee of)*, per Doherty J.A. in dissent; *Re Skydome Corp.*; *Re Anvil Range Mining Corp.*

In this respect, I agree with the following statement of Doherty J.A. in *Elan*, *supra*:

... [T]he Act was designed to serve a “broad constituency of investors, creditors and employees”. Because of that “broad constituency” the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.*¹⁵

No discussion of stakeholders would be complete without addressing creditors. A CCAA restructuring lives or dies based on creditor support. Canadian insolvency professionals point with some pride to the fact that restructuring proceedings under the CCAA are generally faster and much less expensive than comparable proceedings in the United States under Chapter 11 of the *Bankruptcy Code*. One logical question that arises is why do American businesses continue to utilize a process that, to Canadians at least, appears to be vastly more cumbersome and relatively more expensive than other options? The answer, anecdotally and from ongoing experience, is that the outcome of restructuring proceedings that are led by businesspeople rather than a receiver or court officer are preferred by stakeholders despite the costs and delay. Indeed, one recent empirical study from the United States concluded that “creditors and shareholders can more than double their recoveries by reorganizing large public companies instead of selling them”.¹⁶ Keeping the debtor at the helm seems to produce more satisfactory results for creditors, and indeed all relevant stakeholder groups.

What should be obvious from this very cursory introduction is that many interests are at stake during a restructuring, all of which should be well understood by the board of directors charged with marshalling the process. Even when a company is solvent, the board of directors must be cognisant of the interests of the company’s stakeholders as the board fulfills its statutory obligation to act in the best interests of the corporation.¹⁷ As the Supreme Court of Canada found in *Peoples Department Stores Inc. (Trustee of) v. Wise (Peoples)*, when a corporation approaches the “vicinity of insolvency” the directors continue to owe fiduciary duties to the company, including a consideration of the interests of the various stakeholders.¹⁸ The content of this fiduciary duty can change between normal operation and the vicinity of insolvency, and can change again once the company enters a restructuring under the CCAA. So although the duties that are owed by a board can change if a company becomes insolvent, the practice of having to be aware of and potentially accountable for various interests does not change. As such, there is no automatic reason why the same board that served a company when it was solvent, cannot similarly do so during the restructuring process. Indeed, one can make the argument that a board of directors, through the experience of serving the company in times of solvency, should be best placed to serve it in times of insolvency too.

Some have noted that restructurings under the CCAA have unclear theoretical justifications (beyond the pragmatic) and that consequently it is difficult to identify appropriate objectives for directors and their debtors to achieve during the restructuring process.¹⁹ However, even without a defined theoretical basis for choosing restructuring objectives, courts and Parliament have created and fostered incentives, such as the directors’ charge, to encourage the incumbent directors to be the group that leads the efforts to meet those objectives, however they are chosen. Indeed, Justice Farley’s statement of the purpose of the CCAA in *Re Lehndorff General Partner Ltd. (Lehndorff)*, simply cannot be fulfilled without an attentive and informed board:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable [sic] plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make [sic] order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit

***Relief Being Sought by
Lenders is Unprecedented***

SCHEDULE "C"

No.	Proceeding	Ultimate Decision-Making Authority Re SISP	Supported by Debtors?
1.	CFFI Ventures Inc. (SISP)	Monitor "Following the selection of the Successful Bid(s), the Monitor shall seek to finalize any remaining necessary definitive agreement(s) with respect to the Successful Bids" (para. 10).	Yes A Vice President and the Chief Financial Officer of the debtor swore an affidavit in support of the SISP.
2.	Toys "R" Us (Canada) Ltd. (SISP)	Monitor "If any Binding Offers are received, the Monitor will, in consultation with the Company: (d) select the best bid(s) (the "Successful Bid(s)" within five (5) business days of the Phase 2 Bid Deadline and following such selection promptly notify the Binding Bidder making such Successful Bid that it has been selected as the successful bidder". (para. 25).	Yes The debtor's Chief Restructuring Officer, who was appointed before CCAA proceedings commenced, swore an affidavit in support of the SISP.
3.	Hakim Optical Laboratory Limited (SISP)	Monitor "If one or more Qualified Bids (other than the Stalking Horse Bid) has been received by the Monitor on or before the Qualified Bid Deadline, the Monitor shall proceed with an auction to determine the successful bid(s) (the 'Auction') which Auction shall be administered in accordance with Exhibit "A" hereto, subject to such additional procedural rules as may be determined by the Monitor 10 to be necessary or desirable in the conduct of the Auction. The successful bid(s) selected within the Auction shall constitute the	Yes The Senior Controller of the debtor swore an affidavit in support of the SISP.

No.	Proceeding	Ultimate Decision-Making Authority Re SISP	Supported by Debtors?
		successful bid ('Successful Bid', with such bidder being the 'Successful Bidder')" (para. 34) Before the conclusion of the Auction, the Monitor will: (b) designate the highest or otherwise best bid received at the Auction the Successful Bid and the Qualified Party making such bid, the Successful Bidder (SISP, Exhibit A, para. 4)	
4.	Sunterra (SISP)	Chief Restructuring Advisor "Subject to Sections 24 and 26, the Chief Restructuring Advisor, in consultation with the Sale Advisor and the Monitor, will identify the Phase 2 Qualified Bid(s) (the 'Successful Bid(s)'), and the Phase 2 Qualified Bidder making such Successful Bid (the 'Successful Bidder(s)') for any particular Property or the Business in whole or part". (para. 25)	Yes The Principal and Chairman of the debtor filed an affidavit in support of the SISP, and the vesting of decision-making authority with the Chief Restructuring Advisor. Notably, the debtor also sought the appointment of the Chief Restructuring Advisor.
5.	Crown Crest (SISP)	Monitor "(a) the Monitor, in consultation with the Sales Agent, PTC and the CRO, shall select one or more successful bid(s) (the 'Successful Bid', and such bidder, the 'Successful Bidder'". (para. 21)	Yes The Chief Credit Officer of Peoples Trust Company, the creditor that initiated CCAA proceedings, swore an affidavit noting the application was filed with the support of the debtors' management. The Chief Restructuring Officer also filed an affidavit in support of the SISP.
6.	1057863 B.C. Ltd (SISP)	Monitor "The Monitor, after consulting with the Petitioners, reserves the right not to accept any Qualified Bid or to	Yes

No.	Proceeding	Ultimate Decision-Making Authority Re SISP	Supported by Debtors?
		otherwise terminate the SISP at any time. The Monitor reserves the right to deal with one or more Qualified Bidders to the exclusion of others, to accept a Qualified Bid for different parts of the Woodlands Business and Property of the Petitioners, or to accept multiple Qualified Bids and the Petitioners may enter into definitive agreements in respect of all such bids". (para. 48)	The Notice of Application and affidavit sworn in respect of the SISP note the debtors approve of the SISP.
7.	Chesswood Group Ltd. (SISP)	Monitor "The Monitor will: (a) review and evaluate each Qualified Bid; (b) identify the highest or otherwise best bid (the 'Successful Bid', and the Qualified Bidder making such Successful Bid, the 'Successful Bidder'); and (c) identify the next highest or otherwise second best bid (the 'Back-Up Bid', and the Qualified Bidder making such Back-Up Bid, the 'Back-Up Bidder')". (para. 20)	No Opposition In this creditor-initiated CCAA proceeding, the Monitor was granted enhanced powers pursuant to the Initial Order .
8.	Indiva Limited (SISP)	Debtors "The Monitor, with the consent of the Applicants, reserves the right not to accept any Qualified Bid or to otherwise terminate the Sale Process, in which case the Stalking Horse Bid will be the Successful Bid and the Applicants will proceed to seek is Approval and Vesting Order Motion. The Monitor, with the consent of the Applicants, reserves the right to deal with one of the Qualified Bidders to the exclusion or others, to accept a Qualified Bid for different parts of the business and assets of the Applicants, or to accept multiple Qualified Bids and enter into definitive	Yes The President and Chief Executive Officer of the debtors swore an affidavit in support of the SISP.

No.	Proceeding	Ultimate Decision-Making Authority Re SISP	Supported by Debtors?
		agreements in respect of such all such bids". (para. 25)	
9.	TBS Acquireco Inc. (SISP)	Secured Lenders "If a Nominated Bid is determined to be a Successful Bid in accordance with the SISP Procedures, then the SISP Committee, with the assistance of the Monitor shall proceed to negotiate and settle the terms of a definitive agreement in respect of the Successful Bid, which shall be subject to the approval of the Secured Lenders, and which shall be conditional upon Court approval and also conditional on the Successful Bid closing not later than 21 days after the Bid Deadline, or such longer period as shall be agreed to by the Monitor, in consultation with the SISP Committee and the Secured Lenders" (p. 5)	Yes The Chief Financial Officer of the debtors swore an affidavit in support of the SISP.
10.	Harbour Grace Ocean Enterprises Ltd. (SISP)	Monitor "After reviewing and evaluating the Qualified Bids, the Monitor, in consultation with the Company, may identify the highest or otherwise best bid(s) (the 'Successful Bid(s)') for any Assets or the Business of the company, in whole or in part".	Yes The General Manager and Director of the debtors swore an affidavit in support of the SISP.
11.	Teal Jones Holdings Ltd. (SISP)	Debtors "The monitor and the company, may identify the most favourable of the qualified bids received during phrase II as the Successful Bid or Bids. The Company shall	Yes The Vice President and Chief Financial Officer of the debtors swore an affidavit in support of the SISP.

No.	Proceeding	Ultimate Decision-Making Authority Re SISP	Supported by Debtors?
		then proceed to negotiate and settle the terms and conditions of a definitive agreement”.	
12.	Blue Lobster Capital Limited (SISP)	Monitor “Any and all offers submitted in the SISP shall be submitted to the Monitor and reviewed exclusively by it, in consultation with RBC. The Monitor may share and discuss the offers received in the SISP with the Companies and Management if they do not participate in the SISP as Potential Bidders”. (para. 9)	Yes The President of the debtors filed an affidavit in support of the SISP.
13.	2675970 Ontario Inc. (SISP)	Monitor “If any Binding Offers are received (other than the Stalking Horse Agreement) the Monitor will, in consultation with the Companies: (c) select the best bid(s) (the “Successful Bid(s)”) within two (2) business days of the Phase 2 Bid Deadline and following such selection will promptly notify the Binding Bidder making such Successful Bid that it has been selected as a successful bidder (the “Successful Bidder”).” (para. 23)	Yes The President of the Debtors filed an affidavit in support of the SISP.
14.	CannaPiece Group Inc. (SISP)	Monitor “Before the conclusion of the Auction, the Monitor, in consultation with the Applicants, will: (b) identify the highest or otherwise best bid received at the Auction (the ‘Successful Bid’ and the Qualified Party making such bid, the ‘Successful Party’).” (para 26).	Yes The President and Chief Executive Officer of the debtors swore an affidavit in support of the SISP.

No.	Proceeding	Ultimate Decision-Making Authority Re SISP	Supported by Debtors?
15.	Humble & Fume Inc. (SISP)	Monitor “Before the conclusion of the Auction, the Monitor, in consultation with the Applicants, will: b. identify the highest or otherwise best bid received at the Auction (the ‘Successful Bid’) and the Qualified Party making such bid, the ‘Successful Party’”. (para 30).	Yes The Chief Executive Officer of the debtors swore an affidavit in support of the SISP.
16.	CanadaBis (SISP)	Debtors “Following such evaluation, if one or more Qualified Phase II Bids are received, the Monitor, in consultation with the Senior Secured Lender and with the consent of the Companies, may: (i) select one or more Qualified Phase II Bids as the “Successful Bid”, and the party or parties making such Successful Bid(s) will be the “Successful Bidder”; or (ii) proceed to an auction (the “Auction”) in accordance with the procedures set out in the attached Schedule “C” (the “Auction Procedures”) to identify the Successful Bid.” (p. 13)	Yes The President and Chief Executive Officer of the debtors swore an affidavit in support of the SISP.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: **Walter Energy Canada Holdings, Inc. (Re),
2016 BCSC 107**

**See ¶9,
19-21, 25-31**

Date: **20160126**
Docket: S1510120
Registry: Vancouver

**In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36 as Amended**

And

**In the Matter of the *Business Corporations Act*,
S.B.C. 2002, c. 57, as Amended**

And

**In the Matter of a Plan of Compromise or Arrangement
of Walter Energy Canada Holdings, Inc. and the Other
Petitioners Listed on Schedule "A"**

Before: **The Honourable Madam Justice Fitzpatrick**

Reasons for Judgment

Counsel for the Petitioners:

Marc Wasserman
Mary I.A. Buttery
Tijana Gavric
Joshua Hurwitz

Counsel for United Mine Workers of America
1974 Pension Plan and Trust:

John Sandrelli
Tevia Jeffries

Counsel for Steering Committee of First Lien
Creditors of Walter Energy, Inc.:

Matthew Nied

Counsel for Her Majesty the Queen in Right
of the Province of British Columbia:

Aaron Welch

Counsel for Morgan Stanley Senior Funding,
Inc.:

Kathryn Esaw

Canada Group. A sales process completed in the U.S. proceeding is anticipated to result in a transfer of the U.S. assets to a stalking horse bidder sometime early this year. This is significant because the U.S. companies have historically supported the Canadian operations with funding and provided essential management services. This is a relevant factor in terms of the proposed relief, as I will discuss below.

[6] The Walter Canada Group faces various significant contingent liabilities. The various entities are liable under a 2011 credit agreement of approximately \$22.6 million in undrawn letters of credit for post-mining reclamation obligations. Estimated reclamation costs for all three mines exceed this amount. Further obligations potentially arise with respect to the now laid-off employees of the Wolverine mine, who are represented by the United Steelworkers, Local 1-424 (the "Union"). If these employees are not recalled before April 2016, the Wolverine partnership faces an estimated claim of \$11.3 million. As I will discuss below, an even more significant contingent liability has also recently been advanced.

[7] This anticipated "parting of the ways" as between the U.S. and Canadian entities in turn prompted the filing of this proceeding, which is intended to provide the petitioners with time to develop a restructuring plan. The principal goal of that plan, as I will describe below, is to complete a going concern sale of the Canadian operations as soon as possible. Fortunately, as of early December 2015, the Walter Canada Group has slightly in excess of US\$40.5 million in cash resources to fund the restructuring efforts. However, ongoing operating costs remain high and are now compounded by the restructuring costs.

[8] As was appropriate, the petitioners did not seek extensive orders on December 7, 2015, given the lack of service on certain major stakeholders. A stay was granted on that date, together with other ancillary relief. KPMG Inc. was appointed as the monitor (the "Monitor").

[9] The petitioners now seek relief that will set them on a path to a potential restructuring; essentially, an equity and/or debt restructuring or alternatively, a sale and liquidation of their assets. That relief includes approving a sale and solicitation

process and the appointment of further professionals to manage that process and complete other necessary management functions. They also seek a key employee retention plan. Finally, the petitioners seek an extension of the stay to early April 2016.

[10] For obvious reasons, the financial and environmental issues associated with the coal mines loom large in this matter. For that reason, the Walter Canada Group has engaged in discussions with the provincial regulators, being the B.C. Ministry of Energy and Mines and the B.C. Ministry of the Environment, concerning the environmental issues and the proposed restructuring plan. No issues arise from the regulators' perspective at this time in terms of the relief on this application. Other stakeholders have responded to the application and contributed to the final terms of the relief sought.

[11] The stakeholders appearing on this application are largely supportive of the relief sought, save for two.

[12] Firstly, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan") opposes certain aspects of the relief sought as to who should be appointed to conduct the sales process.

[13] The status of the 1974 Pension Plan arises from somewhat unusual circumstances. One of the U.S. entities, Jim Walter Resources, Inc. ("JWR") is a party to a collective bargaining agreement with the 1974 Pension Plan (the "CBA"). In late December 2015, the U.S. bankruptcy court issued a decision that allowed JWR to reject the CBA. The court also ordered that the sale of the U.S. assets would be free and clear of any liabilities under the CBA. As a result, the 1974 Pension Plan has filed a proof of claim in the U.S. proceedings advancing a contingent claim against JWR with respect to a potential "withdrawal liability" under U.S. law of approximately US\$900 million. The U.S. law in question is the *Employee Retirement Income Security Act of 1974*, 29 USC § 101, as amended, which is commonly referred to as "ERISA".

[14] The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

[15] It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to assess the 1974 Pension Plan's contingent claim. No claims process has even been contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

[16] Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

[17] At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

The Sale and Investment Solicitation Process ("SISP")

[18] The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

[19] It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

[24] No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

Appointment of Financial Advisor and CRO

[25] The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

[26] The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

[27] In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

[28] A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

[29] The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

[30] Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

[31] In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

[32] The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

[33] In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *Mobility Group (Re)*, 2013 ONSC 6167 at para. 17). No question arises as to his extensive qualifications to fulfil this role.

[34] The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from the 1974 Pension Plan as to the appropriateness of his

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

See ¶1, 7-8, 14-16

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).

III. Increase in DIP Lending Facility

[3] At present the approved DIP Lending Facility stands at \$5,350,000. The DIP Lender has received commitments to increase that facility by an additional \$10,000. The DIP Lender, through the applicants, renews its request to increase the facility by further \$640,000 to account for fees and expenses of counsel to the DIP Lender payable pursuant to the terms of the DIP Facility. Lender's Counsel has agreed to contribute the fees and expenses to the funding of the DIP Lender instead of requiring payment would could impact the applicants' cash flows. In total, the applicants seek an increase in the DIP Lending Facility to \$6 million.

[4] In its Fifth Report dated May 11, 2012, the Monitor, PricewaterhouseCoopers Inc., reported that it had reviewed and approved the fees submitted by Lender's Counsel. The Monitor concluded that the work performed by Lender's Counsel was "necessary to raise the required DIP financing in order to implement the expedited SISP". The Monitor stated:

Given the challenges of raising a DIP Facility for a pre-commercialization technology company and the need of the Company to continually increase its DIP Facility in the weeks since March 23, 2012, the amount of time and effort expended by counsel to the DIP Lenders does not seem unreasonable in the circumstances.

The Monitor will review the relevant invoices of the DIP Lender's counsel detailing the fees and expenses of the DIP Lender incurred after May 7, 2012 (which are included in the estimate of fees discussed above) prior to any such fees and expenses being added to the DIP Facility.

[5] Pursuant to the Initial Order the DIP Lender's Charge ranked in priority to all other interests "with the exception of valid, enforceable and perfected Encumbrances existing as at the date of filing". The proposed increase in the amount of the DIP Lending Facility will not affect those priorities. The two general secured creditors, RBC and Castcan, did not oppose the increase in the DIP Lending Facility.

[6] Taking into account the factors set out in CCAA s. 11.2(4), I approved an increase in the DIP Lending Facility to \$6 million.

IV. Sales and Investor Solicitation Process

A. Overview of the proposed SISP

[7] The applicants seek approval of a Sales and Investor Solicitation Process which has four main features:

- (i) A short time frame – the deadline for bids will be May 24, 2012, a few days before the current Stay Period expiry date of May 28, 2012;
- (ii) Primary control of the SISP by the applicants, not the Monitor;

(iii) The submission of a stalking horse credit bid by the DIP Lender; and,

(iv) The solicitation and consideration by the applicants of any Qualified Bids in consultation with the Monitor.

[8] According to Mr. Loreto Grimaldi, the Chief Legal Officer of PCAS, the SISP has been developed by the applicants in conjunction with the Monitor. The SISP is intended to maximize stakeholder value through either a going-concern sale of the applicants' business or the attraction of new investment, with a plan of compromise or arrangement.

B. The solicitation and bidding process

[9] The SISP will commence with the distribution of a "teaser" letter. Interested parties may sign a confidentiality agreement to secure access to an online data room and updated business plan. The proposed SISP stipulates the technical requirements for any bid to be considered a Qualified Bid. The terms of the SISP permit the applicants to waive compliance with the requirements for a Qualified Bid, but only with the consent of the Monitor.

[10] Mr. Grimaldi deposed that given the efforts of the applicants over the past number of months to generate interest in the company by contacting a large number of potential investors, the applicants believe that the short SISP time frame – basically 10 days – is justified and practicable. The reality of the situation is that given the applicants' past marketing efforts, a number of potentially interested bidders will be much further along the due diligence and bid preparation curve than those who enter the process at this stage. Nonetheless, the liquidity problems facing the applicants necessitate this abbreviated SISP process.

C. The DIP Lender's stalking horse credit bid

[11] The SISP terms which I approved described the stalking horse credit bid which the DIP Lender will submit as follows:

10. The Applicants have agreed with the DIP Lender that the DIP Lender shall submit a stalking horse bid for the purchase of substantially all of the property, assets and undertaking of the Applicants on an "as is, where is" basis (the "Stalking Horse Bid"). The Stalking Horse Bid will allow the DIP Lender to credit bid its debt in exchange for the purchase of the Applicants' Property. The Stalking Horse Bid will provide for a purchase price equal to the amount of outstanding secured liabilities owing by the Applicants to the DIP Lender (being the principal amount of the DIP Loan advances and all interest and all reasonable fees and expenses to the closing) plus the assumption of all senior secured indebtedness of the Applicants (the "Secured Indebtedness"), estimated to be approximately CDN \$7.9 million. The purchase price contained in the Stalking Horse Bid will be satisfied by the release of the liabilities owed to the DIP Lender by the Applicants plus the value of the assumed senior secured indebtedness. The Stalking Horse Bid shall not be permitted to be in an amount in excess of the Secured Indebtedness.

[12] In the event that no Qualified Bid is received from another person, under the SISP the Stalking Horse Bid will be treated as the Successful Bid for which the applicants shall seek court approval.

[13] Counsel for the applicants and the DIP Lender explained that this Stalking Horse Bid is designed to operate primarily to give an indicative price to other bidders for the company's business and assets. The terms and conditions of the actual Stalking Horse Bid will be available in the applicants' online due diligence room.

D. The treatment of Qualified Bids

[14] In the event that the SISP results in the submission of one of more Qualified Bids, the following rules will apply:

15. If one or more Qualified Bids other than the Stalking Horse Bid are received in accordance with the Bidding Procedures, the Applicants, in consultation with the Monitor, may choose to:

- (a) accept one Qualified Bid (the "Successful Bid" and the Qualified Bidder making the Successful Bid being the "Successful Bidder ") and take such steps as are necessary to finalize and complete an agreement for the Successful Bid with the selected bidder; or
- (b) continue negotiations with a selected number of Qualified Bidders (collectively, "Selected Bidders ") with a view to finalizing an agreement with one of the Selected Bidders.

16. The Applicants shall be under no obligation to accept the highest or best offer and the selection of the Selected Bids and the Successful Bid shall be entirely in the discretion of the Applicants, after consultation with the Monitor.

[15] As can be seen, the contemplated SISP contains significant discretion and flexibility, as well as the risk that a successful transaction may not be negotiated prior to the expiry of the Stay Period. However, I accept the submission of counsel for the DIP Lender that the applicants anticipate a diversity of forms of bids and therefore require sufficient flexibility in the process in order to be able to compare "apples to oranges to fish".

[16] The SISP provides that the applicants will apply to the court for approval of the Successful Bid.

[3]

COURT FILE NO.: 03-CL-5145

DATE: 20040610

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

See ¶1, 11 17

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.

[4] On December 11, 2003 this Court authorized IRM to pursue a dual-track restructuring process: one track is a stand-alone restructuring plan; the second track is the pursuit of a sales process.

[5] The Monitor, the CRO and the unsecured creditors of IRM have a concern that QIT seeks a way whereby it will be paid the monies owing to it by IRM outside the parameter of the CCAA proceeding. The record gives some force to this concern.

[6] A Court Order dated March 22, 2004 authorized a limited number of prospective purchasers to submit offers for the assets of one or more of the Applicants. Some four bidders have now submitted proposals in this regard. Understandably, it is a condition of the proposals that the bidders be able to satisfy themselves as to the nature and status of the historical and existing relationship between QIT and IRM and the nature of any relationship for the future between a buyer of IRM's business and QIT.

[7] The concern that has been raised by the Monitor, CRO and a number of IRM's creditors is that QIT may seek to enter into a relationship with a bidder whereby QIT could achieve some recovery of IRM's pre-filing debt of \$62 million at the expense of other unsecured creditors.

[8] Any purchaser of IRM requires a supply contract with QIT as there are no apparent competitors for its product sold to IRM. The concern is that QIT could insist upon a supply arrangement with the bidder at an unreasonably high price with the bidder offering an unreasonably low price for the assets of IRM. The creditors, Monitor, and the Applicants are concerned that QIT might enter into a supply arrangement with a bidder at the expense of IRM by virtue of the price for IRM's assets being lower than would otherwise be the case in a normal market transaction.

[9] Meetings have been set up to take place between the bidders, the Applicants through the CRO, the Monitor and QIT with a view to determining whether any one or more bidder can achieve a supply agreement with QIT within a context of a satisfactory unconditional bid by that bidder for the assets of one or more of the Applicants.

The Issue

[10] Several issues raised at the outset of the motion were settled by agreement as discussions progressed. It is not necessary to discuss these settled issues. The settled position provides that the Monitor can observe the negotiations to take place between QIT and each bidder. The settled position also provides that disclosure can be made to bidders of the existing supply agreement between IRM and QIT.

[11] A single issue remained for determination by the Court at the conclusion of the hearing, being whether or not the CRO was to be part of the sales process. QIT took the position that the CRO should not be part of the process. The Applicants, the Monitor and the other major

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.

Ernst & Young Inc. in its Capacity as Monitor of all of the Following: Essar Steel Algoma Inc. et al. v. Essar Global Fund Limited et al.

[Indexed as: Ernst & Young Inc. v. Essar Global Fund Ltd.]

Ontario Reports

Court of Appeal for Ontario,

Blair, **Pepall** and van Rensburg JJ.A.

December 21, 2017

**See ¶1 to 5, 47
to 49, 120 to 127**

139 O.R. (3d) 1 | 2017 ONCA 1014

Case Summary

Corporations — Oppression — Algoma's monitor in Companies' Creditors Arrangement Act ("CCAA") restructuring proceedings bringing oppression action under s. 241 of Canada Business Corporations Act ("CBCA") against Algoma's parent Essar — Monitor alleging that Essar had exercised de facto control over Algoma and had consistently preferred its own interests over those of Algoma and its stakeholders — Monitor having standing as complainant under oppression provisions of CBCA — Claim properly pleaded as oppression action rather than derivative action under s. 239 of CBCA — Algoma entirely dependent on access to port in order to function economically — Trial judge entitled to find that transaction directed by Essar which conveyed port to Essar-controlled Portco and resulted in Algoma losing control over port was oppressive to Algoma's stakeholders — Business judgment rule not providing defence to Essar — Trial judge not erring in granting remedy which removed Portco's control rights — Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 239, 241 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Algoma was a steel manufacturer in Sault Ste. Marie, and its port facilities were integral to its operations. At a time when Algoma was facing a liquidity crisis, its board of directors placed responsibility for Algoma's recapitalization efforts in the hands of its parent Essar. Essar directed a transaction which conveyed the port facilities to Portco, which Essar indirectly owned. The port transaction resulted in Algoma losing control over the port facilities. Algoma was involved in restructuring proceedings under the *Companies' Creditors Arrangement Act*. As a result of the port transaction, Portco -- and therefore Essar -- effectively had a veto over any party acquiring Algoma in the CCAA proceedings. With the authorization of the supervising CCAA judge, Algoma's CCAA monitor brought an oppression action under s. 241 of the *Canada Business Corporations Act* against Essar and certain Essar-controlled companies. The trial judge found that the monitor had standing to bring the action. He found that the reasonable expectations of Algoma's trade creditors, employees, pensioners and retirees were that Algoma would not deal with a critical asset like the port in such a way as to lose long-term control over such a strategic asset to a related party on terms that [page2 p]ermitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the related party. He concluded that Essar's actions were oppressive. He granted a remedy

Inc., Essar Ports Canada Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., and Essar Steel Limited.

Clifton P. Prophet, Nicholas Kluge and Delna Contractor, for respondent Ernst & Young Inc. in its capacity as monitor of Essar Steel Algoma Inc. et al.

Eliot N. Kolers and Patrick Corney, for respondent Essar Steel Algoma Inc.

Peter H. Griffin, Monique Jilesen and Kim Nusbaum, for appellants GIP Primus, L.P. and Brightwood Loan Services LLC.

The judgment of the court was delivered by

[1] **PEPALL J.A.:** — This appeal concerns a successful oppression action brought pursuant to s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA"). It involves the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") restructuring proceedings of the respondent Essar [page 5 S]teel Algoma Inc. ("Algoma"),¹ one of Canada's largest integrated steel mills, and the respondent Ernst & Young Inc., the court-appointed monitor.

[2] The supervising CCAA judge authorized the monitor to commence an action for oppression against Algoma's parent, the appellant Essar Global Fund Limited ("Essar Global"), and the remaining appellants, other companies owned directly or indirectly by Essar Global (the "Essar Group"). The action arose in the context of a recapitalization of Algoma and a transaction between Algoma and Port of Algoma Inc. ("Portco"), two companies indirectly owned by Essar Global, in which Algoma's port facilities in Sault Ste. Marie (the "port") were conveyed to Portco.

[3] Portco is a single-purpose company established by Essar Global. As Portco's name suggests, it currently controls the Sault Ste. Marie port. Portco obtained control in November 2014 in a transaction between Algoma, Portco and Essar Global (the "port transaction"). The port transaction effectively provided Portco with the ability to veto any change in control of Algoma's business. The intervenors below and appellants on appeal, GIP Primus, L.P. and Brightwood Loan Services LLC (collectively, "GIP"), are arm's-length lenders who loaned Portco US\$150 million to effect the transaction.

[4] The trial judge found the port transaction and other conduct of Essar Global to be oppressive and granted a remedy that was designed to address that oppression. Essar Global and some of the members of the Essar Group, together with GIP, appeal from that judgment. The appellants advance a number of arguments, many of them factual, in support of their appeal. The appellants' two principal legal submissions are, first, that the monitor lacked standing to bring an oppression claim; and second, that the alleged harm was to Algoma and that therefore the appropriate redress was a derivative action.

[5] For the reasons that follow, I would dismiss the appeal.

[44] On November 9, 2015, Newbould J. granted an order placing Algoma, Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA (the "CCAA applicants") under CCAA protection. As mentioned, he appointed Ernst & Young Inc. as the monitor. The order contained various paragraphs addressing the rights and obligations of the monitor, including a direction to perform such duties as were required by the court. On November 20, 2015, Morawetz J. granted an amended and restated initial order that, among other [page15] things, directed the monitor to review and report to the court on any related party transactions (expressly including the port transaction).

[45] During the CCAA proceedings, on February 10, 2016, a sales and investment solicitation process ("SISP") for Algoma's business and property was approved by the court. Essar North America, a subsidiary of Essar Global, submitted a bid but was disqualified in April 2016 under the terms of the SISP because it failed to provide sufficient evidence of financial ability to purchase. In May and July of 2016, Essar Global persisted in its efforts to be the purchaser of the CCAA applicants. On May 10, 2016, counsel to Portco, who was also counsel to Essar Global, wrote to counsel for Algoma to highlight matters of particular concern in connection with the CCAA process. The letter stated that any prospective bidder was to be told of the consent or veto right:

Portco and [Algoma] are party to a Cargo Handling Agreement pursuant to which [Algoma] has committed to long-term use of the port. Portco, has, of course, a keen interest in any successor to [Algoma] as counterparty to that agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by [Algoma] of the agreement or a change of control of [Algoma].

Again please confirm that this has been made clear to prospective bidders.

[46] On June 20, 2016, the monitor filed its thirteenth report, which described the Portco transaction and indicated that there may be grounds for further review of that transaction. The monitor noted that the renegotiated equity commitment resulted in Essar Global contributing the sum of US\$150 million in equity rather than US\$250 to US\$300 million, and that the Portco transaction transferred control of one of Algoma's most critical assets, the Port, to Essar Global. The Monitor stated that it remained "particularly concerned about the effect on the completion of a restructuring transaction of the restrictions on assignment in the Portco Transaction documents".

[47] On September 26, 2016, Deutsche Bank AG, who led the debtor-in-possession ("DIP") lenders of Algoma and also represented the interests of potential bidders in the CCAA process, applied for an order empowering the monitor to commence certain proceedings and make certain investigations.³ On September 26, 2016, Newbould J. granted an order authorizing the [page16] monitor to commence and continue proceedings under s. 241 of the CBCA in relation to related party transactions, including but not limited to the port transaction.

[48] The action proceeded on an accelerated timetable due to the progress of the CCAA restructuring.⁴ On October 20, 2016, the monitor commenced proceedings claiming oppression pursuant to s. 241 of the CBCA against Essar Global and others in the Essar Group including

Portco. It pleaded that by reason of its role as a court officer directed to commence the oppression proceedings and to oversee the interests of all stakeholders of Algoma, it was a complainant within the meaning of ss. 238 and 241 of the CBCA.

[49] It alleged that since June 2007, the Essar Group had exercised *de facto* control over Algoma and had engaged in a course of conduct that consistently preferred the interests of the Essar Group and, in particular, Essar Global, to those of Algoma and its stakeholders. This included the transfer to the Essar Group of long-term control over, and a valuable equity interest in, Algoma's port facilities, an irreplaceable and core strategic asset of Algoma. The value of control over the port to Algoma and its stakeholders was immeasurable, since Algoma's business could not function without access to the port.

[50] The monitor pointed out that the Essar Group obtained its control and equity interest in the port through a cash contribution of less than US\$4.7 million. It pleaded that the US\$150 million raised as part of the port transaction came from third party lenders, namely, GIP, and was money raised against the security and value of the port facilities, an asset of Algoma, as well as a promissory note that remained unpaid, and a guarantee from Essar Global. The monitor also stressed that the control obtained by the Essar Group was not only over the port facilities, but extended to any sale of the Algoma business such that Essar Global had an indirect veto on transactions involving Algoma's enterprise. Essar Global also obtained a right to substantial payments under the cargo handling agreement.

[51] The oppression occasioned was exacerbated by the fact that the borrowed moneys raised through the transaction were a substitution for moneys Essar Global had promised to contribute as equity in Algoma.

[52] The monitor also argued that s. 15.2 of the cargo handling agreement itself constituted oppression, because it was for the [page 17] long-term benefit of Essar Global and not in the interests of Algoma's non-shareholder stakeholders. The monitor took the position that the provision gave Portco and Essar Global a veto over any party acquiring Algoma in the CCAA process, thus negatively affecting the sales process. The monitor also argued that the change of control provision was not necessary for the protection of GIP because it had its own change of control rights under its credit agreement.

[53] In addition, the monitor pleaded that the oppression and prejudice to creditors was continuing as Essar Global and other related companies had insisted that bidders for Algoma's business under the SISP, which was approved by the court on February 11, 2016, be advised of Portco's consent rights under the change of control clause in the cargo handling agreement.

[54] Essar Global and the remaining defendants filed their defence rejecting the monitor's allegations, describing the action as "an improper and ill-conceived leverage tactic". They asserted that the litigation was an attempt to attack the port transaction for the benefit of other bidders under the sales process, including the DIP lenders. They pleaded that the monitor had no standing, the claim was improperly pleaded, an oppression remedy seeking to unwind or claim damages in respect of the port transaction was unavailable at law, and in any event there was no oppression, prejudice or unfairness.

[55] Portco's lenders, GIP, were granted intervenor status as parties on December 22, 2016. They noted that they were *bona fide*, arm's-length and independent commercial parties and no

[119] Generally speaking, the monitor plays a neutral role in a CCAA proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.

[120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case.

[121] Here, in para. 37(c) of the amended and restated initial CCAA order dated November 20, 2015, the monitor was directed to investigate whether there were potential related party transactions that should be reviewed. It then reported back to the supervising CCAA judge that there were, and on that basis the CCAA judge authorized the monitor to commence proceedings under s. 241 of the CBCA. The monitor proceeded with the oppression action in the interests of the restructuring consistent [page 32] with the objectives of the CCAA. The trial judge ultimately found that aspects of the port transaction, such as the change of control clause in the cargo handling agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The monitor took the action as an "adjunct to its role in facilitating a restructuring".

[122] Moreover, it cannot be said that the monitor was a fiduciary. Indeed, the appellants did not say this in their pleadings, opening submissions, or closing submissions before the trial judge. The remedy granted by the trial judge was directed at the oppression and removed an insurmountable barrier to a successful restructuring. In addition, it was brought in the face of Essar Global demonstrating a continuous desire to acquire Algoma and, as evident from the letter sent by its counsel, a desire to discourage others from doing so.

[123] It will be a rare occasion that a monitor will be authorized to be a complainant. Factors a CCAA supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant include whether

- (i) there is a *prima facie* case that merits an oppression action or application;
- (ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and
- (iii) any other stakeholder is better placed to be a complainant.

These factors are not exhaustive, and none of them is necessarily dispositive; they are simply factors to consider.

[124] In the circumstances that presented themselves here, the CCAA supervising judge was justified in providing authorization. A *prima facie* case had been established; the monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely, the pensioners, retirees, employees and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

[125] Quite apart from meeting the aforementioned criteria, I would also observe that as the presiding judge in the CCAA proceeding and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well positioned to [page33] supervise all parties including the monitor to ensure that no unfairness or unwarranted impartiality occurred.

[126] Lastly, I do accept the appellants' position that the *Nortel* proceedings relied upon by the trial judge in support of his conclusion were quite different from this case. In *Nortel*, the monitor's powers were expanded by an order authorizing the monitor to exercise any powers properly exercisable by a board of directors of Nortel or its subsidiaries. But this expansion was a response to the resignations of the boards of Nortel and its subsidiaries, not, as here, a response to the results of investigations the monitor had been directed to pursue. That said, the case does illustrate the need to avoid rigid definition of a monitor's role and responsibilities.

[127] In conclusion, I would not give effect to the appellants' submission that the trial judge erred in granting the monitor standing to pursue an action for oppression.

(2) *Derivative or oppression action*

[128] In addition to attacking the standing of the monitor to bring the action, the appellants also submit that the monitor was precluded from bringing the action in the form of an oppression remedy proceeding pursuant to s. 241 of the *CBCA*. In their view, the action could only have been brought as a derivative action pursuant to s. 239 of that Act. They say the claim asserted is a corporate claim belonging to Algoma, if anyone, and the stakeholders, on whose behalf the monitor asserts the claim, were not harmed directly or personally but only derivatively through harm done to Algoma. I disagree.

[129] In support of their submission, the appellants rely heavily on the decision of this court in *Wildeboer*. This case is not *Wildeboer*, however.

[130] In *Wildeboer*, "insiders" who controlled the corporation had misappropriated many millions of dollars from the corporation. The *sole claim* advanced by the complainant minority shareholder by way of oppression remedy was for the return of the misappropriated funds *to the corporation*. There was *no claim* asserted by the complainant, of any kind, *for a personal remedy qua shareholder*. As the court noted, at para. 45, "[t]he substantive remedy claimed is the disgorgement of all the ill-gotten gains back to Martinrea [the corporation in question]".

[131] The *Wildeboer* decision must be read in that context. It does not stand for the proposition that in all cases where there has been a wrong done to the corporation, the action must be brought as a derivative action. Consistent with a number of other authorities, this court expressly reaffirmed [page34] the principles that the derivative action and the oppression remedy are not mutually exclusive and that there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This is clear from para. 26:

I accept that the derivative action and the oppression remedy are not mutually exclusive. Cases like *Malata* [*Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36] and *Jabalee* [*Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 (C.A.)] make it clear that there are

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

**See ¶1, 39, 48, 52, 79,
133-135**

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.

Memorandum of Judgment

The Court:

I. OVERVIEW

[1] These are four related appeals from decisions that continued and confirmed proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (CCAA). They stem from two real estate development projects in Texas. The appellants fall into two groups. One group consists of two Texas corporations that acquired and developed the project lands and were involved in raising investment for their development (the Texas LLCs¹). The other group consists of Canadian entities that formed part of a complex structure set up to secure investment from Canadian investors (the Canadian WFC Entities²).

[2] There are two groups of respondents. One group consists of the Canadian and offshore investors in the real estate projects. The other respondent is the court-appointed monitor, Alvarez & Marsal Canada Inc (the Monitor).

[3] In November 2024, five Canadian investors obtained an Initial Order under the CCAA on what was effectively a without notice basis. That order applied to the appellants and other entities that are not parties to these appeals.

[4] The CCAA proceedings commenced by the Initial Order are unusual. They were started by “equity investors” rather than by a debtor company or a creditor. One purpose of the Initial Order was to stop an imminent land sale and enable the gathering of information. The Initial Order gave the Monitor wide powers of management of the relevant entities including the appellants. The anticipated outcome of the CCAA proceedings is the liquidation of the entities’ assets and the distribution of the proceeds to investors and creditors through a claims process, not the survival of the business in a restructured form.

[5] The Initial Order was subject to a “comeback hearing” on notice to determine whether it should have been granted. That hearing took place in two stages before two different judges.

[6] At the first stage, in November 2024, the chambers judge resolved some issues but did not finally determine whether the Initial Order should have been granted. That decision is referred to as the *ARIO Decision* and is one of the decisions under appeal. The second stage of the comeback

¹ Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC.

² Hills of Windridge A2A GP Inc, Fossil Creek A2A GP Inc, Fossil Creek A2A Limited Partnership, Hills of Windridge A2A LP, Fossil Creek A2A Trust and the Hills of Windridge A2A Trust.

described them as “equity investors”. That is significant because one issue on appeal is whether the “equity investors” in this case, or in general, should be able to initiate CCAA proceedings.

[34] Furthermore, the trustees, facilitators, and administrators have not complied with their duties to prepare annual financial statements and maintain accounts, and the offshore investors were never informed of the 2024 sale of the remaining Fossil Creek lands or the expropriation sale of part of the Windridge lands: *Comeback Decision* at paras 37–40.

C. Procedural History

Initial Order

[35] On November 8, 2024, five individual Canadian investors in the Fossil Creek, Windridge, and Angus Manor projects filed an originating application for an initial order under the CCAA. They represented a very small proportion of the investors, dollarwise and numerically.

[36] The application for the Initial Order was effectively *ex parte* because the respondents were given fewer than two days’ notice.

[37] The application was made on an urgent basis because the Canadian investors had found out from a Facebook post that a sale of Angus Manor land in Ontario was imminent. They had not received notice of the sale. They were concerned by a lack of communication for several years, the fact that some companies involved in the investment structure had been struck from the corporate registry, and the lack of any financial returns.

[38] The Initial Order was granted by Feasby J on November 14, 2024. It identified various entities as Debtor Companies, which include the Texas LLCs and some of the Canadian WFC Entities. It also identified various entities as Affiliate Entities integrally related to the Debtor Companies’ businesses, including the other Canadian WFC Entities.⁴

[39] The Initial Order appointed the Monitor and gave it enhanced powers of management and control of the Debtor Companies and the Affiliate Entities, removing those powers from directors and officers. It granted a stay of proceedings against those entities and appointed separate representative counsel for all Canadian investors and all offshore investors. The Initial Order also scheduled a comeback hearing for November 21, 2024. That was a hearing *de novo* in which the Canadian applicants bore the burden of establishing that the Initial Order should be granted and that CCAA proceedings were appropriate.

⁴The Debtor Companies include the Texas LLCs and some Canadian WFC Entities: Hills of Windridge A2A GP Inc and Fossil Creek A2A GP Inc. The Affiliated Entities include the rest of the WFC Entities (i.e., Hills of Windridge A2A LP, Hills of Windridge A2A Trust, Fossil Creek A2A Limited Partnership and Fossil Creek A2A Trust).

[46] The third issue was the threshold condition of insolvency. Under s 3(1), the CCAA applies “in respect of a debtor company or affiliated debtor companies” if claims against them exceed \$5 million. The definition of “debtor company” specifies that the company must be insolvent. The chambers judge found that, considered collectively, the entities bound by the Initial Order were insolvent. It was appropriate to consider insolvency collectively because their businesses were “inextricably intertwined” with respect to the three real estate projects.

B. The Comeback Decision

[47] The *Comeback Decision* confirmed the Initial Order and dismissed the application to set it aside. It addressed two main issues: (1) whether the CCAA proceedings were appropriate; and (2) whether the Texas LLCs could be subject to them. Before addressing those issues, however, the chambers judge made some factual findings.

[48] First, he found the entities bound by the Initial Order were unable or unwilling “to conduct a realization and distribution process that is fair to all investors”: *Comeback Decision* at para 43. That was based on the failure of trustees, facilitators, and administrators under the Declarations of Trust and Deeds of Covenant to comply with their duties and evidence that investors had been paid selectively and disproportionately.

[49] Second, the chambers judge found the investors had not bargained “only” for the rights set out in the Declarations of Trust and Deeds of Covenant, such that it would be unfair for them to access statutory rights through the CCAA proceedings: *Comeback Decision* at paras 46–47. The real issue was whether the investors satisfied the requirements under the CCAA, not whether their contractual arrangement barred access to CCAA proceedings.

[50] The chambers judge divided the appropriateness of the CCAA proceedings into the following sub-issues.

1. Whether the insolvency condition of the CCAA was satisfied.
2. Whether “equity investors” could commence CCAA proceedings and whether the proceedings in this case would further the objectives of the CCAA.
3. Whether the applicant Canadian investors represented the interests of all investors.

[51] With respect to the insolvency condition, the chambers judge noted new evidence which confirmed the *ARIO Decision* on this point: *Comeback Decision* at para 48–54.

[52] The chambers judge rejected the argument that the “equity investors” could not commence CCAA proceedings because they were not “creditors” in the traditional sense: *Comeback Decision* at paras 58–59. The real question was whether the applicants’ use of CCAA proceedings in this case is consistent with the purposes of the legislation. Two relevant purposes are preserving and maximizing the value of the debtor companies’ assets and ensuring the fair and equitable treatment

of investors' claims. As noted, the chambers judge found that the entities subject to the Initial Order had shown that they would do neither. The Monitor could achieve both purposes, the second by administering a fair claims process aided by the stay of proceedings.

[53] An impediment to achieving those purposes with respect to Fossil Creek and Windridge was that the Texas entities that own the remaining lands and the proceeds of sale were not subject to the CCAA proceedings. If the Monitor could not gain control over those assets, there would be no prospect of preserving their value or fairly meeting the claims of investors. The chambers judge concluded that was not a fatal problem. It was reasonable that the Monitor had not yet put forward a detailed plan to gain control of the remaining assets, but the chambers judge ordered the Monitor to provide a plan within 21 days.

[54] The chambers judge also considered whether the CCAA proceedings were appropriate given that a majority of Canadian and offshore investors were not aware of them. The concern was that the expense would be partly borne by those investors. The chambers judge found that if it had been possible to inform all investors, a strong majority would support the CCAA process. As such, the proceedings were fair to the investors as a whole.

[55] Having concluded that the CCAA proceedings were appropriate, the chambers judge found that the Texas LLCs were properly subject to them. The Texas LLCs were incorporated outside Canada, did not have any assets in Canada, and were not doing business in Canada. Nevertheless, they came within the definition of "company" in s 2(1) of the CCAA, interpreted flexibly. Making the Texas LLCs subject to the CCAA proceedings would serve the purposes of the proceedings, partly because the Monitor might use them to get control over the remaining lands and sale proceeds.

IV. ISSUES ON APPEAL

[56] The general issues in these appeals are as follows.

1. Whether the applicants, as "equity investors", had standing to commence proceedings under the CCAA.
2. Whether the CCAA proceedings were improper because:
 - a. they were inconsistent with the purposes of the CCAA;
 - b. they were bound to fail or there was no plan to achieve their purposes; or
 - c. they were not fair to other investors or the issuers of investment instruments.
3. Whether the decisions under appeal were procedurally unfair or misplaced the burden of proof.

[57] Issues specific to the Texas LLCs or the Canadian WFC Entities are as follows.

[76] In this case, the *Comeback Decision* found that the Initial Order and the CCAA proceedings would further at least two objectives of the CCAA: preserving the value of the debtor's assets and fair treatment of investors' claims. The appellants acknowledged these were proper purposes, subject to a qualification addressed below.

[77] The CCAA is an insolvency statute because it applies "in respect of" insolvent debtor companies and, as such, it shares the general remedial objectives of Canada's insolvency statutes articulated in *Callidus*: see paragraph 67 above. Historically, the distinctive objective of CCAA proceedings was to help an insolvent company remain in business by reaching a compromise with its creditors under judicial supervision, as opposed to liquidating its assets to satisfy creditor claims: *Callidus* at para 41. The preservation of the debtor company's business as a going concern typically involves a compromise of its debt and some kind of business restructuring.

[78] However, the survival of the debtor company's business is not an essential objective of the CCAA. The courts have recognized the legitimacy of "liquidating CCAs" in which the debtor company's assets are sold, and the proceeds are distributed to creditors and stakeholders: *Callidus* at para 42. The debtor company's business might survive the liquidation process (e.g., if it is sold as a going concern), but it might not (e.g., if the assets are sold piecemeal).

[79] The CCAA proceedings in this case have evolved into a kind of liquidating CCAA.⁸ The *Comeback Decision* identified its purposes as preserving the value of the remaining assets held by entities within the Fossil Creek and Windridge investment structure,⁹ realizing those assets, and ensuring the fair treatment of investors' claims by distributing the assets through a claims process administered by the Monitor: *Comeback Decision* at paras 64, 68. Those objectives required the Monitor to take control of the entities involved in the Fossil Creek and Windridge projects, largely because existing management was unwilling or unable to preserve the value of the assets and to treat investors fairly. Returning money to the investors would involve the Monitor selling the remaining lands: *Comeback Decision* at para 70.

[80] The appellants argue that the original purposes of the Initial Order were *not* preserving assets and fairly returning value to investors but rather appointing the Monitor to investigate the entities subject to the Initial Order and to gather information. Both decisions under appeal noted that, initially, the Monitor's primary task was investigation: *Comeback Decision* at para 69; *ARIO Decision*, AR, 88/29. The appellants argue that the CCAA cannot be used for the sole purpose of investigating debtor companies although other legal mechanisms may be available for doing so, such as an investigative receivership.

⁸ At the hearing of the originating application, counsel for the applicant investors did not know whether the proceedings would be used to liquidate the entities' businesses or restructure them: AR, 117.

⁹ Namely, the remaining proceeds of sale and the unsold lands.

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 "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.

***No Basis in the Evidence
to Support the
Extraordinary Relief Being
Sought***

G. Dispute over SISP decision-making authority

36. The Applicants have proposed that their Operating Committee should have decision-making authority over the SISP.

37. EDC believes that SISP decisions should be made by the CRO, an independent court officer, with the assistance of the Monitor, another independent court officer. I understand that Oaktree, Hartree and the ad hoc committee of holders of the 2026 Notes agree with this position. I set out EDC's reasons for that position in the following sub-sections.

a. Operating Committee is conflicted

38. EDC, as a significant and senior ranking economic stakeholder, has significant concerns that a SISP in which the Operating Committee composed of shareholder representatives retains decision making authority invites unresolvable conflicts and process concerns.

39. The Operating Committee representatives have been appointed directly by the equity holders of NIO and royalty holders and in many cases hold senior ranking positions with those equity holders and royalty holders. It is reasonably foreseeable that those Operating Committee members will face significant challenges acting in the best interests of the debtors and all of their stakeholders in view of their and their appointing shareholders' separate economic interests.

40. By its own admission, EMG has "an overriding financial interest" in the conduct of the Baffinland CCAA proceeding:¹

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

¹ Written Submissions of EMG dated June 9, 2026 at para 7.

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.

41. Further, Section 3.1 of the USA by which authority over Baffinland's governance has been delegated to the Operating Committee includes the following subparagraph:

- (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.

42. Members of the Operating Committee are not agnostic as to what outcome of a SISF they would prefer. EMG has repeatedly stated its opposition to the SISF process in materials filed in this proceeding to date in favour of its preferred approach, which would involve a single negotiated recapitalization or restructuring transaction instead of a sale. That approach would optimize EMG flexibility to negotiate a transaction that preserves its equity interest and limit access to a broader range of sale or restructuring alternatives that a SISF would provide:

- (a) In written submissions dated June 9, 2026, EMG stated that "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 result for all stakeholders". EMG went on to say that "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";

- (b) In the same submissions, EMG stated that it "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"; and
- (c) EMG concluded its submission by stating that "It is EMG's respectful position that a SISP should not be commenced until the Applicants have been given a reasonable opportunity to come to an agreement with their key stakeholders in order to develop a restructuring and/or recapitalization plan that will be in the best interest of all their stakeholders". Accordingly, EMG stated that it believed "this can be accomplished in a relatively short order and that the delay and expense of a SISP process will not be necessary".

43. The Royalties compound EDC's concerns about the Operating Committee's conflicts of interest. The Royalties were entered into in 2024 to non-arm's length parties controlled by Baffinland's shareholders. The fourth report of the Monitor states that creditors have expressed concern to the Monitor that the consideration paid for the royalties was less than fair value. EDC shares those concerns.

44. The value and validity of the Royalties will impact on the SISP and the value and condition of any bids received.

b. Unwillingness to acknowledge conflict

45. In Mr. Waheed's affidavit, he repeatedly refers to "alleged conflicts" that appear to focus on significant issues regarding royalty interests, without acknowledging the inherently conflicted position created by Baffinland divesting its governance authority to an Operating Committee composed solely of shareholder appointees. This in itself raises a concern about his and the Operating Committee's objectivity and ability to exercise fiduciary duties and make decisions in Baffinland's best interests.

46. I note that Section 2(f) of the Independent Member Mandate states that Section 3.1(c) of the USA shall not apply to "any Member" during the pendency of the CCAA Proceedings when carrying out their duties. This attempt to fundamentally alter the duties of Operating Committee members at this late stage does not remedy the concerns that Section 3.1(c) of the USA creates. EDC cannot support an Operating Committee having decision making authority over matters related to the SISF when throughout their existence to date they have operated, and negotiated for the ability to operate, solely in their appointing shareholders' best interests.

c. EDC's concerns not mitigated by inclusion of independent members

47. The Operating Committee has now proposed to add three alternate representatives that it asserts would act independently of its interests in leading the SISF in the event that any of the current Operating Committee members declare a conflict pursuant to the terms of the Independent Member Mandate.

48. I understand from the Independent Member engagement letters that each Nominating Shareholder has selected, engaged, and pays its own independent nominee. Further, if a

Mines LP, and 12334992 Canada Inc. (collectively, the “**Debtors**” and each a “**Debtor**”). The other NIO shareholder is ArcelorMittal Canada Inc. (“**ArcelorMittal**”).

4. NIO is subject to a Unanimous Shareholders’ Agreement (the “**USA**”) establishing an operating committee (the “**Operating Committee**”) vested with all decision-making authority over NIO and each of its subsidiaries. The Operating Committee’s members are appointed by NIO’s shareholders: EMG appoints five members, and ArcelorMittal appoints two.

5. I swear this Affidavit in reply to the Affidavit of Ashley Glen dated September 21, 2026 (the “**Glen SISP Affidavit**”), and to provide the Court with important details and context related to the Operating Committee and assertions made about governance of the Debtors in the Glen SISP Affidavit.

6. The history of these proceedings and the contemplated SISP are described in the Affidavit of Jowdat Waheed dated September 17, 2026 (the “**Second Waheed Affidavit**”), and I will not repeat those matters here. Capitalized terms not otherwise defined in my Affidavit have the meaning ascribed to them in the Second Waheed Affidavit.

A. EMG’s Support for the SISP and Prior Views on Process Sequencing

7. At paragraph 42 of the Glen SISP Affidavit, Ms. Glen characterizes EMG as having “repeatedly stated its opposition to the SISP process” and suggests that EMG’s earlier preference for a recapitalization transaction reflects a bias that renders the Operating Committee unfit to exercise decision-making authority over the SISP. **This characterization does not reflect EMG’s position or the current state of affairs.**

8. In submissions dated June 9, 2026, more than three months ago, EMG expressed the view that a negotiated recapitalization or restructuring transaction could be pursued before and independently of a formal SISP, and that this approach would yield the best result for all

stakeholders. If successful, it would allow the business to move forward promptly, without the large expense and delay associated with a SISP process. Contrary to what Ms. Glen suggests, EMG did not express opposition to a SISP under any circumstances.

9. Moreover, a recapitalization transaction is expressly contemplated as a permissible transaction type under the proposed SISP, which authorizes the Chief Restructuring Officer (“CRO”) to solicit bids for a broad range of executable transaction alternatives, including recapitalization transaction alternatives. EMG’s earlier preference for exploring a recapitalization does not demonstrate any bias that would be incongruent with the SISP as currently proposed. Instead, it reflects a prior preference for a category of transaction that the SISP itself invites.

10. In any event, I also confirm that EMG is not participating in the SISP as a bidder and has no intention of doing so. Accordingly, I disagree with any suggestion that EMG’s support for the SISP is motivated by a desire to control the process to its own advantage.

B. Conduct of the Operating Committee

11. At paragraphs 38 through 46 of the Glen SISP Affidavit, Ms. Glen raises concerns about the Operating Committee’s ability to act in the best interests of the Debtors and their stakeholders, citing in particular the language of section 3.1(c) of the USA that governs the relationship between NIO, certain of its subsidiaries, and its shareholders, EMG and ArcelorMittal.

12. Ms. Glen attaches the USA to her Affidavit and suggests she became aware of it based on her review of the record in this proceeding. That is a misleading claim. In fact, Export Development Canada (“EDC”, or the “DIP Lender”) has been in possession of the USA since at least 2020. The USA was included as part of a perfection certificate delivered to the lending syndicate in connection with the Debtors’ revolving credit facility, which EDC joined in September 2020. EDC has been fully aware of the governance structure established by the USA — including the terms of section 3.1(c) — for years, and I am not aware of any concerns raised by EDC at any

obligations that apply to the Operating Committee in the context of a court-supervised restructuring.

16. Since the commencement of this CCAA proceeding, the Operating Committee has acted in the best interests of the Debtors and all of their stakeholders to ensure the restructuring process is driven toward an outcome that maximizes value for all parties. Among other things, the Operating Committee has: (a) allowed the Debtors to pursue a value-maximizing sale and investment solicitation process; (b) supported the DIP Settlement, which ended value-destructive litigation and established a framework for cooperation with the secured creditors; (c) approved the appointment of the CRO and the terms of the CRO Mandate; (d) approved the engagement of Morgan Stanley as Transaction Advisor to advance the SISP; and (e) developed and now seeks Court approval of the SISP that is the subject of this motion.

17. Ms. Glen refers at paragraph 46 of the Glen SISP Affidavit to a provision of the Independence Mandate that states section 3.1(c) of the USA “shall not apply to ‘any Member’ during the pendency of the CCAA Proceedings when carrying out their duties”. Ms. Glen characterizes this as “an attempt to fundamentally alter the duties of Operating Committee members at this late stage”. With respect, this provision does not alter any duties at a “late stage”. Rather, it merely confirms what should already be apparent: that the Operating Committee members are, during these CCAA proceedings, carrying out their fiduciary duties to act in the best interests of the Debtors and all stakeholders, and not in the interests of their appointing shareholders. The Independence Mandate makes explicit what EMG and the Operating Committee have been doing in practice since the outset of these proceedings.

C. Compensation of the Independent Members

18. At paragraph 49(d) of the Glen SISP Affidavit, Ms. Glen draws attention to the fact that Mr. Goffman, the Independent Member appointed as the alternate for EMG’s Operating

***The Independence
Mandate Addresses Any
Legitimate Concerns Over
Conflicts***

**Exhibit K to the Second
Waheed Affidavit****MANDATE OF
THE INDEPENDENT MEMBERS OF THE OPERATING COMMITTEE OF
NUNAVUT IRON ORE, INC.****September 16, 2026**

WHEREAS the Unanimous Shareholders' Agreement restricts, in whole, the powers of the directors to manage or supervise the management of the business and affairs of the Company and transfers such powers, in whole, to the Operating Committee;

AND WHEREAS the Operating Committee has requested that Shareholders adopt this mandate (this "**Mandate**") as an amendment to the Unanimous Shareholders' Agreement to govern voting by Members on matters considered within the CCAA Proceedings on which such Members have a Conflict (as defined herein);

NOW THEREFORE, notwithstanding anything to the contrary contained in the Unanimous Shareholders' Agreement:

1. Conflicts.

(a) Meaning of Conflict. Under this Mandate, a Member shall be deemed to have a "**Conflict**" if that Member:

- (i) is a party to a material contract or transaction or proposed material contract or transaction with the Company or other member of the Group, or
- (ii) is a director (or an individual fulfilling a similar role) or an officer of, or has a material interest in, any person who is a party to a material contract or transaction or proposed material contract or transaction with the Corporation or other member of the Group,

and that material contract or transaction, or proposed material contract or transaction, is currently and directly at issue in the CCAA Proceedings and being considered before the Operating Committee, being a "**Matter**".

(b) Deemed Conflicts. Without limiting the generality of Section 1(a), a Member shall be deemed to have a Conflict with respect to any Matter that involves:

- (i) prior to a formal court-approved sale and investment solicitation process, the participation or stated participation by the Member or any of its Member Related Parties in any formally proposed recapitalization transaction of the Group's capital structure within the CCAA Proceedings unless such stated participation and any actual participation have been irrevocably withdrawn;
- (ii) the participation or stated participation by the Member or any of its Member Related Parties in the sales and investment solicitation process approved by the court in the CCAA Proceedings, unless such stated participation and any actual participation have been irrevocably withdrawn;

(iii) any contract between any member of the Group, on the one hand, and a Member or any of its Member Related Parties, on the other hand, where such contract is:

- (A) subject to a disclaimer or formal notice of disclaimer;
- (B) subject to a determination by the Company as to whether or not the contract should be disclaimed; or
- (C) the subject of a formal claim or dispute in the CCAA Proceedings.

(c) **Disclosure or Determination of Conflict.** If, with respect to any Matter:

- (i) any Member has a Conflict or potential Conflict, that Member shall promptly disclose that fact in writing to the Operating Committee; or
- (ii) any Member believes that any other Member has a Conflict or potential Conflict, that Member shall promptly disclose that fact in writing to the Operating Committee. The Operating Committee shall determine whether or not the other Member has a Conflict or a potential Conflict, provided that the Member whose Conflict or potential Conflict is under consideration shall not be entitled to vote in respect of that determination. Such determination shall require the approval of a majority of the remaining Members of the Operating Committee who are not the subject of the alleged Conflict or potential Conflict. If the Operating Committee is unable to make such determination because it lacks the requisite quorum or voting threshold as a result of the alleged Conflict or potential Conflict, the Independent Members shall determine whether or not the other Member has a Conflict or a potential Conflict by majority vote of the Independent Members, with each Independent Member having a single vote.

(d) **Conflicted Member.** Any Member that has made disclosure pursuant to Section 1(c)(i), or has been determined to have a Conflict or a potential Conflict pursuant to Section 1(c)(ii), with respect to a Matter, shall be a “**Conflicted Member**” with respect to that Matter.

(e) **Consequences of Conflict.** With respect to a Matter:

- (i) no Conflicted Member shall:
 - (A) attend any portion of an Operating Committee meeting at which the Matter is discussed;
 - (B) receive any confidential or non-public information pertaining to the Matter;
 - (C) vote on the Matter; or
 - (D) execute any written resolution to approve or take action in respect of the Matter; and

- (ii) the Independent Member appointed by the Nominating Shareholder that appointed the Conflicted Member or Members shall be entitled to vote in respect of the Matter in lieu of the Conflicted Member or Members, and shall have such number of votes on the Matter as are held in aggregate by the Nominating Shareholder that appointed the Conflicted Member or Members.

(f) **Absence of Conflict.** Except in the circumstances described in Section 1(c)(ii) or 1(e)(ii), the Independent Member shall not be entitled to vote on any matter considered by the Operating Committee, but can and shall attend meetings.

2. Independent Member.

(a) **Meaning of Independence.** Under this Mandate, an individual is considered to be independent if he or she is “independent” within the meaning of section 1.4 of National Instrument 52-110 – *Audit Committees* of the Canadian Securities Administrators.

(b) **Initial Independent Members.** Each Nominating Shareholder shall appoint an initial Independent Member:

- (i) Jay Goffman shall be the initial Independent Member appointed by the EMG Parties;
- (ii) Madlyn Gleich Primoff shall be the initial Independent Member appointed by AM Holdco; and
- (iii) William Gula shall be the initial Independent Member appointed by the Operator Parties.

(c) **Duties and Obligations of Independent Members.** When attending meetings and voting in place of a Conflicted Member or Members, each Independent Member shall have the same duties and obligations as a Member.

(d) **Ceasing to be an Independent Member.** An Independent Member shall cease to be a Member upon the earliest to occur of:

- (i) the delivery by the Independent Member of a written resignation to its Nominating Shareholder or the Operating Committee;
- (ii) the Independent Member’s death; and
- (iii) the Independent Member ceasing to be “independent” pursuant to Section 2(a).

(e) **Replacement Independent Member.** If any of the events occur in Section 2(d), the Nominating Shareholder that appointed that Independent Member shall appoint a new Independent Member.

(f) **Section 3.1(c) of the Unanimous Shareholders’ Agreement.** The following portion of Section 3.1(c) of the Unanimous Shareholders’ Agreement shall not apply to

any Member during the pendency of the CCAA Proceedings when carrying out their duties:

(c) ... In (i) exercising any powers of the Directors; (ii) causing its nominees on the Operating Committee to exercise any powers of the Directors; ... 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.

(g) **Counsel and Advisors.** Independent Members shall have the authority to retain outside counsel and any other external advisors from time to time with the approval of the Operating Committee.

(h) **Indemnity.** The Company shall enter into an indemnity agreement with each Independent Member on terms and conditions as the Operating Committee may determine.

3. **Termination.** This Mandate shall terminate upon (i) an order of the court terminating the CCAA Proceedings or terminating this Mandate or (ii) a resolution of the Operating Committee expressly and unanimously terminating this Mandate.

4. **Interpretation.**

(a) **Defined Terms.** In this Mandate, unless the context otherwise requires, each capitalized term has the meaning specified in the Unanimous Shareholders' Agreement and the following terms have the meanings specified below:

"**CCAA Proceedings**" means proceedings initiated by the Company on May 15, 2026 under the *Companies' Creditors Arrangement Act* (Canada);

"**Conflict**" is defined in Section 1(a);

"**Conflicted Member**" is defined in Section 1(d);

"**Company**" means Nunavut Iron Ore, Inc.;

"**EMG Parties**" has the meaning specified in the Unanimous Shareholders' Agreement, but for purposes of this Mandate shall exclude the Operator Parties;

"**Group**" means, collectively, the Company and its direct and indirect subsidiaries from time to time;

"**Independent Member**" means a Member appointed pursuant to Section 2 by a Nominating Shareholder;

"**Mandate**" is defined in the recitals;

"**Matter**" is defined in Section 1(a);

“Member” means a member of the Operating Committee;

“Member Related Party” means, with respect to a Member, the Member, its Nominating Shareholder or any direct or indirect related party of either the Member or its Nominating Shareholder, in all cases, excluding members of the Group;

“Nominating Shareholder” means the Shareholder that appointed or nominated a Member to the Operating Committee, and for purposes of this Mandate, the Operator Parties shall be deemed to have appointed Bruce Walter and Jowdat Waheed;

“Operator Parties” means Four Mile Investments Inc. and Killarney Ventures II Inc.; and

“Unanimous Shareholders’ Agreement” means the unanimous shareholders’ agreement of the Company dated November 2, 2020 between the Shareholders, the Company, Baffinland Iron Mines Corporation and Baffinland Iron Mines LP.

(b) Inconsistencies. In the event of any inconsistency between this Mandate, the Unanimous Shareholders’ Agreement, the articles of the Company and the by-laws of the Company, such inconsistency shall be resolved in the following order of priority: this Mandate, the Unanimous Shareholders’ Agreement, the articles of the Company followed by the by-laws of the Company.

(c) Extraordinary Matters, etc. Nothing in this Mandate shall affect, derogate from or be construed as a waiver of: (i) the requirement that any Extraordinary Matter be approved by an Extraordinary Resolution with the requisite Participating Interests; or (ii) any right held by any Shareholder or related party of such Shareholder pursuant to any agreement between two or more Shareholders or their related parties to which no member of the Group is a party.

Idem

(3) Where execution referred to in clause (2) (b) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution. R.S.O. 1990, c. B.16, s. 131 (3).

Rights of director who pays debt

(4) Where a director pays a debt under subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings, the director is entitled to any preference that the employee would have been entitled to, and where a judgment has been obtained the director is entitled to an assignment of the judgment. R.S.O. 1990, c. B.16, s. 131 (4).

Idem

(5) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim. R.S.O. 1990, c. B.16, s. 131 (5).

✓ Section Amendments with date in force (d/m/y)

Disclosure: conflict of interest

132 (1) A director or officer of a corporation who,

(a) is a party to a material contract or transaction or proposed material contract or transaction with the corporation; or

(b) is a director or an officer of, or has a material interest in, any person who is a party to a material contract or transaction or proposed material contract or transaction with the corporation,

shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of his or her interest. R.S.O. 1990, c. B.16, s. 132 (1).

by director

(2) The disclosure required by subsection (1) shall be made, in the case of a director,

(a) at the meeting at which a proposed contract or transaction is first considered;

(b) if the director was not then interested in a proposed contract or transaction, at the first meeting after he or she becomes so interested;

(c) if the director becomes interested after a contract is made or a transaction is entered into, at the first meeting after he or she becomes so interested; or

(d) if a person who is interested in a contract or transaction later becomes a director, at the first meeting after he or she becomes a director. R.S.O. 1990, c. B.16, s. 132 (2).

by officer

(3) The disclosure required by subsection (1) shall be made, in the case of an officer who is not a director,

(a) forthwith after the officer becomes aware that the contract or transaction or proposed contract or transaction is to be considered or has been considered at a meeting of directors;

(b) if the officer becomes interested after a contract is made or a transaction is entered into, forthwith after he or she becomes so interested; or

(c) if a person who is interested in a contract or transaction later becomes an officer, forthwith after he or she becomes an officer. R.S.O. 1990, c. B.16, s. 132 (3).

Where contract or transaction does not require approval

(4) Despite subsections (2) and (3), where subsection (1) applies to a director or officer in respect of a material contract or transaction or proposed material contract or transaction that, in the ordinary course of the corporation's business, would not require approval by the directors or shareholders, the director or officer shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of his or her interest forthwith after the director or officer becomes aware of the contract or transaction or proposed contract or transaction. R.S.O. 1990, c. B.16, s. 132 (4).

Director not to vote

(5) A director referred to in subsection (1) shall not attend any part of a meeting of directors during which the contract or transaction is discussed and shall not vote on any resolution to approve the contract or transaction unless the contract or transaction is,

(a) one relating primarily to his or her remuneration as a director of the corporation or an affiliate;

***Last-Ditch Argument Only
Underscores the
Weakness of the Lenders'
Position***

September 30, 2026

Norton Rose Fulbright Canada L.P.
222 Bay Street, Suite 3000, P.O. Box 100
Toronto, Ontario M5K 1E7 Canada

**Appendix F to
the Fifth Report
of the Monitor**

BY EMAIL

**Baffinland Iron Mines Corporation, Baffinland Iron
Mines LP, Nunavut Iron Ore, Inc. And 12334992 Canada
Inc.**

c/o Baffinland Iron Mines Corporation
360 Oakville Place Dr., Suite 300
Oakville, Ontario L6H 6K8

F: +1 416.216.3930

nortonrosefulbright.com

Evan Cobb
+1 416.216.1929
evan.cobb@nortonrosefulbright.com

Attention: Mark O'Brien and William Aziz

Our reference: 1001370871

Dear Mr. O'Brien and Mr. Aziz:

Re: DIP Facility Loan Agreement, dated as of June 3, 2026, between Baffinland Iron Mines Corporation, Baffinland Iron Mines LP, Nunavut Iron Ore, Inc. and 12334992 Canada Inc., and His Majesty In Right Of Canada, as represented by Export Development Canada (as amended the "DIP Facility Agreement")

And Re: Second Amendment and Waiver to DIP Facility Loan Agreement dated as of August 27, 2026 (the "Second Amendment")

We write to you on behalf of His Majesty In Right Of Canada, as represented by Export Development Canada (the "**DIP Lender**"), in connection with the DIP Facility Agreement and the Second Amendment. Capitalized terms used in this letter and not otherwise defined herein shall have the meanings specified in the DIP Facility Agreement and the Second Amendment.

Certain Events of Default under the DIP Facility Agreement and the Second Amendment have occurred and continue to exist, including:

1. A failure to meet the Revised Milestones as set out in the Second Amendment; and
2. The seeking of a Court order approving a sale and investment solicitation process in the CCAA Proceedings, in the form enclosed in the Motion Record dated September 17, 2026, which Court order is not in form and substance acceptable to the DIP Lender acting reasonably

(collectively, the "**Existing Defaults**").

This letter shall serve to advise you that:

- (i) The DIP Lender has not waived the Existing Defaults.
- (ii) Any Advance to the Borrowers or any delay in the exercise any rights, remedies, powers and privileges by the DIP Lender under the DIP Facility Agreement with respect to the Existing Defaults or any other Event of Default (whether now existing or hereafter occurring) shall not be, and shall not be construed as, a waiver thereof.
- (iii) All provisions of the DIP Facility Agreement remain in full force and effect.

The Affidavit of Ashley Glen, sworn September 21, 2026, encloses a SISP document that is in form and substance acceptable to the DIP Lender (the “**Acceptable SISP**”). If a Court order approving that Acceptable SISP is granted in form and substance reasonably satisfactory to the DIP Lender on or prior to October 13, 2026, the DIP Lender will consider any waivers or amendments that may be required in connection with the Existing Defaults and the DIP Facility Agreement to accommodate that SISP, in its sole discretion.

The DIP Lender has determined that the Existing Defaults will not cause the DIP Lender to cease making Advances under the DIP Facility Agreement up to and including October 9, 2026. If the Acceptable SISP is not approved on or prior to October 13, 2026, the DIP Lender can provide no assurance that further Advances will be available, and all available rights and remedies of the DIP Lender will need to be considered.

This letter is written under reserve of, and without prejudice to, all of the rights, remedies and recourses of the DIP Lender under the DIP Facility Agreement and any Court order. The DIP Lender reserves its right to fully invoke any and all of its rights, remedies, powers or privileges under the DIP Facility Agreement, any Court order, or applicable laws in respect of the Existing Defaults or any other Event of Default that may now or hereafter exist.

Yours truly,

EXPORT DEVELOPMENT CANADA, as lender, by
its counsel Norton Rose Fulbright Canada LLP

Per: 

Name: Evan Cobb
Title: Partner

cc. *Natalie Renner and Rob Nicholls, Davies Ward Phillips & Vineberg LLP*

Greg Watson and Jeffrey Rosenberg, FTI Consulting Canada Inc.

Marc Wasserman and Michael De Lellis, Osler Hoskin & Harcourt LLP

October 2, 2026

BY EMAIL

Norton Rose Fulbright LLP
222 Bay Street, Suite 3000
P.O. Box 53
Toronto ON M5K 1E7
evan.cobb@nortonrosefulbright.com

Attention: Evan Cobb

Dear Evan:

Re: DIP Facility Loan Agreement, dated as of June 3, 2026, between Baffinland Iron Mines Corporation, Baffinland Iron Mines LP, Nunavut Iron Ore, Inc. and 12334992 Canada Inc., and His Majesty In Right Of Canada, as represented by Export Development Canada (as amended the “DIP Facility Agreement”)

And Re: Second Amendment and Waiver to DIP Facility Loan Agreement dated as of August 27, 2026 (the “Second Amendment”)

I write in response to your letter dated September 30, 2026, which purports to give notice of alleged Events of Default under the DIP Facility Agreement. Capitalized terms not otherwise defined have the meanings given in the Affidavit of Jowdat Waheed dated September 17, 2026 or the DIP Facility Agreement, as amended, as applicable.

The Debtors do not accept that any Event of Default has occurred. The Debtors have worked diligently with stakeholders, including the DIP Lender, to reach consensus on the SISP. The SISP is a purely procedural document. It sets out how the Debtors will seek proposals from interested parties, with the help of the CRO, the Transaction Advisor and the Monitor and under their supervision. After extensive consultation, and well within the time required by the DIP Facility and the Revised Milestones, the Debtors presented a reasonable and customary SISP to the DIP Lender for approval.

Only one meaningful issue remains. The Operating Committee, as would be expected, has decision-making authority over the SISP. That is their role. The DIP Lender proposes, in effect, to transfer that authority to the CRO. The Court will decide this dispute on October 9, 2026 when it considers the SISP.

DAVIES

The alleged Events of Default have arisen through no fault of the Debtors. As you are well aware, the delay is partly due to positions taken by the Qikiqtani Inuit Association ("**QIA**") and Nunavut Tunngavik Incorporated ("**NTI**") against both the Debtors and the DIP Lender. The Debtors have been working diligently to resolve those positions. The delay is also due in part to the DIP Lender's refusal to agree to the Debtors' proposed form of SISP. In the circumstances, that refusal is unreasonable and breaches the DIP Facility Agreement. The DIP Lender's consent right is qualified, and it is using that right to try to impose extraordinary governance changes indirectly. That is not proper. The DIP Lender cannot rely on its own breach to assert Events of Default. This position is also hard to reconcile when a Court hearing is scheduled to consider these issues within days.

The DIP Lender's position is also hard to reconcile with the protections it already has. Under paragraph 26(k) of the DIP Facility Agreement, it already has a consent right over any disposition of the Debtors' assets. The Debtors' proposed SISP also requires the CRO to make recommendations to the Debtors on key decisions. The DIP Lender is therefore already protected against any transaction it considers contrary to its interests.

There is no proper basis for asserting Events of Default. The Debtors expressly reserve all of their rights and remedies if the DIP Lender acts on alleged Events of Default arising from its own conduct.

The Debtors are deeply concerned that the DIP Lender, an agency of the federal government, is threatening the viability of the Debtors' operations and this CCAA proceeding over a procedural document. Your letter states that unless the DIP Lender's SISP is approved by October 13, 2026, it can give no assurance of further DIP advances. In effect, the DIP Lender is threatening to cut off funding before the Court has ruled on whether its conduct is reasonable. That is fundamentally inconsistent with the Debtors' reasonable expectations in choosing the DIP Facility over other interim financing options. It also aims to strong-arm the Court and its discretion to control the overall CCAA process by threatening to pull DIP funding if its desired SISP Order is not granted in a situation where the DIP Lender's interest are fully protected.

The consequences of not funding would be severe. In seeking approval of the DIP Facility, the Debtors told the Court that the "most effective message to bring stability and confidence is that the Debtors and EDC, representing the Government of Canada have reached an agreement ensuring the Mine's operations in 2026, 2027 and beyond".¹ Your letter are at odds with this stated stability and put at risk Nunavut's largest private-sector employer, approximately 1,200 jobs (about 300 held by Inuit workers) and a project that accounts for approximately 24% to 25% of the territory's GDP. It also threatens to undermine the Debtors' progress with QIA and NTI on the SISP and the supply relationships stabilized during the CCAA proceeding.

¹ Affidavit of Celeste van Tonder dated June 7, 2026, para. 24.

DAVIES

Yours very truly,



Natalie Renner

cc Derek Ricci and Steve Cutler, *Davies Ward Phillips & Vineberg LLP*
Greg Watson and Jeffrey Rosenberg, *FTI Consulting Canada Inc.*
Marc Wasserman, Michael De Lellis and Jeremy Dacks, *Osler Hoskin & Harcourt LLP*

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT

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

Court File No. CL-26-00000219-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

COMPENDIUM OF THE APPLICANTS

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